

# Outdated VA Regulations Lead to Confusion for Army National Guard Soldiers With OTH Service Characterizations

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*The purpose of this article is to clarify U.S. Department of Veterans Affairs jurisprudence (or lack thereof) regarding eligibility for VA disability compensation benefits for Army National Guard (ARNG) soldiers who receive a service characterization of other than honorable (OTH) when separated from the ARNG through an administrative separation board. Clarification is needed because many ARNG soldiers have previous periods of honorable active duty service but are unsure whether they retain eligibility for VA disability compensation if they subsequently receive an OTH from the ARNG. This stems in part due to the language of the enlisted separation regulation (AR 135-178) and a lack of clarity in VA rules and regulations. Specifically, the provision “separation characterized as under other than honorable conditions could deprive the Soldier of veterans’ benefits administered by the [DVA]. A determination by that agency is required in each case” is confusing regarding ARNG soldiers being separated.*

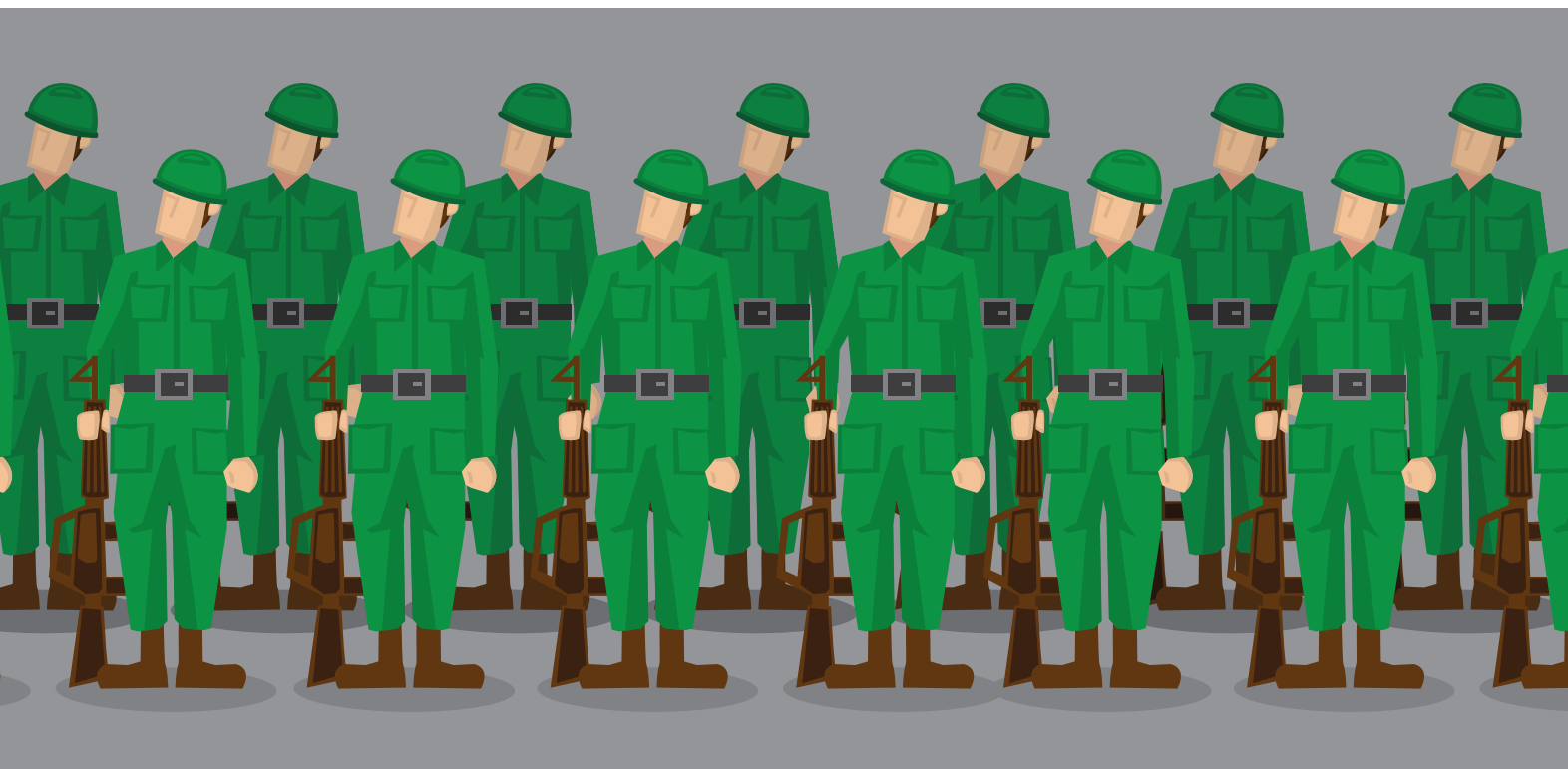
*This article is timely due to the number of ARNG soldiers who have deployed since Sept. 11, 2001, and the number who are subsequently separated through the provisions of AR 135-178.*

**S**taff Sergeant (SSG) Joe Snuffy has just tested positive for marijuana in an Army National Guard (ARNG) urinalysis. As required under the provisions of Army Regulation (AR) 135-178, SSG Snuffy's commander has processed him for separation for committing misconduct.<sup>1</sup> Subsequently, his state adjutant general (hereinafter referred to as separation authority)<sup>2</sup> commenced separation procedures under the authority of AR 135-178.<sup>3</sup> This is the regulation used for enlisted administrative separations of ARNG and reserve soldiers and provides "[t]he authority and general provisions governing the separation of Soldiers before the expiration of their service obligation to meet the needs of the reserve components of the Army and its Soldiers."<sup>4</sup> The regulation also contains "[t]he criteria for characterizing or describing military service as being honorable, general (under honorable conditions), or under other than honorable conditions, and when the service is not characterized."<sup>5</sup>

to file a new service connection claim in the near future for his knees, which he injured while on his honorable active-duty deployment.

### Separation Procedure

As a result of his misconduct, the separation authority has recommended that SSG Snuffy be separated from the ARNG.<sup>7</sup> The separation authority is recommending that, upon separation, his service characterization be classified as other than honorable (OTH).<sup>8</sup> According to AR 135-178, for misconduct, "characterization of service normally will be under other than honorable conditions."<sup>9</sup> Since an OTH characterization has been recommended by the separation authority, SSG Snuffy is entitled to have his case heard by a separation board pursuant to AR 135-178.<sup>10</sup> The board will recommend whether separation is warranted and, if so, recommend what the service characterization should be.<sup>11</sup>



This article will address the confusion that ARNG soldiers, including SSG Snuffy, face when they are being processed for separation from the ARNG with a service characterization of other than honorable (OTH). Specifically, the article will address the provision "separation characterized as under other than honorable conditions could deprive the Soldier of veterans' benefits administered by the [DVA]. A determination by that agency is required in each case"<sup>16</sup> as found in AR 135-178 and what it means for ARNG soldiers facing separation.

### Background

When separation procedures commence, SSG Snuffy's military experience consists of 15 years of service in the ARNG, including a one-year active-duty deployment to Afghanistan from which he recently returned. He currently receives VA disability compensation at a 30 percent rating for various disabilities, including a back condition, that he incurred while on his active-duty deployment. He is also planning

### Conditional Waiver

Prior to requesting a board, another option that SSG Snuffy can exercise under AR 135-178 is submitting a conditional waiver to the separation authority.<sup>12</sup> This would waive his right to an administrative separation board on the condition that his characterization of service on separation would be "higher than the least favorable characterization or description of service authorized for the basis of the separation reason listed in the notification memorandum."<sup>13</sup> In his case, he could be separated with a service characterization of honorable or general, under honorable conditions. SSG Snuffy would have to submit this conditional waiver before the separation board made its findings.<sup>14</sup> However, it must be noted that the separation authority is not required to accept the conditional waiver. If the separation authority did not accept the conditional waiver, the case would then be referred to a separation board.<sup>15</sup>

## Counseling

As part of the separation procedure, AR 135-178 requires that an ARNG soldier who is being recommended for separation be counseled by the chain of command. Part of the counseling includes instruction as to how separation and characterization affects entitlement to DVA benefits. AR 135-178 requires that “[c]ounseling will include advice that a discharge under **other than honorable conditions** is a **conditional bar to benefits** administered by the DVA, notwithstanding any action by a Discharge Review Board. Such explanation may be furnished the Soldier in written form.”<sup>16</sup> As part of the separation procedures, an ARNG soldier will receive notification from his or her commander that states that “I further understand that, as the result of issuance of a discharge where the service is characterized as **Under Other Than Honorable conditions**, I may be **ineligible** for many or all **benefits as a veteran** under both **Federal** and State laws.”<sup>17</sup>

## A Difficult Choice

Because SSG Snuffy has 15 years of service, he really wants to stay in the ARNG; he only needs to serve for five more years to be eligible for retirement.<sup>18</sup> He also believes that he has a very compelling case to present at the separation board and that there is a good chance that the board would recommend retention. He plans on arguing to the board that he only used marijuana once and that the usage was an attempt to treat pain from his in-service injuries. Additionally, he has zero blemishes on his otherwise exemplary career record, which strengthens his case. He also has many people who are willing to testify on his behalf, including his company commander and first sergeant, who plan on asking the board to retain him.<sup>19</sup>

After consulting with Trial Defense Services (TDS), he is told that if he submits a conditional waiver and agrees to a service characterization of general, under honorable conditions, it will likely be approved by the separation authority and that he won't have to go before a board. TDS goes on to tell him that if the separation authority accepts the waiver, he can continue receiving his VA disability compensation and will also retain eligibility to file new compensation claims with the VA in the future. However, the drawback to submitting a conditional waiver is that he will be unable to retire from the ARNG due to his separation before completing 20 years of service. On the other hand, if he does not submit the conditional waiver, he will have to go through the separation board procedures, where there is a chance that he will be separated and possibly receive an OTH service characterization. There is also the chance that the board will retain him or that he will receive a suspended separation.

## Potential Results at a Board

As indicated above, AR 135-178 states that “[n]o Soldier will be discharged in accordance with this regulation, with service characterized as under other than honorable conditions, unless he or she is afforded the right to present his or her case before an administrative separation board.”<sup>20</sup> Pertinently, in SSG Snuffy's case, if he goes before a separation board, the board will make recommendations on the following: retention or separation, suspension of separation, and characterization of service or description of separation.<sup>21</sup>

Regarding whether to separate an ARNG soldier, AR 135-178 directs the board to make a recommendation as to “whether the findings warrant separation with respect to the reason for separation set forth in the notice.”<sup>22</sup> The reason for separation set forth in SSG Snuffy's case is misconduct due to illegal drug use. If the board recommends

retention, “the recommendation must provide for the Soldier to be retained in the component and status in which the Soldier is currently serving.”<sup>23</sup> At this point, if the board recommends retention of the ARNG soldier, no characterization of service will be recommended.<sup>24</sup>

If the board determines that separation is warranted, it can recommend a suspended sentence.<sup>25</sup> AR 135-178 allows suspended separations because, “[i]n order to afford a highly deserving Soldier a probationary period to demonstrate successful rehabilitation prior to expiration of the Soldier's service obligation, the separation authority or a higher authority may suspend execution of an approved separation for a period not to exceed 12 months.”<sup>26</sup> On satisfactory completion of the probationary period, or earlier, if rehabilitation has been achieved, or at the end of the Soldier's period of obligated service, the authority that suspended the separation will remit execution of the approved separation.<sup>27</sup> Essentially, at the end of the probationary period, the recommended separation is removed, and it is as if the ARNG soldier was outright retained at the separation board. The potential of having the suspension lifted and being discharged is gone.

However, it is important to note that if the board recommends a suspended separation, the separation authority can remove the suspension, and the ARNG Soldier will be separated with whatever service characterization was recommended by the board.<sup>28</sup>

If separation or a suspended separation is recommended, the board must recommend a character of discharge.<sup>29</sup> “Characterization will be determined solely by the Soldier's military record, which includes the Soldier's behavior and performance of duty during the current enlistment or period of service to which the separation pertains, plus any extensions of service prescribed by law or regulation or effected with the consent of the Soldier.”<sup>30</sup>

Under AR 135-178, “illegal drug use is serious misconduct.”<sup>31</sup> In the case of misconduct, “[c]haracterization of service normally will be under other than honorable conditions.”<sup>32</sup> Here, since SSG Snuffy failed his urinalysis, and drug use is considered serious misconduct, an OTH service characterization has been properly recommended by the separation authority.

## Available Resources To Assist in Decision-making

This section will cover the resources available to the average ARNG soldier who must decide whether to submit a conditional waiver or request a hearing before an administrative separation board.

## Counsel Recommendation

As a member of the ARNG, SSG Snuffy is entitled to government-provided counsel.<sup>33</sup> This government counsel is usually a judge advocate in the ARNG and is usually a member of Trial Defense Services. “TDS counsel are independent of local commanders and legal advisors. TDS counsel are supervised and rated by their superiors solely within TDS.”<sup>34</sup> Therefore, they are essentially independent of the separation authority and are there solely to assist and represent the ARNG soldier. The TDS motto is “Defending those who defend America.”<sup>35</sup> The mission of TDS is “[t]o provide independent, competent, and ethical defense legal services to Soldiers worldwide, wherever located, as required by law or as authorized by The Judge Advocate General.”<sup>36</sup> TDS is also tasked with “[c]ounseling Soldiers regarding pretrial restraint, nonjudicial punishment, and various adverse administrative actions taken pursuant to military regulations.”<sup>37</sup>

SSG Snuffy elects to be represented by TDS and asks counsel what his options are. His main concern is the continued receipt of VA dis-

ability compensation. Receiving this monthly check is imperative to his livelihood. Because he is partially disabled from his service-connected disabilities, he cannot make enough money to support himself and relies upon his disability check to make ends meet. He is also concerned about losing the ability to retire. TDS informs him that if he elects to go to the separation board, he risks losing his VA disability compensation. TDS bases this advice on AR 135-178, which states that “separation characterized as under other than honorable conditions could deprive the Soldier of veterans’ benefits administered by the [DVA]. A determination by that agency is required in each case.”<sup>38</sup> Unfortunately, this regulation is an inaccurate interpretation of VA law, but since it is found in the Army Regulation, TDS properly provides this advice to SSG Snuffy.

### Conditional Waiver or Board?

SSG Snuffy is now stuck with a career- and life-altering decision: submit a conditional waiver and accept separation with a service characterization of general, under honorable conditions, or exercise his right to a hearing before a separation board and potentially be separated with an OTH service characterization. According to the guidance provided by his TDS counsel, he can submit his conditional waiver and accept the separation with a service characterization of general, under honorable conditions. If he does so, he forgoes the op-

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portunity to stay in the ARNG and eventually retire. TDS informs him that this is the only way that he is guaranteed to continue receiving VA disability compensation—so he can keep his disability compensation but not be able to retire. On the other hand, TDS informs him that if he requests a hearing before a separation board, he could be retained, receive a suspended sentence, or be separated with a service characterization of OTH or general, under honorable conditions. According to guidance as provided by TDS, if he receives an OTH service charac-

terization, he could lose his VA disability compensation.<sup>39</sup> TDS relies upon AR 135-178 in rendering this advice as, regarding separations for misconduct, AR 135-178 states that “[c]haracterization of service normally will be Under Other Than Honorable Conditions.”<sup>40</sup>

After discussing his potential options, TDS counsel leaves the conditional waiver form with SSG Snuffy while he is contemplating how proceed. Seeking further guidance, SSG Snuffy reviews the conditional waiver form. Unfortunately, the conditional waiver form also provides inaccurate advice regarding eligibility for VA disability compensation. It states that “[a]s the result of a discharge where the service is characterized as Under Other Than Honorable conditions, I may be ineligible for many or all benefits as a veteran under both Federal and State laws.”<sup>41</sup> Distraught, SSG Snuffy starts searching VA materials on the Internet for answers and cannot find anything directly addressing his situation.

### VA Resources

He does, however, stumble across a VA fact sheet entitled “Claims for VA Benefits and Character of Discharge.”<sup>42</sup> In pertinent part, the fact sheet states that “[a]s established by VA regulation 38 CFR § 3.12(d), an individual’s character of discharge is considered to have been issued ‘under dishonorable conditions’ if he/she was released under any of the following circumstances: willful and persistent misconduct.”<sup>43</sup> As SSG Snuffy may be discharged for misconduct, he believes that this section applies to him. The fact sheet goes on to state that “[o]n a case-by-case basis, VA determines whether the incidents that led to the discharge may be found to have been under conditions other than dishonorable” and “thus whether basic eligibility for VA benefits can be established.”<sup>44</sup> SSG Snuffy recognizes that this essentially echoes what AR 135-178 stated regarding OTH separation characterizations, and this further worries him about potentially losing eligibility to VA disability compensation. The fact sheet does not address ARNG separations with a service characterization of OTH.

Furthermore, the fact sheet states that “[a] discharge found by VA to have been issued under dishonorable conditions does not, in and of itself, bar an individual from receiving VA benefits based on a separate period of service which terminated under honorable conditions.” However, SSG Snuffy does not believe that this section applies to him because his deployment occurred during his current enlistment in the ARNG. He does not think that the VA considers his previous honorable deployment a separate period of service. This is because SSG Snuffy reenlisted in the ARNG for six years in May 2009. His honorable active-duty deployment spanned from January 2010 to January 2011. His current ARNG enlistment ends in May 2015. His administrative separation board is scheduled for May 2014. Because the fact sheet does not address ARNG separations, he believes that an OTH from the ARNG would encompass his entire six-year enlistment, including his honorable deployment. Veterans law practitioners know that this is not the case, but there is no specific guidance to assist ARNG soldiers in this situation. The fact sheet also does not address this situation.

SSG Snuffy continues searching the Internet and ends up on the VA’s website, which states that “[t]o receive VA compensation benefits and services, the Veteran’s character of discharge or service must be under other than dishonorable conditions (e.g., honorable, under honorable conditions, general).”<sup>45</sup> Again, this further solidifies his belief that he will lose eligibility to VA disability compensation if he receives an OTH at his separation board.

SSG Snuffy even discovers the VA adjudication manual procedures

regarding character of discharge determinations which, in pertinent part, states that “[a] Veteran’s character of discharge (COD) must be under other than dishonorable conditions to establish eligibility for Department of Veterans Affairs (VA) benefits based on that individual’s military service.”<sup>46</sup> ... A formal COD determination is required when the Veteran’s discharge is one of the following ... an OTH discharge.”<sup>47</sup> While the adjudication manual states that “[i]t is not necessary to make a COD determination for VA claim purposes ... if there is a separate period of honorable service, which qualifies the person for the benefits claimed,”<sup>48</sup> SSG Snuffy does not believe that his period of honorable service is a separate period of service as it was encompassed in his six-year ARNG enlistment. Again, no guidance is provided from the VA in this manual regarding ARNG soldiers in SSG Snuffy’s situation.

## Military Resources

Because he cannot find any guidance from the VA regarding his specific situation, SSG Snuffy starts searching the Internet for guidance from the military. He stumbles upon some fact sheets from various commands throughout the ARNG. An Oregon National Guard fact sheet says, regarding OTH service characterizations, “You will likely lose any military or Veterans rights or benefits.”<sup>49</sup> A Florida National Guard website states, regarding an OTH discharge, “You will also likely lose any veterans’ benefits that you have earned.”<sup>50</sup> This solidifies SSG Snuffy’s belief that he could potentially lose his VA disability compensation benefits if he receives an OTH from the separation board.

At this point, SSG Snuffy has to make a life- and career-altering decision: whether to submit the conditional waiver or go to a hearing before a separation board. As indicated above, he has been provided incorrect guidance regarding his continued eligibility for VA compensation benefits. Therefore, any decision that he makes will be not be fully informed. Those well-versed in veterans law know that receiving an OTH at the ARNG administrative separation board would not affect SSG Snuffy’s VA disability compensation benefits from his honorable active-duty deployment. Unfortunately, ARNG soldiers in SSG Snuffy’s situation do not have access to this very helpful knowledge, and nowhere does VA spell it out. Why is this application of law not spelled out in VA rules and regulations?

## VA Law Is Silent on VA Disability Compensation Benefits for National Guard Soldiers Who Have an Honorable Active-duty Deployment and Subsequently Receive an OTH From the ARNG

Veterans law practitioners know that an OTH from the ARNG does not affect eligibility for VA disability compensation from a prior active deployment with a separation characterized as honorable. However, nowhere in VA regulations or jurisprudence is this spelled out. Because this is not spelled out, the Army regulation authorizing ARNG separations, AR 135-178, improperly interprets veterans law, which leads to the above situation—an ARNG soldier being forced to make a career- and life-altering decision based upon an incorrect application of veterans law.<sup>51</sup>

Veterans law practitioners know that ARNG service isn’t taken into account when making a benefits determination unless the claimed condition occurred while on inactive duty for training (INACDUTRA) or active duty for training (ACDUTRA). Below is a quick analysis on the eligibility of ARNG soldiers for VA disability compensation benefits.

## VA Disability Compensation Benefits for National Guard Soldiers

VA law does provide limited guidance for ARNG and reserve soldiers seeking service connection for injuries incurred while on ACDUTRA and INACDUTRA. ARNG soldiers are eligible for disability compensation benefits on the basis of their ARNG service in three circumstances: (1) when an ARNG member is considered a veteran by the VA on the basis of an active duty deployment,<sup>52</sup> (2) when an injury or disease occurs on active duty for training,<sup>53</sup> and (3) when an injury occurs during a period of inactive duty for training (commonly referred as drill).<sup>54</sup> Unless an ARNG soldier falls into one of these categories, he or she is not eligible for VA disability compensation benefits on the basis of his ARNG service. SSG Snuffy’s disability compensation that he currently receives is not based upon a period of ACDUTRA or INACDUTRA.

Additionally, VA has some provided some guidance in the situation where a member of the National Guard is injured while serving on ACDUTRA and is subsequently separated from the National Guard with a service characterization of OTH. In a 2004 VA general counsel precedential opinion, the VA general counsel held that “a claimant’s eligibility for VA disability compensation is governed by the character or release from the [active duty for training (ADT)] period during which a disabling injury or disease was incurred, [and that] [D]VA is not required to reconsider an award based on a period of ADT if the claimant is subsequently discharged from the National Guard under other than honorable conditions.”<sup>55</sup> In other words, an ARNG member could continue receiving VA benefits from a previous period of ACDUTRA even though he or she was subsequently separated from the ARNG with a service characterization of OTH. While this situation is similar to SSG Snuffy’s, it is not analogous because it only addresses periods of ACDUTRA, not a period of active-duty service within an ARNG soldier’s entire enlistment in the ARNG.

## Adjudication Process

How would the VA adjudicate a service connection claim from SSG Snuffy after he was separated from the ARNG with a service characterization of OTH? Let’s say SSG Snuffy injured his knee while on his active-duty deployment from which he received an honorable service characterization and that he is still suffering from residuals of that injury. He has a copy of his service treatment records (STR) documenting the injury, and he also has a positive nexus opinion linking his current knee condition to his in-service injury.

First, to be eligible for disability compensation benefits, veteran status must be established. “*Veteran* means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.”<sup>56</sup> Here, SSG Snuffy is considered a veteran by the VA by virtue of his honorable active-duty deployment.

Next, entitlement to service connection must be established. VA regulations state that “basic entitlement for a veteran exists if the veteran is disabled as the result of a personal injury or disease (including aggravation of a condition existing prior to service) while in active service if the injury or the disease was incurred or aggravated in the line of duty.”<sup>57</sup> Case law states that establishing service connection generally requires (1) medical evidence of a presently existing disability; (2) medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disability.<sup>58</sup>



Here, veterans law practitioners know that this is an open-and-shut case. There is evidence of a current disability, causation, and a positive nexus opinion. Veterans law practitioners also know that the subsequent OTH service characterization from the ARNG bears no effect on the disability compensation process.

As shown above, the adjudication of the claim is fairly simple. So why does AR 135-178 provide an incorrect interpretation of eligibility to disability compensation benefits for ARNG soldiers that have a previous honorable deployment who are subsequently separated with OTH service characterization?

## AR 135-178 and VA Jurisprudence

As indicated above, AR 135-178 is the Army regulation used for administratively separating Army National Guard and reserve soldiers.<sup>59</sup> “This regulation applies to Army National Guard/Army National Guard of the United States and U.S. Army Reserve Soldiers not serving on active duty.<sup>60</sup> ... This regulation sets policies, standards, and procedures to ensure the readiness and competency of the U.S. Army while providing for the orderly administrative separation of Army National Guard of the United States (ARNGUS) and U.S. Army Reserve (USAR) enlisted Soldiers for a variety of reasons.”<sup>61</sup>

As indicated above, the pertinent provision of AR 135-178 for the purposes of this article states that “separation characterized as under other than honorable conditions could deprive the Soldier of veterans’ benefits administered by the [DVA]. A determination by that agency is required in each case.”<sup>62</sup> What is the origin of this language?

This language essentially mirrors that found in the active-duty enlisted administrative separations regulation, AR 635-200, which states that “[d]ischarge under other than honorable conditions may or may not deprive the Soldier of veterans’ benefits administered by the Department of Veterans Affairs; a determination by that agency is required in each case.”<sup>63</sup> While this statement is true regarding active-duty separations, it is untrue regarding ARNG separations, and this is problematic.

Why does AR 135-178 mirror AR 635-200 regarding VA benefits for soldiers separated with OTH service characterizations? To understand the relationship between AR 135-178 and AR 635-200, we must first address the relationship between VA rules and regulations and AR 635-200.

## VA Adjudication of Claims With Service Characterization of OTH

Regarding OTH service characterizations, VA rules and regulations states that there are two types of character-of-discharge bars to establishing entitlement to VA benefits: (1) statutory bars found at 38 U.S.C.A. § 5303(a) and 38 C.F.R. § 3.12(c), and (2) regulatory bars listed in 38 C.F.R. § 3.12(d).

### Statutory Bars

As to the statutory bars, benefits are not payable where the former service member was discharged or released under one of the following conditions listed under 38 C.F.R. § 3.12(c): (1) as a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities; (2) by reason of the sentence of a general court-martial; (3) resignation by an officer for the good of the service; (4) as a deserter; (5) as an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release; and (6) by reason of a discharge under other than honorable conditions issued as a result of

an AWOL for a continuous period of at least 180 days (the regulation provides certain exceptions to this condition).

As to the exception to AWOL, a person discharged under conditions other than honorable on the basis of an AWOL period of at least 180 days is barred from receipt of VA benefits “unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence.”<sup>64</sup>

### Regulatory Bars

As to the regulatory bars, a discharge or release because of one of the offenses specified under 38 C.F.R. § 3.12(d) is considered to have been issued under dishonorable conditions. These offenses are: (1) acceptance of undesirable discharge in lieu of trial by general court-martial; (2) mutiny or spying; (3) offense involving moral turpitude (this includes, generally, conviction of a felony); (4) willful and persistent misconduct; and (5) homosexual acts involving aggravating circumstances and other factors affecting the performance of duty.

In particular, a discharge from military service because of willful and persistent misconduct, including a discharge under other than honorable conditions, is considered to have been issued under dishonorable conditions.<sup>65</sup> A discharge because of a minor offense will not be considered willful and persistent misconduct if service was otherwise honest, faithful, and meritorious.<sup>66</sup> An act is willful misconduct where it involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences. Mere technical violation of police regulations or ordinances will not, per se, constitute willful misconduct.<sup>67</sup>

### Character of Discharge Determinations

In cases of a separation with a service characterization of OTH, VA must make a character of discharge determination to determine whether the period of service will be considered other than dishonorable for VA purposes.<sup>68</sup> Regarding willful and persistent misconduct, the VA adjudication manual states that “[c]ases in which the facts indicated the service member’s behavior constituted willful and persistent misconduct are a bar to benefits.”<sup>69</sup> However, “[t]he evidence must show both willful and persistent misconduct. A one-time offense or a technical violation of police regulations or ordinances does not necessarily constitute willful and persistent misconduct.”<sup>70</sup>

The VA character of discharge determination process is clearly geared toward active-duty separations. AR 635-200 interprets this process regarding VA benefits for active-duty soldiers being separated with a service characterization of OTH, and states that “separation characterized as under other than honorable conditions could deprive the Soldier of veterans’ benefits administered by the [DVA]. A determination by that agency is required in each case.”<sup>71</sup> The determination to which AR 635-200 is referring is the character of discharge determination as found in the VA adjudication manual. As both VA law and AR 635-200 are geared toward active-duty separation, this is a correct interpretation of VA law and, therefore, is a true statement of law.<sup>72</sup>

## There Is a Lack of VA Guidance for ARNG Separations

The problem arises because VA provides no guidance regarding ARNG soldier separations. The above VA rules and regulations do not mention, nor contemplate, separations for ARNG soldiers with previous honorable deployments. Because the ARNG has no guidance from the VA regarding benefits upon separating with an OTH, the language

of AR 135-178 is forced to essentially mirror the language of AR 635-200 by stating that “separation characterized as under other than honorable conditions could deprive the Soldier of veterans’ benefits administered by the [DVA]. A determination by that agency is required in each case.”<sup>73</sup> There is no VA rule or regulation that contradicts this interpretation. As indicated above, this leads to ARNG soldiers being forced to make career- and life-altering decisions on the basis of improper guidance.

### Back to SSG Snuffy

What happens if SSG Snuffy decides to accept the general, under honorable conditions service characterization on the basis of the incorrect analysis of VA benefits found as in AR 135-178? SSG Snuffy has forgone his opportunity to retire based on faulty advice. Or what happens if SSG Snuffy goes to the board and receives a separation with a service characterization of other than honorable? He may be discouraged from applying for benefits because he thinks VA will have to make a character of discharge determination, which he believes will be negative. Unfortunately, there is a high probability that many soldiers have made these decisions on the basis of this faulty interpretation of VA rules and regulations in AR 135-178 and the lack of VA rules and regulations addressing the issue.

This is because of the widespread belief within the ARNG community that an ARNG soldier becomes ineligible for VA disability compensation when he or she receives a separation under OTH conditions from the ARNG even with a previous honorable deployment. These materials are addressed above.

The fact that ARNG soldiers make uninformed life and career decisions on the basis of this guidance is a problem. Why does this occur? This issue has been written on before from an ARNG perspective,<sup>74</sup> but the main issue is that VA rules and regulations are outdated with regard to ARNG and reserve soldiers. At the time these VA regulations were written, ARNG and reserve soldiers were rarely deployed. However, since Sept. 11, 2001, almost 1 million reserve component service members have been deployed.<sup>75</sup> Many of these service members have served on multiple deployments. Unfortunately, many of them have subsequently been recommended for separation with OTH service characterizations under the provisions of AR 135-178. Many of them may have also accepted a service characterization of general, under honorable conditions, instead of exercising their right to a hearing before a board for fear of receiving an OTH and losing eligibility to VA disability compensation.

An update or any type of guidance from the VA on this subject would allow ARNG soldiers to make life and career-altering decisions based on accurate information regarding eligibility for VA disability compensation. Along with eligibility for disability compensation with an OTH, below are some areas of the law in which clarification would greatly benefit soldiers and veterans.

### Clarification of Period of Service

As indicated above, SSG Snuffy’s deployment fell within his six-year enlistment in the National Guard. As indicated above, AR 135-178 and VA regulations define period of service differently. This leads to confusion such as that experienced by SSG Snuffy.

When a soldier is discharged under AR 135-178, “[t]he type of discharge and character of service will be determined solely by the military record during the current enlistment or period of service, plus any extension thereof, from which the Soldier is being separated.”<sup>76</sup>

This is referring to the ARNG soldier’s enlistment in the ARNG. In SSG Snuffy’s case, it is his enlistment that began in May 2009 and encompasses his honorable active deployment.

VA regulations state that “if the former servicemember did not die in service, [then] pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable.”<sup>77</sup> For SSG Snuffy, this is his yearlong honorable deployment.

On what period of service would a service connection claim be based? SSG Snuffy has no idea. These regulations define period of service differently, leading to confusion. Veterans law practitioners know that the claim is based upon the period of active service. Most ARNG soldiers do not know that. VA regulations are silent regarding the ARNG enlistment that encompasses the active period of service.

VA fact sheets should also address OTH discharges from the ARNG when the soldier has a previous honorable deployment. As indicated above, SSG Snuffy found the VA fact sheet pertaining to OTH discharges, but it was not helpful because it did not address his situation. Unfortunately, this situation arises often in the ARNG.

### Conclusion

Unclear VA rules and regulations lead to ARNG soldiers making uninformed career and life decisions when faced with the potential of being separated with a service characterization of OTH. Additionally, unclear VA law and materials may discourage veterans from applying for VA benefits, because they may believe that they are ineligible based upon their OTH service characterization. VA law and materials need to be updated to reflect the new generation of veterans. This generation is unlike any generation of veterans the VA has ever seen because it contains close to 1 million veterans of the reserve components. Clarification of VA rules and regulations would go a long way toward assisting these veterans in life and career decisions. ☉



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### Endnotes

<sup>1</sup>U.S. DEP’T OF ARMY, REG. 135-178, ARMY NATIONAL GUARD AND ARMY RESERVE: ENLISTED ADMINISTRATIVE SEPARATIONS para. 12-1(d)(1) (Mar. 18, 2014) (requires commanders to process for separation all Soldiers that test positive for illegal drug use) [hereinafter AR 135-178].

<sup>2</sup>*Id.* at para. 1-10(a) (provides the authority for the State Adjutant General to order separation under AR 135-178).

<sup>3</sup>*Id.* at para. 1-1(a). (“This regulation sets policies, standards, and procedures to ensure the readiness and competency of the U.S. Army

while providing for the orderly administrative separation of Army National Guard of the United States (ARNGUS) and U.S. Army Reserve (USAR) enlisted Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.”).

<sup>4</sup>*Id.* at para. 1-1(c)(2).

<sup>5</sup>*Id.* at para. 1-1(c)(3).

<sup>6</sup>*Id.* at para. 2-8(a).

<sup>7</sup>*Id.* at para. 3-10(d). (“If there is a sufficient factual basis for separation for the reason set forth in the notification, the separation authority will determine whether separation is warranted under the guidance in chapter 2, sections I and II, of this regulation. On the basis of that guidance, the separation authority will direct one of the following actions: Retention, Separation, or Suspended separation.”).

<sup>8</sup>*Id.* at para. 2-9(c). (“Service may be characterized as under other than honorable conditions only when discharge is for misconduct, fraudulent entry, unsatisfactory participation, or security reasons.”).

<sup>9</sup>*Id.* at para. 12-8(a).

<sup>10</sup>*Id.* at para. 2-9(c)(3). (“No Soldier will be discharged in accordance with this regulation, with service characterized as under other than honorable conditions, unless he or she is afforded the right to present his or her case before an administrative separation board. The Soldier will be afforded the advice and assistance of counsel. Such discharge must be supported by approved board findings, and an approved board recommendation for discharge under other than honorable conditions.”).

<sup>11</sup>*Id.* at para. 3-18(h)(4).

<sup>12</sup>*Id.* at para. 3-16.

<sup>13</sup>*Id.* at para. 3-16(b).

<sup>14</sup>*Id.* at para. 3-16(b)(2). (“There is no requirement to delay board proceedings pending action by the separation authority on the conditional waiver. However, once the board has made its findings and recommendations, the convening authority may not approve the conditional waiver.”).

<sup>15</sup>*Id.* at para. 3-16(b)(1). (“The separation authority may approve or disapprove the conditional waiver. If the conditional waiver is disapproved, the case will be referred to a hearing before an administrative board, unless there is a subsequent unconditional waiver of a right to a hearing before an administrative separation board under paragraphs 3-5a(7) and 3-11a(6), above.”).

<sup>16</sup>*Id.* at para. 2-12 (emphasis added).

<sup>17</sup>*Id.* at Figure 3-6. (emphasis added) (“Format for Soldier’s response by endorsement to notification of separation proceedings when the administrative board procedure is used.”).

<sup>18</sup>U.S. DEP’T OF ARMY, REG. 600-8-7, RETIREMENT SERVICES PROGRAM, para. 9-4(b)(2) (Apr. 28, 2015).

<sup>19</sup>AR 135-178, *supra* note 2, para. 3-18(c)(1). (“The Soldier will be notified of the names and addresses of witnesses expected to be called at the board hearing and that the recorder of the board will, on written request of the Soldier, endeavor to arrange for the presence of any available witness the Soldier desires to call. Pursuant to AR 15-6, paragraph 3-7c, expert medical and psychiatric testimony routinely may be provided in the form of affidavits.”).

<sup>20</sup>*Id.* at para. 2-9(c)(3).

<sup>21</sup>*Id.* at para. 3-18(h)(4).

<sup>22</sup>*Id.* at para. 3-18(h)(3).

<sup>23</sup>*Id.* at para. 3-18(4)(a).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at para. 3-18(4)(b). (“If the board recommends separation, it

may recommend that the separation be suspended in accordance with chapter 2, section II, of this regulation, but the recommendation of the board is not binding on the separation authority.”).

<sup>26</sup>*Id.* at para. 2-5(a).

<sup>27</sup>*Id.* at para. 2-5(c).

<sup>28</sup>*Id.* at para. 3-18(4)(b).

<sup>29</sup>*Id.* at para. 3-18(4)(c). (“If separation or suspended separation is recommended, the board will recommend a characterization of service or description of separation as authorized by the basis for separation (chaps. 6 through 16, of this regulation) in accordance with the guidance in chapter 2, section III, of this regulation.”).

<sup>30</sup>*Id.* at para. 2-10.

<sup>31</sup>*Id.* at para. 12-1(d).

<sup>32</sup>*Id.* at para. 12-8(a).

<sup>33</sup>*Id.* at para. 3-3(b)(1) (“A reserve component or Regular Army officer of the Judge Advocate General’s Corps appointed by the convening authority to provide representation during the course of any hearing before an administrative separation board under the provisions of this regulation. Representation by counsel will be in accordance with AR 15-6. Such counsel must be qualified under Article 27(b)(1) of the UCMJ.”).

<sup>34</sup>Ft. Bragg Trial Defense Services, [www.bragg.army.mil/directorates/osja/Pages/TrialDefenseServices.aspx](http://www.bragg.army.mil/directorates/osja/Pages/TrialDefenseServices.aspx) (accessed May 1, 2015).

<sup>35</sup>U.S. Army Reserve Legal Command, [www.usar.army.mil/ourstory/commands/USARLC/Pages/Trial%20Defense.aspx](http://www.usar.army.mil/ourstory/commands/USARLC/Pages/Trial%20Defense.aspx) (accessed May 1, 2015).

<sup>36</sup>U.S. Army Trial Defense Services, [www.jagcnet2.army.mil/8525781C0048C0D5/0/96996077D1202E30852577D-0006701C1?opendocument](http://www.jagcnet2.army.mil/8525781C0048C0D5/0/96996077D1202E30852577D-0006701C1?opendocument) (accessed May 1, 2015).

<sup>37</sup>*Id.*

<sup>38</sup>AR 135-178, *supra* note 2, para. 2-8(a).

<sup>39</sup>This incorrect guidance is not the fault of TDS counsel, as it is found in AR 135-178. VA provides no guidance to the contrary.

<sup>40</sup>AR 135-178, *supra* note 2 para. 12-8(a).

<sup>41</sup>*Id.* at Figure 3-7. (“Format of request for conditional waiver of administrative board proceedings.”).

<sup>42</sup>U.S. Department of Veterans Affairs, [www.benefits.va.gov/BENEFITS/docs/COD\\_Factsheet.pdf](http://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf) (accessed May 1, 2015).

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>U.S. Department of Veterans Affairs, [www.benefits.va.gov/benefits/character\\_of\\_discharge.asp](http://www.benefits.va.gov/benefits/character_of_discharge.asp) (accessed May 1, 2015).

<sup>46</sup>VA COMPENSATION AND PENSION MANUAL REWRITE M21-1MR, PART. 3, SUBPT. V, CH. 1, SEC. B, ¶ 5(a) (2014).

<sup>47</sup>*Id.* at ¶ 5(c).

<sup>48</sup>*Id.* at ¶ 5(d).

<sup>49</sup>Army National Guard Trial Defense Service, [www.oregon.gov/OMD/JAG/docs/memo\\_enlisted\\_separation\\_boards.pdf](http://www.oregon.gov/OMD/JAG/docs/memo_enlisted_separation_boards.pdf) (May 4, 2011).

<sup>50</sup>Florida Guard Online, [www.fl.ng.mil/1565th-trial-defense-team/involuntary-separations](http://www.fl.ng.mil/1565th-trial-defense-team/involuntary-separations) (accessed May 1, 2015).

<sup>51</sup>The merits of whether SSG Snuffy deserves an OTH are not at issue here. What is at issue is the VA providing proper guidance to veterans in situations such as SSG Snuffy.

<sup>52</sup>38 C.F.R. § 3.1(d) (2014).

<sup>53</sup>38 U.S.C. § 101(24) (2014). The term “active military, naval or air service” is further defined as (1) active duty or a period of ACDUTRA



deity is at best a fairy tale created to support the earthly and real deity.

Indeed, the distinction between primary and secondary states of nature doesn't really require a heavenly god. Even in the most intense and chaotic of wars, alliances shift, and at times one ally will act in support of another. If we must hypothesize the state of nature as a war of all against all, we can also readily imagine that it would slowly modify itself. Warriors will develop (perhaps at first short-lived and shifting) alliances with one another and will make promises to their allies in pursuit of strategies against common foes.

Further, Hobbes himself offers psychological explanations of this process that don't require that the warriors working their way toward such alliances have to believe in any god. Consider the quotation I introduced above in which Hobbes suggests that an individual in the natural state may keep his promise to another simply because he feels a sense of glory or pride in appearing not to need to break it. Suppose the warriors/promisers are atheists. Since when

does atheism make such pride impossible?

Insofar as Byron presumes Hobbes' sincerity as a Christian, his argument fails. That of course doesn't make this book worthless. Indeed, I can recommend it without hesitation to anyone seeking to keep track of the latest in Hobbesian scholarship, and I believe that Byron's discussion of the two different states of nature in particular is quite insightful, as, for example, where he writes that Hobbes would have classified as secondary states of nature "a range of political structures, including tribes, towns, and other polities whose leaders do not amount to a Hobbesian sovereign."

This insight holds some promise for a deconstruction of the whole Hobbesian project. Yes, "deconstruction" is an overused word and has become vague as a consequence. But I mean it here in its original literary-theory sense, as a demonstration of the way in which meanings in any closely examined text can be rendered unstable, even causing the text to subvert its own meaning. In other words, words depend on other words, and

this network of dependence makes surprises inevitable. As a case in point, a theory designed to support the claims of an absolute monarch ends up containing within itself a possibly tempting description of an organized society without a sovereign.

Even if you don't care to read Hobbes' *Leviathan* as arguing against a leviathan, you can take from *Submission and Subjection in Leviathan* a healthy skepticism about the positivist reading of Hobbes. If law is present in *any* important sense within a "state of nature," then law is something other than the will of the sovereign. The history of legal philosophy needs a reworking. ☉

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during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and (2) any period of INACDUTRA during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty.

<sup>54</sup>*Id.*

<sup>55</sup>DVA Op. Gen. Counsel Prec. 6-04 (July 12, 2004). ("According to VA regulations, the VA General Counsel is authorized to designate precedential opinions. 38 C.F.R. § 2.6(e)(8). . . . The General Counsel, or the Deputy General Counsel acting as or for the General Counsel, is authorized to designate, in accordance with established standards, those legal opinions of the General Counsel which will be considered precedent opinions involving veterans' benefits under laws administered by the Department of Veterans Affairs.").

<sup>56</sup>38 C.F.R. *supra* note 51, § 3.1(d) (emphasis original).

<sup>57</sup>*Id.* at § 3.4(b)(1).

<sup>58</sup>*Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)); *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

<sup>59</sup>This regulation "implements Department of Defense Instructions 1132.14. It establishes policies, standards, and procedures governing the administrative separation of certain enlisted Soldiers of the Army National Guard of the United States and the United States Army Reserve."

<sup>60</sup>AR 135-178, *supra* note 2.

<sup>61</sup>*Id.* at 1-1(a).

<sup>62</sup>*Id.* at 2-8(a).

<sup>63</sup>U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, para. 3-6(b) (Jun. 6, 2005) (RAR Sep. 6, 2011) [hereinafter AR 635-200].

<sup>64</sup>38 U.S.C. § 5303(a)(2014); 38 C.F.R. § 3.12(c)(6)(2014).

<sup>65</sup>38 C.F.R. *supra* note 51, § 3.12(d)(4).

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at § 3.1(n).

<sup>68</sup>VA COMPENSATION AND PENSION MANUAL REWRITE M21-1MR, PART. 3, SUBPT. V, CH. 1, SEC. B, ¶ 5(c) (2014)

<sup>69</sup>*Id.* at ¶ 7(c)

<sup>70</sup>*Id.*

<sup>71</sup>AR 635-200, *supra* note 63, para. 3.6(b).

<sup>72</sup>For a detailed assessment of eligibility for VA benefits of active-duty members separated with an OTH, see Major John W. Brooker, et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV., Winter 2012.

<sup>73</sup>AR 135-178, *supra* note 2, para. 2-8(a).

<sup>74</sup>Capt. Jeremy R. Bedford, *Eligibility for VA Disability Compensation and Health Care Benefits for Army National Guardsmen Discharged With an Other Than Honorable Discharge*, ARMY LAW, July 2014, at 36.

<sup>75</sup>Department of Defense, Unique SSAN Activations as of April 22, 2014, [www.defense.gov/documents/Mobilization-Weekly-Report-04-25-14.pdf](http://www.defense.gov/documents/Mobilization-Weekly-Report-04-25-14.pdf) (accessed May 1, 2015). (As of April 22, 2014, 895,630 members of reserve components had been active since Sept. 11, 2001.).

<sup>76</sup>AR 135-178, *supra* note 2, para. 2-8(a).

<sup>77</sup>38 C.F.R. § 3.12 (2014).