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PERSONNEL AND READINESS

AUG 25 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment

In December 2016, the Department announced a renewed effort to ensure veterans were aware of the opportunity to have their discharges and military records reviewed. As part of that effort, we noted the Department was currently reviewing our policies for the Boards for Correction of Military/Naval Records (BCM/NRs) and Discharge Review Boards (DRBs) and considering whether further guidance was needed. We also invited feedback from the public on our policies and how we could improve the discharge review process.

As a result of that feedback and our internal review, we have determined that clarifications are needed regarding mental health conditions, sexual assault, and sexual harassment. To resolve lingering questions and potential ambiguities, clarifying guidance is attached to this memorandum. This guidance is not intended to interfere with or impede the Boards' statutory independence. Through this guidance, however, there should be greater uniformity amongst the review boards and veterans will be better informed about how to achieve relief in these types of cases.

To be sure, the BCM/NRs and DRBs are tasked with tremendous responsibility and they perform their tasks with remarkable professionalism. Invisible wounds, however, are some of the most difficult cases they review and there are frequently limited records for the boards to consider, often through no fault of the veteran, in resolving appeals for relief. 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. This clarifying guidance ensures fair and consistent standards of review for veterans with mental health conditions, or who experienced sexual assault or sexual harassment regardless of when they served or in which Military Department they served.

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days. My point of contact is Lieutenant Colonel Reggie Yager, Office of Legal Policy, (703) 571-9301 or reggie.d.yager.mil@mail.mil.

A. M. Kurta
Performing the Duties of the Under Secretary of Defense for Personnel and Readiness

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment

Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment

Generally

1. This document provides clarifying guidance to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault; or sexual harassment.

2. Requests for discharge relief typically involve four questions:

   a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
   b. Did that condition exist/ experience occur during military service?
   c. Does that condition or experience actually excuse or mitigate the discharge?
   d. Does that condition or experience outweigh the discharge?

3. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

4. Evidence may come from sources other than a veteran's service record and may include records from the DoD Sexual Assault Prevention and Response Program (DD Form 2910, *Victim Reporting Preference Statement*) and/or DD Form 2911, *DoD Sexual Assault Forensic Examination [SAFE] Report*), law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, physicians, pregnancy tests, tests for sexually transmitted diseases, and statements from family members, friends, roommates, co-workers, fellow servicemembers, or clergy.

5. Evidence may also include changes in behavior; requests for transfer to another military duty assignment; deterioration in work performance; inability of the individual to conform their behavior to the expectations of a military environment; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; unexplained economic or social behavior changes; relationship issues; or sexual dysfunction.

6. Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.

7. The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.

8. Cases falling under this guidance will receive timely consideration consistent with statutory requirements.

Was there a condition or experience?

9. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge.

10. Evidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge.

11. A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.

12. Review Boards are not required to find that a crime of sexual assault or an incident of sexual harassment occurred in order to grant liberal consideration to a veteran that the experience happened during military service, was aggravated by military service, or that it excuses or mitigates the discharge.

Did it exist/occur during military service?

13. A diagnosis made by a licensed psychiatrist or psychologist that the condition existed during military service will receive liberal consideration.

14. A determination made by the Department of Veterans Affairs (VA) that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the Department of Defense, is persuasive evidence that the condition existed or experience occurred during military service.

15. Liberal consideration is not required for cases involving pre-existing conditions which are determined not to have been aggravated by military service.

Does the condition/experience excuse or mitigate the discharge?

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.

17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally

construed as warranting a change in narrative reason to "Secretarial Authority," "Condition not a disability," or another appropriate basis.

Does the condition/experience outweigh the discharge?

18. In some cases, the severity of misconduct may outweigh any mitigation from mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

19. Premeditated misconduct is not generally excused by mental health conditions, including PTSD; TBI; or by a sexual assault or sexual harassment experience. However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.

Additional Clarifications

20. Unless otherwise indicated, the term "discharge" includes the characterization, narrative reason, separation code, and re-enlistment code.

21. This guidance applies to both the BCM/NRs and DRBs.

22. The supplemental guidance provided by then-Secretary Hagel on September 3, 2014, as clarified in this guidance, also applies to both BCM/NRs and DRBs.

23. The guidance memorandum provided by then-Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness Brad Carson on February 24, 2016, applies in full to BCM/NRs but also applies to DRBs with regards to de novo reconsideration of petitions previously decided without the benefit of all applicable supplemental guidance.

24. These guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations.

25. Unless otherwise indicated, liberal consideration applies to applications based in whole or in part on matters related to diagnosed conditions, undiagnosed conditions, and misdiagnosed TBI or mental health conditions, including PTSD, as well as reported and unreported sexual assault and sexual harassment experiences asserted as justification or supporting rationale for discharge relief.

26. Liberal consideration includes but is not limited to the following concepts:

a. Some circumstances require greater leniency and excusal from normal evidentiary burdens.

b. It is unreasonable to expect the same level of proof for injustices committed years ago when TBI; mental health conditions, such as PTSD; and victimology were far less understood than they are today.

c. It is unreasonable to expect the same level of proof for injustices committed years ago when there is now restricted reporting, heightened protections for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment than ever before.

d. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported.

e. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected.

f. Reviews involving diagnosed, undiagnosed, or misdiagnosed TBI or mental health conditions, such as PTSD, or reported or unreported sexual assault or sexual harassment experiences should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.

g. Veterans with mental health conditions, including PTSD; TBI; or who experienced sexual assault or sexual harassment may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran's life.

h. An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

i. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case. For example, marijuana use is still unlawful in the military but it is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.

j. Service members diagnosed with mental health conditions, including PTSD; TBI; or who reported sexual assault or sexual harassment receive heightened screening today to ensure the causal relationship of possible symptoms and discharge basis is fully considered, and characterization of service is appropriate. Veterans discharged under prior procedures, or before verifiable diagnosis, may not have suffered an error because the separation authority was unaware of their condition or experience at the time of discharge. However, when compared to similarly situated individuals under today's standards, they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care.

k. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.