

Second of Three Parts

REPRESENTING SERVICE MEMBERS IN INVOLUNTARY DISCHARGE PROCEEDINGS

by Kathleen Gilbert

This is the second part of an article on military involuntary discharge proceedings. Part one, in the September/October 2007 issue of *On Watch*, gave an overview of the reasons and procedures for discharges under the “notification procedure,” which can result in honorable, general or entry level separation (ELS, uncharacterized) discharge. This part looks at the more complex area of “administrative discharge board procedure” discharges, where other than honorable (OTH) discharge may be warranted, and where procedural rights are therefore greater. A final part three in a future issue will discuss preparation and conduct of administrative discharge board hearings, as well as post-hearing review. As with the ostensibly good discharges for personality disorder, unsatisfactory performance, homosexual conduct and the like, civilian counselors can play an important role in protecting service members against unwanted discharges with highly stigmatizing characterization and reasons.

Uses of Administrative Discharge Board Procedure

The administrative discharge board (ADB) procedure is used for discharge by reason of misconduct (unless the possibility of OTH characterization is removed), for misconduct-drug abuse, for unsatisfactory participation in the reserves, for security reasons, and for homosexual conduct. In all but the last of these, OTH discharge is often warranted under the regulations; in the last category, the ADB procedure is used for all proposed discharges, although only findings of specific “aggravating circumstances” permit OTH discharge in individual cases.

Criteria and procedures for these discharges are found in Department of Defense (DoD) Directive 1332.14, and in implementing regulations for each branch of the service: Army Regulation (AR) 635-200; Air Force Instruction (AFI) 36-3208; Naval Military Personnel Manual (MILPERSMAN) Section 1900-010 et seq.; Marine Corps Separation and Retirement Manual (MARCORSEPMAN) Chapter 6; and Secretary of the Navy Instruction (SECNAVINST) 1910.4B, which is controlling for both the Navy and the Marine Corps, but not routinely used in the handling of discharges.

An OTH discharge normally means loss of almost all veteran’s benefits, while a general discharge preserves all but Montgomery GI Bill educational benefits.ⁱ Commands are usually well aware of these side-effects of some administrative discharges, and may be vindictive in their use. At the same time, administrative discharge board members and reviewing authorities know or can be told of these effects and will sometimes consider them reasons for lenient treatment.

Reasons to Fight for Retention

A service member facing an ADB may want to challenge the discharge and fight for retention, or may simply want a better character of discharge. Since military retirement does not vest until a soldier or sailor has served twenty years,ⁱⁱ someone with eighteen or

nineteen years of service has a strong incentive to fight against separation.

Because disability evaluation and discharge or retirement are deferred pending resolution of disciplinary proceedings or discharge proceedings which could involve OTH characterization, and denied for those who are discharged,ⁱⁱⁱ a soldier or sailor wishing to protect medical benefits often needs retention to allow disability retirement processing, or characterization of honorable or general to remain eligible for VA benefits.

Reasons for Discharge Requiring ADB Procedure

Misconduct Commonly Leads to Involuntary OTH Discharge

Misconduct is the most common reason for involuntary discharge with an OTH characterization. The DoD Directive provides the main descriptions, though there are some service variations. Under DoD 1332.14, E3.A1.11.1, the types of misconduct include:

- “Minor disciplinary infractions. A pattern of misconduct consisting solely of minor disciplinary infractions.”^{iv}
- “Pattern of misconduct. A pattern of misconduct consisting of (a) discreditable involvement with civilian or military authorities or (b) conduct prejudicial to good order and discipline.”^v
- “Commission of a serious offense. Commission of a serious military or civilian offense if in the following circumstances:
 - “The specific circumstances of the offense warrant separation; and
 - “A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial.”^{vi}
- “Civilian conviction. Conviction by civilian authorities or action taken that is tantamount to a finding of guilty, including similar adjudications in juvenile proceedings, when the specific circumstances of the offense warrant separation, and the following conditions are present:
 - “A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial; or
 - “The sentence by civilian authorities includes confinement for six months or more without regard to suspension or probation.”^{vii}

Although the Directive gives no clear guidance on some of these terms, service regulations tend to be somewhat more specific, and to vary among themselves. The Army divides misconduct into conviction by a civilian court and acts or patterns of misconduct, including in the latter the other DoD categories of minor disciplinary infractions, pattern of misconduct, and commission of a serious offense; in the Army regulations, serious offenses include, among other things, drug abuse.^{viii}

The Marine Corps divides misconduct into minor disciplinary infractions, pattern of misconduct, drug abuse, commission of a serious offense, sexual perversion, sexual harassment, participation in supremacist or extremist organizations or activities, and driving under the influence.^{ix} Sexual perversion, as used here, includes lewd and

lascivious acts, sodomy, indecent exposure, indecent acts with or assaults on a person under 16, transvestism “or other abnormal sexual behavior,” and other indecent acts or offenses, but not homosexual conduct.^x

For the Air Force, misconduct may be minor disciplinary infractions; pattern of misconduct; civilian conviction; commission of a serious offense, including sexual perversion, prolonged unauthorized absence, and “other serious offenses;” HIV personnel who have not complied with lawfully ordered preventive medicine procedures; and drug abuse.^{xi} The Navy has separate misconduct categories for minor disciplinary infractions, pattern of misconduct, commission of a serious offense, civilian conviction and drug abuse.^{xii}

Sexual Harassment, Extremist Activity Singled Out in Some Services

Some services have made special note of misconduct related to sexual harassment and to extremist activity. The Navy gives “supremacist and extremist conduct” a separate discharge category altogether, but processes cases under the misconduct section.^{xiii} The Marine Corps mentions sexual harassment^{xiv} and “participation in supremacist or extremist organizations or activities” as individual subcategories of misconduct, but then advises commands to process such misconduct under one of the general categories (minor infractions, serious offense, etc.) if possible.^{xv} The Army tends not to make these distinctions in the discharge regulation.

The counseling and rehabilitation requirements described in Part One of this article normally apply only in the case of minor infractions or a pattern-of-misconduct misconduct, and even here the requirement may sometimes be waived. The Directive authorizes use of the notification procedure, and discharge with no less than a general or entry-level discharge if the misconduct fits within the general guidelines for such characterization under DoD 1332.14, E3.A2.1.3. This is often done with a pattern of minor infractions.

Drug Abuse Considered Misconduct; Harsh Punishment Favored Over Rehabilitation

Despite small differences in categorization of discharges, drug abuse is viewed as misconduct by all of the services. Since the 1980s, a “zero tolerance” policy has led to harsh treatment of drug use, with a move away from rehabilitation. Rehabilitation programs still exist, and a very few service members are returned to service after drug rehab, but these are the exception.

For many soldiers and sailors, drug rehabilitation is simply a prelude to discharge. Generally, a single instance of illegal drug possession or use results in OTH discharge. Each service has very limited exceptions for drug use revealed during voluntary self-referral for rehabilitation and similar categories. A service member discharged for misconduct as the result of drug use or possession is likely to find “misconduct–drug abuse” on his or her DD-214 discharge document.

Urinalysis Testing Fails to Halt ‘Self Medication’

DoD and the services have extensive regulations governing urinalysis testing, disposition of drug users, and rehabilitation.^{xvi} These deserve review in any case involving drug use or possession. As noted above, there are some limitations on OTH characterization of discharge for certain non-random testing, and a very small number of limitations on discharge. But commands have remarkable difficulty in following the regulations, sometimes raising possibilities for challenges to characterization or discharge. Failure to follow proper procedures in urinalysis testing sometimes makes it possible to challenge the reliability of test results or the chain of custody of samples.

Wartime personnel requirements sometimes cause commands to overlook or defer discharge for minor drug use or possession. While routine random urinalysis testing in all the services has reduced drug use to some extent over the years, increases are to be expected during this war. Serious drug addiction became a major problem during the Vietnam era, as many soldiers “self-medicated” unrecognized psychological problems resulting from combat, and counselors and attorneys are beginning to see similar patterns.

Homosexual Conduct: Behind the Veneer of Don’t Ask, Don’t Tell

Homosexual conduct discharge requires ADB processing in all cases,^{xvii} although OTH discharge is warranted only if there are findings of specific aggravating circumstances. Under current regulations, “homosexual conduct” includes statements that one is homosexual (or words or gestures to that effect), homosexual acts, and marriage or attempted marriage of a person of the same sex. While homosexual orientation is theoretically private and not a basis for separation, there is a rebuttable presumption that a statement regarding one’s orientation is an admission that one desires, intends or “has a propensity” to engage in homosexual acts.

In this convoluted policy, “acts” include any touching of another person of the same sex for purposes of sexual gratification – simple hugs, kisses or “grab assing” constitute homosexual acts if a “reasonable person” would believe that sexual desire is involved – attempting or soliciting such behavior is also grounds for discharge.

For women, this is especially troublesome. The definitions of acts and statements are so broad that few women have not performed the physical part of some act – kissing, hugging, touch-dancing or holding hands with another woman – or engaged in conduct stereotyped as lesbian, e.g. playing softball or otherwise acting like a “jock,” having short hair, wearing little or no makeup, rejecting advances from male coworkers, and being assertive or even aggressive in management style. (These are, unfortunately, also desirable and professional appearance and behavior for career military women.)

Circumstances Under Which Homosexual Conduct Warrants OTH

Homosexual conduct warrants OTH discharge only when “there is a finding that during the current term of service the member attempted, solicited or committed a homosexual act in the current circumstances:

- “By using force, coercion, or intimidation;
- “With a subordinate in circumstances that violate customary military superior-

- subordinate relationships;
- “Openly in public view;
- “For compensation;
- “Aboard a military vessel or aircraft; or
- “In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.”^{xxviii}

Some commands have real difficulty recognizing that conduct or status they dislike is not grounds for OTH discharge. Even under Don't Ask, Don't Tell, an occasional commander thinks that any homosexual act allows or requires OTH characterization. This occasionally leads to errors in the processing – unanticipated because the notification can properly say that an OTH is the least favorable warranted for this reason of discharge (as would be the case only if an aggravating circumstance were alleged and found), and since the ADB procedure must always be used.

Problems in this area can often be corrected by pointing out the mistake to a military attorney (a member of the Judge Advocate General corps, commonly referred to as a JAG) or Staff Judge Advocate (a military attorney appointed to represent a command, commonly called an SJA) in a position to speak to the commander. Because of this particularly punitive attitude towards homosexuality, some counselors and attorneys routinely suggest that members waiving their rights in gay cases make a written note on the waiver on the issue.^{xix}

Unsatisfactory Participation in the Ready Reserves – i.e., Ditching Drills

This category shows up primarily with drilling reservists who fail to attend drills, and should not be confused with unsatisfactory performance, a notification procedure discharge designed for poor performers. The DoD Directive relies on the services to define unsatisfactory participation in implementing regulations.^{xx} This and other discharges for reservists are beyond the scope of this article; readers are referred to the regulations and the section on Unsatisfactory Participation in CCCO's *Military Counselors Manual*.^{xxi}

Fraudulent Enlistment: OTH or ADB Procedure Applies Where Member Mischaracterized Prior Separation

Under some circumstances, fraudulent enlistment may be a basis for OTH discharge, but this is much more limited than in the past. Most concealment, involving prior criminal activity, medical conditions or treatment, or educational level, can result in a general discharge at the worst, so that the notification procedure is used.

OTH and the ADB procedure apply only “[i]f the fraud involves concealment of a prior separation in which service was not characterized as honorable....”^{xxii} The Navy is attempting to expand this, having added a second category, “concealing an offense warranting OTH, if offense occurred while on active duty and would have prevented their enlistment.”^{xxiii} The other services, and the Navy’s controlling SECNAVINST 1910.4B, conform to the DoD requirement, though the Marine Corp’s language is so vague that

commands may assume they have discretion to give OTHs in any fraudulent entry case.

Security: Seldom Used As Reason for Discharge

This reason for discharge is seldom used. DoD Directive 1332.14 authorizes discharge on grounds of security when “retention is clearly inconsistent with the interest of national security.” It refers to the general guidance on characterization and security regulations for characterization, and to service instructions and separate DoD regulations for criteria.^{xxiv}

In the Air Force, interestingly, the applicable instruction says that discharge for those in entry level status “will” be described as uncharacterized (ELS), but otherwise OTH is permissible; in any case, the ADB procedure will be used.^{xxv} The Navy covers security discharge in SECNAVINST 1910.4B.,^{xxvi} using the ADB procedure only if an OTH is warranted. The Marine Corp seems to follow this.^{xxvii}

Notification of Discharge: Much Like Notification Procedure, But Specific Facts and Reasons in Notice

Notification of the proposed discharge is much like that used in the notification procedure, although the command is more likely to follow the requirement that specific reasons for discharge and specific facts on which it is based must be stated in the notice. In ADB proceedings, the notice and accompanying (or following) statement of awareness/waiver of rights form include additional rights, and further rights are available to those who demand the most significant of the rights described in the waiver form, a hearing before an administrative discharge board. Representation by military counsel is available throughout the proceeding, rather than just in the initial decision to demand or waive rights.

In some cases, a servicemember has no warning that discharge is contemplated until he or she received written notice – and considerable time may have passed since the conduct on which the discharge is based. Any conduct within the current period of enlistment is subject to discharge proceedings during that period, so that a command may defer action until after a deployment or operation, or until after a war.

It is worth noting that, since discharge is an administrative process, it does not preclude and is not precluded by disciplinary action. Some servicemembers hope that non-judicial punishment or court-martial can be avoided by admin discharge, or vice versa. However, it is common for commands to subject an individual to disciplinary action and then to administrative discharge, based either on the underlying act of misconduct or the fact of conviction.

Soldier Afforded an Array of Rights in ADB Hearing

With or shortly after written notification, the servicemember will be given a waiver of awareness/statement of rights form, discussed generally in part one. With the ADB procedure, the soldier is notified of a broader set of rights, including:

- the right to consult with counsel before demanding and waiving rights;
- the right to be represented by appointed military counsel or, if he or she wishes, the right to request individual military counsel;

- the right to civilian counsel at the respondent's own expense;
- the right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation;
- the right to request a hearing before an administrative board;
- the right to present written statements instead of appearing at a hearing;
- the right to waive these rights; and
- the fact that failure to appear at the hearing without good cause constitutes a waiver of the right to be present at the hearing.^{xxviii}

The service regulations are in accord.^{xxix} While not mentioned in all rights forms, a respondent also has the rights normally associated with administrative hearings: the right to testify, to present witnesses and documentary or other evidence, to cross-examine witnesses produced by the government, to testify or make an unsworn statement, submit a written statement, or have counsel read or make a statement, to challenge members of the board for cause, and so on. Many, but not all of these are discussed in the remainder of the regulations on ADB procedures.

Truth Is Victim As Commands Cajole Soldiers Into Waiving Rights

The services are remarkably uniform in one part of the discharge process: In almost all cases, when the notice is presented or soon afterwards, a senior enlisted person or officer from the command will urge or warn the service member to waive all rights in the discharge proceeding. The reasons may include one or more of these: the discharge is inevitable; the discharge will be worse if the member doesn't waive; the command has recommended a general discharge and therefore the member will receive a general, but only if he or she waives; any bad discharge will automatically upgrade in six months; without a waiver the discharge will take much, much, much longer; the speaker has seen dozens or hundreds of cases just like this, and demanding rights never helped; or the alternative to waiver is Leavenworth (military prison). These things are not true, but the threats and promises are very effective, and waivers are extremely common as a result.

One other threat or promise is occasionally true, from a certain point of view. A service member may be told that the command is offering the admin discharge as a deal, and will take the case to court-martial unless the member waives his or her rights and quietly goes away. Occasionally, this may be the position of the command, and occasionally the person who makes the threat may know it is true – but the scenario is actually very unlikely. The reality of this informal “deal” can always be verified or disproved if the member simply demands the right to consult counsel before waiving or demanding rights – that right is among those listed in the notification and on the waiver of rights form.

Any soldier or sailor may see a JAG (and/or a civilian attorney) before completing the waiver form. The attorney can talk with the command about its intentions without “skewing” the deal, and help the servicemember decide if there is any wisdom in waiving rights under these circumstances. While verbal agreements with a command are not enforceable, the CO or staff judge advocate will normally tell an attorney the command's current position, so that the attorney can advise the member accordingly.

Conditional Waivers: Don't Attempt Without Counsel

Periodically, the services utilize conditional waivers in cases warranting an OTH – these policies vary from service to service, and may be abandoned for several years before being revived.^{xxx} In all cases, conditional waivers are made only after a member has demanded the right to an ADB, and counsel is involved. Through counsel, the member and command may propose an agreement in which the member waives the previously-demanded board on the condition that he or she be given a more favorable character of discharge. These waivers should only be done through counsel and only in writing.

Counsel Options Include JAG Attorney or 'Individual Military Counsel'

A soldier is entitled to representation by military and/or civilian counsel throughout the discharge proceeding. Once a demand for counsel has been made, a JAG will be appointed through the local defense or "personal representation" legal system. This may not be the JAG who provided the initial advice about rights in the procedure. Once a JAG is appointed or "detailed," the member may request another military attorney to replace the JAG – no reason need be given, but the "individual military counsel" (IMC) requested must be asked for by name, must under normal circumstances be within a reasonable distance of the hearing location, and must be "reasonably available," a matter decided by the JAG's own command. Normally IMC replaces the other JAG, but in complex cases the detailed JAG may be allowed to remain. If the member has formed an attorney-client relationship with a JAG in a related matter (such as a disciplinary action on the same alleged misconduct), that attorney may be detailed to the administrative discharge case, or may be requested in addition to the detailed or individual military counsel on the basis of the attorney-client relationship. This determination is normally made by the JAG command as well.

Civilian Counselors Have a Role, But May Need to Convince JAG to Relax

Civilian counsel can be retained at the member's own expense, in addition to or instead of detailed counsel or IMC. (If a member wants IMC and civilian counsel, it is often wise to wait until IMC is appointed before mentioning civilian counsel.) Civilian counsel automatically becomes lead counsel in the case. Experienced civilian practitioners normally retain the JAG, and involve them in more than menial tasks. JAGs often provide a wealth of experience in military law, knowledge of local commands, and an important official presence alongside the respondent during the proceedings.

Civilian counselors can play a role as counselor or advocate. Generally, service regs mention non-attorney counsel only as an alternative to an attorney, and the common understanding is that this provision is used when the member really wants a particular military person to represent him or her and is willing to waive attorney counsel.

The DoD Directive includes in its statement of rights that a respondent has the right to be represented at the hearing by non-lawyer counsel if:

- The respondent expressly declines appointment of counsel qualified under Article 27(b)(1) of the UCMJ and requests a specific nonlawyer counsel, or

- The separation authority assigns non-lawyer counsel as assistant counsel.^{xxxix}

Despite this language, one could argue that non-attorney civilian counsel should be permitted as assistant counsel or additional counsel if requested by the client, without loss of military counsel. This author has assisted in ADBs without question, but is not aware of any case that has tested the “right” to additional representation by a civilian counselor. Not all attorneys are experienced and comfortable with non-attorney advocates, and in some cases involving a counselor, civilian counsel and counselor must spend some time convincing the JAG to relax.

Counselors who do not serve as advocates can provide much other assistance in involuntary discharge cases. They may be more familiar than the JAG and/or civilian counsel with the specific discharge regulations, with medical or other specialized issues involved in the case, with the facts of the case, or simply with the client’s personality and style.

Counselors can often help a servicemember work with his or her attorney effectively, suggesting questions, evidence and issues the client may wish to present to the attorney, and helping the client consider the attorney’s strategic and tactical approach to the case. This is not to suggest that counselors should second-guess experienced attorneys or give legal advice. In some cases, however, they can help a client sort out the facts and consider the pros and cons of a suggestion from the JAG, or point out issues to the attorney with which he or she may not have experience.

Challenging the Involuntary Discharge: Outside Assistance Is Advantageous

At the outset, of course, it is important for counsel, counselor and client to develop a strategy for the case. In the course of military law practice, many JAGs receive limited training in handling these cases, and are provided little in the way of administrative law preparation by law school or specialized military legal training. There is sometimes a tendency to handle these cases on the run, as commands prefer to do them very swiftly (sometimes after months of command inaction) and often resist requests for sufficient time to prepare and sufficient discovery of evidence to give a clear picture of underlying issues. In many cases, military counsel is not assigned or made available until very shortly before the hearing, limiting time to consider and prepare the case. And, needless to say, it is extremely difficult to obtain funding or military personnel for investigations, witness interviews and expert evaluation of evidence, so that a client and representatives must often do the bulk of the work themselves and hire civilian experts. Nonetheless, some efforts can be made to even the playing field or obtain additional ammunition for the respondent’s side.

Two thoughtful discussions of involuntary homosexual conduct discharge cases can be useful in preparing for a hearing on any discharge. The 1985 manual, *Fighting Back: Lesbian and Gay Draft, Military and Veterans Issues*,^{xxxix} while dated, has creative discussion of discovery, pre-hearing preparation, conduct of ADBs and post-hearing appeals that can be applied to other discharge areas. The chapter on “Military and Veterans Cases” in *Sexual Orientation and the Law*,^{xxxix} has a very similar discussion

adapted to the current “Don’t Ask, Don’t Tell” policy.

In misconduct cases, it is important to look for underlying issues that led to the misconduct or motivated the command. A common issue, discussed in part one, is the tendency for a soldier with psychological or even physical problems to “act out,” “self-medicate” or express frustration, depression or confusion in ways that are perceived as acts of misconduct. On rare occasions, the acts are defensible as inevitable consequences of the medical condition. More commonly, though, the underlying problems provide mitigation for the offense(s).

Medical Records May Shed Light on Underlying Causes of Alleged Misconduct

For example, exploration may show that the soldier had severe PTSD after a combat tour, that he had been denied access to military doctors, or misdiagnosed by those doctors with a personality disorder (not seen as mitigating by most officers), or the doctor’s recommendations for duty limitations or discharge were ignored by the command. Similarly, a Marine with traumatic brain injury (TBI, considered the “signature” injury of this war) may be disciplined and considered for discharge for memory lapses, judgment problems and impulse control problems related directly to the injury. A soldier with a painful back injury may encounter disciplinary problems for “self-medicating” with alcohol or other drugs when physicians who do not recognize the injury deny him proper pain medication.

In such cases, symptoms of the problems may appear in the medical records even if they are not properly diagnosed. Some military physicians can be sympathetic and helpful when given opportunity to make a real evaluation of PTSD, TBI or disc herniation. And civilian experts can be used as witnesses, or their reports brought in as evidence, to demonstrate the underlying cause of the alleged misconduct. Even in those cases in which discharge processing itself is mandatory, the ADB members and separation authority have authority to process the case and then recommend retention, or recommend honorable discharge. While ADBs cannot technically recommend medical retirement or convenience of the government discharge, boards often make their wishes known on these matters.

Women May Face Backlash If They Report Harassment

Misconduct cases are sometimes the result of complaints about sexual harassment or sexual assault. Despite 2005 and 2006 regulations claiming to expand the rights of those who make complaints,^{xxxiv} military and civilian studies have shown that women in the service fear they will face career-altering reprisals if they report sexual attacks or harassment; studies and the experience of civilian attorneys and counselors show that these fears are well grounded. It is extremely common for complainants to experience involuntary psychiatric evaluation, lowered performance evaluations, and disciplinary action for minor offenses normally tolerated or even encouraged by the command. (An attorney who finds, for example, that her client is the only one of 40 Marines with office hours and a counseling entry for coming back late from lunch may want to inquire about the reasons for the command’s attitude.)

The new sexual assault regulations should ensure that women are provided opportunity to make complaints, that reports of assault are handled respectfully, and that medical attention and evidence gathering are thorough, so that evidence of an assault may be clear. Retaliation is often harder to prove than the assault, since it may involve non-judicial punishment for command-endorsed behavior, or evaluations of intangible matters like management skills in a performance evaluation. Nonetheless, it is often possible to show that the entire command engages in the particular misconduct or that other observers have entirely different evaluations of past and current performance and management style. And the “old boys network” is occasionally sloppy enough to talk about the reason for reprisals in front of witnesses.

Rejected Male Suitors, Sexual Harassers May Levy Accusations of Lesbianism

One reprisal for complaint against sexual harassment or rejection of sexual advances is well-known among military women. Accusations of lesbianism by harassers or rejected male suitors can lead to involuntary discharge for homosexual conduct. Similarly, victims of racial harassment or discrimination, or mistreatment based on religious, cultural or ethnic status, whether or not they complain about mistreatment, may also face involuntary discharge proceedings based on allegedly poor performance or the most minor of disciplinary problems.

Demonstrating the discriminatory basis of the actions can be difficult. Since some forms of overt racism are understood to be unacceptable under social norms and military regulations, racism and similar biases may take more subtle and insidious forms. Sometimes it is possible to show discriminatory motivation by a pattern of treatment of others of the same race or religion, but this is not always feasible in small commands or units. Occasionally the offenders may leave symbols behind – a twine noose left over a bunk, crosses scrawled on a Muslim soldier's barracks wall, pornography left in a woman's workspace. And occasionally alert friends of the victim may overhear racist or discriminatory comments directed towards the victim. When these cases, or sexual harassment or discrimination cases, fall within the purview of military Equal Opportunity (EO) regulations,^{xxxv} it is sometimes useful or necessary to file complaints within that system before raising the issue in the discharge proceedings, although EO is poorly designed for individual remedies.

Many of the people described above may have made or prepared to make complaints that would bring them within the scope of the Military Whistleblowers Protection Act (MWPA).^{xxxvi} Other service members who have complained about waste, mismanagement, or violation of military regulations and policies, may come under the Act as well. In these cases, counsel, counselor and client may wish to raise violation of the applicable regulations, which will trigger an investigation of the reprisal and handling of the complaint made by the soldier, as well as the underlying issue about which he or she complained. It offers some limited but useful rights to complainants who have suffered reprisals for their complaints, and flags the case in ways which may cause the command to consider its position and act more carefully.

Conclusion

While an ADB is never a welcome development, with the right counseling and investigation a successful outcome is possible.

ⁱ There is a separate bar to full VA benefits if a soldier received an OTH discharge after having been AWOL continuously for 180 days. See 38 CFR 3.12(c)(6) (2007). Denial of benefits for this reason can be appealed in the VA system.

ⁱⁱ There have been occasional exceptions to the twenty-year rule, particularly during the military drawdown in the 1990s. The services sometimes established 18- and even 15-year retirement programs to encourage retirement. This period also saw the development of transition programs to provide career counseling and short-term transitional benefits to retirees and discharges. Some of those programs remain in effect.

ⁱⁱⁱ DoD 1332.38, Part E3.2.4.3 states that a service member is ineligible for physical disability evaluation unless service regulations are more favorable if “pending separation under provisions that authorize a characterization of service of Under Other Than Honorable....This provision is based on the provisions under which the member is being separated and not on the actual characterization the member receives.”

^{iv} DOD 1332.14, E3.A1.1.11.1.1.

^v DOD 1332.14, E3.A1.1.11.1.2.

^{vi} DoD 1332.14, E3.A1.11.1.1.3. When the offense has resulted in a court-martial conviction, HQ approval must be obtained before an OTH may be awarded; see, e.g., AR 635-200, Part 14-3.b.

^{vii} DoD 1332.14, E3.A1.1.11.1.1.4.

^{viii} AR 635-200, Parts 14-5 and 14-12.

^{ix} MARCORSEPMAN 6210. Some of these categories are, in turn, processed under others of the categories--sexual perversion is labeled and processed as commission of a serious offense or civilian conviction.

^x MARCORSEPMAN 6002. The sodomy subcategory applies only to heterosexual acts.

^{xi} AFI 36-3208, Section 5-H, Parts 5-49 through 5-54. Part 5-47 provides further guidance and specifically excludes homosexual conduct and fraudulent entry as subtypes of misconduct.

^{xii} MILPERSMAN 1910-136 through 1910-146.

^{xiii} MILPERSMAN 1910-160. This covers “substantiated incidents of serious misconduct resulting from participation in supremacist or extremist activities. The proscribed misconduct must relate to (1) illegal discrimination based on race, creed, color, sex, religion or national origin; (2) advocating the use of force or violence against any federal state or local government or agency thereof, in violation of federal, state, or local laws.” While these cases require coordination with personnel command headquarters, the cases are normally to be processed as misconduct – commission of a serious offense or, where misconduct offenses cannot be shown, under best interests of the service (BIOTS), MILPERSMAN 1910-164. BIOTS discharges cannot be OTH.

^{xiv} MARCORSEPMAN 6210.8.

^{xv} MARCORSEPMAN 6210.9. Discharge by reason of the best interest of the service under Section 6214 is also mentioned. While 6210.9 requires “a substantiated incident of misconduct,” and a substantiated incident must involve conduct, it is likely that 6214 is designed to cover otherwise protected political speech, protest or association.

^{xvi} DoD Directive 1010.1, DoD Instruction 1010.16. Service regulations include

SECNAVINST 5300.28D, OPNAVINST 5350.4C, AR 600-85 and AFI 44-121.

^{xvii} DoD 1332.14, Part E3.A1.1.8. Service regulations are MILPERSMAN 1910-148, MARCORSEPMAN 6207, AR 40-501, Chapter 15, and AFI 36-3208, Part 5G.

^{xviii} DoD 1332.14, Part E3.A1.1.8.3, MILPERSMAN 1910-148, Sec. 9, MARCORSEPMAN 6207.5, AR 635-200, Part 15-4, and AFI 36-3208, Sec. 5.37.3.

^{xix} The author suggests that clients add a handwritten and initialed notation to the waiver of rights form itself, stating "I understand that the character of my discharge will be determined by my overall record of service, and cannot be less than honorable [or general, if applicable]. It is with this understanding that I waive the right to an administrative discharge board hearing. Were this not the case, I would demand all available rights." While commands sometimes fuss over this addition, it is nowhere prohibited in the regulations.

^{xx} DoD 1332.14, Part E3.A1.1.14 and DoD Directive 1215.13 series.

^{xxi} For information on ordering the Manual, visit the Central Committee for Conscientious Objectors website at <http://www.objector.org/publications.html> or <http://www.objector.org/helpingout/order.html>, or contact info@objector.org.

^{xxii} DoD 1332.14, E3.A1.1.5.4.2. Service regulations include MILPERSMAN 1910-134, MARCORSEPMAN 6204.3, AR 635-200, Part 7-17 et seq., AFI 36-3208, Sec. 5.15 et seq.

^{xxiii} MILPERSMAN 1910-134, Sec. 2. This section says that the notification procedure should be used for all but the most serious offenses falling in these two categories, including but not limited to "drug trafficking, concealing a prior service Dishonorable Discharge (DD), Bad Conduct Discharge (BCD), or OTH discharge and crimes of violence." Sec. 2.b.

^{xxiv} DoD 1332.14, Part E3.A1.1.3. governs security discharge. It refers to Part E3.A2.1.3, which gives general guidance on the factors warranting honorable, general, other than honorable and ELS discharge. One or more incidents of misconduct may warrant OTH when they are "acts or omissions that endanger the security of the United States,..." among many other things. A1.1.3 also states that security discharges should be handled "under conditions and procedures established by the Secretary of Defense in DoD 5200.2-R." This Regulation, "Personnel Security Program," explains security investigations and programs, and the granting and denial of security clearances. It mentions discharge for security reasons only briefly, saying a servicemember should not be separated under its provisions if separation can be effected through nonsecurity (for example, administrative separation) regulations. Chapter 8, Sec. 1.4.

^{xxv} AFI 36-3208, Section 5J, Parts 5.57 to 5.60.

^{xxvi} SECNAVINST 1910.4B, Encl. 2, Part 1.M; there appears to be no reference to this discharge in the Naval Military Personnel Manual.

^{xxvii} MARCORSEPMAN 6212. This section is silent about the procedure to be used if OTH is not warranted, and so should be presumed to follow the Navy Instruction.

^{xxviii} DoD 1332.14, E3.A1.3.1.4-12.

^{xxix} Service regulations include MILPERSMAN 1910-404, 1910-406, and 1910-512, MARCORSEPMAN 6304, AR 635-200, Part 2-4, and AFI 36-3208 Sec. 6.13.

^{xxx} MILPERSMAN 1910-226, MARCORSEPMAN 6304.5, AR 635-200, Part 2-5, and AFI 36-3208, Sec. 6-24 through 6-29.

^{xxxii} DoD 1332.14, E3.A3.1.3.1.4.

^{xxxiii} *Fighting Back: Lesbian and Gay Draft, Military and Veterans Issues*, 1985, Joseph Schuman and Kathleen Gilberd, eds., Katherine Bourdonnay, R. Charles Johnson, Joseph Schuman and Bridget Wilson, auths., produced by the National Lawyers Guild's Military Law Task Force, the Midwest Committee for Military Counseling, the NLG Gay Rights Task Force and the NLG Committee to Combat Women's Oppression. The principal work on representation in administrative discharge board hearings was done by Katherine Bourdonnay.

^{xxxiiii} *Sexual Orientation and the Law*, 2/2007 Ed., Roberta Achtenberg, Orig. Ed., Karen Moulding, Updating Ed., "Military and Veterans," Katherine A. Bourdonnay, Kathleen Gilberd, Mary Newcombe and Bridget Wilson, Leslie M. Hill and Sharon E. Debbage Alexander, Chapter Auths. and Eds., Thomson West Pub.

^{xxxv} See, e.g., DoD Instruction 6495.02, June 23, 2006, "Sexual Assault Prevention and Response Program Procedures."

^{xxxvi} DoD Directive 1350.2, August 18, 1995, incorporating change 1 of May 7, 1997, "Department of Defense Military Equal Opportunity (MEO) Program.

^{xxxvii} 10 USC 1034. The Act is implemented by DoD Directive 7050.6, June 23, 2000, "Military Whistleblower Protection."