



LESS THAN HONORABLE: THE LEGAL AID & VETERANS CLINIC RESPONSE

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STEPS TO AN UPGRADE

Agenda

- Merits Assessments
- Records Review 101
- Building an Upgrade Application
- Crafting Contentions
- Structuring Hagel/Kurta Arguments
- Group Discussion & Questions

TRIAGING DU INTAKES

CVLC Triage

- Initial Phone Screening
 - Referral by clinician or self referral
 - Production of DD214 to verify discharge status
 - No income bar or means testing for DU
- General (Under Honorable Conditions)
 - Eligible for VA care and Voc. Rehab. if SC
 - Not a priority but look at each case for whether DU would be life-changing
- Other Than Honorable
 - Vast majority of cases
 - Prioritize veterans with PTSD/TBI or other mental health condition whose discharge status excludes them from VA care
- Bad Conduct or Dishonorable
 - Only basis for upgrade is clemency
 - Post-separation conduct usually needs to be exemplary

VLC at LSC Triage

- Initial Phone Screening
 - Referrals from many sources
 - No strict income bar or means testing
- Prioritize veterans whose discharge status presents a barrier to important benefit/status, especially:
 - MST victims/survivors
 - Veterans who experienced PTSD/TBI or other mental health condition in service
 - Local veterans
- Assess whether case would be good student learning opportunity
 - Possible hearing? Client interactions? Work with medical expert? Federal court experience?
- Will refer veterans whose cases potentially have merit to *pro bono* attorneys

RECORDS REVIEW 101: OMPF



OMPF (Official Military Personnel File)

- Always request official copies; never rely on veteran's own copy
- Never accept the government's "presumption of regularity"
- Request records from a variety of sources, not just the NPRC
- Seek congressional office assistance, when necessary

RECORDS REVIEW 101: OMPF

Basic Contents *should* include

1. DD 214
2. Enlistment Contract(s) (incl. test scores, enlistment physical, drug policy)
3. Chronological Record of Service (duty stations)
4. Master Personnel Files (education, training, and promotions)
5. Performance Evaluations
6. Commendatory Records (awards and decorations, letters of merit)
7. Derogatory/Disciplinary Records (administrative counseling, non-judicial punishment, court-martial conviction)
8. Separation Packet (recommendation for separation, memo, approval)

RECORDS REVIEW 101: DD214

1. Dates of Service—full enlistment?
2. Foreign Service—where?
3. Decorations and awards
4. Type and character of discharge
5. Separation and reentry codes
6. Time lost?

RECORDS REVIEW 101

Data mine the OMPF for evidence of conditions or experiences that may have contributed to discharge, per Kurta Memo.

- **Combat deployment**—confirm time and place of unit deployment. Helmand Province during the most recent troop drawdown? LSA Anaconda Iraq 2004, aka "Mortarville"? Use unit histories, cruise books, unit web-sites and open source reporting to discover what conditions on the ground were when the veteran was deployed there.
- **Humanitarian Assistance missions**—deployed to UN rescue missions, part of international task force in non-combatant locations such as Bangladesh, Cuba, Somalia
- **Guard duty** such as Guantanamo or Parwan Detention Facility
- **Stateside military bases** that have past records of training abuses, recruit fatalities or high suicide rates

RECORDS REVIEW 101

Data mine the OMPF for evidence of personal achievement, often present prior to traumatic experience.

- **Letters and/or Certificates of Commendation/Achievement** (*should name service member personally)
- **Meritorious Masts** (same as above)
- **Personal decorations and awards**, NOT unit or campaign medals
 - ***Time in service**
 - Good Conduct Medal for every 3 years of service
 - ***Outstanding Performance**
 - Army/Air Force/Navy and Marines Achievement Medal
 - Army/Air Force/Navy and Marines Commendation Medal
 - ***Personal Valor**
 - Purple Heart/Bronze or Silver Star/Medal of Honor

For the most accurate information on military decorations and awards, visit the Institute of Heraldry—inside the Pentagon: www.tioh.hqda.pentagon.mil. Also, review regulations on medals and awards.

WHERE TO APPLY

- Were you discharged by order of a general court-martial? YES NO
- Were you discharged more than 15 years ago? YES NO
- Were you previously denied by a DRB after a personal hearing? YES NO

DRB

BCMR

- If previously denied at BCMR, can ask for reconsideration *at any time* if present "materials not previously presented to or considered by the board" 10 U.S.C. § 1552(a)(3)(D)
- If previously denied at DRB, can ask for reconsideration for specific reasons (now have counsel, new/substantial/relevant evidence, no hearing yet, new policy that is substantial enhancement of rights, etc.) 32 C.F.R. § 70.8(b)(8)

APPLICATION BASICS

What do DU applications have to include?

- DD 293 or DD 149 and DD 214

What else do we suggest?

- Cover letter
- Detailed brief
- Client personal letter/statement
- Copies of all relevant military records
- Copies of all relevant medical records
- Proof of mental health diagnosis, if applicable
- Timeline of major events
- Evidence of positive character
- Other evidence



CRAFTING CONTENTIONS/ISSUES

Standard of Review

DRBs

- Equity 32 C.F.R. § 70.9(c)
- Propriety 32 C.F.R. § 70.9(b)
- Clemency (if the discharge was result of *special* court-martial conviction) 10 U.S.C. § 1553(a)

BCMRs

- Injustice 10 U.S.C. § 1552(a)(1)
- Error 10 U.S.C. § 1552(a)(1)
- Clemency (if the discharge was result of *special* or *general* court-martial) 10 U.S.C. § 1552(f)(2)

EQUITY/INJUSTICE

Three regulatory reasons for equity/injustice upgrade:

1. Future Policy Change: If, the policy that led to the veteran's discharge has now been changed to such a degree that the veteran would not have been discharged as the policies currently stand. 38 C.F.R. § 70.9(c)(1)
2. In-service Inconsistencies: If, at the time the veteran was discharged, the discharge was inconsistent with the standards of discipline at that time. 38 C.F.R. § 70.9(c)(2)
3. Personal Record: If the discharge was inequitable/unjust based on evidence relating to A) quality of service or B) capability to serve. 38 C.F.R. § 70.9(c)(3)

➤ Can think of many ways to frame equity/injustice arguments.

IMPROPRIETY/ERROR

Two regulatory reasons for an impropriety/error upgrade:

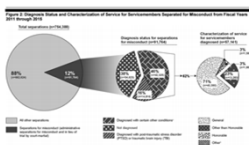
1. An error of fact, law, procedure, or discretion occurred, and the error was prejudicial to the veteran during the discharge process. 38 C.F.R. § 70.9(b)(1)(i)
➤ Prejudicial error means there is a "substantial doubt" that the discharge would have remained the same if the error had not been made.
2. A change in policy by the military service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge. 38 C.F.R. § 70.9(b)(1)(ii)

IMPROPRIETY/ERROR

2017 GAO Report: Actions Needed to Ensure PTSD and TBI Are Considered in Misconduct Separations

The Numbers:

- 91,764 SM separated from misconduct (FY 2011-2015)
- 62% (57,141) had PTSD, TBI or other MH diagnosis
- 23% received an OTH



A Few of the Findings:

- Navy does not require MH screenings for in lieu of CM separations
- Over 1/3 of the USMC separation packets lacked pre-adsep MH screening
- Almost ¼ of Army in lieu of CM separations lacked evidence of the MH screening

improper

CONTENTIONS: SAMPLE APPLICATION

Mandatory Pre-Separation Screenings 10 U.S.C. § 1177

- NDAA FY2010 mandated pre-administrative separation mental health examinations for SMs who deployed within previous 24 months and who were diagnosed with or exhibited signs of PTSD
- NDAA FY2017 expanded provision to SMs who were sexually assaulted within prior 24 months
- **Purpose of exams:** "assess whether the effects of post-traumatic stress disorder or traumatic brain injury constitute matters in extenuation that relate to the basis for administrative separation under conditions other than honorable or the overall characterization of service of the member as other than honorable"

MST EQUITY CONTENTION

Sample Contention for MST-Related Discharge (Pre-Dec. 23, 2016)

- Pursuant to 30 C.F.R. § 70.9(c)(1), Veteran's discharge is inequitable because the policies under which s/he was discharged have changed materially. Current military policies afford protections to prevent wrongful discharges for service members suffering from MST-related PTSD.
- Specifically, 10 U.S.C. § 1177, now requires a health examination for any service member who was sexually assaulted within 24 months of an administrative discharge. These exams look for possible mental health correlation with misconduct prior to an involuntary separation.
- At the time of Veteran's discharge, no such policy existed. Had 10 U.S.C § 1177 been in effect, the command would not have been able to discharge Veteran without such an examination because *[add in facts such as s/he was sexually assaulted within 24 months of being administratively discharged and had been diagnosed with PTSD/ was clearly exhibiting symptoms of an underlying mental health disorder, etc.]*.
- There is substantial doubt that had the current policies been in place at the time of Veteran's discharge s/he would have received a *[insert current characterization of discharge and narrative reason]* because *[insert facts showing the connection between the misconduct and the MST related mental health disorder]*.
- Therefore, this Board should upgrade Veteran's character of discharge to Honorable and change the narrative reason for separation and separation codes to *[insert applicable narrative and SPN codes. If RE code change is requested, list here as well]*.

MST PROPRIETY CONTENTION

Sample Contention for MST-Related Discharge (Post-Dec. 23, 2016)

- The Board should grant Veteran an Honorable discharge and change the narrative reason for discharge to *[insert New narrative]* under the propriety standard (30 C.F.R. § 70.9(b)(1)(i)).
- At the time of Veteran's discharge, DODI 1332.14 Enlisted Administrative Separation section E5.9 was in effect implementing the protections codified at 10 U.S.C. § 1177. These protections require health examinations for any service member who was sexually assaulted within 24 months of an involuntary discharge. The purpose of the exams is to look for possible mental health correlation with misconduct prior to an administrative separation.
- In Veteran's case, *[list the ways in which the policy was not followed]*.
- Had these errors not been made, there is substantial doubt that Veteran would have received a *[current characterization and narrative reason]* discharge because *[insert facts showing mitigation or other reasons a properly administered exam likely would have prevented the current discharge and narrative reason]*.
- Therefore, this Board should upgrade Veteran's character of discharge to Honorable and change the narrative reason for separation and separation codes to *[insert applicable narrative and SPN codes. If RE code change is requested, list here as well]*.

NEW MENTAL HEALTH GUIDANCE

Three Crucial DOD-Level Memos for Boards

- Hagel Memo 2014
- Carson Memo 2016
- Kurta Memo 2017

HAGEL MEMO

Dated September 4, 2014

- Statute of limitations liberally waived at the BCM/NRs (not the DRBs) for PTSD-related cases
- Liberal consideration for PTSD in service if symptoms in service treatment records or service records
- Special consideration for VA determination of service-related PTSD
- Liberal consideration for civilian provider diagnoses
- (Potential) Mitigation of misconduct

CARSON MEMO

Dated February 24, 2016

- Time limits waived (not DRB)
- De novo review of any decision on PTSD-based claim pre-Hagel standards, or any case in which Hagel standards were not applied
- Specific mention of TBI as a condition related to PTSD

KURTA MEMO

Dated August 25, 2017

“Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later.”

- Expands Carson and Hagel to include “mental health conditions, sexual assault, and sexual harassment”
- Mandates that Carson and Hagel standards apply to DRBs and BCMRs
- Mandates that Carson and Hagel standards apply to all discharge statuses (not just OTH)
- Clarifies that the available relief includes changes to characterization, narrative reason, separation code, and re-enlistment code

KURTA MEMO

Four Kurta Memo Questions

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
2. Did that condition exist/experience occur during military service?
3. Does that condition or experience actually excuse or mitigate the discharge?
4. Does that condition or experience outweigh the discharge?

KURTA MEMO

<p>Question 1</p> <p>Did the veteran have a condition or experience that may excuse or mitigate the discharge?</p> <p><u>Condition</u></p> <ul style="list-style-type: none"> • Diagnosis <ul style="list-style-type: none"> • Licensed psychiatrist or psychologist • Symptomatology <ul style="list-style-type: none"> • Liberal consideration <p><u>Experience</u></p> <ul style="list-style-type: none"> • Physical Trauma • Mental Trauma • MST – liberal consideration given to evidence at the outset 	<p>Question 2</p> <p>Did that condition exist/experience occur during military service?</p> <ul style="list-style-type: none"> • Diagnosis made by a licensed psychiatrist or psychologist that condition existed during service receives liberal consideration • VA Determination of service connection between mental condition including PTSD, TBI, sexual assault or sexual harassment is persuasive evidence • No liberal consideration for pre-existing conditions unless <i>aggravated</i> during service
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KURTA MEMO

<p>Question 3</p> <p>Does that condition or experience actually excuse or mitigate the discharge?</p> <p>Conditions/experiences that <i>existed at the time of discharge</i> are liberally considered as excusing or mitigating</p> <p><u>Excuse</u></p> <ul style="list-style-type: none"> • A basis for reduction of responsibility (Bouvier Law Dictionary) • Appears in the MCM under Defenses (MCM R. 916) <p><u>Mitigate</u></p> <ul style="list-style-type: none"> • Evidence ... that might offset culpability (Bouvier Law Dictionary) • A circumstance that calls for leniency or clemency • Appears in the MCM under Sentencing (MCM R. 1007(c)) 	<p>Question 4</p> <p>Does that condition or experience outweigh the discharge?</p> <p><u>“Severity” Balancing Test</u></p> <ul style="list-style-type: none"> • Behavior - mitigated by the condition/experience that led to discharge <p style="text-align: center;"><i>versus</i></p> <ul style="list-style-type: none"> • Less than Honorable discharge <p><u>Premeditated Misconduct</u></p> <ul style="list-style-type: none"> • Typically not excused by condition/experience <i>except</i> substance-seeking behavior or self-medicating behavior
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KURTA MEMO

Extra good stuff!

- Liberal consideration applies to:
 - Conditions that were diagnosed *or* undiagnosed *or* misdiagnosed
 - MST that was reported *or* unreported
- Leniency and excusal from evidentiary standards
- Recognition that past conditions/experiences hard to document/prove
- Honorable discharge does not require “flawless” service
- “Misbehavior” can be attributed to conditions/experiences

KURTA MEMO

Good medical evidence is key to Hagel/Kurta Memo argument

- ✓ Qualified diagnostician (psychologist, psychiatrist)
- ✓ Mental health disorder diagnosis
- ✓ Disorder existed in service (even if not diagnosed then)
- ✓ Nexus between disorder and conduct that led to discharge

HAGEL/CARSON CLASS ACTIONS

Two federal district courts recently certified class actions

1. **Kennedy v. Esper**, No. 3:16-cv-2010 (D. Conn.): post-9/11 Army veterans with less-than-fully-Honorable discharges – alleges that ADRB systemically fails to adequately implement Hagel/Carson standards
2. **Manker v. Spencer**, No. 3:18-cv-372 (D. Conn.): post-9/11 Navy and Marine Corps veterans with less-than-fully-Honorable discharges – alleges that NDRB systemically fails to adequately implement Hagel/Carson standards

DADT REPEAL MEMO

Don't Ask, Don't Tell & prior policies: servicemembers could be discharged for "homosexual acts or conduct" or "homosexual admission" and sometimes could receive a less-than-honorable discharge

After the repeal of Don't Ask, Don't Tell in 2011, DOD issued a policy about discharge upgrades and records correction for servicemembers separated under DADT

- Upgrade less-than-honorable discharge status and change narrative reason
- Unless there are "aggravating circumstances"



VA CHARACTER OF DISCHARGE

Some veterans with less-than-honorable discharges may be able to access some/all basic VA benefits (healthcare, compensation, pension, voc. rehab, etc.) *without* first getting a discharge upgrade

VA Character of Discharge review process determines, under VA's eligibility rules, whether a former servicemember was "discharged or released" "under conditions other than dishonorable" 38 U.S.C. § 101(2); see 38 C.F.R. § 3.12

➤ The VA COD process could generate helpful evidence or findings for a discharge upgrade application → Hagel/Kurta give "special consideration" to VA diagnoses

DISCHARGE UPGRADE MANUAL

- CVLC & LSC are partnering to create a Discharge Upgrade practice manual
- Swords to Plowshares also contributed to the manual and this presentation
- Our work is generously supported by the Bob Woodruff Foundation, which is dedicated to ensuring that impacted post-9/11 veterans, service members, and their families are thriving long after they return home



QUESTIONS?
