

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.**



**Statement for the Record**

**Before the**

**House Committee on Veterans' Affairs  
Subcommittee on Disability Assistance and Memorial Affairs**

**Concerning**

**“Stuck in Red Tape: How VA’s Regulatory Policies Prevent Bad Paper  
Veterans From Accessing Critical Benefits”**

**July 8, 2020**

Chairman Luria, Ranking Member Bost, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) would like to thank you for the opportunity to offer our views on how VA's regulatory policies prevent bad paper veterans from accessing critical benefits.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents nearly 650 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC) and U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. NOVA operates a full-time office in Washington, DC.

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NOVA members frequently represent veterans who have been denied compensation, pension, and healthcare benefits because of their "bad paper" discharges. Many of these individuals are the veterans most in need of assistance due to PTSD and other mental health conditions (some of which may have been caused by military sexual trauma disproportionately impacting women veterans) and traumatic brain injuries manifested in service, which in turn led to behaviors that resulted in "Other Than Honorable" or OTH discharges. In 1944, with passage of the Servicemen's Readjustment Act, Congress did not limit eligibility for benefits to only those veterans with Honorable discharges. Rather, Congress allowed for benefits to be extended to those with less than Honorable discharges, to include OTH discharges. Congress tasked VA with making the eligibility determination based on whether the veteran should have received a Dishonorable discharge by court-martial, not on the discharge characterization the veteran received from the military.

The parties to the *Petition for Rulemaking*, as well as the authors of *UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER*, have elaborated on the problems with the current regulations implementing this statute. *Petition for Rulemaking to Amend 38 C.F.R. §§ 3.12(a), 3.12(d), 17.34, 17.36(d)* (December 19, 2015) (submitted by representatives of Swords to Plowshares; National Veterans Legal Services Program; Veterans Legal Clinic, Legal Services Center of Harvard Law School; and Latham & Watkins, LLP); *UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER* (2016). Chief among these are (1) the regulatory bars to eligibility which go beyond those enumerated by Congress; (2) the overly broad definition and application of "willful and persistent misconduct"; (3) no consideration of mental health conditions outside of

“insanity”; (4) a failure to consider mitigating factors; (5) unlawful singling out of a class of veterans due to their sexual orientation and/or gender identity; and (6) a general presumption of ineligibility for those with OTH discharges.

Furthermore, many veterans never receive an eligibility evaluation until after they apply for (and are denied) VA benefits. “[T]he VA does not conduct eligibility evaluations automatically when a service member is discharged, and therefore many veterans do not know whether they are or may be eligible for VA services. . . . In practice, the VA fails to initiate COD reviews when veterans request healthcare at a VA hospital or clinic. Nor does VA policy provide a path for an eligibility evaluation to occur when a veteran seeks homeless shelter services. Instead a Character of Discharge review only occurs when a veteran applies for a benefit from the Veterans Benefits Administration (VBA). Until the veteran applies to the VBA and the VBA completes a lengthy Character of Discharge adjudication, almost no services are available to the veteran.” UNDERSERVED at 9-10.

Even when VA provides veterans with eligibility evaluations, VA employees interpret and apply the regulations with broad disparities across VA Regional Offices (ROs). For example, in 2013, three ROs – Indianapolis, Boise, and Wichita – had 100-percent denial rates, while the Boston RO had a 69-percent denial rate. UNDERSERVED at 3; 16. When a veteran is erroneously denied eligibility and fails to receive necessary treatment for conditions caused by service, further problems manifest in homelessness, criminal behavior, mental illness, and suicide.

### **Promulgation Of Proposed Regulations Is Overdue**

The parties filed the *Petition for Rulemaking* in December 2015; VA granted it in May 2016. As of June 29, 2020, over four years after this grant and in spite of extensive research and recommendations provided to assist its efforts, VA has failed to issue any proposed regulations. VA should issue regulations without further delay.

### **VA’s Regulations Should Be Informed By The Findings Of Petitioners**

NOVA agrees with the recommendations and proposed changes offered by the experts in the above-referenced documents and urges VA to incorporate them into its amended regulations. These recommendations include, but are not limited to, the following:

- VA should only bar veterans whose misconduct resulted in, or should have resulted in, a dishonorable discharge.
- VA should allow for consideration of the mitigating and positive factors of a veteran’s service.

- VA should account for in-service mental health conditions that do not rise to the level of “insanity” and consider whether the condition led to the misconduct that resulted in discharge.
- VA should not require prior eligibility reviews for those who received an administrative OTH discharge.
- VA should provide tentative healthcare eligibility to veterans with OTH discharges.

*See Petition for Rulemaking* at 86-105; *UNDERSERVED* at 29-32.

### **VA Should Fully Implement The Provisions Of The *Honor Our Commitment Act***

In 2017, VA provided for short-term, emergency mental health care for veterans with OTH discharges. In 2018, Congress passed *Honor Our Commitment Act*, 38 U.S.C. § 1712I, which provided mental and behavioral healthcare to certain veterans with OTH discharges. A year later, several senators and VVA implored the Secretary to properly implement the law. Reports of outdated IT systems, improper training of VA staff, inadequate outreach to potentially eligible veterans, and inconsistent application of standards persisted. *See* John Rowan, CEO/President, Vietnam Veterans of America, to Honorable Robert Wilkie (June 7, 2019); Senator Christopher S. Murphy, et al., to Robert Wilkie (May 22, 2019). VA must ensure veterans can access this care by informing everyone who presents of their potential eligibility and provide assistance in completing the process. This Subcommittee should press VA to provide additional details regarding implementation of this important legislation and ensure those who are eligible can avail themselves of these benefits.

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NOVA is committed to continue working on behalf of veterans wrongly denied benefits they have earned through their service. We again thank the Subcommittee for allowing us to provide our views on this important issue. For questions regarding this testimony or if you would like to request additional information, please contact:

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