



**NVLSP**

NATIONAL VETERANS LEGAL SERVICES PROGRAM

**Oral Comments on VA's Regulatory Bars to Benefits**

**Based on Character of Discharge**

**Presented by:**

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## Introduction

Good morning my name is Renee Burbank, and I am the Director of Litigation at the National Veterans Legal Services Program, or NVLSP. For 40 years, NVLSP has worked to ensure our nation fulfills its moral duty to care for our veterans. Each year, NVLSP assists thousands of veterans and active-duty personnel to obtain the benefits to which they are entitled.

First, thank you. NVLSP sincerely appreciates that VA is taking this rulemaking with the seriousness it deserves. The Department of Veterans Affairs has a historic opportunity to correct a rule that has kept far too many veterans from receiving the benefits that they need and deserve. The current regulatory bars at 38 C.F.R. § 3.12 contribute to the higher rates of homelessness, suicide, unemployment, and untreated mental health conditions among less-than-honorably discharged veterans. Improving the character of discharge rule is not simply legally the right thing to do; it will save lives.

Nevertheless, VA's Proposed Rule, though improved, does not do enough. When Congress enacted the "other than dishonorable" eligibility standard in the G.I. Bill of 1944, it had at the front of its mind VA's duty to support those wounded in uniform, and expressly tasked VA with caring for former service members in their post-service lives, not imposing discipline. The proposed Rule should conform to that Congressional intent and purpose.

NVLSP, along with its partner Swords to Plowshares, intends to submit additional written comments in response to VA's September 9<sup>th</sup> Federal Register Notice. I therefore will focus my oral comments today on just two points: First, I urge VA to expand how veterans can establish compelling circumstances. Second, VA should remove its willful and persistent bar entirely because it is unlawful as well as arbitrary, capricious, and discriminatory.

### **A. Compelling Circumstances**

NVLSP strongly supports VA creating a compelling circumstances consideration in its character of discharge determinations, but we are concerned that, by creating a dispositive list of factors to consider, VA's proposed rule is still too narrow.

To take just one example, in its topic A.2 in the Sept 9 Federal Register notice, VA asks whether it should expand its proposed "sexual abuse / assault" category to "military sexual trauma" or another term. MST is broader than abuse / assault, and therefore a better choice, but

MST does not include all types of assault and harassment that VA should consider. Other types of sexual violence or personal trauma and harassment should be explicitly included, including intimate partner violence and assault, harassment, or hazing based on race, religion, color, sexual orientation or gender identity, or disability as well as sex.

NVLSP also agrees that adjudicators should and must look beyond service records to corroborate accounts of compelling circumstances, but the language of 3.304(f)(5), by its terms, applies only to veterans claiming PTSD based on a personal assault.

Section 3.12 should not be so limited. Several of the proposed “compelling circumstances” categories would regularly require evidence not apparent in a member’s service records. For example, the “duress, coercion, or desperation” factor and “family obligations or obligations to a third party” factor would presumably require looking outside service records in most cases. Therefore, the expansive evidentiary rule in section 3.304(f)(5) should apply to all determinations evaluating compelling circumstances, but the specific list of possible evidentiary sources in 3.304(f)(5) is not broad enough. The Proposed Rule should direct adjudicators that all factors in the proposed 3.12l(2) can be corroborated through evidence from sources other than the veteran’s service records, and that *any* credible information from *any* source must be considered.

#### **B. Willful and Persistent Misconduct**

Next, VA also seeks comments on its proposed changes to the “willful and persistent misconduct” bar. That bar is the most common way VA excludes former service members from VA benefits. As VA works to improve the Rule, therefore, fixing the willful and persistent misconduct bar is critical.

Title 38 defines a veteran for VA purposes as a service member “who was discharged or released therefrom under conditions other than dishonorable.” Therefore, any regulatory bar based on that definition must relate to the reason a service member was discharged. The statute therefore requires that VA’s “willful and persistent” misconduct standard be restricted so that VA considers only serious misconduct, for which the veteran was actually discharged, that should have but did not lead to a dishonorable discharge.

Take, for example, a fact pattern that matches the experience of too many less-than-honorably discharged service members. A service member serves well and capably enough for a number of years. Then, after failing a single drug test, they are discharged with an other-than-honorable characterization. Rather than simply assessing whether that drug use should bar the service member from VA benefits, VA's proposed rule would have the adjudicator root through their entire service record to find and judge misconduct that the Department of Defense did not see fit to discharge the veteran for. If the record reflects a variety of non-judicial punishments over a span of a couple years for incidents like being late to their post of duty or being disorderly – incidents that their chain of command specifically did not believe warranted discharge of any kind and which could not result in a dishonorable discharge in any event – the veteran now risks a negative character of discharge determination.

VA adjudicators are not trained in the Uniform Code of Military Justice. Their job is to fulfill VA's mission to care for veterans, not to judge and decide appropriate punishment. The willful and persistent misconduct standard is unworkable, unfair, and unlawful. VA should remove it entirely.

### **Conclusion**

In conclusion, NVLSP urges VA to conform its proposed rule to Congress's original intent and purpose to care for as many of our veterans as possible and to exclude service members only when they were discharged the most serious misconduct and no mitigating circumstances exist. I thank you for your time.

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