HAP

LEGAL SERVICES TO END HOMELESSNESS

September 8, 2020

Submitted via www.regulations.gov
Director
Office of Regulation Policy and Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue NW, Room 1064
Washington, DC 20420

Re: RIN 2900–AQ95—Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge

On behalf of the Homeless Advocacy Project (HAP), we write in response to the Department of Veterans Affairs' (VA) proposal to amend its regulations regarding Character of Discharge (COD) determinations. HAP is a Philadelphia-based nonprofit organization that provides free legal services to individuals and families who are homeless or at risk of homelessness. For nearly 20 years, HAP has provided comprehensive and specialized legal assistance to homeless veterans in a broad range of areas, including VA compensation and pension claims, VA healthcare eligibility, and petitions for discharge upgrades. Many of the homeless veterans we represent have been harmfully impacted by the current character of discharge review process. While HAP agrees with some modifications to the regulatory framework for CODs, we believe additional improvements must be made to align with legislative intent and avoid the same issues that plague the regulation as currently written and applied.

I. The Proposed Regulation Will Continue to Unnecessarily Harm Homeless Veterans

Under its current regulatory framework, the VA fails to recognize as veterans hundreds of thousands of former members of the Armed Forces. These service members received Other Than Honorable (OTH) or Bad Conduct discharges. However, refusing to classify these soldiers as veterans is contradictory to Congress' intent, which was to deny benefits only to those whose conduct was most egregious and warranted a Dishonorable discharge.

Many service members who received these discharges, otherwise known as "bad paper" discharges, served in combat. They sacrificed time with their families to serve our country and they continue to suffer from the battle scars of service, both physical and mental.

Despite their service, VA regulations as currently interpreted and implemented consistently deny these soldiers access to essential services such as healthcare, housing support, disability compensation, and vocational rehabilitation. Sadly, the proposed rule will result in much of the same by continuing to presumptively deny these former service members access to services they deserve, based on their discharges, in contradiction to legislative intent.

The veterans most harmed by the VA's current COD rules are, perhaps not surprisingly, some of the veterans most in need of the VA's support. Studies have found that Marine Corps veterans deployed to combat zones, and subsequently diagnosed with Post-Traumatic Stress Disorder (PTSD), were eleven times more likely to be discharged for misconduct.[1] Another study showed that soldiers hospitalized for a mental health disorder were nine times more likely to be discharged for misconduct than soldiers hospitalized for a non-mental health condition,[2] and the Government Accountability Office found that almost 2/3 of the service members discharged for "misconduct" between 2011and 2015 had a prior mental health diagnosis.[3] Moreover, since 2009, over 22,000 soldiers have been separated from the Army with bad paper discharges after being diagnosed with PTSD or a TBI.[4]

Despite these statistics, service members like these are regularly denied access to services they desperately need because the VA does not recognize them as veterans. As it stands now, neither minor misconduct, which is often a consequence of mental illness, nor substance abuse secondary to mental illness, are factors in VA CODs. The effects of this are devastating: the suicide rate among these veterans is twice as high as for other veterans and the rates of homelessness and incarceration are at least 50% higher.[5] Of course, these are the very service members that the VA should be supporting with vital services that address chronic mental illness and homelessness, not turning them away to find less veteran centered care elsewhere.

To be clear, the presumptive exclusion of veterans with bad paper discharges is a result of discretionary policymaking. It is not mandated by Congress. In fact, as discussed in more detail below, it is not even authorized by Congress. It is a restrictive interpretation of the law that goes far beyond what Congress intended.

The VA's regulatory bars are responsible for 85% of bad paper exclusions, while only 15% are due to statutory standards set by Congress.[6] Currently the VA is excluding more veterans than at any point in the nation's history.[7] Furthermore, the regulatory bars inequitably harm the service

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[1] R.M. Highfill-McRoy, G.E. Larson, S. Booth-Kewley, C.F. Garland, Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines, BMC Psychiatry (Oct. 25, 2010).
[2] Charles Hoge et al., Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care, 351 New England J Med. 13 (2004).
[3] Turned Away, How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges, https://legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf.
[4] Daniel Zwerdling, Thousands of Soldiers With Mental Health Disorders Kicked Out For "Misconduct", NPR (October 28, 2015) https://www.npr.org/sections/thetwo-way/2015/10/28/452652731/ thousands-of-soldiers-with-mental-health-disorders-kicked-out-for-misconduct.
[5] Swords to Ploughshares, Petition for Rulemaking to Amend 38 C.F.R. §§ 3.12(a), 3.12(d), 17.34, 17.36(d) Regulations Interpreting 38 U.S.C. § 101(2) Requirements for Service "Under Conditions Other Than Honorable".
[6] Id at 2.
[7] Id at 96.

members most in need,[8] and the proposed rule will only perpetuate these inequities. It is not only an unauthorized use of power; it is a disservice to those who had the courage and patriotism to put on the uniform in the first place. But, the VA does not have to continue on this path.

II. The Proposed Rule Does Little Clarify the Regulatory Bars to Benefits and Will Continue to Result in Arbitrary and Overly Punitive Results

Swords to Ploughshares (STP) – supported by many organizations dedicated to serving the veteran population – submitted a petition for rulemaking arguing the COD determination process lacked consistency and that the regulatory bars concerning willful and persistent misconduct, moral turpitude, and aggravating homosexual acts were outdated or vague. While we support the change of paragraph (d)(2)(iii) to include all sexual acts involving aggravating circumstances, additional changes must be made to the regulatory framework to achieve the intended result.

a. Willful and Persistent Misconduct

The section of the proposed regulation pertaining to willful and persistent misconduct exceeds congressional authority and, as a result, must be eliminated in its entirety or, at a minimum, be scaled back to only bar benefits for veterans who were discharged for repeated acts of severe misconduct.

The VA's authority for regulating benefit eligibility resides in 38 U.S.C § 101(2), which defines a veteran as an individual who served on active duty and was discharged under conditions "other than dishonorable." The law was passed in 1944, and an overwhelming majority of the law's legislative history – perhaps even all of the legislative history – establishes that Congress intended for the VA to only bar from benefits those former service members who received, or should have received, a Dishonorable discharge due to *severe* misconduct. As currently written, however, the proposed rule would not only bar these soldiers from benefits, it would also bar former service members who were discharged as a result of only *minor* acts of misconduct.

In support of the proposed rule's more cramped interpretation of the law, the VA cites *Camarena v. Brown, 6 Vet. App. 565 (1994)* for the general proposition that Congress intended for the VA to have broad authority for determining the types of conduct that could be deemed dishonorable and thus a bar to benefits. This citation is misleading, however, in that the *Camarena* decision clearly does not contemplate the VA's proposed use of minor misconduct as a means of disqualifying former members of military. In fact, the *Camarena* court took pains to point out that the legislative history for 38 U.S.C. § 101(2) only supports a bar to benefits for those service members who commit such severe misconduct as to warrant a Dishonorable discharge.[9]

The legislative history relied on by the *Camarena* court is both abundant and incontrovertible. In the petition for rulemaking, STP offered and put into context repeated examples of such evidence, most of it contemporaneous or nearly contemporaneous with the law's passage. It is telling that in contrast to the historical evidence cited by STP in the petition, the VA was only

[8] Id at 73.
[9] 1995 U.S. App. LEXIS 16683, at *8 (Fed. Cir. July 7, 1995).

able to cite one piece of contemporaneous evidence – an ambiguous and in fact unsupportive quote from a single senator – in support of the authority to bar veterans discharged for minor misconduct.

In addition to the legislative history, the proposed rule's reliance on minor misconduct as a basis for barring benefits fails for another, equally compelling reason: it is inequitable. As the petition for rulemaking plainly establishes, whether a former service member receives an administrative or punitive discharge often depends on nothing more than which branch of service issued the discharge. In other words, a member of the Air Force may receive a General discharge for the exact same infraction that a member of the Marines may receive an OTH discharge, the result being that the airman will be presumed eligible for VA benefits while the marine will be subject to a COD.

Given the inequities inherent in the proposed rule and Congress's clear intent of providing for veterans discharged for minor misconduct, one wonders: Why has the VA proposed a rule that not only contravenes congressional intent, but that will also discriminate against certain soldiers based on nothing more than the branch of service to which they pledged their allegiance? That there appears to be no legitimate answer to this question mandates that any reference to minor misconduct in the proposed rule be eliminated.

Even if the VA insists on retaining minor misconduct as a basis for barring benefits, the agency must nevertheless remove and replace the proposed regulation's definition of persistent. In the proposed rule, the VA asserts that the plain meaning of "persistent misconduct" is misconduct that recurs on more than one occasion or conduct that is ongoing over a period of time.

In practical terms, however, the plain meaning of "persistent" is not, as the VA claims, something that recurs more than once, or, to put it another way, something that could occur as infrequently as twice. In truth, the much more accurate and understood meaning of persistent is the second definition – conduct that is ongoing over a period of time.

By defining persistent in the proposed regulation as either (1) instances of minor misconduct occurring within two years of each other or (2) an instance of minor misconduct occurring within two years of more serious misconduct or (3) instances of more serious misconduct occurring within five years of each other, the VA is purposely and inexplicably aligning itself with the less accurate and more restrictive definition of "persistent." As a result, we should expect to see the same overly harsh outcomes for veterans that we have seen under the current regulation. By way of example, HAP's attorneys recently represented a marine who served two tours of duty in Afghanistan as an infantryman during the height of that war. While on his first deployment, the soldier was disciplined on one occasion for falling asleep on duty after he was kept up all night by the sound of nearby explosions. Despite this incident, he completed his deployment and was awarded a Combat Action Ribbon for his participation in multiple firefights with Taliban forces. Approximately 15 months later, well after he returned to the United States, he turned himself in to military authorities for smoking marijuana, which he was using to help fall asleep at night. Shortly thereafter, he was released from active duty with an OTH discharge despite having been previously diagnosed by a military psychiatrist with PTSD.

Under the current version of the proposed rule, this soldier would be found guilty of willful and persistent misconduct. As a result, instead of being presumed eligible for benefits because he did not receive, and should not have received, a Dishonorable discharge, he would be forced to endure a lengthy and uncertain COD. Furthermore, while waiting for a decision, he would be ineligible for VA healthcare and his PTSD left untreated.

If the supplementary information section of the proposed rule is any indication, the VA's likely response to this scenario will be to reference the rule's expanded use of compelling circumstances as an acceptable safeguard. The exception is addressed in more detail below, and is in some ways a positive step. But the VA's reliance on compelling circumstances in this situation – a situation, it must be noted, that is not in any way uncommon among homeless veterans – is unfortunately more revealing of a glaring disregard for the life-and-death needs of mentally ill soldiers than of an acceptable solution to a real problem. After all, who is to say what will happen to these soldiers while a VA adjudicator slowly weighs compelling circumstances against the soldier's minor misconduct rather than quickly and decisively finding the soldier eligible for benefits based on a more accurate definition of persistent? Prolonged homelessness? Suicide?

In addition to justifying the proposed rule with the expansion of the compelling circumstances exception, the VA states that by using the Manual of Courts-Martial United States (MCM) — specifically the Statutes of Limitations (SOLs) contained within the MCM — to define persistent, it is bringing consistency to the COD process. But at what cost? As demonstrated above, many former soldiers, including homeless, combat, and disabled soldiers, will be without vital VA healthcare while, rather than being presumed eligible for benefits, the fate of their COD determination sits on a VA employee's desk. Moreover, SOLs are, and always have been, intended to prevent an individual from being prosecuted after the memories of witnesses have faded or the evidence has otherwise become stale.[10] At no known point have SOLs, either in civilian or military courts, been used as a basis for determining the severity of an individual's future punishment.[11] This is for good reason. By using the SOLs in this fashion, the VA will be subjecting former soldiers to inequitable, unjust, and unduly harsh outcomes for little more than the sake of convenience and consistency.

b. An Offense Involving Moral Turpitude

The regulatory bar for an offense involving moral turpitude should be eliminated due to its vague definition that will lead to unintended results. As thoroughly detailed above, Congress granted the VA discretion to create regulatory bars to benefits in order to punish severe misconduct that warranted, but somehow escaped, a Dishonorable discharge.[12] Given that backdrop, the underlying rationale of barring an offense involving moral turpitude makes sense – the objective is to punish conduct considered so egregious that the veteran should have received a

[10] University of Pennsylvania Law Review, Vol. 102, pp. 630 – 653.
[11] *Id.*
[12] *See* Swords to Plowshares, *VA Rulemaking Petition to Amend Regulations Interpreting 38 U.S.C. 101 (2),* p. 9 ("Congress authorized the VA to exclude people who did receive or should have received a dishonorable characterization, but not to exclude those who did not deserve a dishonorable characterization.").

Dishonorable discharge. In practice, however, the regulation is entirely unworkable and should be eliminated.

Recognizing the elusiveness of the term moral turpitude, the VA Office of General Counsel attempted to define the regulatory bar in Office of General Counsel Opinion 6-87 (Opinion). The case at issue involved a veteran who was charged and convicted in civilian criminal court for multiple offenses. Defining moral turpitude as "a willful act committed without justification or legal excuse that gravely violates accepted moral standards and would likely cause harm or loss of a person or property," the Opinion determined the offenses that led to the discharge in that particular case were "calculated acts" that are "inherently wrong." In reaching its conclusion, the Opinion noted that it is the nature of the offense that determines whether moral turpitude was involved.

Similarly, federal and state courts have long attempted to create a concrete and objective definition of moral turpitude. While the specific language of the definition differs, the overall sentiment remains the same – moral turpitude involves conduct that grievously violates the code of humankind.[13] Such an offense is so morally bankrupt that under no circumstance is it justified. Despite comparable definitions, the VA and courts vary widely when deciding what specific offenses constitute moral turpitude. In fact, a determination of whether the same exact crime involves moral turpitude has resulted in differing opinions depending on the jurisdiction.[14] Consequently, the term has been abandoned in many contexts. For example, the American Bar Association removed the moral turpitude standard from the Model Code of Professional Responsibility in 1983.[15] The definition proved to be unworkable in the context of attorney discipline.

Despite its attempt to shed light on the meaning of moral turpitude by incorporating the Opinion definition into the regulation, the proposed rule will continue to result in confusion and inconsistences. Because the regulation requires individual VA adjudicators to make value judgements that testify to the moral standards of our nation, the review process will lack the certainty that should be required when making a COD determination and result in unreliable and often conflicting outcomes. Under the current discharge review process, VA adjudicators are already instructed to refer to the Opinion when determining whether an offense involves moral turpitude. Even when considering the Opinion in its entirety, there is too much room for subjectivity. While it is evident that some offenses – like rape and unprovoked murder – gravely violate accepted moral standards, other offenses are far less clear. The added language to the regulation does little to clarify what warrants a bar from benefits and consequently, the outcomes of COD determinations will continue to rest on the morality of individual VA adjudicators.

Moreover, the omission of the phrase "without justification or legal excuse" dilutes the intended meaning of moral turpitude. The proposed rule reasons that the phrase should be omitted from

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[13] *See* Derrick Moore, *Crimes Involving Moral Turpitude: Why the Void-for-Vagueness Argument Is Still Available and Meritorious*, 41 Cornell Int. Law J. 3, pp. 816-20 (Fall 2008); Julia Ann Simon-Kerr, *Moral Turpitude*, 2 Utah Law Rev. 1002 (2012).
[14] *Id.* at 824.
[15] *See* Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 Neb. Law Rev. 647, p. 688 (2012).

the regulation because any determination of whether a willful act was committed without justification or legal excuse will be addressed when considering compelling circumstances. This completely overlooks the significance of the phrase. In defining moral turpitude, the Opinion and courts have pointed out that offenses involving moral turpitude are so depraved that under no circumstance is the conduct justified.[16] The individual facts of the case are irrelevant – what matters is whether the offense on its face can be justified or excused. This qualifier drastically limits the types of offenses that rise to the level of moral turpitude. By eliminating this critical guidepost in understanding the nature of offenses involving moral turpitude, the proposed rule improperly broadens the scope of the regulation.

Both the current regulation and proposed rule use moral turpitude as a catchall when making COD determinations. While the definition provides flexibility to punish severe misconduct – the type of conduct intended by Congress – it also allows for nearly any misdeed to be categorized as an offense involving moral turpitude. In order to avoid inconsistencies in applying this vague and overly broad definition, the VA should eliminate paragraph (d)(2)(i) from the regulatory framework in its entirely. Otherwise, the regulation will continue to improperly exclude from benefits veterans who commit offenses that merely violate generally understood rules of social conduct.

For example, HAP is currently representing a veteran who was discharged from the United States Army for threatening a superior commissioned officer. Using the current regulatory framework, the VA adjudicator who handled her claim determined the offense involved moral turpitude. The veteran – who was the victim of racial targeting and harassment – impulsively offered the threat by demanding the commanding officer stop the harassment or there would be consequences. The proposed regulatory framework does little to clarify whether the VA adjudicator was correct in determining the offense involved moral turpitude. Does threatening potential violence gravely violate accepted moral standards? It depends on who you ask. Are there situations when threatening someone else is justified? Yes – absolutely. A thorough understanding of the legislative intent and case law surrounding moral turpitude clearly indicates that – although admittedly wrong – the conduct should not exclude the veteran from benefits. Under the proposed rule, an enormous amount of time and resources will be spent reviewing conduct that should never result in a bar from benefits.

If the VA wants to create a regulatory bar for specific conduct that should have resulted in a Dishonorable discharge, then the VA should propose specific offenses for which a veteran could be barred from receiving benefits. By listing these particularly egregious offenses that under no circumstance could be justified or excused, the VA can eliminate the subjective and discretionary nature of the review process. Undoubted, this exercise will expose the unworkability of the regulation as it currently stands and why it must be eliminated. Beyond rape and unprovoked murder, it is hard to definitively categorize offenses that should always result in a bar to benefits regardless of facts.

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[16] *See* Moore at 818 ("The facts of the offense are not the important inquiry; instead, the issue is whether the 'full range of conduct encompassed by the statute constitutes a crime of moral turpitude.' In other words, the offense must be 'always and under all circumstances' a crime involving moral turpitude.").

c. Compelling Circumstances

Context matters when making a COD determination. While the compelling circumstances exception appropriately requires full consideration of the context surrounding a discharge, it is the contrived solution to a regulatory framework that has long disregarded legislative intent. As repeatedly discussed, Congress only intended the VA to bar benefits from veterans whose service merited a Dishonorable discharge. Such discharges are reserved for what the military considers the most reprehensible conduct that cannot be justified. Consequently, the VA should review the circumstances of a discharge to determine if the misconduct was so severe that it should have resulted in a Dishonorable discharge. The current regulatory framework has perverted the intended analysis to such an extent that the VA systematically bars minor to moderate conduct that would never warrant a Dishonorable discharge.

Instead of addressing the underlying issue of the regulatory framework, the proposed rule offers the compelling circumstances exception as a seemingly necessary tool to combat the overly harsh discharge review process. Again, if the VA simply adhered to legislative intent, the compelling circumstances exception would be needless because only the most severe misconduct that should have resulted in a Dishonorable discharge would be barred from benefits. Such misconduct is so reprehensible that compelling circumstances are immaterial. Should the VA insist on largely maintaining its regulatory framework, however, the compelling circumstances exception must be altered to ensure just outcomes that more closely align with congressional intent.

First, paragraph (e) should presume that if the evidence indicates that any compelling circumstance exists, the AWOL or misconduct at issue should be considered mitigated and the regulatory bar should not apply. Requiring individual VA adjudicators to weigh the compelling circumstances against the AWOL or misconduct at issue will only result in an administrative nightmare. Additionally, the regulation should explicitly state that the factors listed under paragraph (e) are not exhaustive. While the supplementary explanation section of the proposed rule indicates the list is not exhaustive to provide VA adjudicators the flexibility needed to deal with unique situations that may arise in reviewing COD determinations, the regulation reads differently. Without clear language that explicitly notes additional factors can and should be considered, the regulation will unintentionally result in strict adherence to only those factors listed.

Second, absent clear evidence demonstrating otherwise, paragraph (e)(1) should presume all service is of such quality and length that it is characterized as honest, faithful and meritorious and of benefit to the Nation. By virtue of putting on the uniform and committing oneself to the Armed Forces, a veteran's service should be deemed worthy of receiving benefits. Any other understanding would undermine the importance of our entire military. This presumption is especially needed because military personnel records do not always reflect the realities of overall service. While the military is quick to keep track of all potential wrongdoing of service members, there is rarely any documentation of good behavior. The simple act of doing ones job in the Armed Forces – whatever that job might be – is considered honest, faithful and meritorious and of benefit to the Nation. This presumption should be extended to the regulation.

Third, for the same reason as stated above, the regulation should make explicit that the factors listed under paragraph (e)(2) are not exhaustive. Moreover, the list of factors should include racial discrimination and harassment. For too long, our military has been plagued by racist and discriminatory policies and practices.[17] Personal biases have resulted in disparate treatment of servicemembers who are Black, Indigenous, and people of color. By recognizing this shameful reality and incorporating it into the regulation, the VA can help right such an obvious wrong.

Finally, under the proposed rule, former service members who received an OTH discharge in lieu of trial by general court-martial will not be eligible for benefits under the compelling circumstances exception. However, the reasons provided in the proposed rule for not availing these soldiers of the exception reveal a lack of understanding and/or appreciation of the realities of the discharge process when a general court-martial is involved. Moreover, when these realities are properly understood and considered, it is clear that denying such service members the benefit of the compelling circumstances exception is not only arbitrary but also unjust, and that the rule must be revised to provide these soldiers the benefit of the exception.

The first of the VA's justifications for the exclusion is predicated on what the VA characterizes as military procedures that ensure that a service member is fully aware of the consequences of receiving an OTH in lieu of trial by court-martial, in particular the loss of VA benefits. The difficulty with this justification is that in practice it is simply not true. Putting aside that military procedures relating to future VA eligibility have changed drastically over time, and that they vary from branch to branch, former service members regularly report having never been informed about an OTH's impact on VA eligibility. But even assuming that they were, would it be surprising to anyone that very few actually digested the significance of this information while facing the possibility of a lengthy prison sentence at Leavenworth? In other words, holding these soldiers, many of whom are only a few years removed from adolescence, to such an unrealistic standard fails to account for the severe stress and anxiety that accompany a general court-martial trial.

The VA further justifies the exclusion by stating that certain military branches provide medical examinations at the time of discharge to ensure that soldiers are capable of providing informed consent for the OTH discharge. What this justification fails to take into account, however, is the nearly universal cursory nature of these evaluations. Many are little more than fleeting yes/no question and answer sessions that do little to ascertain a soldier's true capacity for giving informed consent. In fact, it is not uncommon for a HAP attorney to meet a former soldier who was deemed mentally fit at discharge but hospitalized for a mental break within months of receiving an OTH. Moreover, as the proposed rule concedes, only certain branches of the military provide discharge examinations that go to informed consent. In this sense, the VA is justifying the exclusion by citing a safeguard that is available to some, but not all, soldiers who choose to accept an OTH.

In its least convincing justification for the exclusion, the VA claims that by accepting a discharge in lieu of trial by general court-martial, soldiers do not always receive OTHs, that a General or even Honorable discharge is possible. To be fair, this is, as the VA contends, theoretically

[17] *See* Defense Equal Opportunity Management Institute, *Historical Overview of Racism in the Military* (2002), available at https://apps.dtic.mil/dtic/tr/fulltext/u2/a488652.pdf.

possible. But over the course of 20 years representing homeless veterans, many of whom have in fact accepted administrative discharges in lieu of trials by court martial, not one received a General, Honorable, or even Entry Level discharge. All received OTHs, and the fact that the VA would even offer such an improbable justification for excluding these soldiers tells us something about the biases underpinning certain sections of the proposed rule. While the VA touts itself as giving veterans the benefit of the doubt whenever possible, the proposed rule turns this on its head by citing an unheard of scenario to justify denying soldiers possible VA benefits.

In its final justification, the VA argues that soldiers who accept a discharge in lieu of a general court-martial should not be eligible for the exception because a discharge by sentence of a general court martial is a statutory bar to benefits, and soldiers who receive an administrative discharge should not be entitled to a "different outcome." This makes little sense. If Congress wanted to statutorily bar soldiers who accepted an administrative discharge instead of going to trial, it would have done so. In fact, by equating these soldiers with those who went to trial, the VA is taking the position that Congress also intended to statutorily exclude those that agreed to an OTH. In other words, the VA is effectively creating an additional statutory bar. In addition, the VA's reasoning assumes that soldiers who accepted an OTH would otherwise have been found guilty at trial and sentenced to discharge. Putting aside that this pre-supposes the outcome of a trial that never occurred, it also fails to appreciate that many soldiers accept an OTH not because they believe they will be found guilty at trial, but because they have already spent a long time in jail awaiting trial and they will do anything just to be released and return home to their family.

III. The Proposed Rule Fails to Simplify the Character of Discharge Review Process and Will Further Burden an Already Backlogged System Harming Homeless Veterans

The VA is supposed to be "veteran friendly" and was specifically designed to meet veterans' needs, chiefly those arising out of military service. By continuing to presume ineligibility for so many disadvantaged veterans, the VA contradicts its "veteran friendly" intent. In fact, COD determinations, which the VA uses to review eligibility, are highly burdensome to everyone involved. Even then, these reviews are not automatic, and most applicants do not receive a review at all. For example, only 10% of the post-2001 service members who require a review have had one.[18] This is partly because the VA is unable to adjudicate even requested claims yearly due to such high numbers of veterans in need. Service members are forced to wait extremely long times for a response to a review. The average length of pending claims is over 2 years, which means it can take almost 4 years (1,200 days) for a final decision.[19] Even then, the denial rates are remarkably high.

These delays are especially burdensome for veterans facing homelessness in Philadelphia. So much so, that in 2001 HAP designated attorneys specifically to serve veterans due to overwhelming need. Our veteran clients experience daily challenges due to extreme poverty, PTSD and other mental health issues, substance abuse as a form of self-medication, and debilitating service-related physical injuries. In working with these veterans, HAP attorneys

[18] Id.
[19] Id.

have firsthand knowledge of the profound impact caused by the VA's denial of VA health care and other benefits.

HAP is the only legal aid organization in Philadelphia dedicated to providing direct civil legal services to individuals and families experiencing homelessness in the city. Last year, on any given night in Philadelphia, over 250 veterans struggled with homelessness.[20] That is more than a quarter of all homeless veterans in Pennsylvania.[21] Countless numbers of these veterans have received bad paper discharges. These homeless veterans have told us of the challenges they face accessing treatment, finding employment, and in maintaining housing. Aside from hearing about the barriers these worthy veterans face, we as attorneys have witnessed their struggles in accessing needed support from the VA: the limited paths to initiate a COD review, the overly broad disqualification criteria, and the widespread misconception that they are categorically ineligible.

Our experiences with veterans experiencing homelessness are not unique. Studies show that veterans with OTH discharges are significantly more likely to experience homelessness than other veterans.[22] Since 1980, roughly 7% of all categorically discharged service people received "bad paper" discharges.[23] Of those, 81% received administrative OTH discharges which are not punitive discharges by court-martial.[24] That means those veterans never underwent a court process to determine if the discharge characterization was even appropriate. Put another way, roughly 5% of all separating service members receive an OTH discharge, but they make up 25% of the nation's total homeless veteran population.[25] That is over 9,000 veterans.[26] These same veterans also have higher rates of mental health conditions, suicide, and unemployment.

Individuals, including veterans, experiencing homelessness lead transient, unstable lives. The presumptive exclusions of bad paper discharges by the VA, and the extreme delay in adjudicating CODs, are particularly harmful to homeless veterans. These veterans are often moving around, lack access to vital documents, and struggle to stay in contact with the VA due to their transiency. Missing correspondence from the VA and limited phone access often leads to denials for technical reasons. Also, the length of time it takes to complete reviews means that veterans experiencing homelessness are waiting years and years before they even know if they can access services.

Additionally, many of the resources committed to addressing veteran homelessness are filtered through VA programs which apply VA eligibility standards. For example, the HUD-VASH

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[20] HUD 2019 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations, Philadelphia COC 1/23/19, https://files.hudexchange.info/reports/published/CoC_PopSub_CoC_PA-500-2019_PA_2019.pdf.
[21] HUD 2019 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations, Pennsylvania 1/23/19, https://files.hudexchange.info/reports/published/CoC_PopSub_State_PA_2019.pdf.
[22] Turned Away, How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges, https://legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf.
[23] Id.
[24] Id.
[25] "Bipartisan Tester, Young, Murphy Bill to Curb Veteran Homelessness Clears Key Hurdle", The United States Senate Committee on Veterans' Affairs, https://www.veterans.senate.gov/newsroom/minority-news/bipartisan-tester-young-murphy-bill-to-curb-veteran-homelessness-clears-key-hurdle.
[26] 25% of the 37.085 homeless veterans in 2019. See Footnote 21.

program which provides permanent housing support to veterans, an essential part of the effort to end veteran homelessness, is only available to those eligible for VA health care services. The VA's COD review process impedes this national effort to end veteran homelessness. Their restrictive implementation of the eligibility standard, specifically for those with OTH discharges, leaves most homeless veterans with bad paper discharges unable to access this crucial program that could help them find stable and secure housing. In fact, Congress recently recognized how the VA eligibility standards particularly harm our homeless veterans with bad paper discharges. H.R. 2398 passed in January 2020 by a house vote of 362-31would expand HUD-VASH eligibility to homeless veterans who have received OTH discharges.[27] This Bill, introduced as a work around of the VA's overly restrictive eligibility standards, passed easily because our legislators recognize the VA's failure to help those in need.

The proposed rule does little to further streamline the COD process. Continuing to presumptively deny bad paper discharges means that the COD review process will remain unmanageable. The number of necessary reviews will continue to grow and long delays will continue. The identifiable risk factors that put people more at risk for bad paper discharges such as mental health issues, substance use, and disability, are also risk factors for homelessness. The proposed changes to the regulations do little to shorten already lengthy processes. Homeless veterans will continue to face obstacles attempting the process on their own. It is estimated that veterans with bad paper discharges are at seven times the risk of homelessness as other veterans. Yet, the VA continues to deny them services at devastatingly high rates. The over 37,000 homeless veterans[28] in this country deserve more than a presumptive denial and impossible review process to receive merited help.

IV. Conclusion

While HAP supports some of the changes included in the proposed rule, further adjustments must be made to accomplish the legislative intent of the underlying COD statute, and to correct the harmful outcomes of the current regulation. Without additional enhancements, the VA will continue to deny services to countless veterans who served in combat, faced discrimination, struggle with mental illness, lack reliable housing, and sacrificed for our country. To avoid this outcome, the regulatory bar for an offense involving moral turpitude should be eliminated. It is an unworkable standard that exceeds the authority vested in the VA by Congress. Similarly, the proposed section regarding willful and persistent misconduct greatly exceeds congressional authority and must be removed. Congress intended for the VA to bar benefits only from former service members who received, or should have received, a Dishonorable discharge due to severe misconduct. The proposed rule's reliance on minor misconduct, and the timeframe in which that conduct occurred, fails to carry out that intent. In addition, disparities between branches render the rule inequitable. Finally, if the VA fails to remove these regulatory bars, the compelling

[27] National Alliance to End Homelessness, "Expanding Eligibility for HUD-VASH to Other-Than-Honorably Discharged Veterans (H.R. 2398 and S. 2061)," https://endhomelessness.org/legislation/expanding-eligibility-for-hud-vash-to-military-personnel-discharged-with-an-other-than-honorable-basis/.

[28] HUD 2019 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations, Full Summary Report, https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2019.pdf.

circumstances exception should be broadened to ensure that veterans are not being barred from benefits for minor or moderate misconduct.

Under the proposed rule, a massive amount of time and resources will be spent reviewing conduct that should never result in a bar from benefits as Congress envisioned. During that waiting period, service members will continue to struggle with homelessness, addiction, and suicide. The VA has the power to change this narrative, but it will require the agency to be brave, bold, and honest. We believe in the VA's commitment to these ideals, and we ask that it make the changes recommended above to achieve them, thereby treating veterans as they deserve to be treated.

Thank you for the opportunity to comment on these proposed regulations.

Respectfully submitted,

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