**APPENDIX A**

**United States Court of Appeals for the Federal Circuit**

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**DIANA GARVEY,**
*Claimant-Appellant*

v.

**ROBERT WILKIE,**
**SECRETARY OF VETERANS AFFAIRS,**
*Respondent-Appellee*

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2020-1128

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Appeal from the United States Court of Appeals for Veterans Claims in No. 18-5059, Senior Judge Robert N. Davis.

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Decided: August 27, 2020

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ROBERT C. BROWN, JR., Norman, OK, for claimant-appellant.

AMANDA TANTUM, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by ETHAN P. DAVIS, TARA K. HOGAN, ROBERT EDWARD KIRSCHMAN, JR.; JONATHAN KRISCH, Y. KEN LEE,

Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

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Before LOURIE, SCHALL, and DYK, *Circuit Judges*. DYK, *Circuit Judge*.

Diana Garvey is the widow of John P. Garvey. Mr. Garvey served in the Army from 1966 to 1970. Mrs. Garvey sought dependency and indemnity compensation and death pension benefits on the basis of Mr. Garvey's Army service. The Department of Veterans Affairs ("VA") denied Mrs. Garvey's claim because Mr. Garvey was discharged from the Army for "willful and persistent misconduct," and thus he was ineligible for benefits under the applicable regulation. *See* 38 C.F.R. § 3.12(d)(4). Mrs. Garvey now challenges the validity of Rule 3.12(d)(4) as being contrary to 38 U.S.C. § 5303.

We hold that the regulation is consistent with, and authorized by, the statute. Section 5303, contrary to Mrs. Garvey's assertion, is not the exclusive test for benefits eligibility. A former servicemember is ineligible for benefits unless he or she is a "veteran" as defined in 38 U.S.C. § 101(2). To be a "veteran" under section 101(2), a former servicemember must have been discharged "under conditions other than dishonorable." *Id.* The VA was authorized to define a discharge for willful and persistent misconduct as a discharge under "dishonorable conditions." *See* 38 C.F.R. § 3.12. We therefore affirm.

## BACKGROUND

John P. Garvey served in the U.S. Army from February 1966 to May 1970. After training, Mr. Garvey was posted to Germany, where he served until November 1967. While in Germany, Mr. Garvey was punished under Article 15 of the Uniform Code of Military Justice for "disorderly conduct" in an incident with a German taxi driver.[1] J.A. 74. However, Mr. Garvey's service record indicates that his "conduct" and "efficiency" while in Germany were "[e]xc[ellent]." J.A. 10.

Beginning in December 1967, Mr. Garvey was posted to Vietnam, where his record deteriorated significantly. In June 1968, Mr. Garvey was convicted by special court-martial of possessing four pounds of cannabis with intent to sell. He was sentenced 90 days of confinement, ordered to forfeit a portion of his pay, and reduced in rank. In November 1968, Mr. Garvey was convicted by special court-martial of being absent without leave ("AWOL") from September 9, 1968, to October 1, 1968. In June 1969, he was convicted by special court-martial of being AWOL from April 18, 1969, to June 5, 1969. For each of these convictions he was given a suspended sentence of confinement and ordered to forfeit a portion of his pay. In April 1970, Mr. Garvey was convicted by special court-martial of being AWOL from February 16, 1970, to April 1, 1970. For

[1] Article 15 authorizes commanding officers to impose certain "disciplinary punishments for minor offenses without the intervention of a court-martial." 10 U.S.C. § 815(b).

this conviction, he was sentenced to five months of confinement and again forfeited a portion of his pay.

Because of these events of misconduct, Mr. Garvey was discharged as unfit for service on May 13, 1970, with an "Undesirable Discharge."[2] J.A. 32. He waived consideration of his case before a board of officers and acknowledged that he "may be ineligible for many or all benefits as a veteran under both Federal and State laws." J.A. 66. On June 23, 1977, under the Special Discharge Review Program, a procedure by which Vietnam-era servicemembers could have their discharge status upgraded if they met certain criteria, Mr. Garvey's discharge status was upgraded to "Under Honorable Conditions (General)." J.A. 35. However, on August 1, 1978, a Discharge Review Board found that Mr. Garvey would not have been entitled to an upgrade under generally applicable standards. The apparent effect of this finding was to prevent Mr. Garvey from receiving benefits on the basis of his upgraded status. *See* 38 U.S.C. § 5303(e); 38 C.F.R. § 3.12(h).

Claimant-appellant Diana Garvey married Mr. Garvey on November 10, 1979. Mr. Garvey died on August 13, 2010. On September 4, 2012, Mrs. Garvey applied for dependency and indemnity compensation and death pension benefits on the basis of Mr. Garvey's service.

On August 28, 2018, the Board of Veterans' Appeals ("Board") denied Mrs. Garvey's claim. The Board

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[2] We capitalize formal discharge status (e.g., Honorable, Dishonorable, Undesirable, etc.).

concluded that Mr. Garvey was ineligible for benefits because he was discharged for "willful and persistent misconduct," which under 38 C.F.R. § 3.12(d)(4) is a bar to benefits. On September 30, 2019, the United States Court of Appeals for Veterans Claims ("Veterans Court") affirmed the Board's decision, rejecting Mrs. Garvey's contention that the "willful and persistent misconduct" bar, section 3.12(d)(4), is contrary to statute.

Mrs. Garvey appealed to this court. We have jurisdiction under 38 U.S.C. § 7292.

## DISCUSSION

On review of a decision from the Veterans Court, this court "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1). This court "shall hold unlawful and set aside any regulation . . . that was relied upon in the decision of the [Veterans Court] that [this court] finds to be . . . not in accordance with law." *Id*. § 7292(d)(1)(A).

### I

On appeal Mrs. Garvey does not dispute that Mr. Garvey was discharged for willful and persistent misconduct, or that this rendered him ineligible for benefits under the regulation, but renews her argument that the "willful and persistent misconduct" bar is contrary to statute.

We have previously upheld the regulation in a two-paragraph non-precedential decision that affirmed the Veterans Court. *Camarena v. Brown*, 60 F.3d 843 (Fed. Cir. 1995). We now address the issue in a precedential decision.

We begin with a summary of the relevant statutes and regulations. For purposes of eligibility for veterans' benefits, section 101(2) defines a "veteran" as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 101(2). Section 5303(a) lists several situations, such as discharge due to general court-martial or desertion, in which a former servicemember is barred from receiving veterans' benefits.[3] Section 5303 does not list

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[3] Specifically, section 5303(a) provides that:

> The discharge or dismissal [1] by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person [2] on the ground that such person was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or [3] as a deserter, or [4] on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence, or [5] of an officer by the acceptance of such officer's resignation for the good of the service, or [6] (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of

"willful and persistent misconduct" as one of its statutory bars.

Sections 101 and 5303 are implemented in 38 C.F.R. § 3.12. As relevant here, Rule 3.12(c) provides that "[b]enefits are not payable" under specified conditions. These include those listed in section 5303(a).[4] Mirroring the "conditions other than dishonorable"

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such person under laws administered by the Secretary [of the VA]. . . .

38 U.S.C. § 5303(a).

[4] Section 3.12(c) states that:

> Benefits are not payable where the former service member was discharged or released under one of the following conditions:
>
> (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. See § 3.7(b).
>
> (6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. . . .

38 C.F.R. § 3.12(c).

language of section 101(2), Rule 3.12(a) provides that:

> If the former service member did not die in service, 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. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the [VA] as to character of discharge.

38 C.F.R § 3.12(a) (emphasis added). Rule 3.12(d) further defines "dishonorable conditions," providing that:

> A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions. . . .
>
> > (4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

*Id.* § 3.12(d) (emphasis added).

Every servicemember is assigned a status—Honorable, Dishonorable, or an intermediate status—upon discharge. Under Rule 3.12, a former servicemember's

discharge status might be, but is not necessarily, determinative of eligibility for benefits. A servicemember with an Honorable discharge is eligible for benefits because a discharge "under honorable conditions" is "binding" on the VA as to benefits eligibility. *Id.* § 3.12(a). A servicemember with a Dishonorable discharge is ineligible for benefits because a Dishonorable discharge is a discharge by sentence of a general court-martial—a bar to benefits under Rule 3.12(c)(2). A former servicemember's discharge status is not determinative, however, when it is neither "under honorable conditions" nor Dishonorable. The military has issued several types of discharges of this sort over the years, including Undesirable, Ordinary, and Without Honor discharges. Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from "Veteran" Services*, 122 Penn. St. L. Rev. 69, 80 (2017). For servicemembers discharged with one of these intermediate statuses, the character of their service governs. The VA deems servicemembers with an intermediate discharge status who were discharged for "willful and persistent misconduct" to have been discharged under "dishonorable conditions," rendering them ineligible for veterans' benefits.[5] *See* 38 U.S.C. § 3.12(d)(4).

[5] Discharges for "[m]utiny," "spying," and "[a]cceptance of an undesirable discharge to escape trial by general court-martial" are also deemed by the VA to "have been issued under dishonorable conditions." 38 C.F.R. § 3.12(d).

II

Mrs. Garvey contends that the "willful and persistent misconduct" bar in Rule 3.12(d) is contrary to statute. Mrs. Garvey argues that because section 5303(a) specifies six conditions under which a former servicemember is ineligible for benefits, it was improper for the VA to add a seventh, unlisted "willful and persistent misconduct" bar. We disagree.

Neither section 5303 nor any other statute provides that section 5303 contains the exclusive list of conditions for benefits eligibility. On the contrary, the definition of "veteran" in section 101(2) expressly limits benefits to those discharged "under conditions other than dishonorable." 38 U.S.C. § 101(2). The central question here is the meaning of this language in section 101(2).

In section 101(2), Congress chose not to use a "Dishonorable discharge" bar. Instead, it used the phrase "conditions other than dishonorable." Unlike a Dishonorable discharge, the phrase "conditions other than dishonorable" is not a term of art in the military.[6] In view of the ambiguity of that phrase, we turn to the statute's legislative history to determine its meaning. *Adm'r, Fed. Aviation Admin. v. Robertson*, 422 U.S. 255,

[6] There is a statement in the Senate floor debate on the provision now present in section 101(2) that the phrase "conditions other than dishonorable" was "well-understood," 90 Cong. Rec. 3077 (1944), but this appears only to suggest that the core concept was well understood, not that the full scope of the term was well understood. Indeed, as described below, Congress left it to the VA to define the term by regulation.

263 (1975) (reasoning that an "unclear and ambiguous" statute "compell[ed] resort to the legislative history").

Section 5303 and the "conditions other than dishonorable" requirement of section 101(2) trace their origin to the Servicemen's Readjustment Act of 1944 ("the G.I. Bill"). Pub. L. No. 78-346, 58 Stat. 284; *see generally* Adams & Montalto, *supra*, at 84-85. The G.I. Bill provided a variety of educational, financial, and other benefits to former servicemembers. However, not all former servicemembers would be eligible. In the version of the G.I. Bill first introduced in Congress, section 300 barred the provision of benefits to servicemembers discharged for any of several enumerated reasons, including discharge: (1) by sentence of a court-martial (e.g., a Dishonorable discharge); (2) for being a conscientious objector; (3) as a deserter; or (4) of an officer by resignation for the good of the service. S. 1767, 78th Cong. § 300 (as introduced, Mar. 13, 1944).[7]

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[7] Specifically, as relevant here, section 300 stated that:

> The discharge or dismissal by reason of the sentence of a general court-martial of any person from the military or naval forces, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of a competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, shall bar all rights of such person, based upon the period of service from which he is so discharged or dismissed, under any laws administered by the [VA]. . . .

S. 1767, 78th Cong. § 300 (as introduced, Mar. 13, 1944).

The Senate committee amended the bill to add a new section, section 1603, while retaining the statutory bars in section 300. New section 1603 provided that:

> A discharge or release from active service under conditions other than dishonorable shall be a prerequisite to entitlement to veterans' benefits provided by this [A]ct. . . .

S. 1767 § 1603 (as reported to the Senate, Mar. 18, 1944). The committee report explained the dual purposes of this provision: to provide benefits to deserving servicemembers with "honest and faithful or otherwise meritorious" service even if they did not receive Honorable discharges, but to deny benefits to "unworthy" former servicemembers even if they were not given a Dishonorable discharge. S. Rep. No. 78-755, at 15 (1944). Specifically, the report explained:

> The purpose of this section is to provide a uniform basic entitlement contingent upon the type of release from active military or naval service. It provides that in order to be entitled to any veterans' benefits provided by this act . . . a veteran must have been discharged or released from active service under conditions other than dishonorable. . . . The amendment would remove a discrepancy in existing law which has been found to be highly undesirable, . . . relating to hospitalization whereby a veteran not dishonorably discharged may be entitled to hospitalization benefits. In practice it has been found that this permits most unworthy cases to be hospitalized often to the

> detriment of persons honorably discharged or discharged under conditions other than dishonorable. It is believed that the hospital facilities of the Veterans' Administration should be maintained for veterans whose service was honest and faithful or otherwise meritorious.
>
> Further, the amendment will correct hardships under existing laws requiring honorable discharge as prerequisite to entitlement. Many persons who have served faithfully and even with distinction are released from the service for relatively minor offenses, receiving a so-called blue discharge if in the Army or a similar discharge without honor if in the Navy. It is the opinion of the committee that such discharge should not bar entitlement to benefits otherwise bestowed unless the offense was such, as for example those mentioned in section 300 of the bill, as to constitute dishonorable conditions. A dishonorable discharge is effected only as a sentence of court martial, but in some cases offenders are released or permitted to resign without trial—particularly in the case of desertion without immediate apprehension. In such cases benefits should not be afforded as the conditions are not less serious than those giving occasion to dishonorable discharge by court martial.

*Id.* (emphasis added).

The committee's amendment was agreed to on the Senate floor. 90 Cong. Rec. 3075 (1944). There, the

sponsor of the G.I. Bill,[8] Senator Champ Clark, similarly explained the purpose of the "conditions other than dishonorable" standard on the Senate floor where the committee amendment was adopted. He reasoned that a person with poor conduct in the service might nevertheless be discharged without a court-martial because the military "did not want to take the trouble to court martial them and give them what they deserved—a dishonorable discharge." *See* 90 Cong. Rec. 3077. To Senator Clark, such a servicemember should not receive benefits. Senator Clark stated that the "conditions other than dishonorable" language meant that:

> if a man's service has been dishonorable, if he has been convicted of larceny or any other crime or has been convicted of chronic drunkenness or anything else one might think of, the [VA] will have some discretion with respect to regarding the discharge from the service as dishonorable.

*Id.* (emphasis added).[9] The House of Representatives version of the G.I. Bill would have restricted benefits

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[8] "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988) (quoting *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964)).

[9] In the same vein, a later report of the President's Commission on Veterans' Pensions, chaired by General Omar Bradley (VA Administrator from 1945 to 1947), explained that:

> The Congress did not want to use the words "honorably discharged" or "discharged under honorable conditions," because it was felt that such an eligibility requirement

to those discharged "under honorable conditions." S. 1767 § 1503 (as passed by the House, May 18, 1944). However, on the recommendation of the conference committee, both houses ultimately adopted the Senate's "conditions other than dishonorable" standard. H.R. Rep. No. 78-1624, at 26 (1944); 90 Cong. Rec. 5754 (June 12, 1944); 90 Cong. Rec. 5847 (June 13, 1944). The G.I. Bill was thus enacted with the section 300 bars and the "conditions other than dishonorable" requirement.

In enacting the G.I. Bill, Congress intended for benefits to be provided to former servicemembers "whose service was honest and faithful or otherwise meritorious," even if they were not discharged with Honorable status. S. Rep. No. 78-755, at 15. However, benefits were not to be provided to former servicemembers whose misconduct was "not less serious than those giving occasion to dishonorable discharge by court-martial," even if they did not receive a Dishonorable discharge. *Id.* Congress provided the VA with

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> was too restrictive. Neither did Congress want to use the words "not dishonorably discharged" because such words would have been too broad and opened the door to persons who were administratively discharged for conduct that was in fact dishonorable. The controversy was finally resolved by adopting the words "conditions other than dishonorable.". . . . The eligibility of persons discharged with [neither Honorable nor Dishonorable] discharges was left to a determination by the [VA] based on the pertinent facts. . . .

President's Comm'n on Veterans' Pensions, Staff of H. Comm. on Veterans' Affairs, 84th Cong., Rep. On Discharge Requirements for Veterans' Benefits 15-16 (Comm. Print 1956).

"discretion," 90 Cong. Rec. 3077, in determining the "conditions" under which a former servicemember was "[ ] worthy" of benefits, S. Rep. No. 78-755, at 15. Congress did not intend the specific provisions of section 300 to be the sole bar to veterans' benefits.

Though the section 300 bars are now codified at 38 U.S.C. § 5303(a)[10] and the "conditions other than dishonorable" requirement is codified at 38 U.S.C. § 101(2),[11] the meaning of and relationship between these statutory provisions have not materially changed since the G.I. Bill's enactment in 1944. Whether the statute is interpreted to expressly delegate to the VA the interpretation of "conditions other than dishonorable," or instead the delegation is implicit, we conclude that the VA has authority to define the term consistent with the Congressional purpose. *Chevron, U.S.A., Inc.*

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[10] In a 1958 reorganization of veterans' benefits statutes, section 300 was codified at 38 U.S.C. § 3103(a). Pub. L. No. 85-857 § 3103, 72 Stat. 1105, 1230 (1958). In 1991, section 3103 was renumbered as 5303. Pub. L. No. 102-40, Title IV, § 402(b)(1), 105 Stat. 187, 238-39 (1991).

[11] Section 606 of the House version of the 1944 G.I. Bill provided that "[t]he term 'veteran' as used in this title shall mean a person who served in the active service of the armed forces during a period of war in which the United States has been or is engaged and who has been discharged or released therefrom under honorable conditions." S. 1767 § 606 (as passed by the House, May 18, 1944). At conference committee, section 606 was moved to section 607 and revised to use the "under conditions other than dishonorable" standard. H.R. Rep. No. 78-1624, at 13. Section 607 was part of the enacted G.I. Bill. G.I. Bill § 607. The current definition of "veteran," codified at 38 U.S.C. § 101, derives from section 607 and was enacted in the 1958 reorganization of veterans' benefits statutes. Pub. L. 858-57 § 101, 72 Stat. at 1106.

*v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (discussing "express delegation" and "implicit" delegation of an interpretive question to an agency).

Since 1946, VA regulations have provided that a discharge for "willful and persistent misconduct" was under "dishonorable conditions," and thus was a bar to benefits. 11 Fed. Reg. 12,869, 12,878 (Oct. 31, 1946). The bar has existed in its current form—codified at 38 C.F.R. § 3.12(d)(4)—since 1963. 28 Fed. Reg. 123 (Jan. 4, 1963). The "willful and persistent misconduct" bar is consistent with the statute in denying benefits to those who committed serious misconduct even if they did not receive a Dishonorable discharge.

Our conclusion is further supported by Congress' 1977 amendment to what is now section 5303. On April 5, 1977, President Carter initiated the Special Discharge Review Program. Under the Program, as relevant here, a Vietnam-era servicemember with a discharge "Under Other than Honorable Conditions" could obtain an upgrade to a "general discharge under honorable conditions" if a Discharge Review Board found that "such action is appropriate based on all of the circumstances of a particular case and on the quality of the individual's civilian records since discharge." *Discharge Review Boards*, 42 Fed. Reg. 21,308, 21,310 (Apr. 26, 1977).[12] Because Rule 3.12(a) provides that "[a] discharge under honorable conditions is binding on

[12] Mr. Garvey's upgrade to an "Under Honorable Conditions (General)" discharge status was under the Special Discharge Review Program.

the [VA] as to character of discharge," some servicemembers who were ineligible for benefits (due, for example, to the "willful and persistent misconduct" bar), would become eligible because of their upgrade under the Program.

Congress concluded that this aspect of the Program was unfair because it upgraded Vietnam-era servicemembers but not other servicemembers, and because it unfairly allowed those with problematic service records to obtain veterans benefits. S. Rep. No. 95-305, at 3 (1977); 123 Cong. Rec. 28,193, 28,198 (Sep. 8, 1977). Because of these concerns, in 1977, Congress passed an "Act to deny entitlement to veterans' benefits to certain persons who would otherwise become so entitled solely by virtue of the administrative upgrading under" the Program. Pub. L. No. 95-126, 91 Stat. 1106 ("the 1977 Act"). The 1977 Act provided, in relevant part, that servicemembers upgraded to "a general or honorable discharge" under the Program were ineligible for veterans benefits unless, after a case-by-case review by a Discharge Review Board, the VA determined that the veteran would have received the upgraded discharge status even under generally applicable standards. *Id.*[13]

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[13] More specifically, the 1977 Act's exclusion is now codified at 38 U.S.C. § 5303(e)(2), which provides:

> Notwithstanding any other provision of law . . . no person discharged or released from active military, naval, or air service under other than honorable conditions who has been awarded a general or honorable discharge under revised standards for the review of

The structure and purpose of the 1977 Act support the "willful and persistent misconduct" bar. The Act presupposes that a servicemember discharged under less than honorable conditions would, but for his or her upgrade under the Program, not have been eligible for benefits in at least some circumstances. At the time, the "willful and persistent misconduct" bar had been in force for over three decades. *See* 11 Fed. Reg. at 12,878 (amending regulation to add the "willful and persistent misconduct" bar). And Congress was well aware that if the servicemember had been discharged for "willful and persistent misconduct" he or she would not be not entitled to veterans' benefits. *See, e.g.*, *S.* Rep. No. 95-305, at 27 (quoting 38 C.F.R. § 3.12 (1977)); H.R. Rep. No. 95-580, at 9 (same); *Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings: Hearing Before the Committee on Veterans' Affairs*, 95th Cong. 354-55 (1977) (statement of Sen. Thurmond) (same). That Congress required an upgraded servicemember to remain subject to the VA's rules under his or her original discharge status (absent a specific dispensation) suggests approval of those rules, including the "willful and persistent misconduct" bar.

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> discharges . . . as implemented on or after April 5, 1977, under the Department of Defense's special discharge review program . . . , shall be entitled to benefits under laws administered by the Secretary except upon a determination, based on a case-by-case review, under [uniform and historically consistent] standards . . . that such person would be awarded an upgraded discharge under such standards.

We reject Mrs. Garvey's challenge to the "willful and persistent misconduct" regulatory bar.

## CONCLUSION

We uphold the VA's interpretation that a discharge for "willful and persistent misconduct" is, under the statute, "issued under dishonorable conditions." See 38 C.F.R. § 3.12(d). Mr. Garvey's discharge was for willful and persistent misconduct, so Mrs. Garvey is not entitled to veterans' benefits. The decision of the Veterans Court is

**AFFIRMED**

## APPENDIX B

*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 18-5059

DIANA GARVEY, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

Before DAVIS, *Chief Judge.*

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.*

DAVIS, *Chief Judge*: Diana Garvey is the surviving spouse of the late John P. Garvey, who served in the U.S. Army from February 1966 to May 1970 before receiving a discharge under conditions other than honorable. Mr. Garvey died in August 2010. Mrs. Garvey now appeals an August 28, 2018, Board of Veterans' Appeals decision that denied entitlement to VA death benefits because the Board determined that Mr. Garvey's discharge was due to willful and persistent misconduct and thus served as a bar to benefits. Because the Board did not err when it determined that the character of Mr. Garvey's discharge served as a bar to Mrs. Garvey's claim, the Court will affirm the Board's decision.

## I. ANALYSIS

To be eligible for VA benefits, a service member must be a "veteran," defined by Congress as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."[1] In addition to this general requirement, Congress has imposed additional bars to the receipt of benefits for any individual who was (1) discharged or dismissed by reason of the sentence of a general court martial; (2) discharged as a conscientious objector who refused to perform military duty; (3) a deserter; (4) absent without leave for more than 180 days; (5) an officer who resigned for the good of the service; or (6) discharged during a period of hostilities as an alien.[2] VA regulations further provide that a discharge or release under several additional circumstances, including a discharge due to willful and persistent misconduct, "is considered to have been issued under dishonorable conditions.[3]

Mrs. Garvey presents two arguments on appeal. First, she contends that VA was without authority to promulgate its "willful and persistent misconduct" regulation, asserting that Congress specifically limited the circumstances that would result in a bar to benefits to those enumerated in section 5303(a). Second, she argues that the Board's determination that Mr. Garvey's discharge was due to willful and persistent misconduct

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[1] 38 U.S.C. § 101(2).

[2] 38 U.S.C. § 5303(a).

[3] 38 C.F.R. § 3.12 (2019).

was arbitrary and capricious, because that standard is not listed in section 5303(a). She does not otherwise challenge the Board's decision or its findings.

In *Camarena v. Brown*,[4] the Court considered arguments nearly identical to those made by Mrs. Garvey and held that § 3.12(d) was valid. Mrs. Carrera recognizes the binding effect of *Camarena*, but she contends that "the courts probably made a mistake when they ruled on this case,"[5] because neither this Court nor the U.S. Court of Appeals for the Federal Circuit cited *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.* ("*Chevron*")[6] in its analysis. Specifically, she asserts that the Court did not properly consider whether section 5303 was ambiguous and whether Congress intended the list of bars to benefits in section 5303(a) to be exhaustive.

But although the Court in *Camarena* did not specifically cite *Chevron*, it did consider these issues. After examining the plain meaning and legislative history of section 5303, the Court held that

> there is simply nothing in [section 5303], nor in the overall statutory scheme encompassed by either title 38 of the U.S. Code (Veteran's Benefits) or title 10 (Armed Services), that would suggest that the definition of "veteran" was to

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[4] 6 Vet.App. 565 (1994), *aff'd*, 60 F.3d 843 (Fed. Cir. 1995).

[5] Appellant's Brief at 7.

[6] 67 U.S. 837 (1984).

> be entirely removed from the rulemaking power of the Secretary of Veterans Affairs.[7]

The Court concluded that, "[w]hether a 'plain meaning' or congressional intent analysis is used, it is abundantly clear that Congress did not say or intend to say that only those receiving 'dishonorable discharges' would be denied veteran status. We find the regulation valid."[8]

Mrs. Garvey has not convinced the Court that reconsideration of *Camarena* is warranted or that § 3.12(d) is invalid. And because her second argument is premised on her first, she has provided no grounds to set aside the Board's decision.[9] The Court will, accordingly, affirm the Board's decision.

## II. CONCLUSION

On consideration of the foregoing, the Court AFFIRMS the Board's August 28, 2018, decision.

DATED: September 30, 2019

Copies to:

Robert C. Brown, Jr., Esq.

VA General Counsel (027)

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[7] *Camarena*, 6 Vet.App. at 567.

[8] *Id.* at 568.

[9] *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table);

## APPENDIX C

## BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

[SEAL]

IN THE APPEAL OF
**DIANA GARVEY** Docket No. 13-18 662A
IN THE CASE OF
**JOHN P. GARVEY**
REPRESENTED BY
**Robert C. Brown, Attorney**

DATE: August 28, 2018

### ORDER

**As the character of the service member's discharge is a bar to his surviving spouse's eligibility for VA death benefits, to include Dependency and Indemnity Compensation (DIC) benefits and nonservice-connected death pension benefits, the appeal is denied.**

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### FINDINGS OF FACT

1. During his active service, the service member was the subject of one Article 15 punishment and was convicted of four offenses at four separate special courts martial, and he was discharged from service under conditions other than honorable.

2. Due to his willful and persistent misconduct, the service member's discharge is considered dishonorable

for VA purposes, and the most probative competent evidence of record establishes that he was not insane at the time of his in-service willful and persistent misconduct.

## CONCLUSION OF LAW

The character of the service member's discharge is under dishonorable conditions and constitutes a bar to the receipt of VA death benefits. 38 U.S.C. §§ 101, 1310, 1541, 5107 5303; 38 C.F.R. §§ 3.1, 3.3, 3.12, 3.102, 3.312, 3.354.

## REASONS AND BASES FOR FINDINGS AND CONCLUSION

The service member served on active duty from February 1966 to May 1970. Because he does not have the status of a veteran for VA benefits purposes, the Board shall refer to him as "the service member" throughout this decision. He was discharged from service "Under Conditions Other Than Honorable." He died in August 2010, and the appellant is his surviving spouse.

This matter first came before the Board of Veterans' Appeals (Board) on appeal from a November 2012 decision.

In June 2104, the appellant testified at a Board hearing.

The Board denied this appeal in a March 2016 decision. The appellant appealed the Board's decision to

the United States Court of Appeals for Veterans Claims (Court), which issued a memorandum decision in April 2017 vacating the Board's decision and remanding the matter for action consistent with the Court's decision.

The Board has limited the discussion below to the relevant evidence required to support its finding of fact and conclusion of law, as well as to the specific contentions regarding the case as raised directly by the appellant and those reasonably raised by the record. *See Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015); *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008).

**Whether the character of the service member's discharge is a bar to his surviving spouse's eligibility for VA death benefits.**

A. Applicable Law

The appellant filed a claim for both DIC benefits and nonservice-connected death pension benefits in September 2012. A necessary prerequisite for eligibility for these benefits is the underlying veteran status of the appellant's deceased husband. *See* 38 U.S.C. § 1310; 38 C.F.R. § 3.312 (providing the requirements for DIC benefits), and 38 U.S.C. § 1541; 38 C.F.R. § 3.3 (providing the requirements for nonservice-connected death pension benefits).

For both of these benefits, the term "veteran" means a person who served in the active military, naval, or air service, and who was discharged or released therefrom

under conditions other than dishonorable. 38 U.S.C. § 101(2); 38 C.F.R. § 3.1.

There are two types of character of discharge bars to establishing entitlement for VA benefits: statutory bars found at 38 U.S.C. § 5303 (a) and 38 C.F.R. § 3.12(c), and regulatory bars listed in 38 C.F.R. § 3.12(d).

The statutory bars under 38 U.S.C. § 5303 (a) and codified at 38 C.F.R. § 3.12(c) are not applicable in this case. The regulatory bars under 38 C.F.R. § 3.12(d) state that a discharge is considered to have been issued under dishonorable conditions for numerous offenses, including willful and persistent misconduct. Specifically, the regulation states that "a discharge under other than honorable conditions" will be considered dishonorable "if it is determined that it was issued because of willful and persistent misconduct." 38 C.F.R. § 3.12(d)(4).

A discharge because of a minor offense will not be considered willful and persistent misconduct if the appellant's service was otherwise honest, faithful, and meritorious. *Id.* A discharge or release from service under either the statutory or regulatory bars is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense. 38 C.F.R. § 3.12(b).

VA's definition of insanity is set forth in 38 C.F.R. § 3.354(a) and does not necessarily have the common components of insanity definitions used in criminal

cases. *See Gardner v. Shinseki*, 22 Vet. App. 415, 419-21 (2009). VA's definition states:

> An insane person is one (1) who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or (2) who interferes with the peace of society; or (3) who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides. 38 C.F.R. § 3.354 (a).

The phrase "due to disease" applies to all three circumstances of the insanity definition. *Zang v. Brown*, 8 Vet. App. 246, 253 (1995). Although insanity need not be causally connected to the misconduct that led to the discharge, it must be concurrent with that misconduct and requires competent medical evidence to establish a diagnosis. *See Beck v. West*, 13 Vet. App. 535, 539 (2000). The question (and only relevant timeframe) is whether the claimant was insane *at the time* he committed the offense. *Gardner*, 22 Vet. App. at 420-21.

## B. Discussion

In this case, the question for the Board is whether the service member met VA's definition of insanity at the time of his in-service offenses.

The service member served on active duty from February 1966 to May 1970. During that time, he received numerous punishments for misconduct. In January 1967, he was involved in an incident with a German taxi driver, which resulted in a charge of disorderly conduct and forfeiture of $25 in pay. In April 1968, he was arrested in Vietnam with 4 pounds of marijuana. He was charged with possession of marijuana and intent to sell marijuana; he was convicted and sentenced to 90 days of confinement.

Overall, he was convicted of four separate offenses at four separate courts martial. In June 1968, he was convicted of possession of 4 pounds of marijuana. He was sentenced to 3 months of confinement, ordered to forfeit a portion of his pay, and reduced in rank. In November 1968, he was found to have been absent without leave (AWOL) from September 9, 1968, until October 1, 1968. He was given a suspended sentence of confinement and ordered to forfeit a portion of his pay. In June 1969, he was again convicted of having been AWOL from April 18, 1969 to June 5, 1969. He was given a suspended sentence of confinement and ordered to forfeit a portion of his pay. In April 1970, he was convicted of having been AWOL from February 16, 1970 to April 1, 1970. He was sentenced to 5 months of confinement and forfeited a portion of his pay.

In April 1970, an Army chaplain determined that the service member was not amenable to rehabilitation, and he recommended that service member be discharged from the Army. At a separate April 1970 psychiatric evaluation, two Army physicians stated that

service member "was and is mentally responsible to distinguish right from wrong and adhere to the right." They also noted that the service member had no disqualifying mental or physical disease or defect sufficient to warrant discharge through medical channels.

A May 1970 separation document noted the service member's four convictions, and found that he had approximately 181 days of bad time due to his multiple periods of absences and confinement. In May 1970, the service member was notified that he was to be discharged as unfit for service. The service member waived consideration of his case before a board of officers or for a personal appearance. He acknowledged that, because of the terms of his discharge, he "may be ineligible for many or all benefits as a veteran under both Federal and State laws." He was terminated from service under "Other Than Honorable Conditions."

In April 1977, the service member sought an upgrade of his discharge from the "DOD Discharge Review Program (Special)." In June 1977, that panel upgraded the service member's discharge to "Under Honorable Conditions (General)." The service member was issued a new DD-214 reflecting this change. Subsequently, however, in 1978, the Army's Discharge Review Board voted to not affirm the service member's upgraded discharge, finding that the under other than honorable conditions discharge was consistent with the standards of the Army at the time of his discharge, and noting that the service member had 186 days of time lost.

At present, the character of his service remains, absent evidence of insanity, a bar to his (and now his spouse's) receipt of VA benefits. *See* 38 C.F.R. § 3.312(d)(4). The only way to rebut his current discharge is through a showing that he was insane at the time of his offenses.

There were initially differing medical opinions as to this question.

In a September 2006 letter, W.R.R., MD, wrote that the service member suffered from PTSD, and that his "symptoms began while he was in Vietnam and started after the severe rocket attack at Camp Eagle in March 1968." Dr. W.R.R. went on to state that the service member's "PTSD symptoms started before he was discharged from the Army." Dr. W.R.R. did not, however, address the question of whether the service member was insane at the time of his in-service offenses.

The service member, during his lifetime, underwent a VA examination in August 2008. The examiner determined that the service member's actions were "characterized by a prolonged period of deviation from his normal behavior." The examiner stated that the service member was "clearly not functioning according to the accepted standards of the community to which he belonged by birth and education." The examiner therefore concluded that it is at least as likely as not that, as it pertains to the service member's offenses in 1970 "and in the year or so before and after, was functioning in a way that fits the definition of insanity." The examiner did not, however, directly address the service member's earlier incidents in 1967 and 1968.

In contrast, an April 1970 in-service psychiatric evaluation determined that the service member "was and is mentally responsible to distinguish right from wrong and adhere to the right." That evaluation also noted that the service member had " no disqualifying mental or physical disease or defect sufficient to warrant discharge."

Additionally, a prior Veterans Health Administration (VHA) medical opinion was obtained from a psychiatrist in August 2015, which is in the record. However, it was deemed not adequate.

Specifically, this matter was previously appealed to the Court, which determined in the April 2017 memorandum decision, that a new medical opinion was needed because the prior evidence did not explain whether the service member's behavior was potentially aggravated by his later diagnosis of PTSD, thereby contributing to his in-service offenses. Moreover, according to the Court, the evidence did not explain whether his preexisting antisocial behavior possibly contributed to his inability to conform his conduct to community standards when he committed the in-service offenses. This was especially concerning to the Court given that VA's definition of "insanity" specifically includes those who have become antisocial.

Accordingly, the Board referred the matter to VHA for a second expert medical opinion. The Board asked two questions: (1) whether it is at least as likely as not (i.e., at least equally probable) that the service member's antisocial features were aggravated by his later

diagnosed PTSD, and (2) whether it is at least as likely as not (i.e., at least equally probable) that his antisocial personality rose to the level of "insanity" at the time of his in-service offense.

The opinion was authored in April 2018. The expert, a VA staff psychiatrist, gave his opinion that while it is possible that, if the service member had PTSD at the time of his service (which was questionable according to the VHA expert), such could have contributed to some of the behaviors in question (which the examiner also noted as questionable); it certainly cannot account for all of the aforementioned behaviors. Additionally, the expert went on, while the possible presence of PTSD cannot adequately explain all behaviors in question, the presence of Antisocial Personality Disorder can making it, by far, the most likely explanation. As such, the expert concluded, it was not at least equally probable that the service member's antisocial features were sufficiently aggravated by his later diagnosis of PTSD.

The expert gave an extensive supporting rationale. In brief, the expert discussed question (2) first, starting off by giving the DSM-5 definition of Antisocial Personality Disorder and reviewed VA's definition of insanity. The examiner then broke down VA's definition and first focused on the "due to" clause. After explaining the distinction between organic/physiologic diseases and personality disorders, the examiner opined that there was no evidence in the record to suggest that the service member was suffering from a possible organic issue to account for his behavior. The expert focused on the

in-service psychiatric evaluation conducted in April 1970, which he found important as it was the only evaluation conducted contemporaneous with the events. The examiner explained that since it was determined that the service member could distinguish between right and wrong at that time, he would then not meet the legal definition of insanity, and would therefore be culpable for his actions.

Next, the expert explained that there was not a prolonged deviation from the service member's normal method of behavior. The expert explained that one should exhibit traits of Antisocial Personality Disorder during childhood or adolescence, which would mean prior to service in the instant case. The expert then cited multiple instances in the record supporting this, including criminal conduct prior the service member's entrance into service, plus the fact that he completed only 2 years of high school. The expert found this important for several reasons, including that the pre-service pattern of behavior strongly suggested that the specific behaviors during service were not precipitated by service. Rather, his in-service behavior was "very much *consistent* with *his* normal pattern of behavior." (Emphases in original.)

The expert next discussed the VA insanity definition requiring a lack of adaptability to the community's social customs. Finally, the expert examined the " not mentally defective or constitutionally psychopathic" component. The expert explained that one with Antisocial Personality Disorder would be considered "psychopathic," which would preclude the service member

from meeting VA's definition of insanity unless there was a superimposed psychosis and this service member's records gave "no indication whatsoever that at any time (and particularly during the events in question) the [service member] was psychotic."

The expert then summarized that because the service member's actions were not secondary to a disease, nor were these behaviors a deviation from his normal pattern of behavior, nor did he truly lack the ability to adjust to the social customs of the community in which he resided, and given the diagnosis of Antisocial Personality Disorder, he would be, by definition, considered constitutionally psychopathic, which is why the expert concluded that he did not meet the criteria for VA's specific definition of insanity.

The expert then discussed his reasoning behind his negative opinion starting with the Board's first question. The expert stated that while it is certainly possible that if the service member had PTSD at the time of his service, such a diagnosis could have contributed to some of the behaviors in question, but the preponderance of the evidence overwhelmingly suggested that this was not probable. The examiner first deconstructed the positive opinion given by Dr. W.R.R. The expert particularly focused on the questionable veracity of the statement the service member gave to Dr. W.R.R., which the expert noted as the sole evidence supporting the opinion. The expert explained that, given the service member's documented propensity for changing his explanation for his in-service behavior, which was motivated by secondary gain, the

statements given to Dr. W.R.R. should have been given greater scrutiny. The expert then exhaustively and carefully documented the repeated instances over the years where the service member "changed his story in regards to the substantive facts, as well as to assigning an underlying explanation for his behavior." The expert found this "overall presentation [] very much consistent with the hallmarks of Antisocial Personality Disorder, rather than that of PTSD."

The expert found it debatable whether the service member did have PTSD at the time of any of the in-service events. He noted that some of the events occurred before the PTSD stressful events, including prior to service. The expert then opined that although PTSD could possibly have contributed to the service member's possession/use of marijuana during service, it would not account for his attempt to sell the same. Rather, this would be consistent with Antisocial Personality Disorder. Likewise, while the service member's AWOLs could possibly be associated with avoidance symptoms associated with PTSD, "the more likely explanation is that these were simply a continuation of his antisocial behavior" when considered in the context of all the other incidents.

The Board finds this April 2018 VHA expert's opinion to be the most persuasive and probative evidence in this case because it was based on an accurate medical history and provides an explanation that contains clear conclusions and supporting data, and because it addresses the concerns raised in the Court's April 2017 memorandum decision. *See Nieves-Rodriguez v. Peake*,

22 Vet. App. 295, 304 (2008). As the most probative evidence, it therefore establishes that the service member was not insane at the time of his actions leading to his discharge.

In an August 2018 brief, the appellant's attorney representative presented the primary contention. The attorney argued that Congress did not express an intent for willful and persistent misconduct to be a bar to receipt of VA benefits. Citing *Chevron* deference, the attorney argued that Congress was not ambiguous when it enacted § 5303. Rather, VA's addition of willful and persistent misconduct to the list of disqualifying acts added a seventh bar to benefits. Adding this seventh bar to benefits, according to the attorney, was arbitrary and capricious.

The attorney next argued that there is a split in the current precedent. The attorney first discussed *Camarena v. Brown*, 60 F.3d 843 (Fed. Cir. 1995) (*per curiam*), which found § 3.12 valid and within VA's rulemaking power, including where it considered a discharge to have been issued under dishonorable conditions if given for willful and persistent misconduct. In contrast, the attorney next cited *Garvey v. Shulkin*, No. 16-1407 (Vet. App. April 11, 2017). In that single judge decision, the Court commented in a footnote that there was a potential conflict between *Camarena* and *Lane v. Principi*, 339 F.3d 1331, 1340-41 (Fed. Cir. 2003). The Court "acknowledge[d] this potential conflict in caselaw and the need for clarification[.]"

Ultimately, the appellant's attorney concluded that there was potential agency overreach in its rulemaking thereby making the "willful and persistent misconduct" clause unenforceable.

The Board appreciates this potential conflict in the Federal Circuit's jurisprudence. Specifically, under 38 U.S.C. § 101(2), "[t]he term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." Here, because the service member here was not released under conditions other than dishonorable, the argument would be that § 3.12 is invalid to the extent it excludes the service member as a "veteran." In contrast, 38 U.S.C. § 5303 establishes certain bars to VA benefits, including for those including those sentenced under a general-court martial. The Court and Federal Circuit in *Camarena* affirmed VA's rulemaking authority for § 3.12, whereas the Court in *Garvey* highlighted the potential conflict as to whether the promulgating authority for § 3.12 may be 38 U.S.C. § 101(2) rather than § 5303. If the promulgating authority is § 101(2) instead of § 5303, the addition of willful and persistent misconduct as a bar to VA benefits in § 3.12 may represent an impermissible restriction on those who may be considered a "veteran."

At present, the Board is without jurisdictional authority to address this potential conflict in the jurisprudence. In its decisions, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs and precedent opinions of the General

Counsel of the Department of Veterans Affairs. 38 U.S.C. § 7104(c); 38 C.F.R. § 20.101(a). Currently, the Federal Circuit's decision in *Camarena* is binding precedent to the extent it affirmed § 3.12 as valid. Thus, the attorney sets up a legal dispute that must be resolved by the Court and Federal Circuit.

To conclude, the Board finds that the preponderance of the evidence shows that the Veteran's May 1970 discharge was a result of his persistent and willful misconduct and is considered dishonorable, and that the Veteran was not insane at the time of his offense. Thus, the benefit-of-the-doubt doctrine is not applicable. *See* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102. Because of this discharge, he does not have "veteran" status for VA benefits purposes, and the appellant is barred from any applicable VA death benefits. The claim is therefore denied.

/s/ Ryan T. Kessel
RYAN T. KESSEL
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD C. Bosely, Counsel

## APPENDIX D

NOTE: This order is nonprecedential.

**United States Court of Appeals for the Federal Circuit**

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**DIANA GARVEY,**
*Claimant-Appellant*

v.

**ROBERT WILKIE,**
**SECRETARY OF VETERANS AFFAIRS,**
*Respondent-Appellee*

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2020-1128

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Appeal from the United States Court of Appeals for Veterans Claims in No. 18-5059, Senior Judge Robert N. Davis.

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**ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

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Before PROST, *Chief Judge*, NEWMAN, LOURIE, SCHALL*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges.*

PER CURIAM.

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* Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

**ORDER**

Appellant Diana Garvey filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by Appellee Robert Wilkie The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on December 11, 2020.

FOR THE COURT

December 4, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

## APPENDIX E

## RELEVANT STATUTES AND REGULATIONS

### 10 U.S.C. § 815. Art. 15. Commanding officer's non-judicial punishment

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a), any commanding officer may, in addition to or in lieu of admonition

or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial –

(1) upon officers of his command –

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command –

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month's pay per month for three months;

(2) upon other personnel of his command –

(A) if imposed upon a person attached to or embarked in a vessel, confinement for not more than three consecutive days;

(B) correctional custody for not more than seven consecutive days;

(C) forfeiture of not more than seven days' pay;

(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(G) detention of not more than 14 days' pay;

(H) if imposed by an officer of the grade of major or lieutenant commander, or above –

(i) the punishment authorized under clause (A);

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of one month's pay per month for two months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an

enlisted member in a pay grade above E-4 may not be reduced more than two pay grades;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purposes of this subsection, "correctional custody" is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments authorized under subsection (b)(2)(A)-(G) as the Secretary concerned may specifically prescribe by regulation.

(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating –

(1) arrest in quarters to restriction;

(2) confinement to correctional custody;

(3) correctional custody or confinement to extra duties or restriction, or both; or

(4) extra duties to restriction;

the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of

the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of –

(1) arrest in quarters for more than seven days;

(2) correctional custody for more than seven days;

(3) forfeiture of more than seven days' pay;

(4) reduction of one or more pay grades from the fourth or a higher pay grade;

(5) extra duties for more than 14 days;

(6) restriction for more than 14 days; or

(7) detention of more than 14 days' pay;

the authority who is to act on the appeal shall refer the case to a judge advocate or a lawyer of the Department of Homeland Security for consideration and

advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article and may also prescribe that certain categories of those proceedings shall be in writing.

* * *

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**10 U.S.C. § 822. Art. 22. Who may convene general courts-martial**

(a) General courts-martial may be convened by –

(1) the President of the United States;

(2) the Secretary of Defense;

(3) the commanding officer of a unified or specified combatant command;

(4) the Secretary concerned;

(5) the commanding officer of an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(6) the commander of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

(7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;

(8) any other commanding officer designated by the Secretary concerned; or

(9) any other commanding officer in any of the armed forces when empowered by the President.

(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

* * *

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**10 U.S.C. § 823. Art. 23. Who may convene special courts-martial**

(a) Special courts-martial may be convened by –

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary

air field, or other place where members of the Army or the Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.

* * *

**Servicemen's Readjustment Act (1946)**

TITLE I

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CHAPTER III—REVIEWING AUTHORITY

SEC. 300. The discharge or dismissal by reason of the sentence of a general court martial of any person from the military or naval forces, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, shall bar all rights of such person, based upon the period of service from which he is so discharged or dismissed, under any laws administered by the Veterans' Administration : *Provided*, That in the case of any such person, if it be established to the satisfaction of the Administrator that at the time of the commission of the offense such person was insane, he shall not be precluded from benefits to which he is otherwise entitled under the laws administered by the Veterans' Administration : *And provided further*, That this section shall not apply to any war risk, Government (converted) or national service life-insurance policy.

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TITLE VI

CHAPTER XV—GENERAL ADMINISTRATIVE AND PENAL PROVISIONS

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SEC. 1503. A discharge or release from active service under conditions other than dishonorable shall be a prerequisite to entitlement to veterans' benefits provided by this Act or Public Law Numbered 2, Seventy-third Congress, as amended.

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**38 U.S.C. § 697c. Discharge or release as prerequisite to benefits (1946).**

A discharge or release from active service under conditions other than dishonorable shall be a prerequisite to entitlement to veterans' benefits provided by this chapter or sections 701-703, 704, 105, 706, 707-710, 712-715. 717, 718, 720, and 721 of this title.

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**38 U.S.C. § 101. Definitions**

For the purposes of this title –

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(2) The term "veteran" means a person who served in the active military, naval, or air service, and

who was discharged or released therefrom under conditions other than dishonorable.

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**38 U.S.C. § 501. Rules and regulations**

(a) The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including –

(1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;

(2) the forms of application by claimants under such laws;

(3) the methods of making investigations and medical examinations; and

(4) the manner and form of adjudications and awards.

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**38 U.S.C. § 1310. Deaths entitling survivors to dependency and indemnity compensation**

(a) When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Secretary shall pay dependency and

indemnity compensation to such veteran's surviving spouse, children, and parents. The standards and criteria for determining whether or not a disability is service-connected shall be those applicable under chapter 11 of this title.

(b) Dependency and indemnity compensation shall not be paid to the surviving spouse, children, or parents of any veteran dying after December 31, 1956, unless such veteran (1) was discharged or released under conditions other than dishonorable from the period of active military, naval, or air service in which the disability causing such veteran's death was incurred or aggravated, or (2) died while in the active military, naval, or air service.

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**38 U.S.C. § 1541. Surviving spouses of veterans of a period of war**

(a) The Secretary shall pay to the surviving spouse of each veteran of a period of war who met the service requirements prescribed in section 1521(j) of this title, or who at the time of death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability, pension at the rate prescribed by this section, as increased from time to time under section 5312 of this title.

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**38 U.S.C. § 5303. Certain bars to benefits**

(a) The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person on the ground that such person was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or as a deserter, or on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence, or of an officer by the acceptance of such officer's resignation for the good of the service, or (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10.

* * *

(e)(1) Notwithstanding any other provision of law, (A) no benefits under laws administered by the Secretary shall be provided, as a result of a change in or new issuance of a discharge under section 1553 of title 10, except upon a case-by-case review by the board

of review concerned, subject to review by the Secretary concerned, under such section, of all the evidence and factors in each case under published uniform standards (which shall be historically consistent with criteria for determining honorable service and shall not include any criterion for automatically granting or denying such change or issuance) and procedures generally applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditions; and (B) any such person shall be afforded an opportunity to apply for such review under such section 1553 for a period of time terminating not less than one year after the date on which such uniform standards and procedures are promulgated and published.

(2) Notwithstanding any other provision of law –

(A) no person discharged or released from active military, naval, or air service under other than honorable conditions who has been awarded a general or honorable discharge under revised standards for the review of discharges, (i) as implemented by the President's directive of January 19, 1977, initiating further action with respect to the President's Proclamation 4313 of September 16, 1974, (ii) as implemented on or after April 5, 1977, under the Department of Defense's special discharge review program, or (iii) as implemented subsequent to April 5, 1977, and not made applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditions, shall be entitled to benefits under laws administered by

the Secretary except upon a determination, based on a case-by-case review, under standards (meeting the requirements of paragraph (1) of this subsection) applied by the board of review concerned under section 1553 of title 10, subject to review by the Secretary concerned, that such person would be awarded an upgraded discharge under such standards; and

(B) such determination shall be made by such board (i) on an expedited basis after notification by the Department to the Secretary concerned that such person has received, is in receipt of, or has applied for such benefits or after a written request is made by such person or such determination, (ii) on its own initiative before October 9, 1978, in any case where a general or honorable discharge has been awarded before October 9, 1977, under revised standards referred to in clause (A)(i), (ii), or (iii) of this paragraph, or (iii) on its own initiative at the time a general or honorable discharge is so awarded in any case where a general or honorable discharge is awarded after October 8, 1977.

If such board makes a preliminary determination that such person would not have been awarded an upgraded discharge under standards meeting the requirements of paragraph (1) of this subsection, such person shall be entitled to an appearance before the board, as provided for in section 1553(c) of title 10, prior to a final determination on such question and shall be given written notice by the board of such preliminary determination and of the right to such appearance. The Secretary shall, as soon as administratively feasible,

notify the appropriate board of review of the receipt of benefits under laws administered by the Secretary, or of the application for such benefits, by any person awarded an upgraded discharge under revised standards referred to in clause (A)(i), (ii), or (iii) of this paragraph with respect to whom a favorable determination has not been made under this paragraph.

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**Department of Veterans Affairs Regulation (1946)**

1064. (A) CHARACTER OF DISCHARGE UNDER PUBLIC NO. 2, 73D CONGRESS. [AS AMENDED, AND UNDER PUBLIC NO. 346, 78TH CONGRESS.—To be entitled to compensation or pension under Veterans Regulation No. 1 (a), as amended, the period of active service upon which claim is based must have been terminated by discharge or release under conditions other than dishonorable. In other words benefits under Public No. 2, 73d Congress, and No. 346, 76th Congress, are barred where the person was discharged under dishonorable conditions. The requirement of the words "dishonorable conditions" will be deemed to have been met when it is shown that the discharge or separation from active military or naval service was (1) for mutiny, (2) spying or (3) for an offense involving moral turpitude or wilful and persistent misconduct, of which convicted by a civil or military court: Provided, however, That where service as otherwise honest, faithful and meritorious a discharge or separation other than

dishonorable because of the commission of a minor offense will not be deemed to constitute discharge or separation under dishonorable conditions.

* * *

(C) The acceptance of an undesirable or blue discharge to escape trial by general court-martial will, by the terms of section 1503, Public No 346, 78th Congress, be a bar to benefits under Public No. 2, 73d Congress, as amended, and Public No. 346, 78th Congress. as it will be considered the discharge was under dishonorable conditions.

(D) An undesirable or blue discharge issued because of homosexual acts or tendencies generally will be considered as under dishonorable conditions and a bar to entitlement under Public No. 2, 73d Congress, as amended, and Public No. 346, 78th Congress. However, the facts in a particular case nay warrant a different conclusion, in which event the case should be submitted to central office for the attention and consideration of the director of the service concerned. (As to the effect of alienage see S. & P. R-1001 (J)). (August 9, 1946.)

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**38 C.F.R. § 3.1 Definitions.**

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(d) *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.

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(n) *Willful misconduct* means an act involving conscious wrongdoing or known prohibited action. A service department finding that injury, disease or death was not due to misconduct will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the facts and the requirements of laws administered by the Department of Veterans Affairs.

(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.

(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (See §§ 3.301, 3.302.)

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**38 C.F.R. § 3.12 Character of discharge.**

(a) If the former service member did not die in service, 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. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

* * *

(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(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. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not

otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term *established basic eligibility to receive Department of Veterans Affairs benefits* means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can estalish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background,

educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of

willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

(e) An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(f) An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (h)(1), (2) and (3) of this section by a discharge review board established under 10 U.S.C. 1553 set aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(g) An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d), but not paragraph (c), of this section provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to an persons administratively discharged or released from active military, naval or air service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(h) Unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (g) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

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