

VETERANS LAW



“To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors.”



INTRODUCTIONS



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- Navy Corpsman
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- Director, AF General Counsel's Office in Europe
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YOUR TURN





Roadmap



Tuesday

- Eligibility for Benefits
- Discharge Upgrades
- Entitlement to Benefits

Wednesday

- Building an Original Claim
- Adjudicating Disability Ratings
- Trauma Claims
- Pension Claims
- DIC
- TDIU Ratings
- *Ingram v. Collins*



Roadmap



Thursday

- Ethics
- SMC
- Award Effective Dates
- Caregiver Benefits
- Appeals
- NVLSP Partnership with Michigan VAA





Lots of Information

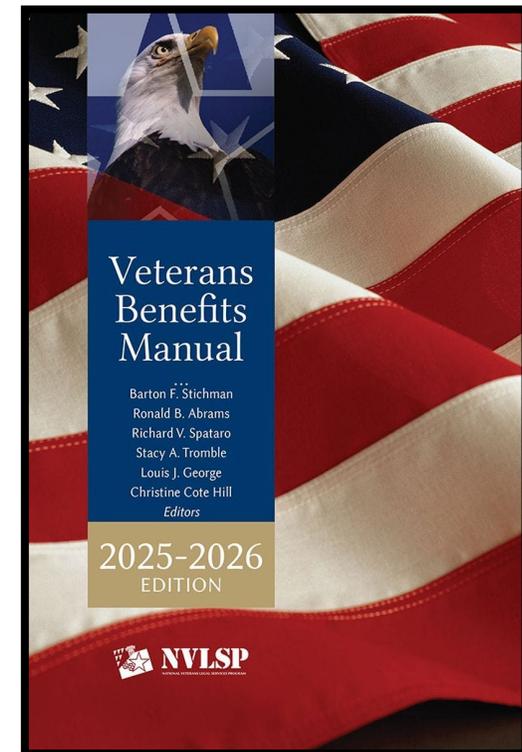


One small
piece
at a
time



Training Multiple Experience Levels

- Premise: Different experience levels
- Slides cover intro-level to advanced topics
- Veterans Benefits Manual





Format

- This is a **discussion** - your examples, experiences and questions and comments are **welcome!**



Challenging Life of a VSO



- Very Challenging Job – **Practice of Veterans Law**
 - Claims for: Disability Compensation, Pensions, DIC, Caregiver Benefits, Toxic Exposures, VA Medical Negligence, Health Benefits, Death Benefits
 - Confusing Issues – SMC, TDIU, Effective Dates, Adequacy of C&P Exams
 - Appeals to the VA Regional Office, Board of Veterans' Appeals
 - Two Appeals Systems: Legacy and Appeals Modernization Act (AMA)
 - Difficult Evidentiary Issues - Interplay between medical evidence and legal standards
 - Frequently changing laws, regulations, and court opinions
 - Clients can be difficult – **VSOs need social worker skills**
 - Many distrust the system / Resource Challenged / Frustrated / Fragile / Homeless / PTS / MST / Surviving Spouses / Suicidal
 - Frequent Constituent Inquiries
 - **VSOs must become Subject Matter Experts in many areas**



Virginia

“The work of the [Benefits] Division has become a highly specialized field, requiring not only a thorough knowledge and understanding of the approximately 3000 veterans’ laws, but of the many and oft changing regulations and procedures of the Veterans Administration.”

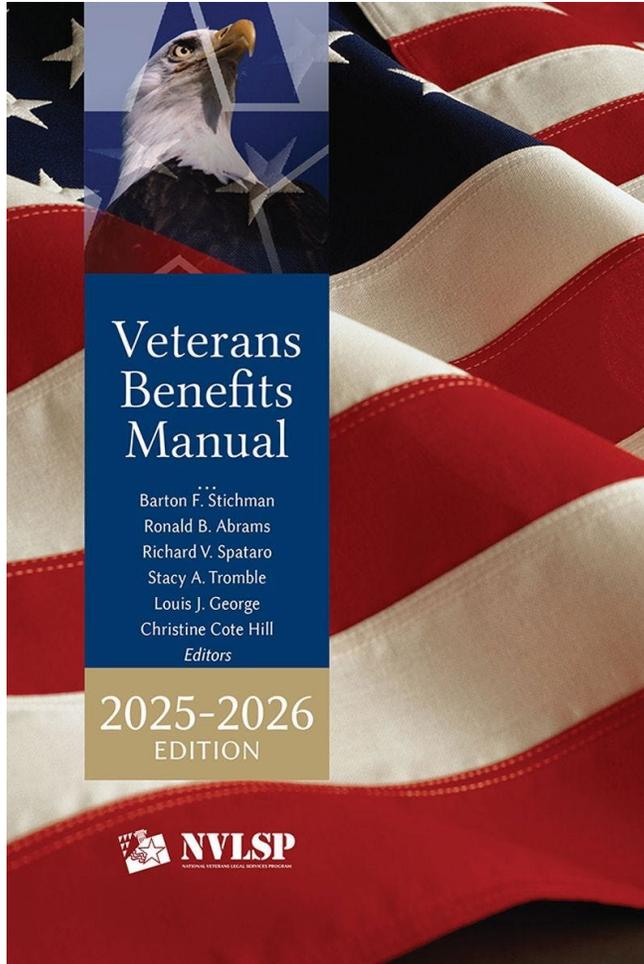


Virginia

“The work of the [Benefits] Division has become a highly specialized field, requiring not only a thorough knowledge and understanding of the approximately 3000 veterans laws, but of the many and oft changing regulations and procedures of the Veterans Administration.”

- Report to the Governor and General Assembly, 1948

Challenging Life of a VSO



2000+ pages
Index – 100+ pages alone

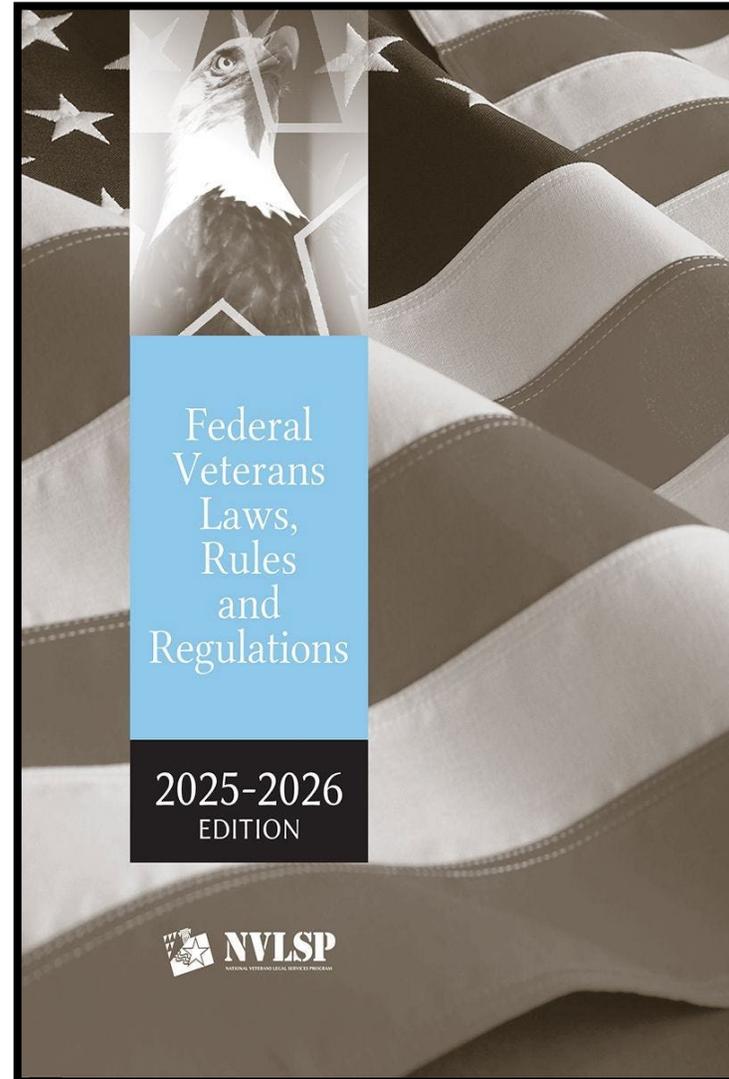
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Challenging Life of a VSO



**Plus...
2400 Pages
of Laws and
Regulations**

**Not Including the
VA's Online Manual
(M21-1)**





Sources of Veterans Law





Sources of Veterans Law

- **Title 38 United States Code**
- **38 Code of Federal Regulations**
- Rulemaking under the Administrative Procedures Act
 - Ratings Schedule – 38 CFR Book C
- **VA Manual (M21-1)**
 - SOP binding on adjudicators but not BVA Judges
 - Changes often
 - https://www.knowva.ebenefits.va.gov/system/templates/self-service/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014066/M21-1-Part-I-Chapter-1-Section-C-Requesting-Records#1



Sources of Veterans Law

- **Precedential Opinions of the VA OGC**
 - Binding on RO and BVA
 - EX: Reduction of Benefits on Incarceration
 - <https://www.va.gov/ogc/precedentopinions.asp>
 - But – Trump Administration position on OGC / VBA contact
- **Fast Letters - Guidance from VA Central Office in DC**
 - Usually procedural in nature



Sources of Veterans Law

- **Board of Veterans' Appeals (BVA) decisions**
 - No precedential effect, but can be persuasive
 - Final Agency Decision under the APA
- **Court decisions** interpreting statutes and rules
 - Court of Appeals for Veterans Claims
 - Binding precedent only when decided by 3-judge panel
 - Court of Appeals for the Federal Circuit
 - Questions of law only
 - Supreme Court of the United States

VETERANS LAW

Eligibility for Veterans Benefits



“To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors”



Eligibility for Veterans Benefits

- “Veteran” Defined
- Reserve and National Guard Service
- Line of Duty Determinations
- Length of Service Requirements
- Character of Service Determinations
 - Statutory Bars to Benefits
 - Regulatory Bars to Benefits



Basic Eligibility

- 2 Step Process:
 - Must be eligible for veterans' benefits; and
 - Must be entitled to veterans' benefits
- Eligibility:
 - Veteran – “A person who served in the active military, naval, or air service and who was discharged or released therefrom under conditions other than dishonorable.” 38 USC § 101(2)



Veteran Defined

“A person who served in the active military, naval, or air service...”

- Types of Service includes:
 - Active Service (Title 10 USC)
 - Army, Navy, Marine Corps, Air Force, Space Force, Coast Guard
 - Cadets and Midshipmen at Academies and Preparatory Schools
 - Officers of the Public Health Service and the National Oceanic and Atmospheric Administration (NOAA)



Veteran Defined

“A person who served in the active military, naval, or air service...”

- Active Duty (Title 10)
- National Guard and Reserves
 - Generally, service as a traditional Reservist or National Guard member is not active service and is not adequate service upon which to establish Veteran status
 - Exceptions...



Veteran Defined

“A person who served in the active military, naval, or air service...”

- Reserves

- **Active Duty for Training (ADT)** (full-time training for Reservists)
 - Basic training / technical school, annual training (AT); authorized travel
 - During which a person is disabled or dies from a **disease or injury** incurred or aggravated in the line of duty
 - Line of Duty investigations (DD Form 261) validate LOD
 - No intentional negligence or willful misconduct
- **Inactive Duty for Training (IADT)** (weekend drills plus travel)
 - During which a person is disabled or dies from an **injury (but not disease)** incurred or aggravated in the line of duty or from any of the following conditions that occurred during training:
 - Acute myocardial infarction; cardiac arrest, or a cerebrovascular accident



Veteran Defined

- National Guard
 - Generally, not entitled to federal veteran benefits unless ordered into federal service
 - Title 10 USC – Federal service under command and control of the President
 - Title 32 USC – Service funded by Federal Govt, but under the Governor’s command and control
 - Could be either federal or state status
 - **But not State Status – Funded by state and under the command and control of the Governor**
 - Active Guard and Reserve (AGR) (full time Guardsman – Title 32 USC but treated as Federal)
 - Posse Comitatus
 - Active Duty for Training (ADT) (full-time training – Title 10 or 32)
 - Basic training and technical school, annual training (AT)
 - During which a person is disabled or dies from a **disease or injury** incurred or aggravated in the line of duty
 - Inactive Duty for Training (IADT) (weekend drills plus travel - Title 32)
 - During which a person is disabled or dies from an **injury (but not disease)** incurred or aggravated in the line of duty or from any of the following conditions that occurred during training:
 - Acute myocardial infarction; cardiac arrest, or a cerebrovascular accident



Allen v Nicholson





Line of Duty

- Determination made after an investigation into the circumstances of a service member's **injury, disease, or death**
- Active-duty:
 - Required with any death or disease / injury likely to result in permanent disability, involving drugs / alcohol, self inflicted, or occurring during periods of AWOL or acts later charged under the UCMJ
- Reserve / Federalized Guard:
 - Member dies, incurs, or aggravates a disease or injury or receives medical care while on "duty status" to include the overnight before or in between successive IDTs or traveling to or from duty
 - Members have 180 days to report their medical condition



Line of Duty

- Answers 3 Questions:
 1. Whether the injury or disease existed prior to service and if so, did service aggravate the condition;
 2. Whether the injury, disease, or death occurred while the member was AWOL; and
 3. Whether the injury, disease, or death was due to the member's **misconduct or willful negligence**



Line of Duty

- Three Outcomes
 - In the Line of Duty - Presumption
 - Not in the Line of Duty – Not member's misconduct
 - Ex: Auto accident while member AWOL
 - Not in the Line of Duty – Member's misconduct
 - Ex: injured during an assault or DUI
- Death, injury and disease is **presumed to be in the line of duty**
 - Burden is on the Govt to establish not in the line of duty by **clear and convincing evidence**



Line of Duty

- Misconduct or Willful Negligence
 - “An act involving conscious wrongdoing or a known prohibited action.” 38 CFR § 3.1(n)
 - More than a mere violation of the law
- Impact of “LOD-No” Determination
 - Member may be responsible for the cost of their medical care
 - **Not entitled to disability compensation benefits for those disabilities**
 - Not eligible for medical retirement or severance pay
 - **Family not eligible for Survivor Benefit Plan (SMB) annuity and Dependent Indemnity Compensation (DIC)**



Line of Duty

- Commander determination – Human factor
- Service LOD determinations are binding on VA unless “patently inconsistent with the facts and law administered by the VA.” 38 CFR § 3.1
- Special Cases:
 - Alcohol/Drugs – outside the line of duty if they proximately caused the death, disease, or injury
 - Not the result of medical treatment or PTS
 - STIs – in the line of duty
 - Suicide – generally, in the line of duty since the service member was not of sound mind



Line of Duty

MSgt Stevens purchased a new motorcycle following his promotion and corresponding raise in pay. One Saturday afternoon, Stevens took his new bike for a ride. Midway through the ride, he crashed and was killed, survived by his wife, Lisa, and their two young children.

- LOD needed?
- Presumption?





Line of Duty

Major Jim White was appointed as the “LOD Officer” and completed the investigation.

In the line of duty?

- Motorcycle had a defect and the breaks failed, causing the crash?
- MSgt Stevens was struck by another driver who ran a stop sign?
- MSgt Stevens was traveling 27 miles an hour over the speed limit and caught a gust of wind, pushing him into a barrier?
- MSgt Stevens was drunk driving?
- Emotionally distraught over his possible divorce, MSgt Stevens intentionally ran his motorcycle into the back of a semi, attempting to kill himself?



Eligible Service?





Quiz





Quiz





Sgt John Jones

- **Active-duty** Marine assigned to an artillery unit in Camp Lejeune, NC
- While on deployment to Iraq, he injured his right knee when he fell off of his 155mm Howitzer. Eligible for veterans' benefits?
- While on field maneuvers in California, twisted his knee while doing morning PT?
- How about if Sgt Jones injured his knee while coaching his daughter's soccer team on the weekend after he returned from his field maneuvers?



Sgt John Jones

- **Reserve** Marine assigned to an artillery unit in Camp Lejeune, NC
- While on deployment to Iraq, he injured his right knee when he fell off of his 155mm Howitzer. Eligible for veterans' benefits?
- While on annual training in California, he twisted his knee while doing morning PT?
- How about if Sgt Jones injured his knee while coaching his daughter's soccer team on the weekend after he returned from his annual training?



Sgt Jane Jones

- **Guard** soldier assigned to an artillery unit in her home state of Michigan
- While on deployment to Iraq, she injured her right knee when she fell off of her 155mm Howitzer. Eligible for veterans' benefits?
- While on annual training in California, she twisted her knee while doing morning PT?
- How about if Sgt Jones injured her knee while coaching her son's soccer team on the weekend after she returned from her annual training?



Sgt Jane Jones

- **Guard** soldier assigned to an artillery unit in her home state of Michigan. She injures her knee:
- While on deployment to Saginaw, MI to assist with regional flooding?
- While on deployment ordered by the Governor to provide security at the Texas / Mexico boarder?
- While federalized by the President to provide security at the Texas / Mexico boarder?



Length of Service

- Length of Active Service for Veterans Benefits:
 - Prior to 7 Sep 80 – no minimum length of service required
 - After 7 Sep 80 – shorter of the full period” of active duty or 24 months of continuous active duty if not full period 38 USC § 5303A
 - “Full period” – as determined by the military service
 - Is 24 months arbitrary? *Raugust v. Shinseki*
- Exceptions: **Disability compensation benefits!!**
VA Life Insurance (VGLI)
- Family eligibility for benefits depends on the service member’s eligibility



Character of Service





Military Separation

- End Term of Service (ETS)
- Retirement
 - Length of Service
 - Medical
- Court Martial
- Administrative Separation





Military Separation

- Administrative Separation – Maintain High Standards of Readiness
 - Convivence of the Government (H, G)
 - Dependence and/or Hardship (H, G)
 - Defective Enlistment (H, G, OTH)
 - Pregnancy (H)
 - Alcohol/Drug Treatment Failure (H, G)
 - Unsatisfactory Performance (H, G)
 - Misconduct (G, OTH)



Discharge Characterization

- Honorable
- Honorable Conditions (“General”)
- Entry Level
- Other than Honorable (“OTH”)

-
- Bad Conduct – (SPCM/GCM)
 - Dishonorable – (GCM)
 - Dismissal (Officers Only) (GCM)





Types of Courts Martial

- Summary – Minor Offenses
 - No discharge is authorized
- Special Court Martial – Misdemeanor Offenses
 - Limited to a Bad Conduct Discharge
- General Court Martial – Felony-type Offenses
 - Bad Conduct Discharge
 - Dishonorable Discharge
 - Dismissal (Officer's DD Equivalent)



Discharge Characterization

- Effect on VA Benefits:
 - A discharge characterized by the military as under honorable conditions (Honorable or General) is binding on the VA and allows for VA benefits if other eligibility requirements are met
 - If a discharge was not characterized as under honorable conditions, benefits are not payable unless VA determines the discharge was “under conditions other than dishonorable” – Character of Discharge Determination
 - Multiple periods of service?
 - Ex: Court Martial conviction / BCD on third enlistment



Bad Paper Trends

- “Bad Paper” Discharges: Rate Increasing
 - WW II Era: 1.7%
 - Vietnam Era: 2.8%
 - Gulf War Era: 6.5% (1% statutory/5.5% discretionary)
 - Over 125K (33K deployed to Iraq & Afghanistan)
- Service Differences
 - USMC - 10 times more likely to get a bad paper discharge than Air Force



Discharge Characterization

- Effect on VA Benefits: Statutory Bar (38 USC 5303)
 - A release or discharge for any of the following reasons constitutes a statutory bar to benefits, unless it is determined that the Service member was insane at the time of the offense
- Insanity definition is different from that in criminal law
 - *Gardner v. Shinseki*



Discharge Characterization

- **38 CFR § 3.354 Determinations of Insanity**
- (a) ***Definition of insanity.*** An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, **a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.**
- (b) ***Insanity causing discharge.*** When a rating agency is concerned with determining whether a veteran was insane at the time he committed an offense leading to his court-martial, discharge or resignation (38 U.S.C. 5303(b)), it will base its decision on all the evidence procurable relating to the period involved, and apply the definition in paragraph (a) of this section.



Stringham v. Brown

- Nonjudicial Punishment (“Article 15” “Captains Mast” “NJP”)
 - AWOL – Multiple times
 - Failure to Obey and Order
- Discharged with a UOTHC
- VA awarded SC for PTSD for healthcare purposes only under 38 CFR 3.360
 - SC for disability benefits denied? W&P misconduct
- Veteran argues insanity because of PTSD
- But PTSD manifest itself after misconduct
- Court upheld Board of Veterans Appeals denial



38 CFR § 3.360

- **38 CFR § 3.360 Service-connected health-care eligibility of certain persons administratively discharged under other than honorable condition.**
- (a) ***General.*** The health-care and related benefits authorized by chapter 17 of title 38 U.S.C. shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty.
- (b) ***Discharge categorization.*** With certain exceptions such benefits shall be furnished for any disability incurred or aggravated during a period of service terminated by a discharge under other than honorable conditions. Specifically, they may not be furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in § 3.12(c) applies [statutory bar].
- (c) ***Eligibility criteria.*** In making determinations of health-care eligibility the same criteria will be used as is now applicable to determinations of service incurrence and in line of duty when there is no character of discharge bar.



Discharge Characterization

- Effect on VA Benefits: Statutory Bar (38 USC 5303)
 - A release or discharge for any of the following reasons constitutes a statutory bar to benefits:
 - **Sentence of a General Court-Martial (BCD, DD, Dismissal);**
 - Conscientious objector who refused to perform military duty, wear the uniform, or otherwise comply with lawful orders of competent military authority [Vietnam];
 - Desertion;
 - **Officer resignation for the good of the service (RILO);** or
 - Absence without official leave for a continuous period of 180 days or more resulting in a UOTHC discharge



Discharge Characterization

- Effect on VA Benefits: Regulatory Bar (June 2024)
 - Acceptance of an undesirable discharge (OTH or BCD) to escape trial by General Court-Martial (Plea Agreement);
 - Mutiny or spying;
 - An offense involving “moral turpitude” (OGCO 6-87); or
 - “Willful and persistent misconduct” (80%+)
 - Homosexual Acts – REMOVED in 2024



Discharge Characterization

Changes effective 1 June 2024

- An offense involving “moral turpitude”
 - “gravely violates accepted moral standards”
 - “shocks the public conscience” – murder, rape, child porn
 - All felonies?
- “Willful and persistent misconduct” (See UCMJ)
 - Not one-time offense
 - 2+ “minor” offenses within 2 years of each other; or
 - 1+ minor offense(s) within 2 years of a “major” offense; or
 - 2+ major offenses within 5 years of each other

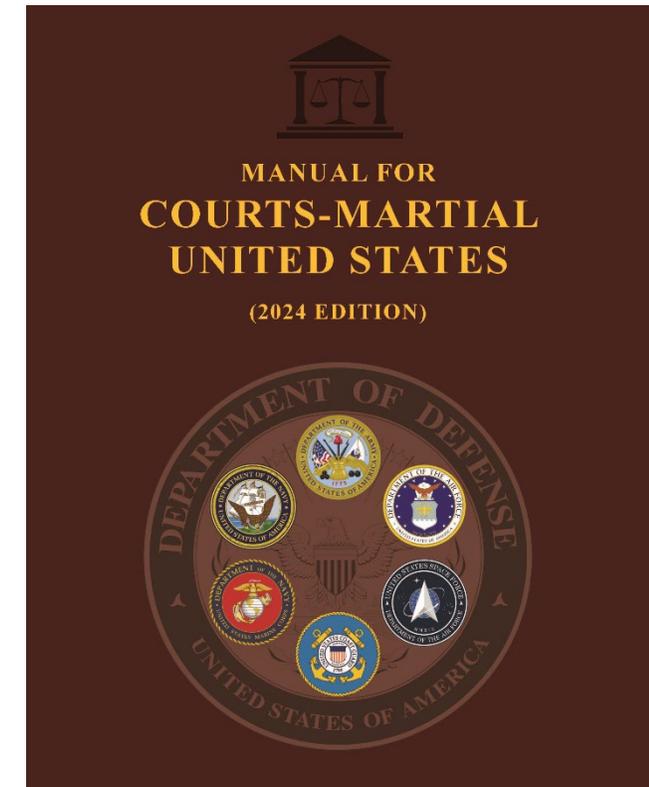


Minor vs. Major Offenses

Changes effective 1 June 2024

“Minor” offense = Maximum punishment does not include either a Dishonorable Discharge or confinement in excess of one year

86	Absence without leave, etc.	DD, BCD	2 yrs. ¹	Total
	Failure to go, going from place of duty	None	1 mo.	2/3 1 mo.
	Absence from unit, organization, etc.			
	Not more than 3 days	None	1 mo.	2/3 1 mo.
	More than 3, not more than 30 days	None	6 mos.	2/3 6 mos.
	More than 30 days	DD, BCD	1 yr.	Total
	More than 30 days and terminated by apprehension	DD, BCD	1 yr., 6 mos.	Total
	Absence from guard or watch	None	3 mos.	2/3 3 mos.
	Absence from guard or watch with intent to abandon	BCD	6 mos.	Total
	Absence with intent to avoid maneuvers, field exercises	BCD	6 mos.	Total
87	Missing movement			
	Through design	DD, BCD	2 yrs.	Total
	Through neglect	BCD	1 yr.	Total
88	Contempt toward officials	Dismissal	1 yr.	Total
89	Disrespect toward superior commissioned officer	BCD	1 yr.	Total





Discharge Characterization

Changes effective 1 June 2024

- ***Compelling Circumstances Exception:*** The regulatory bar to **benefits for prolonged AWOL and the two types of misconduct (moral turpitude and willful/persistent misconduct)** will not be applied if compelling circumstances mitigate the AWOL or the misconduct at issue. Consider the following factors:
 - (1) *Length and character (honest, faithful, meritorious) of service exclusive of the period of prolonged AWOL or misconduct.* **and**
 - (2) *Reasons for prolonged AWOL or misconduct.* Factors considered are as follows ...



Discharge Characterization

Changes effective 1 June 2024

- **(2) *Reasons for prolonged AWOL or misconduct.*** Factors considered are as follows:
 - **(i) Mental or cognitive impairment** at the time of the prolonged AWOL or misconduct, to include but not limited to a **clinical diagnosis** of (or evidence that could later be medically determined to demonstrate existence of) posttraumatic stress disorder (**PTSD**), depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, or cognitive disabilities;
 - **(ii) Physical health**, to include physical trauma and any **side effects of medication**;
 - **(iii) Combat-related or overseas-related hardship**;
 - **(iv) Sexual abuse/assault**;
 - **(v) Duress, coercion, or desperation**;
 - **(vi) Family obligations** or comparable obligations to third parties;
 - **(vii) Age, education, cultural background, and judgmental maturity**;



Character of Discharge Determination

- Effect on VA Benefits: VA Discretion
 - VA reviews the facts and circumstances surrounding the incident(s) that led to the discharge before making a character-of-discharge determination
 - On a case-by-case basis, VA determines:
 - Whether the incidents that led to the discharge may be found to have been “under conditions other than dishonorable,” and
 - Whether basic eligibility for VA benefits can be established
- **Subjectivity requires advocacy!**



Bad Paper

- If statutory bar – VA cannot legally rate
- If regulatory bar – Subjective review by VA
 - Advocate to the Rater
 - Explain why the discharge was not the result of “moral turpitude” or “willful and persistent misconduct” or compelling circumstances exist
 - Appeal
- If COD is determined to be “dishonorable” by VA – only option is to attempt a discharge upgrade



Barred from Benefits?

- Dishonorable Discharge?
 - Regulatory or Statutory?
- Dismissal?
 - Regulatory or Statutory?
- Bad Conduct Discharge?
 - Regulatory or Statutory?
- Other than Honorable Conditions Discharge?
 - Regulatory or Statutory?



Barred from Benefits?

- Dishonorable Discharge?
 - Yes - Statutory Bar
- Dismissal?
 - Yes - Statutory Bar
- Bad Conduct Discharge?
 - Depends on the Court Martial
- Other than Honorable Conditions Discharge?
 - Regulatory Bar



Basic Eligibility

Two Step Process to Benefits:

1. Must be eligible for veterans' benefits
 - Active Service
 - Title 10, Title 32, Pure State Status
 - Characterized as Other than Dishonorable
 - No statutory or regulatory bars to eligibility
2. If eligible, must be entitled to veterans' benefits



NVLSP

