

Meeting Summary

Attendees

Dave Barrans – Department of Veterans Affairs (VA) Office of General Counsel (OGC)

Brian Griffin – OGC

Jonathan Krisch – OGC

Evan Grant – OGC

Laurine Carson – Veterans Benefits Administration (VBA) Compensation Service (CS)

Jane Che – CS

Olumayowa Famakinwa – CS

Alex Stout – Latham & Watkins LLP (Latham)

Dana Montalto – Harvard Law School

Brittany Bruns – Latham

Amy Rose – Swords to Plowshares (STP)

Maureen Siedor – STP

Summary

Swords to Plowshares (STP) requested a meeting with the Department of Veterans Affairs (VA) regarding proposed rule RIN 2900-AQ95, Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge. As the proposed rule notes, STP's petition for rulemaking in part spurred the issuance of the proposed rule. A meeting was held telephonically on August 20, 2020, at 2:00 PM EDT, during the public comment period. The names and organizations of those in attendance are listed above. The meeting lasted approximately one hour.

STP primarily voiced concerns that VA's proposed rule may have the effect of barring VA benefits for more former servicemembers than Congress intended. Topics raised included VA's use of the term "offense involving moral turpitude" and potential ambiguities therewith, whether VA's definition of "willful and persistent misconduct" is overly broad, and perceived inconsistencies between statutory bars to benefits and regulatory bars, specifically as pertained to periods of absence without leave.

STP specifically requested that VA consider removing 38 C.F.R. § 3.12(d)(5)—which currently bars benefits for former servicemembers discharged for homosexual acts involving aggravating circumstances or other factors affecting the performance of duty—in its entirety rather than simply replacing the word "homosexual" with "sexual," as called for in the proposed rule. STP believes the provision would nonetheless disparately impact LGBT former servicemembers despite the proposed change.

STP expressed concern about VA's reliance on the Manual for Courts Martial. The basis for this concern is that the outer limit of what someone could be charged with under the Manual for Courts Martial often is not what would be a realistic or fair handling of that case, so the outcome would be VA potentially treating certain conduct more severely than would be the case in the military justice system.

STP also voiced concerns with not applying the compelling circumstances exception to former servicemembers who have accepted an other than honorable discharge in lieu of trial by general court-martial. STP believed that could expand eligibility disparities between branches of the Armed Forces, as certain branches may issue certain discharges more frequently than others.

STP inquired as to the level of coordination between VA and the Department of Defense (DoD) in drafting the proposed rule. VA responded that DoD was involved as indicated in public hearing testimony but that there is no joint rulemaking agreement in place, largely because DoD's process for separating servicemembers serves a notably different purpose than VA's character of discharge determinations.

STP concluded the meeting with a number of other suggestions, which included improving the general structure of the regulation, clarifying the meaning of the phrase "other than honorable *or its equivalent*," and modifying the "benefit to the nation" language used in the "compelling circumstances" exception to certain regulatory bars. STP also suggested adding sexual harassment, intimate partner violence, and discrimination as compelling circumstances that might mitigate misconduct under proposed new 38 C.F.R. § 3.12(e).

STP stated that it would follow up with detailed written comments documenting the concerns raised in the phone call.