



The Newsletter of the
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the National Lawyers Guild

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Don't Ask Don't Tell - It Comes Down To Integrity

BY JEFF LAKE

There has been a flurry of activity recently around the military policy commonly known as "Don't Ask Don't Tell" (DADT). This article will attempt to summarize the events of the last few months concerning Congressional testimony and legislation, changes in regulations and pending litigation.

Current 'interim' policy adopted in 1993

The current policy, originally adopted as an "interim" policy in 1993, has led to the discharge of more than 13,500 troops. However, these numbers have been declining. In 1997, 997 service members were discharged. In 2008 this number was down to 619 and in 2009 only 428 were discharged. These reduced figures could be the result of personnel needs during wartime.

Attitudes within the military are clearly changing. On February 2, 2010, the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen stated,

"No matter how I look at the issue, I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens. For me, it comes down to integrity – theirs as individuals and ours as an institution."

A survey of readers conducted by the Military Times in November showed that opposition to repeal of DADT has fallen to just 51 percent, a decline of 12 percentage points since 2003. Commanders are clearly split. Former Joint Chiefs Chair Colin Powell has changed his position and now supports repeal. Marine Commandant James Conway is an ardent opponent of repeal. The Army and Air Force Chiefs

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Marc Hall, stop-loss singer, discharged by Army

BY DAVID GESPASS

On April 17, the Army decided that Marc Hall should be discharged "for the good of the service" rather than being court-martialed. Indeed, it was for the good of the service, as the case against him grew weaker as the facts came out. The defense requested the discharge, despite its confidence that a court-martial would have ended in acquittal, as the speediest way to end his ordeal, which began when he was taken into custody without warning

on December 12, 2009. It continued with him being shuttled from one county jail in Georgia to another before the Army figured out how transport him in shackles to Kuwait. His court-martial was to begin April 27.

The allegations against him were serious: that he threatened to "go Fort Hood" on officers in his battalion if he was stop-lossed and returned to Iraq for a second tour of duty; that the rap song he sent to the Pentagon talking about killing officers if the performer was stop loss were genuine



of Staff testified on February 23, 2010, that they want to conduct a study on the policy before changing it.

On March 2, 2010, Secretary of Defense Robert Gates issued a memo ordering a review of DADT. This review is to be completed by December 1, 2010. Several commentators have pointed out that this date is beyond the elections so that members of Congress will not have to deal with a vote on the issue prior to November. Also, Commandant Conway will have completed his term on November 13th, prior to the release of the report so his successor would testify at any post-report hearings. Clearly the DoD is buying time. Nine months of study may be only the start of continuing delays.

Recent changes to existing regulations

On March 29, 2010, changes were made to existing regulations implementing DADT. The revised regulations for separation of enlisted personnel can be found at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>. The regulations for separation of Officers can be found at <http://www.dtic.mil/whs/directives/corres/pdf/133230p.pdf>. The changes leave the basics of the policy unchanged, despite confusing statements to the contrary by military officials and media commentators.

The changes, among other things, raise the level of the commander authorized to initiate inquiries and separation proceedings regarding homosexual conduct; revise what constitutes “credible information” and “reliable persons”; and specify certain categories of information that cannot be used for purposes of homosexual conduct discharges.

With only slight changes in wording, “homosexual conduct” is defined as, “engaging in, attempting to engage in, or soliciting another to engage in a homosexual act or acts; a statement by a member that he or she is a homosexual or bisexual, or words to that effect; or marriage or attempted marriage to a person known to be of the same biological sex.”

A statement by a Service member that he or she “is a homosexual or bisexual, or words to that effect” creates a “rebuttable presumption” of homosexual conduct. This presumption can be rebutted by, among other things, “a statement under oath by the Service member,” a basis for rebuttal not mentioned in the 1993 policy. It is an open question as to whether submission of a sworn statement

will open the Service member up to cross-examination in administrative discharge board hearings in which unsworn statements are often submitted to avoid questions. (Counsel may argue that the sworn statements available for rebuttal are not the equivalent of general sworn statements before boards, and do not allow cross-examination, but it remains to be seen whether boards and their legal advisors will accept this.)

There are changes as to who can conduct inquiries. These changes:

- Raise the level of the officer who is authorized to initiate a fact-finding inquiry or separation proceedings regarding homosexual conduct to a general or flag officer in the Service member’s chain of command.
 - Raise the level of the person who conducts a fact-finding inquiry regarding homosexual conduct to the level of O-5 (Lieutenant Colonel or Navy Commander), or above.
 - Raise the level of the officer who is authorized to separate an enlisted service member for homosexual conduct to a general or flag officer in the service member’s chain of command.
- (Under current policy, the separation authority for officers is the Service Secretary.)



There is a lot of new language concerning what is “credible information” for purposes of conducting hearings. (See DoDI 1332.14, Enclosure 5; DoDI 1332.20 Enclosure 8.) This language attempts to eliminate hearsay statements as evidence of statements, acts or marriages, except for direct admissions, and clearly defines who is a “reliable person.” Now, only testimony from reliable persons is deemed “credible.” Information provided by reliable third parties should now be given under oath.

Categories of confidential information recognized

Finally, the new regulations do recognize several categories of confidential information that will not be used for purposes of homosexual conduct discharges:

- Information provided to lawyers, clergy, and psychotherapists;
- Information provided to a medical professional in furtherance of medical treatment or a public health official in the course of a public health inquiry;
- Information provided in the course of seeking professional assistance for domestic or physical abuse;
- Information about sexual orientation or conduct obtained in



the course of security clearance investigations, in accordance with existing Department of Defense policies. (This provision existed in the 1993 policy, and was often respected.)

The “information provided in the course of seeking professional assistance for domestic or physical abuse” privilege is the closest DoD comes to protecting statements made by victims or witnesses to crimes. It leaves open the question of compelled testimony in civilian court or courts-martial by victims or witnesses of such crimes.

Chaos in the ranks: Arbitrary application of DADT foreseen

So what does this mean going forward? Well, there appears to be chaos in the ranks. On March 31, 2010, The Secretary of the Army, John M. McHugh, said that he was effectively ignoring DADT and said that it made no sense to pursue discharges of service members as he speaks with them about the change in policy. The next day, on April 1st (coincidence?) he issued a statement saying there was no moratorium on enforcing the law. On the other side, Lt. General Benjamin R. Mixon, the commander of Army forces in the Pacific wrote a letter in Stars and Stripes the urged those who support DADT to contact their elected officials. After numerous conversations with the Army Chief of Staff, Lt. Gen. Mixon now recognizes his comments were “inappropriate.” Likewise, General John “Jack” Sheehan testified before Congress on March 18th that allowing gays to serve openly hurts military readiness, stating that the Dutch

military had been hurt by the use of gay soldiers. General Sheehan has since apologized, the Army has apologized and he’s been let off the hook. Clearly the military is in disarray, and discharges under DADT are likely to be arbitrary and capricious over the course of the next year.

As for litigation, the current lawsuit challenging DADT, *Log Cabin Republicans v. Gates*, CV04-8425 (C.D. Cal. filed Oct. 12, 2004) is pending in California. The Obama Department of Justice is, of course, defending the policy in the case. A hearing will be held on April 26, 2010 on whether to dismiss the suit or send it to trial in mid-June. Further delays are also possible.

Finally, on March 3, 2010, a bill to end DADT was introduced by Senators Levin, Udall, Gillibrand, Burriss and Joe Lieberman. The Servicemembers Legal Defense Network is organizing people to contact legislators, write letters to the editor, and spread the word on Facebook and Twitter. The SLDN is also organizing “Veterans Lobby Day” in Washington D.C. on May 11th. More information can be found at: www.veteranslobbyday.org.

The MLTF will continue to monitor events affecting DADT in the months ahead and publish our findings in future issues of On Watch. After all, it is a matter of integrity.

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threats. The facts adduced at the Article 32 tell a different story. All that witnesses heard him say was that he was afraid of blacking out if sent back to Iraq, that he was glad he did not have to carry a weapon while at Ft. Stewart, and that he said he would like “to hurt” a sergeant and an officer on occasions after they chewed him out. The witnesses also said he was always joking and they never took him seriously until the Army locked him up.

There were serious procedural issues in the case. Moving him to Iraq for trial meant that a number of civilian witnesses would have to testify by telephone. He was very well represented at the Article 32 investigation by his trial defense counsel, Tony Schiavetti, but he was unable to have

me, counsel of his choice, there despite the critical nature of the proceeding. Tony deserves most of the credit for the relatively successful conclusion; Marc was fortunate to have him, and I was privileged to work with him.

Further, Marc’s friends, family and supporters, as well as reporters covering the story, would not be present, rendering his right to a public trial a mere formality with no substance.

Serious concerns were raised about whether Marc was suffering from PTSD or TBI. No one knows yet, since the Army didn’t investigate.

In the end, the OTH discharge he received, however the Army has tried to spin it, was welcome and a victory,

albeit partial. If he is indeed suffering from service-connected PTSD or TBI, he will get the treatment he needs from the VA. And we will soon undertake to upgrade his discharge and secure a bit more justice.

Marc’s story gives lie to the rhetoric we hear about the concern and gratitude military brass and Defense Department bigwigs have for the well-being of individual service members. Their only concern is that those individuals serve the imperial interests of the US government, however much those interests conflict with their own, with most of the American people and the people of the world.

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Practice Tips and Counseling Suggestions for Hardship and Dependency Discharges

BY KATHLEEN GILBERD

Hardship and dependency (hereafter hardship) discharges are often neglected by counselors and attorneys. There is a temptation to tell servicemembers to look at this website and that regulation, and call back if they run into problems. At the same time, hardship discharges are considered among the more difficult of voluntary discharges.

This is not only because the criteria are narrow—they are—but also because of problems in documentation and/or mishandling by senior enlisted personnel and officers who “advise” servicemembers and process their applications. In many hardship cases, effective civilian advice or counseling can reduce these problems and significantly increase the chances of success.

The following are some practical suggestions, based primarily on the writer’s own experience with Navy and Marine Corps cases. Criteria and procedures for this discharge vary in important details from service to service. Similarly, counseling and advocacy styles differ among those of us who work in this area, and these suggestions should not be viewed as the only or necessarily the best ways to approach the discharge.

Is There a Hardship? Explore the facts

Many soldiers and sailors tell us about problems at home that sound as though they fall short of the hardship

criteria discussed below, but experience suggests that it is always worth exploring the facts thoroughly before concluding that the discharge will not work. Servicemembers may describe only part of the situation at home, often because they have become injured to problems or are unaware of the importance of contributing factors that magnify the hardship.

When members mention, for example, a sick mother being cared for by her husband, or a spouse who is threatening divorce, there may well be more at issue. If the father must work to retain medical insurance and so cannot provide the level of care doctors recommend, or has a lesser disability of his own that limits his ability to provide care, or if a minor child or another ill family member requires supervision neither parent can provide, the situation may rise to the level of a hardship. If the frustrated spouse is severely depressed or otherwise ill, so that he or she may need hospitalization, or cannot provide care for their small child, there may be a hardship. The hardship may well involve more than one disabled family member, and care requirements may be complex.

This is not to suggest that hardship claims be exaggerated, of course, but rather to say that clients do not always explain or even know the extent of the hardship, and that very detailed discussion is helpful. In a society where close extended families

are not the norm and where financial losses and dwindling social services offer little support, illness, injury, or financial problems can leave families in dire straits – and serious hardships are not uncommon among military personnel.

Don’t rely on ‘military wisdom’; read the regulations

Most servicemembers have only a vague idea of the conditions which qualify for hardship discharge and the procedures for submitting an application. That vague idea usually comes from a gunnery sergeant, chief or chaplain, whose own understanding is based on information she or he received from his/her own gunnery sergeant, chief or chaplain. Unfortunately, this common military wisdom can be misleading and counterproductive, often at odds with the regulations.

Both clients and attorneys or counselors benefit from reading the regulation at the beginning of a discharge case – even if they have handled these discharges for years. The services have different requirements for documentation and the form of the application; different policies on Red Cross intervention, emergency leave, and temporary transfers; and slight variations of the controlling DoD Instruction. The devil can be in the details. While preparing documentation, in particular, it is useful to work directly from the service regulation or a check-list specific to the service.



The Criteria Are Vague, So Check the Guidelines

As with most voluntary discharges, the criteria are somewhat vague, although the army has tried to provide specific guidelines and several services provide examples of appropriate or inappropriate hardships in the regulations. Generally, this discharge requires **severe medical, psychological or financial problems** in the member's immediate family.

Medical and psychological problems are termed dependency, while financial problems are described as hardship, though many military personnel use the terms interchangeably. The problem must be more extreme than those commonly encountered by other soldiers.

For example, it is insufficient if a soldier and her husband face the usual sort of bankruptcy, even if this may result in the loss of their home. Discharge is not usually granted when family members simply have disabilities. A mother's breast cancer, in itself, is insufficient. Roughly stated, with any hardship or dependency, the problem must be so severe that the family will not be able to get by if the member remains in the military. Extraordinary and unpreventable financial losses which may cause the member's parents to lose their farm may be sufficient. A mother's cancer should suffice if it leaves her too ill to care for herself or the member's minor siblings. A depressed spouse who may decompensate, requiring hospitalization or threatening suicide, often fits this criterion. In each case, reviewing authorities tend to ignore hardships if they are not well beyond the "normal" problems caused by insolvency or psychiatric or physical illness at home.

Although the regulations do not all specify, the hardship should involve a **family member**. The Navy requires hardship to immediate family mem-

bers, by which it means members' spouses, children, stepchildren, siblings, parents, or other persons, including stepparents, who acted in loco parentis for a period of at least five years before the member turned 21. The Army limits cases to immediate family of servicemembers *or their spouses*: spouses, children, parents, siblings, only blood relatives, or others who have stood in loco parentis for a *continuous* period of five years before the member was 21 (there is no reference to step-children). The Marine Corps regulation, oddly, does not actually state that the hardship

must be to family members, though it mentions documentation from immediate family and financial hardship of family members, along with a few other references to family. Similarly, the Air Force Instruction does not define or specifically include family in the hardship criteria, mentioning family only in several examples of hardships.

Unfortunately, appeal to the DoD Instruction is not helpful where commands exclude all but immediate family members, or attempt to narrow the definition of immediate

Regulations

- ◇ Department of Defense (DoD) Instruction 1332.14, Encl. 3, Part 3.a.(3)
- ◇ Army Regulation (AR) 635-200, Chapter 6
- ◇ Marine Corps Separation and Retirement Manual (MARCORSEPMAN), Section 6407
- ◇ Naval Military Personnel Manual (MILPERSMAN), Section 1910-110
- ◇ Air Force Instruction (AFI) 36-3208, Section 3C

Criteria

Criteria, from AR 635-200, Ch. 6, Sec. 6-3. Discharge is appropriate where there is:

"a. Dependency. Dependency exists when death or disability of a member of a Soldier's (or spouse's) immediate family causes that member to rely upon the Soldier for principal care or support." or

"b. Hardship. Hardship exists when in circumstances not involving death or disability of a member of the Soldier's (or spouse's) immediate family, separation from the Service will materially affect the care or support of the family by alleviating undue and genuine hardship." and

"(1) Conditions have arisen or have been aggravated to an excessive degree since entry on AD or ADT.

"(2) Conditions are not of a temporary nature.

"(3) Every reasonable effort has been made by the Soldier to alleviate the dependency or hardship conditions without success.

"(4) Separation from active military service of the Soldier is the only readily available means of eliminating or materially alleviating the dependency or hardship conditions."



family, since the Instruction nowhere mentions the relationship of the person experiencing the hardship. In general, commands and separation authorities assume that immediate family is involved, and tend to assume that step-children and adopted children are included within that term. When the hardship is to grandparents or other less immediate family members, meeting the *in loco parentis* provisions, or showing a very similar relationship, may be sufficient. The Navy specifically excludes in-laws and grandparents if they have not been *in loco parentis* for the required time. In some cases, a close reading of the service regulation may allow inclusion of people whose relationship to members is less traditional or more extended than immediate family.

Nature of the Hardship

In addition, the hardship **must have arisen or become more severe after enlistment**. When the problem existed prior to enlistment, the member must prove that it has changed significantly since then. This may mean the worsening of a medical condition, or the recent unavailability of a regular care-giver. It is important to show that the change was unanticipated, particularly in the early part of a first enlistment.

The problem must be long-term. This is not well defined in the service regulations. General wisdom among counselors is that hardship discharge is appropriate when the problem is expected to last for a year or more, and hardship transfer is seen as the proper solution for a problem of six months or so. Commands generally assume that problems lasting only a month or two should be handled through emergency leave, regular leave, and the like, despite the fact that sufficient leave time may not be available.

Every reasonable effort must have been made to solve the problem in other ways. Essentially, members must show that they, their family or others have tried to find other means to solve or control the problem, and that nothing other than discharge will suffice. Fortunately, the military does not assume that every family can afford full-time nursing care, but discharge authorities do require a showing (at least in the form of statements from family members or others who have knowledge) that private, social service and similar resources are not available or will not suffice.

Only the soldier's presence at home can resolve the problem or prevent it from worsening. In addition to showing that there is no other solution, the application and supporting documentation must show how the servicemember will solve the problem or keep it from becoming worse.

It is uncommon for commands to actively investigate a hardship claim, although an occasional officer will call a doctor, social worker or other professional providing supporting documentation. For the most part, however, commands simply approach applications with great skepticism, often assuming that family members will lie or exaggerate to help servicemembers obtain discharges. As a result, applicants must not only meet the criteria, but must document them heavily enough to overcome reviewing authorities who would rather ignore the problem.

Advocacy: Try Going It Alone First

Some attorneys and counselors choose to announce their presence to commands at the beginning of hardship discharge cases, notifying commanding officers that an application is pending or submitting a cover

letter with the application. This writer's experience suggests, however, that servicemembers may do well to appear unrepresented until problems arise with the command.

The theory here is that applicants who look sympathetic—just nice guys and gals who would rather stay and do their job, but desperately need to go home to take care of a child, spouse or parent with overwhelming problems—may receive some sympathy in the handling their cases. The idea that applicants are supplicants standing alone may weigh against command skepticism and smooth processing and review of the case. It may increase the likelihood that commanding officers will grant emergency leave or consider an emergency transfer before the application is submitted or while it is pending. And it will occasionally result in gratuitous favorable recommendations from chiefs, master sergeants or unit commanders. Particularly where the separation authority is local, the image of a young man or woman trying all alone to help mom may create an atmosphere in which granting the application seems the right thing to do.

Put another way, clients who appear to be unrepresented don't trigger the hostility sometimes brought on by even most delicate advocacy. Since servicemembers' rights are limited in this discharge, the appearance that they intend to assert rights by bringing in outside advocates is not always beneficial, at least until commands have managed to violate the regulation.

When Visible Advocacy May Help

Of course every approach has exceptions; visible advocacy from the outset may be important for clients who are so emotionally distressed about the situation, or are already



so disliked or mistreated by their commands, that it would be difficult for them to submit the application and make sure it is processed. These are the people most easily put off when their immediate supervisors attempt to deny the claim, send them back to rewrite it in some other, useless format, or simply fail to do anything with it.

In most cases, though, a strong appearance from attorneys or counselors is not necessary unless the clients' initial, polite approach proves unsuccessful and commands mishandle the application. If there is still some value to presenting the servicemembers as sympathetic victims, blame for an Article 138 complaint, appeal to a superior officer, or other action can be placed on the difficult civilians—the poor members are only trying to go home to take care of the problem and would not dream of complaining, but must do everything possible to solve the problem even if it means following an attorney's advice or counselor's suggestion of assertive action.

This does not mean, however, that legal assistance is unimportant when the command seems cooperative. Help in suggesting and reviewing documentation, preparing the application as a whole, submitting it and following its process are often critical to the final outcome.

Documentation: Two Doctors Are Better Than One

Servicemembers with problems at home may have little time, energy and emotional strength to gather documentation in support of a claim. Yet substantial documentation can be critical, and it is almost impossible to have too much paperwork supporting an application. Commands and separation authorities are impressed by official-looking documents, letterhead stationary, unusual sources of

support, and multiple statements providing consistent information. While some of the regulations suggest that paperwork be minimized, it is almost always the case that two doctors are better than one, three agencies describing the hardship but concluding they cannot offer sufficient help are better than none, and four neighbors who have seen the problem are better than two.

It is useful to begin cases by explaining the criteria and documentation requirements in detail, working from the regulation, and then helping clients to develop a list of all possible sources of supporting letters, records and other evidence, and which criteria they can support. The idea sounds simple—every criterion must be supported by documentation beyond the clients' own statements—but commands and separation authorities take claims more seriously if there are multiple sources of support for each of the criteria. When servicemembers are overwhelmed by the time and energy needed to gather documentation, or their schedule or location limits communication with family, doctors and others, a family member or a counselor or attorney in their hometowns can assist in gathering documentation. (This goes against the grain for those of us who emphasize direct communication with our clients and try to limit family members' role as intermediaries. But in many cases, a sibling, aunt or other relative may be able to coordinate the gathering of documentation more effectively than the applicant.)

- Applications need to show that no other members of the family can take the applicant's place. Usually the best approach is to have letters from every member of the immediate family and from a few extended family members as well. In addition

to showing that no one else can solve or ameliorate the hardship, they can describe the situation, providing details and examples from their own observations, and covering other criteria in the process. If a family member is unwilling to write a letter, other members should explain that person's reluctance to write. Whether or not the regulations note it, statements made under oath before a notary public (rather than notarized to show the identity of the writer) carry a bit more weight than others. When notaries are unavailable, statements can be made under penalty of perjury, providing more impact than a simple letter, but not as impressive to commands as notaries' seals.

- While most of the regulations require inability of other family members to resolve the hardship, refusal to help should meet the criterion. If an estranged sister just will not come home to take care of mom, she can say this; since estranged sisters are often reluctant to say such a thing, others in the family can describe her refusal.
- Documentation from family members alone is generally insufficient, even in situations where the regulations do not appear to require further documentation. Since family members are suspect, undoubtedly wanting Johnny to come home, letters from neighbors, friends of the family, fellow parishioners and others in a position to observe the situation can be very helpful. Again, notarized statements or declarations under penalty of perjury are a bit more impressive than others.
- Commands and separation authorities can also be impressed by letterhead stationary or professional titles. In some cases, the business or profession has no relation to the hardship, but the CEO who lives



next door can add weight to her description of a suffering family by using company stationery. Professionals, business owners or executives, professors and others with social or economic status are often assumed to be more truthful than relatives, at least when writing about other families' problems. With these writers, titles and stationery reduces the need for notarized letters.

- Clients should also request letters from any professionals who do have a relationship with the family or the hardship. Social workers, teachers, school counselors, nurses, professional caregivers, ministers or church officials, and others who interact with the family can describe the hardship, describe the limitations of their help if appropriate, and, when possible give their opinion about the need for the servicemembers' presence. In some cases, whether or not the professional is willing to write a letter, their records may be of use—a social worker's or school counselor's file, school records, etc., may provide documentation. Where these writers are able to provide some help with the hardship, it is useful for them to say so, and to explain why the help is insufficient. If families have sought help from church charity groups, county social services offices or the like, agency records or letters from staff may help document the hardship and show the denial or the limitations of their services.
- Where the hardship is medical or psychiatric, commands require documentation from physicians, and the Marine Corps requires a recommendation on the member's presence or help. Regardless of the service, such recommendations or opinions carry a great deal of weight. Some of the service regula-

tions state that pre-printed forms requiring only doctors' signatures are not sufficient, but in all services they are far less effective than letters or reports. Acceptance of psychologists' reports seems to be growing, psychiatrists get a little more weight. If the only mental health professional is a psychologist, and a psychiatric report can't be obtained, then a general physician's supporting letter is wise. Regardless of service, however, a doctor's letter is given more weight if it requests the servicemember's presence at home. Letters from licensed clinical social workers, other social workers, and medical paraprofessionals are valuable, but primarily to complement doctors' reports. The MARCORSEPMAN specifically requires that doctors' reports include a statement about the need for servicemembers' presence at home.

- When the hardship is based on economic problems, and for all applications in some services, financial information and a family budget are necessary. If members are not returning home to rescue the families' businesses or farms, they must provide statements from a potential employer showing that they will have a job when discharged.
- Moderate creativity is useful here. Letters from friends or relatives who happen to be former military officers or senior enlisted personnel can have an extra impact; in some cases, writers may want to note that they have processed, recommended or ordered hardship discharges, and that they consider this case appropriate for discharge. Statements from government officials or personnel, VA staff, professionals associated with prestigious institutes, etc., may carry more weight than others even if writers are simply friends or neighbors. Documentation of the hardship may

be shown in other sources, such as church bulletins or social groups' newsletters, particularly when these are attached to letters from officials of the organization. Statements may also be supplemented with other evidence showing that the hardship is real—church bulletins, newspaper or newsletter articles, or even fliers from neighborhood drives to help the family.

Some families are isolated, very small, dysfunctional, or otherwise have few available lay witnesses; some have no medical care or resources. In these cases, help can sometimes be obtained from ministers or priests who are willing to look into and report on the hardship of non-congregants; from groups of supportive medical professionals such as the Civilian Medical Resources Network (<http://www.civilianmedicalresources.net/index.html>); and from staff or volunteers of community groups, church-related social service agencies, and organizations set up to support servicemembers and their families. Here, too, a little creativity may lead to additional documentation and avoid the common command assumption that little documentation means little validity.

Applicants' own statements also need careful review. It is often useful to prepare them when all of the other documentation is in hand, both to maintain consistency and to integrate helpful information from supporting statements. Some services require a personnel form as a cover to the application, which allows members to give a very brief summary of the case. Whether or not a form is used, applicants should begin statements with a brief summary of the hardship, touching on all the criteria. Some applicants, like this writer, may need assistance in crafting statements which avoid extraneous information or commentary on their commands'



harsh response to the situation, and in providing sufficient detail on each criterion. Here, again, it is important to review the service regulations to ensure that service-specific requirements are met. Servicemembers may find it useful to mention their own emotional distress from the hardship and its effect on their performance of duties.

As with other discharges, it is best that nothing be submitted to the command without review by counselors or attorneys. Inconsistencies between applicants' statements and supporting letters, or among the supporting letters, are a common basis for denial. Consistency with previous information given to the command, Red Cross reports and any other knowledge available to the command should also be considered. If hardships change while cases are being prepared—a medical condition worsens, or some assistance is obtained or lost—the changes should be explained or letters revised to prevent inconsistency.

Command 'Assistance' Often a Problem

The service regulations differ on command assistance to hardship discharge applicants. The Army requires personnel officers to assist servicemembers in understanding the criteria and procedure and in preparing evidence; the Air Force regulation tells commands to assist applicants and, if the application is incomplete, to help them "get what it lacks." The Navy requires commands to counsel servicemembers about the provisions of the regulations, as well as the fact that discharge may not be granted, but does not provide for assistance. The Marine Corps regulation is silent on this issue.

In reality, command assistance is often a problem, when helpful or merely officious superiors explain

requirements and procedures in a manner at odds with the regulations, attempt to reject statements or whole applications not to their liking, or send members away to revise applications. ('No, you don't want those letters from neighbors, that won't fly. And the doctor has to notarize her letter. You can't submit any of that handwritten stuff.') It is useful to warn applicants that they should check these suggestions or demands against the regulations and review them with their civilian counselors or attorneys. When command assistance delays or prevents submission or processing of the application, members may try to persuade superiors with polite references to the regulation, make informal appeal to higher-ranking personnel, submit Article 138 complaints, request Congressional inquiry, etc. This may be the right time for intervention by an advocate.

Red Cross Assistance

Traditionally, servicemembers have turned to the Red Cross to verify hardship claims, but current regulations take different approaches here. The Navy has arranged with the Red Cross that it will not respond to sailors' requests for help, but that commands may use the agency if additional information is needed. The Army allows requests from servicemembers or commands if the Red Cross can help obtain information showing the validity of the claim, but only commands may request formal reports. The Air Force follows a similar policy, while the MARCORSEPMAN does not mention the Red Cross. (Red Cross assistance for emergency leave requests may be available regardless of service.)

Extended Leave and Emergency Transfers: Strategic Considerations

Most servicemembers know they can request emergency leave in family

emergencies. Even when renewed, however, emergency leave usually lasts only a week or two. Regular annual leave is sometimes helpful, but commands may refuse to grant leave already earned ("on the books") if they are skeptical about the emergency or simply short-handed. But few members know that the hardship regulations contain provisions for extended leave or emergency attachment to commands near home in hardship discharge cases. (This is not the same as hardship transfer or compassionate reassignment for hardships expected to last less than a year, which may be requested in procedures almost identical to hardship discharges.)

Requests made directly to local commands for extended leave or emergency attachment are frequently worth consideration, since they allow members to provide help at home while the application is pending, give them time and opportunity to gather supporting documentation, and often change the separation authority from parent commands with a strong interest in maintaining personnel strength to commanders with no direct interest in the outcome. In all cases, local and parent commands have discretion in deciding on transfer or leave. Naturally, procedures are different in each service, as is the form of transfer or leave, so that review of the service regulations is essential.

The Army provisions, set out in AR 635-00, section 6-6.a, seem to be written for soldiers who are on leave when they discover the need for discharge, but should be applicable to members at their parent commands or on deployment. Soldiers may ask the local command that they be attached there while applications are prepared and processed. Virtually any Army installations except MEPS, main recruiting



stations, and medical centers may be used. If the local and parent commands agree, members are placed on emergency attachment at the local base pending determination of their claims. The provisions of AR 614-30, section 5-5, should be reviewed when soldiers are on orders for overseas transfer or deployment, and perhaps for others overseas.

Marines may be granted permissive temporary additional duty to bases nearest home, in which case the members submit their applications through the local base, and the decision to grant or deny discharge is made by the office of the Commandant of the Marine Corps rather than the normal separation authority. This is set out in MARCORSEPMAN 6407.1, which refers to Marine Corps Order (MCO) P1000.6, para. 1301 for additional information.

MILPERSMAN 1910-110, section 8, permits sailors to apply for hardship discharge while on leave in "unusual circumstances," presumably an immediate need for their presence. They make the request at the Navy installation closest to home, and that command may request that members be provided extended leave or attached to their facility on no-cost temporary additional duty. Both local and parent commands must approve. Section 8 is unclear as to which command has separation authority under these circumstances.

The Air Force Instruction, at section 3.25, makes provisions for airmen who are on leave or en route to commands to submit applications to commands near home, which may request extended leave for applicants from their parent commands. With agreement from both commands, members may also be assigned PCS to the local commands while their cases are considered.

Procedures: 'Walk' the Application UP Chain of Command

Unless these attachment or transfer provisions are used, servicemembers normally submit hardship applications to their commanding officers. Many commands require members to forward applications through the chain of command, which allows all senior enlisted personnel and intermediate officers in the direct chain of command to recommend approval or disapproval. This can delay applications considerably. When direct contact with the commander is not feasible, members may try to "walk" the application up the chain of command, hand-carrying it from one person to another, or may ask their personnel officer, chaplain or legal officer to assist in forwarding it. If the application cannot be placed directly in the commanding officer's hands, frequent checks on the applications' progress may keep them from becoming lost on supervisors' desks or routed in the wrong direction. Here, again, advocacy may be the best approach if applications become stalled.

Soldiers are often anxious to submit their applications as soon as possible, and commands may pressure them to do so, even when documentation is not yet complete. The rule of thumb is that applications should be submitted when all of the documentation has been assembled, to avoid the very real possibility that later-submitted statements will never catch up with the application itself. When early submission is expedient, members should make sure that the new documentation has been added to the application by the time it reaches their immediate commanders, or make sure those commanders and separation authorities are advised that additional documentation is en route. The military's ability to misplace, re-route, hide or throw away paperwork is remarkable, especially in voluntary discharge cases.

Common Bureaucratic Pitfalls

Most commands assign a personnel, administrative or legal officer to supervise processing of discharges. In some cases, hardship applications gather dust on their desks while the officers figure out what to do. Unfortunately, they sometimes decide to base their procedures on common military wisdom, needlessly re-routing applications to and from other offices, delaying them for unnecessary recommendations, or rejecting them for perceived mistakes in content or format. Even when these officers follow the regulations with care, it is helpful for applicants to check with them regularly and politely to ask about the status of their cases. Hopefully the officers will process the cases quickly in order to get rid of these squeaky wheels, although this may backfire if applicants are considered too pushy.

The Marine Corps is the only service which uses hardship or dependency boards, if separation authorities decide they would be useful. Commanding officers with special court-martial convening authority appoint boards of at least three members higher in rank than applicants to review evidence, interview applicants and make recommendations to the separation authority.

These boards, as well as immediate commanding officers in all services and sometimes chiefs or division officers, may make their own recommendations about discharge. In some cases, these may actually point to flaws in the application, though more often they focus on extraneous factors such as a history of trouble-making or the likelihood that a soldier wants to avoid deployment. Nothing in the regulations prohibits applicants or their advocates from commenting on or rebutting negative recommendations or adding additional documentation in response to them. As



with other late documentation, care must be taken to ensure that these are added to the application.

In the Army, Navy and Air Force, commanding officers who have special court-martial convening authority serve as separation authorities, while the Marine Corps uses general court-martial convening authorities.

Denial of Claims: Separation Authorities Must Give Reasons

Separation authorities have broad discretion to grant or deny hardship discharges. Fortunately, the regulations require them to give the reasons for denial. Where they abuse their discretion with outrageous decisions or use improper reasons, or where commands violate the regulations in processing cases, Article 138 complaints and other appeals to higher authority may be useful. If advocates have been invisible during the case, this may be the time to appear. When initial letters of complaint under Article 138 are obviously written by lawyers or counselors experienced in military law, separation authorities sometimes find it expedient to reconsider their decisions in order to avoid review by their superiors through the formal Article 138 complaint which would follow. Other methods, such as Congressional inquiry, media attention or other complaint procedures, can certainly be

considered, and more than one method may be used. This author has a fondness for 138 complaints and the control which they give members over the complaint process.

Improper denials and abuse of discretion may also be grounds for suit in federal court, though courts are hesitant to review command decisions about personnel matters. Judicial review is beyond the scope of this article or the writer's expertise, but it bears consideration in egregious cases. *Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir. 1971), sets forth a four-factor test courts may use to determine whether to review a command decision versus defer to the military with respect to its internal affairs. However, not all courts agree with the *Mindes* test. E.g. *Knutson v. Wisconsin Air Nat. Guard*, 995 F.2d 764, 768 (7th Cir. 1993); *Watson v. Arkansas Nat. Guard*, 886 F.2d 1004, 1009-10 (8th Cir. 1989); *Doe v. Rumsfeld*, 297 F.Supp.2d 119, 127-28 (D.D.C. 2003).

Servicemembers may submit a second application, presenting evidence of greater hardship. Particularly when problems in the documentation gave legitimate grounds for denial of the first claim, a re-application can be used to correct them—without, of course, contradicting the first claim and so suggesting that one or the other is false. Even when members

have worked hard to document all aspects of a hardship, reviewing the situation at home may reveal other problems or other aspects of the hardship not known at the time of the application or, better, arising after it was submitted. Care should be taken to show how and why the situation has changed. If possible, everyone who wrote statements for the first application should provide new statements, although old statements preceded by strong addenda can be used with some witnesses. (Doctors, in particular, may be loathe to write a second report but willing to prepare an update or addendum that refers to the prior report.)

When the change involves deterioration of a medical condition, writers should discuss the practical impact of medical changes on patients' ability to perform normal acts of daily living, any need for increased supervision, monitoring or care, etc., and the increased need for the servicemembers' presence.

Conclusion

There are, of course, other nuances and considerations in hardship discharge, the discussion of which could make this article endless. Suffice it to say that what seems to be a straightforward and simple discharge is complex, offering many opportunities for mistakes by applicants and mistakes or intentional mishandling by commands. While visible advocacy and interaction with commands may be unnecessary in many cases, servicemembers who have attorneys' or counselors' assistance in preparing applications and reviewing documentation, and in monitoring each step of the discharge process, may have far better chances of success than members who rely on their commands for information and advice.

Kathleen Gilbert is a legal worker in San Diego, California, and co-chair of the MLTF.

ANNOUNCEMENTS



The National Lawyers Guild convention will take place from September 23 to 26 in New Orleans!

MLTF will hold its annual membership meeting on Thursday afternoon, the 23rd. Proposed workshops include challenging military sexual assault, representing resisters, and the human right to peace (co-sponsored with the International Committee).

More information will be available soon on the Guild's website, at www.nlg.org/members/convention/.

About the Military Law Task Force

The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *On Watch* as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property rights.

The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please check our website at www.nlgmtf.org or contact the Task Force at:

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