

**MEMORANDUM OUTLINING VETERAN’S DISCHARGE UPGRADES AND THE  
NECESSITY FOR PROACTIVE MENTAL HEALTH RESOURCES**

**I. SEPARATING FROM THE MILITARY: DEPARTMENT OF DEFENSE,  
VETERANS ADMINISTRATION**

For many individuals, joining the military is an opportunity to serve their nation and launch a career. Upon discharge from the military, it is critical to note that there are two distinct, yet linked processes, which determine the level of benefits that the veteran may access: (1) the Department of Defense (Branch of Service) Discharge and (2) the Veterans Administration Determination of Benefits, which is in part determined by the Department of Defense Discharge.

Many post-service benefits are conditioned on the award of an honorable discharge characterization. The Department of Defense offers discharge guidance to the military departments but the authority to discharge is delegated to the service secretaries.<sup>1</sup> Unfortunately, the process of determining service characterizations can be wrought with inequities. Certain conduct may not be treated consistently across military branches.<sup>2</sup> Further, between 2006 and 2015, black servicemembers were sixty-one percent more likely to face a general or special court-martial than their white counterparts.<sup>3</sup>

Every service member receives a characterization of service upon completion of their tenure at the military. There are five characterizations, listed from best to worst: (1) Honorable, (2) General (under honorable conditions), (3) Other than Honorable, (4) Bad-Conduct, and (5)

---

<sup>1</sup> See U.S. Dep’t of Def., Instr. 1332.14, Enlisted Administrative Separations, enclosure 5 (Jan. 27, 2014.) <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133214p.pdf?ver=ZXvYTwcxAHtZNAB7hXBZZQ%3D%3D>

<sup>2</sup> See *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*, VETERANS LEGAL CLINIC OF HARV. L. SCH., March 2016, [https://uploads-ssl.webflow.com/5ddd3d7ad8b1151b5d16cff/5e67da6782e5f4e6b19760b0\\_Underserved.pdf](https://uploads-ssl.webflow.com/5ddd3d7ad8b1151b5d16cff/5e67da6782e5f4e6b19760b0_Underserved.pdf) [hereinafter *Underserved*]

<sup>3</sup> *Id.*

Dishonorable. Eighty-five percent of service members receive an Honorable discharge.<sup>4</sup> The remaining fifteen receive Less than Honorable.<sup>5</sup> Discharges can be made by administrative determinations or they can be punitive discharges.

Administrative discharges are personnel actions that affords servicemembers considerably less due process than court-martials. Honorable, General (under honorable conditions), or “Other than Honorable” discharge determinations are made administratively. An “Other than Honorable” (OTH) discharge occurs when the veteran’s service records show some misconduct, but the servicemember has not been involved with a court-martial.<sup>6</sup>

Punitive discharges are authorized by court-martials. These discharges normally cover bad conduct or dishonorable discharges. Bad conduct discharges can occur in two ways; either the veteran has received a misdemeanor conviction from special court martial or has been convicted of a felony by a general court-martial.<sup>7</sup> The former may still be eligible for VA benefits if they seek a discharge upgrade, but the latter is presumptively barred from receiving VA benefits.

Discharge characterizations are recorded on a servicemember’s official discharge document called a “DD-214.” These documents contain both the characterization of the discharge and a narrative reason for discharge. The distinction between an administrative “Other than Honorable” discharge and a punitive discharge can be confusing because both denote misconduct of some sort. In some instances, this confusion leads to veterans being wrongfully turned away

---

<sup>4</sup> Swords to Plowshares, *Veterans and Bad Paper: The Facts*, INST. FOR VETERAN POLICY [https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5ef515b7b9ae332b86820e21\\_Bad-Paper-Fact-Sheet-June-2015.pdf](https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5ef515b7b9ae332b86820e21_Bad-Paper-Fact-Sheet-June-2015.pdf)

<sup>5</sup> *Id.*

<sup>6</sup> Swords to Plowshares, *Assisting Bad Paper Veterans Discharge Upgrades & Character of Discharge Determinations*, INST. FOR VETERAN POLICY, 2021, [https://www.njreentry.org/application/files/9116/3655/7759/Assisting\\_Bad\\_Paper\\_Veterans\\_COD\\_DU\\_Training\\_-\\_2021.pdf](https://www.njreentry.org/application/files/9116/3655/7759/Assisting_Bad_Paper_Veterans_COD_DU_Training_-_2021.pdf) [hereinafter *Assisting Bad Paper Veterans*]

<sup>7</sup> *Id.*

from receiving VHA benefits.<sup>8</sup> Far too often, veterans who receive an OTH discharge are stuck in limbo. The following section will outline how a veteran may upgrade their discharge status.

## **II. THE DISCHARGE UPGRADE PROCESS**

There are two ways in which a veteran can upgrade their discharge status. First, the veteran may apply for a Military Discharge Review. If successful, the veteran's discharge status will be upgraded by the Department of Defense and their military record will be corrected. Second, the veteran may have the VA review their Character of Discharge. The following two sub-sections will detail these processes.

### **A. Military Discharge Review Boards (Department of Defense)**

A discharge upgrade is an administrative process by which a veteran's characterization of service may be improved from a less desirable to a more desirable classification. Each branch of the military has an administrative agency called the Discharge Review Board ("DRB"). The Board consists of a number of officers who are empowered to evaluate and change a veteran's characterization of discharge in certain circumstances. A veteran has fifteen years from the date of separation to file an application with the appropriate DRB.<sup>9</sup>

There is a presumption that military officials have properly determined the assignment of an applicant's characterization of service and, thus, military records are assumed to be correct.<sup>10</sup> The veteran-applicant, therefore, carries the burden of presenting "substantial credible evidence" that the original characterization was improper.<sup>11</sup>

---

<sup>8</sup> Swords to Plowshares, *Veterans and Bad Paper: The Facts*, INST. FOR VETERAN POLICY [https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5ef515b7b9ae332b86820e21\\_Bad-Paper-Fact-Sheet-June-2015.pdf](https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5ef515b7b9ae332b86820e21_Bad-Paper-Fact-Sheet-June-2015.pdf) [hereinafter *Veterans and Bad Paper*]

<sup>9</sup> 32 C.F.R. §70.8(a)(2).

<sup>10</sup> 32 C.F.R. §70.8 (b)(12)(vi).

<sup>11</sup> *Id.*

The DRB is authorized to upgrade a discharge characterization in two ways: either in propriety or equity. A characterization of service will be changed on the basis of propriety if an “error of fact, law, procedure, or discretion occurred, and the error was prejudicial to the veteran during the discharge process.”<sup>12</sup> Further, a change of discharge is required when a change in policy has been made that would have retroactively benefitted the former servicemember’s discharge status.<sup>13</sup>

Alternatively, the DBR will upgrade a discharge on the basis of equity if the characterization does not adequately represent the veteran’s quality of service. Under the equitable evaluation, the Board may consider the veteran’s overall military performance, including service history, service evaluations, awards, wounds received in action, records of promotions or demotions, and records of misconduct.<sup>14</sup> Applications made on the grounds of equity also consider abstract concepts, including total capacities, family and personal problems, arbitrary or capricious actions, and discrimination.<sup>15</sup>

If more than fifteen years have passed, there is still opportunity to correct a veteran’s military record. While the veteran is statutorily barred from applying directly to their respective DRB, the veteran may submit their application to the Board for Correction of Military Records (“BCMR”). Similar to DRBs, each branch of the military has its own BCMR; however, BCMRs have much broader authority to alter or modify the military service record of a veteran. BCMRs can alter the characterization of service listed on a veteran’s certificate of discharge. This form is also known as a “DD 214.” Further, BCMRs can change inaccurate performance evaluations or,

---

<sup>12</sup> 32 C.F.R. §70.9(b).

<sup>13</sup> *Id.*

<sup>14</sup> 2 C.F.R. §70.9(c)(3)(i).

<sup>15</sup> 2 C.F.R. §70.9(c)(3)(ii).

in some instances, order a veteran to be reinstated into service.<sup>16</sup> For veterans with service-connected PTSD or TBI, the Board shall:

- (A) review medical evidence of the Secretary of Veterans Affairs or a civilian health care provider that is presented by the claimant; and
- (B) review the claim with liberal consideration to the claimant that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal.<sup>17</sup>

## **B. Character of Discharge Process at the VA**

A veteran with a “bad-paper” discharge may apply to the VA and receive a Character of Discharge Review from a VA adjudicator. Until the veteran applies to the Veterans Benefit Administration and the Administration reviews the Character of Discharge adjudication, no services are available to the veteran.

While the veteran’s claim is being processed, the VA is required to “make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate [their] claim for benefit under a law administered by the VA.”<sup>18</sup> When making the COD determination, the VA is required to give the veteran the benefit of the doubt if there is “an approximate balance of positive and negative evidence regarding any claim.”<sup>19</sup>

If a veteran’s request to the Veterans Benefits Administration is denied, the veteran may file a Notice of Disagreement with the Board of Veterans’ Appeals (“BVA”). Once the claim is with the BVA, the BVA may be grant, deny, or remand the veteran’s appeal. If the veteran disagrees with the BVA’s decision, the veteran may appeal to the Court of Appeals for Veterans’ Claims (“CAVC”).<sup>20</sup> If the veteran is dissatisfied with the determination made by the CAVC, the

---

<sup>16</sup> 10 U.S.C. §1552.

<sup>17</sup> 10 U.S.C. §1552(h)(2)(A-B).

<sup>18</sup> 38 U.S.C. § 5103A(a)(1) (2012); see also 38 C.F.R. § 3.159(c)(1) (2016).

<sup>19</sup> 38 U.S.C § 5107(b).

<sup>20</sup> 38 U.S.C. § 7252(a)

veteran may then appeal to the Court of Appeals for the Federal Circuit.<sup>21</sup> The Federal Circuit's standard of review is limited. It can only the VA's determination that is arbitrary or capricious, unconstitutional, in excess of statutory limitation, or procedurally flawed.<sup>22</sup> The Federal Circuit cannot review a challenge to the VA's factual determination or "a challenge to a [VA] law or regulation as applied to the facts by a particular case."<sup>23</sup> Finally, the veteran may petition the Supreme Court for certiorari and any decision therein made would be final.<sup>24</sup>

### **III. MENTAL HEALTH AND ADDICTION SERVICES ARE CRITICALLY NEEDED DURING BUREAUCRATIC DOD AND VA APPEALS**

Procedurally, pursuing a COD determination is difficult; for many veterans, the VA will not conduct a COD unless the veteran asks.<sup>25</sup> Once the veteran asks the VA for a COD determination, the normal wait time for a determination is approximately 1,200 days.<sup>26</sup> Furthermore, the COD evaluation process may be triggered inconsistently across agencies within the VA.<sup>27</sup> For example, if the veteran is applying for service-connected benefits through the Veterans Benefits Administration, the COD process is triggered.<sup>28</sup> However, if the veteran seeks healthcare or treatment directly from the Veterans Health Administration, a COD determination is not conducted.<sup>29</sup> Consequently, there is a high rate of exclusion at the VA due to this procedural inadequacy; many veterans with bad-paper discharges do not pursue a COD claim because of the longstanding presumption that bad-paper discharges are ineligible.<sup>30</sup> Only 10% of post-2001

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 7292(d)(1).

<sup>23</sup> *Id.* § 7292(d)(2).

<sup>24</sup> *Id.* § 7292(c).

<sup>25</sup> See *Underserved*, at 10, [https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5e67da6782e5f4e6b19760b0\\_Underserved.pdf](https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5e67da6782e5f4e6b19760b0_Underserved.pdf)

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

veterans with bad-paper discharges receive a COD determination and many are found ultimately dishonorable because of inconsistent regulatory and statutory interpretations.<sup>31</sup> Further, there is a 65% overall denial rate by the Board of Veteran's Appeals for a post-2001 veteran who appeals their initial COD determination.<sup>32</sup> Without easily applicable, bright-line rules, many veterans are wrongfully excluded from critically needed VA benefits.

Similarly, seeking an upgrade through a Discharge Review Board does not prove to be an adequate alternative. There is a common misconception that a veteran can easily change their discharge status once transitioning back to civilian life.<sup>33</sup> Unfortunately, the DRB's upgrade process is often convoluted and difficult for veterans to accomplish without a lawyer. The DRB's legal and factual inquiries are quite different than the VA's legal and factual inquiries.<sup>34</sup> Additionally, seeking a Military Discharge Upgrade does not automatically a veteran eligible for benefits. The determination for veteran's benefits eligibility is separate and distinct from correcting a servicemembers military record.<sup>35</sup> For those who do seek a corrected military record, the rates of success are quite low and applicants wait nearly twelve to twenty-four months on average for a decision.<sup>36</sup> In 2018, the percentage of veteran-applicants granted a discharge upgrade after seeking review from their respective DRBs averaged about 11%.<sup>37</sup>

Nearly one in four veterans receive less than honorable discharges.<sup>38</sup> Moreover, the link between bad-paper discharges and service-related injuries or traumas is stark.<sup>39</sup> One in five

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 12

<sup>33</sup> See *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges*, at 8, <https://www.legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Veterans and Bad Paper*, [https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5ef515b7b9ae332b86820e21\\_Bad-Paper-Fact-Sheet-June-2015.pdf](https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5ef515b7b9ae332b86820e21_Bad-Paper-Fact-Sheet-June-2015.pdf)

<sup>39</sup> *Id.*

veterans who have served in the Iraq or Afghanistan Wars have been diagnosed with Post Traumatic Stress Disorder (PTSD) or approximately 313,000 veterans have been diagnosed with a traumatic brain injury (TBI).<sup>40</sup> Both PTSD and TBI “produce dysfunction through an exaggerated startle response, inability to control reflexive behavior, irritability, or attraction to high-risk behavior.”<sup>41</sup> The inference therefrom is that a significant number of veterans with bad-paper have been given this status as a result of undiagnosed or untreated service-related injuries or trauma.<sup>42</sup>

The fallout from a bad-paper discharge is dangerous. Veterans with bad-paper are at an increased risk of untreated mental health conditions, suicide, involvement with the criminal justice system, and homelessness.<sup>43</sup> Veterans with bad paper discharges are two times more likely to commit suicide and three times more likely to have suicidal ideations.<sup>44</sup> In 2017, the VA disclosed that 6,139 veterans have committed suicide.<sup>45</sup> While the VA has concerned itself with veteran’s mental health outreach, the regulatory and procedural inadequacies directly conflict with these efforts.<sup>46</sup> The most at-risk veterans are the ones who are more likely to be excluded from VHA eligibility.<sup>47</sup> The need for proactive mental health access is apparent. The following sections will outline two states which recognized this need and expanded healthcare access for presumptively ineligible veterans.

---

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *Underserved*, supra note 2, at 21.

<sup>44</sup> *Assisting Bad Paper Veterans*, supra note 6.

<sup>45</sup> Veteran’s Administration Office of Mental Health and Suicide Prevention, *2019 National Veteran Suicide Prevention Annual Report*, at 8, [https://www.mentalhealth.va.gov/docs/data-sheets/2019/2019\\_National\\_Veteran\\_Suicide\\_Prevention\\_Annual\\_Report\\_508.pdf](https://www.mentalhealth.va.gov/docs/data-sheets/2019/2019_National_Veteran_Suicide_Prevention_Annual_Report_508.pdf).

<sup>46</sup> See *Underserved*, supra note 2, at 21.

<sup>47</sup> *Id.*



#### **IV. LEGISLATIVE SOLUTIONS**

##### **A. California’s 2017 Act to Amend Section 5600.3 of the Welfare and Institutions Code, Relating to Mental Health Services<sup>48</sup>**

In 2017, California enacted A 2325. This bill prohibits eligible California veterans from being denied county medical or behavioral health services while waiting for a determination of eligibility for, and availability of, services provided by the VA. The bill progresses the state’s legislative intent to address the mental and behavioral health needs of California veterans by improving access to services closer to the veteran’s home regardless of insurance coverage or eligibility for Medi-Cal or any other federal health care services.

This bill serves to increase mental health accessibility for veterans who would otherwise be denied as a result of their veteran status. The bill adds veterans to the meaning of a “qualified adult” and mandates that veterans shall be treated in the same manner as any other adult in need of mental health services, irrespective of funding. A “qualified adult” according to the bill is an adult who has a “serious mental disorder”. A “serious mental disorder” includes post-traumatic stress disorder and shall not be construed to exclude persons with a serious mental health disorder and a diagnosis of substance abuse.

##### **i. Findings and Declarations of A 2325**

Veterans are eligible for county mental and behavioral health services in the same manner as any other adult in the county, whether or not they are eligible for mental and behavioral health services from the VA.<sup>49</sup> Applying and receiving eligibility from the VA is time-consuming, and

---

<sup>48</sup> For the full text of the bill, *see* [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=WIC&sectionNum=5600.3](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC&sectionNum=5600.3).

<sup>49</sup> *See* § 1 (b)(1)

veterans should not have to wait to receive needed mental and behavioral health care while awaiting eligibility if a similarly situated adult could receive state benefits in the same county.<sup>50</sup>

Mental and behavioral health services may not be available in a timely manner or accessible when a veteran is eligible for benefits from the VA. Veterans who need services in a county but cannot access them in an adequate, timely, or accessible manner from another source should be treated like any other adult in the county and be provided with services through the county mental health programs, irrespective of funding source.<sup>51</sup>

**B. Connecticut’s 2018 Act Concerning Benefits for Certain Veterans Who Have Been Diagnosed with Post-Traumatic Stress Disorder or Traumatic Brain Injury or Who Have Has an Experience of Military Sexual Trauma<sup>52</sup>**

In May 2018, Governor Malloy of Connecticut signed a bill extending a broad range of state and municipal benefits to veterans who received an Other than Honorable discharge characterization as a result of PTSD, TBI, or MST. The bill acknowledges the impact of service-related mental health conditions on discharge characterizations and the need for transitional assistance beyond mental health to fully recover. OTH veterans with PTSD, TBI, or MST also receive education, employment, and housing assistance to reintegrate themselves into the community.

The act defines a veteran as “any person (i) honorably discharged from, or released under honorable conditions from active service in, the armed forces, . . . or (ii) with a qualifying condition, . . . who has received a discharge other than bad conduct or dishonorable from active service in the armed forces.” A qualifying condition “means a diagnosis of post-traumatic stress disorder or traumatic brain injury made by, or an experience of military sexual trauma, as described

---

<sup>50</sup> §1(b)(2)

<sup>51</sup> §1(b)(3)

<sup>52</sup> For full text, see <https://www.cga.ct.gov/2018/ACT/pa/pdf/2018PA-00047-R00SB-00284-PA.pdf>

in 38 USC 1720D, . . . disclosed to an individual licensed to provide health care services at a United States Department of Veterans Affairs facility.”

**i. Findings of Connecticut’s Public Act No. 18-47**

Yale Law School’s Veterans Legal Services Clinic and the Connecticut Department of Veterans Affairs estimated that 1,700 to 2,500 veterans with bad-paper live in the state.<sup>53</sup> Based on statistical projections of the prevalence of PTSD, TBI, and MST in veterans with bad-paper, it was likely that approximately 800 residents would be directly impacted.<sup>54</sup> These veterans represent 0.4% of the state’s current veteran population and would have had a negligible effect on the state’s spending on veterans’ programs.<sup>55</sup>

**V. CONCLUSION**

The NJRC seeks to implement state legislation that would help bridge the gap while veterans wait to receive benefits from the VA or are in the process of upgrading their discharge status.

The New Jersey Reentry Corporation, through its Veterans Justice Outreach Initiative, works to provide critically needed services for veterans regardless of their discharge status. The NJRC maintains an interest in assisting veterans by easing the legal barriers to enrolling in VA benefits.

---

<sup>53</sup> Veterans Legal Services Clinic, Yale Law School, for the Connecticut Chapter of Iraq and Afghanistan Veterans of America, *A TIME TO HEAL: STATE BENEFITS FOR CONNECTICUT VETERANS WITH BAD PAPER*, at 10, Feb, 2018, [https://law.yale.edu/sites/default/files/area/clinic/document/a\\_time\\_to\\_heal\\_-\\_state\\_benefits\\_for\\_connecticut\\_veterans\\_with\\_bad\\_paper.pdf](https://law.yale.edu/sites/default/files/area/clinic/document/a_time_to_heal_-_state_benefits_for_connecticut_veterans_with_bad_paper.pdf).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*