At-A-Glance: Changes to VA Character of Discharge Regulations

April 2024

Before

- 38 CFR 3.12 (d) was the VA-created regulatory bar most frequently used to deny basic eligibility. The language of "willful and persistent misconduct" was broad enough to justify opposite decisions on the same sets of facts. Advocates resorted to dictionary definitions of the terms "willful" and "persistent" and the definition of "willful misconduct" found in line of duty determinations for incidents involving alcohol or drugs, see 38 CFR 3.301(c), and in the general definition for VA purposes, 38 CFR. 3.1(n).
- Examples of misconduct routinely found to be "willful and persistent" under this old version included any number of hours or days of unauthorized absence; substance use; and purely military offenses such as disrespecting a superior or failing to obey an order. There was no basis for arguing any mitigating factors. There was some ability to argue that misconduct was either willful or persistent, but not both, meaning the bar should not apply

After

- 38 CFR 3.12(d)(2)(ii) represents significant changes in how to analyze service records that show multiple instances of misconduct prior to discharge. First, it institutes a lookback period of either 2 years or 5 years when evaluating the frequency of misconduct over time. Second, it relies on the maximum possible sentence for offenses according to the Manual for Courts Martial.
- VA will now consider an offense as serious and subject to a 5 year lookback period for purposes of evaluating "persistence" of misconduct, if the offense could have been punished by a fully dishonorable discharge, or confinement for longer than one year. In contrast, an offense is minor and only subject to a 2 year lookback period if the maximum punishment would have included confinement of one year or less. Applying this new definition, an unauthorized absence of less than 30 days alone should no longer bar a former servicemember from basic eligibility. But, disrespect and failure to obey orders are not defined as minor based on their maximum possible sentences. Two instances of disrespect, if separated by less than five years, could disqualify a former servicemember from veteran status. Advocates will likely need to redouble their efforts to prove that a compelling circumstance or circumstances should apply.

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Before

- 38 CFR 3.12(c)(6) was the statutory bar for unauthorized absences lasting more than 180 consecutive days. There followed a nonexhaustive list of exceptions if the applicant demonstrated “compelling circumstances.” This list did not apply to create exceptions for “willful and persistent misconduct” or an offense of “moral turpitude.”

After

- 38 CFR 3.12(c)(6) remains intact, though the compelling circumstances exception is now relocated to 3.12(e). More importantly the exception has expanded to potentially apply to “willful and persistent misconduct” and “moral turpitude” cases, instead of being limited to cases where over 180 days of unauthorized absence led to an other than honorable discharge

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Before

- 38 CFR 3.354, the definition of “insanity” that operated as the sole broadly applicable exception that could allow a veteran with an Other than Honorable (OTH) or Bad Conduct Discharge (BCD) to get basic eligibility, even without a discharge upgrade. Advocates should note this definition is distinct from any version found in criminal law. VA’s standard character of discharge correspondence did not invite veterans to submit evidence on this topic. Its boilerplate development letters included excerpts of 38 C.F.R. 3.12, but not 3.354.

After

- 38 CFR 3.12 (b) explicitly cites the insanity exception and clarifies that it can apply in any circumstance where a discharge may otherwise bar a former servicemember from veteran status. For an excellent analysis of this topic along with practical guidance for advocates and mental health practitioners, see Making the Best from a Mess: Mental Health, Misconduct, and the" Insanity Defense" in the VA Disability Compensation System by Prof. Caleb R. Stone

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Before

- 38 CFR 3.12(d)(g) was the provision that discriminated against sexual orientation, because it was a bar to veteran status if discharge was due to certain “homosexual acts” with aggravating circumstances. This applied regardless of whether the events occurred after the repeal of the so-called ‘Don’t Ask, Don’t Tell’ policy and its predecessors. If performed heterosexually, those same acts were not bars to veteran status, unless the VA interpreted any as “an offense involving moral turpitude.” The old regulation contained no exceptions for mitigating factors or compelling circumstances

After

- 38 CFR 3.12(d)(g)*rescinded* As expected, the VA finally took this provision off the books, and no longer discriminates based on sexual orientation when it comes to its character of discharge regulation.

Please Note:

Although TVC’s Discharge Upgrade Program doesn’t take on these types of cases, COD is a potential alternative way to access VA healthcare and benefits, without getting a discharge upgrade, and the VA is making an effort to improve the rules and process of applying for veterans who have been shut out for so long. TVC encourages veterans to apply and re-appy to VA even if they’ve been denied in the past.

Questions? Email: intakes@vetsprobono.org