

**OpJAGAF 2018/11, 25 July 2018, SCOPE OF DISCHARGE REVIEW BOARD
“PROPRIETY” AUTHORITY**

This is in response to your question about the limits on the scope of the Discharge Review Board (DRB)’s authority in finding errors in processes related to the propriety of an administrative discharge. Your inquiry concerns the meaning of the phrase “associated with the discharge at the time of issuance” in DODI 1332.28_AFI 36-3213 Supp, *Air Force Discharge Review Board*, para E4.2.1.1. and also the “liberal consideration” language of 10 U.S.C. §1553.

Factual Background

As we understand it, the DRB has been confronted with cases where there appear to be defects in processes (legal and medical) prior to initiation of discharge, the consequences of which defects call into question whether the subsequent formal administrative discharge or final characterization was appropriate. You provide examples of such cases:

(1) A member with PTSD/mental-health concerns is placed into pretrial confinement and there are multiple procedural errors in the pretrial-confinement process. After a lengthy stay in pretrial confinement, the member’s request for an administrative discharge in lieu of court-martial submitted under AFI 36-3208, Chapter 4 is approved and the member is discharged with a characterization of Under Other Than Honorable Conditions. You wish to find that errors in the pretrial-confinement process, coupled with the member’s PTSD/mental-health issues, resulted in the member involuntarily requesting a Chapter 4 discharge.

(2) A member purportedly used marijuana in an effort to self-medicate after not receiving proper medical treatment from military providers. The member was administratively discharged for drug abuse. You wish to find that the medical-treatment failure was the cause of the drug abuse and thus renders the discharge for that reason improper.

(3) A member discharged for misconduct has information in their medical records of pre-initiation debilitating migraines that arguably should have resulted in a Medical Evaluation Board (MEB) and entry into the Disability Evaluation System (DES). You wish to find that the member’s discharge for minor disciplinary infractions was improper due to the purported failure to enter the member into DES and dual-track his discharge.

Standards

Title 10, United States Code, Section 1553(a)-(b) gives the Secretary of the Air Force power to establish a board “to review [a] discharge or dismissal” and “change a discharge or dismissal, or issue a new discharge, to reflect its findings.” The Air Force implements this power through AFI 36-3213, which is a supplement to the governing Department of Defense Instruction 1332.28, *Discharge Review Board (DRB) Procedures and Standards*, 4 Apr 04. The objective of the DRB

“is to examine the propriety and equity of the applicant’s discharge.” AFI 36-3213, E.4.1. (emphasis added).

The DRB’s statutory authority, 10 U.S.C. §1553, was amended in 2009 to allow broader review of discharge cases for members “experiencing post-traumatic stress disorder [PTSD] or traumatic brain injury [TBI] as a consequence of [] deployment.” §1553(d)(1). That broader review ensured priority consideration for such cases, and membership of an appropriately trained medical provider on a review board. §1553(d)(1)-(2); Pub. L. 111-84, §512 (28 Oct 09), 123 STAT. 2281.

The 2017 National Defense Authorization Act (NDAA), Public Law 114-328 (23 Dec 201), 130 STAT 2124, added an additional requirement: “review the case with **liberal consideration** to the former member that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge of a lesser characterization.” §1553(d)(3)(ii)(emphasis added.). The intent of this addition to §1553(d) was to extend existing policy for the Boards of Correction of Military Records to Discharge Review Boards:

The committee endorses the supplemental guidance issued by former Secretary of Defense Chuck Hagel on September 3, 2014, to military boards for correction of military/Naval records considering discharge upgrade requests by veterans claiming PTSD. This guidance requires the boards to give liberal consideration to petitions for changes in characterization of service to service treatment record entries which document one or more symptoms which meet the diagnostic criteria of PTSD or related conditions. The committee directs that similar guidance be provided to military discharge review boards and that in cases where PTSD or PTSD-related conditions may be reasonably determined to have existed at the time of discharge, all boards will consider those conditions as potential mitigating factors for any misconduct that resulted in a discharge less than an honorable discharge.

Senate Rep. No. 114-255, 114th Cong, 2d Sess. (2016); *see also* H.R. Conf. Rep. No. 115-200114th Cong, 2d Sess. (2016)(“The committee continues to believe PTSD is underreported and underdiagnosed, leading to unnecessary suffering and some service members receiving other than honorable discharges that are unwarranted.”).

This codification of the “liberal consideration” guidance became part of the NDAA through Senate amendment, adopting the Fairness for Veterans Act (S.1567, introduced June 11, 2015), which was sponsored by Michigan Senator Gary Peters. At various points during the NDAA’s legislative consideration, Senator Peters emphasized the need to take a hard look at discharge characterizations for members suffering from PTSD and TBI:

- The Peters amendment would codify the commonsense principles of the Hagel memo, ensuring that liberal consideration will be given to petitions for changes in characterization of service related to PTSD or TBI before discharge review boards.... Unfortunately, many of these [servicemembers] have received a less-than-honorable discharge, also known as a bad paper discharge. These former servicemembers often receive bad paper discharges for minor misconduct--the same type of misconduct that is often linked to behavior seen in those suffering from PTSD, TBI, and other trauma-related conditions. That is why we must ensure that they get the fair process they

deserve when petitioning for a change in characterization of their discharge. Peters amendment No. 4138 will do just that. 114 Cong. Rec. S3258-59 (May 26, 2016).

- We have far too many servicemembers who are suffering from trauma related conditions like posttraumatic stress disorder or traumatic brain injury. Unfortunately, many of these servicemembers have received a less-than-honorable discharge, instead of the help and assistance they have earned. 114 Cong. Rec. S7016-17 (December 9, 2016).¹

Unfortunately, this legislative history does not define how this “liberal consideration” statutory requirement applies to the DRB’s propriety or equity authority. Generally, the DRB’s “equity” review is broad. In addition to focusing on potential different outcomes when current policies and procedures are applied to past discharges, AFI 36-3213, E4.3.3. gives the DRB broad authority to change a discharge that was “otherwise equitable and proper at the time of issuance,” if the DRB believes that “relief is warranted based on consideration of the applicant’s service record and other evidence presented to the DRB” *See also* AFI 36-3213, E.4.3.1.

The DRB’s “propriety” review is more circumscribed. Under its propriety authority, the DRB is charged with determining whether:

E4.2.1.1. An error of fact, law, procedure, or discretion exists associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

E4.2.1.2. A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

¹ Senator Peters shared an example of how the “liberal consideration” scheme would have likely changed the outcome of a previous discharge review: “I would like to share a story of a former servicemember who shared his experience with my office in Michigan He was scheduled to be evaluated for TBI. However, that evaluation never occurred. He began drinking to help himself sleep and received an other-than-honorable discharge after failing a drug test. Following his discharge, the VA diagnosed him with TBI, and he began treatment. The VA later determined he was ineligible for treatment due to the character of his discharge, and his treatment ceased immediately. He was later evaluated by a psychologist specializing in trauma management who determined that the behavior that led to his discharge was the result of his TBI and PTSD. He petitioned the Discharge Review Board for a discharge upgrade and presented the medical evidence of both TBI and PTSD. However, the Discharge Review Board considered his medical evidence to be irrelevant and his petition was denied. ... This is an example of someone who is suffering as a result of service to his country, and yet the VA denied his request for benefits on the basis of this discharge. The Discharge Review Board also denied his request to upgrade his discharge, despite his presenting clear evidence of his condition. We must stop denying care to servicemembers with stories like this and start providing them with the benefits they deserve and earned through their service. We have a responsibility to treat those who defend our freedom with dignity, respect, and compassion.... The Peters amendment would ensure liberal consideration will be given to petitions for changes in characterizations of service related to PTSD or TBI before Discharge Review Boards.” 114 Cong. Rec. S3525-34 (June 7, 2016).

What issues fall within the propriety or equity authority of the DRB, or which “error[s] of fact, law, procedure, or discretion” are “associated with the discharge at the time of issuance,” are not well defined by the AFI. AFI 36-3213, E3.1.6.2. notes that “[a]n issue of propriety is a matter that involves a determination whether a discharge should be changed under the propriety standards of enclosure 4 [detailed above],” which is not particularly helpful. Enclosure 3.1.6.2. does list issues that, when raised by the applicant, fall within the DRB’s propriety authority: “an **error in the discharge** pertaining to a regulation, statute, constitutional provision, or other source of law (including a matter that requires determining if the action by military authorities was arbitrary, capricious, or an abuse of discretion).” (emphasis added.). A “discharge,” in this context, is defined as the formal process that results in “[t]he complete severance from all military status gained by the enlisted or induction concerned, including the assignment of a reason for such discharge and characterization of service.” AFI 36-3213, E.2.1.4. In that sense, errors in collateral processes which occur during the lead up to initiation of the formal process of discharge, such as pretrial confinement, do not seem to fall within the DRB’s propriety authority.

Analysis

But there do not appear to be any OpJAG opinions or reported cases discussing the parameters of a DRB’s propriety authority or what “associated with the discharge at the time of issuance” means. Though reasonable minds could differ, application of common tenets of construction calls for a limited scope of the DRB’s power when considering issues under its propriety authority. So limited, those issues which are “associated with the discharge” are those issues directly relevant to the formal discharge process itself, as opposed to those issues relevant to collateral processes that lead up to initiation of the formal process of discharge. Thus, under the fact patterns noted above, the DRB in exercising its propriety authority should not decide that errors in pretrial confinement (a process that led up to initiation of the formal process of discharge) rendered the subsequent formal discharge process defective when that formal discharge process itself was free of procedural or substantive errors. Or the DRB in exercising its propriety authority should not decide that perceived errors in medical treatment or failure to pursue a MEB at an earlier point (as opposed to errors in the statutorily-required separation physical during the discharge process) rendered the formal discharge process defective when that formal discharge process itself was free of procedural or substantive errors.

This reading of the AFI (and §1553) has the benefit of giving meaning to the plain language of the definition of “discharge” in Enclosure 2.1.4. (the process that results in “[t]he complete severance from all military status”) and the DRB’s charge under its propriety authority detailed in Enclosure 3.1.6.2. (to review “an error in the discharge”). More than that, assuming those two provisions could be interpreted more broadly, this more limited reading of the AFI (and §1553) has the benefit of being consistent with the fundamental tenets of construction that require reading the guidance as a whole, and reading its sections together so that no part is rendered meaningless if it can be harmonized with the remainder. *Richards v. United States*, 369 U.S. 1, 11 (1962).

Applying these fundamental tenets of construction, the AFI must intend a difference between the propriety and equity authority of the DRB--in other words, the DRB must be exercising those authorities differently or there would not be a reason to distinguish propriety from equity authority. The AFI does distinguish by providing different criteria to both (E4.3.3. and E4.2.1.). As defined

by those two references, equity authority is broad while propriety authority is more circumscribed. Propriety authority determines whether there was a factual or legal error in the formal discharge process itself; equity authority determines whether, even if there was no factual or legal error in the formal discharge process, the discharge or the characterization was the “right” decision all things considered.²

This reading does not undermine or lessen the “liberal consideration” statutory requirement imposed in the 2017 NDAA (§1553(d)(3)(ii)) or “liberal consideration” enhancement dictated recent by DoD policy guidance.³ Propriety and equity authority are creatures of DoD implementation rather than a statutory requirement, and thus the legislative history discussed above does not address how “liberal consideration” effects application of those authorities. But propriety and equity authority relate to the structure of DRB review, not the quantum of evidence necessary to support a finding. “Liberal consideration,” particularly as described in the USD(P&R) Memorandum of 25 Aug 17, relates to the quantum of evidence the DRB need secure before granting relief (*i.e.*, less evidence than before application of “liberal consideration”). Thus, the application of “liberal consideration” does not alter the structure of the DRB’s review and in that structure propriety authority is limited to issues directly relevant to the formal discharge process itself, as opposed to those issues relevant to collateral processes that lead up to initiation of the formal process of discharge.

This reading of the limited scope of the DRB’s propriety authority also finds support in the Senate and House of Representatives Reports, and Senator Peters floor comments. This legislative history demonstrates that the intent of the change was not a focus on errors in the formal processes that led to discharge (propriety authority), but rather in ensuring that PTSD and TBI symptoms were considered in focusing on whether the underlying discharge process came to the “right” answer as to characterization (equity authority). This is the most reasonable inference drawn from Senate Report noting that PTSD and TBI symptoms should be liberally considered not as defects in the process, but “as potential mitigating factors” in determining whether a change in characterization is appropriate. Likewise, this is the most reasonable inference drawn from the House Conference Report noting that the intent of “liberal consideration” was to ensure whether the underlying characterization was “unwarranted” as opposed to procedurally erroneous. At no point in the legislative history is there discussion of whether the failure to consider PTSD or TBI symptoms should be considered a formal-process failure; the discussion was whether a DRB should give the existence of PTSD or TBI symptoms special consideration in ensuring that the underlying discharge characterization was the right one. This recent legislative history supports the reasonable interpretation that “propriety” review should concern itself with those issues directly relevant to the formal discharge process itself, as opposed to those issues relevant to collateral processes the lead up to initiation of the formal process of discharge.

² And the AFI contemplates that the discharge process is presumed to be correct. *See* E3.2.12.6. (“There is a presumption of regularity in the conduct of governmental affairs. This presumption shall be applied in any review unless there is substantial credible evidence to rebut the presumption.”). This is only relevant to the DRB when exercising its propriety authority as when exercising its equity authority it matters not whether the discharge process was conducted with “regularity”; rather when exercising its equity authority the DRB is determining whether the process resulted in the “right” decision.

³ *See* Memorandum from USD(P&R), *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*, 25 Aug 17.

Conclusion

As to the above hypotheticals, the DRB should not exercise its propriety authority to use errors in collateral processes to find defect in an otherwise error-free formal discharge process. The DRB certainly can exercise its equity authority when determining whether correct formal discharge processes came to the “right” characterization (particularly with “liberal consideration” of the potential effect of PTSD and TBI symptoms on the member’s underlying behavior). To interpret the DRB’s “propriety” authority more broadly erases the distinction between “propriety” and “equity” authority, rendering the former superfluous to the latter. As this runs afoul of fundamental tenets of construction, it is our legal opinion that the DRB’s “propriety” authority should be interpreted narrowly.

OpJAGAF 2018/11

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