

It's Not "Quality of Life," it's "Life or Death"

*The Disparate Structural Barriers that Accompany VA Regulatory Policies
for Minority Veterans Holding "Bad Paper" Discharge Characterizations*



Written Testimony Provided for:

the House Veteran's Affairs Subcommittee on Disability Assistance and Memorial Affairs'
Hybrid Oversight Hearing: *Stuck in Red Tape: How VA's Regulatory Policies
Prevent Bad Paper Veterans from Accessing Critical Benefits*
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Chairwoman Luria, Ranking Member Bost, and Distinguished Members of the Subcommittee,

We collectively serve and represent the minority veteran community through the Minority Veterans of America (MVA). Our organization works to create belonging and advance equity for minority veterans, and we have always recognized that equitable access to necessary and due benefits is central to fulfilling our mission. Thank you for convening this oversight hearing and for allowing us to contribute to the work you are doing to address this crucial issue.

Our position affords us the privilege and honor of serving thousands of U.S. veterans across 46 states, 2 territories, and 3 countries. Prior to our service with MVA, we both worked with the legal department of OutServe-Servicemembers Legal Defense Network, where a substantial amount of our efforts were focused on availing veterans to their earned benefits and assisting veterans with bad paper discharge upgrades in their appeal efforts. As veterans with service-connected disabilities, we are testifying from both our personal experiences and on behalf of the countless minority veterans who have never, and may never, have the opportunity to be recognized or heard.

In our work, we routinely encounter minority veterans that received (often incongruously) a bad paper discharge through administrative proceedings. These veterans have reported that these discharge characterizations and the resulting impact on their access to due and necessary services cause them to feel like they do not deserve to call themselves veterans or that they do not feel respected as veterans. Not only is their service often unrecognized by the American public, but within our communities they have been ostracized by structural forces and social attitudes that are antithetical to the values of our military and democracy. They are made to question their value, their abilities, their safety, and, perhaps most insidiously, their sanity.

Current State

More than 500,000 veterans across all military branches have received an administrative “Other Than Honorable” (OTH) discharge.¹ Despite their service, veterans are being turned away

¹ Alaiigh, P. 2017. “Access to Mental Health Services for Other Than Honorable Discharged Servicemembers.” Undersecretary for Health Memorandum. Washington, DC: Department of Veterans Affairs. https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=5350.

from the VA, unable to even *apply* for their benefits, upon showing their DD214 to staff members at the VA. Internal VA guidance concerning bad paper discharge benefit eligibility is incorrectly informing VA staff members and preventing access to due and necessary care. These veterans are deprived of their right to due process, which requires at the minimum an investigation into their individual cases to determine eligibility for benefits.

The stigma associated with bad paper discharges extends beyond the issue of turning away veterans who enter VA facilities. The weight they carry influences the perceptions and expectations of veterans themselves, creating a barrier to even applying for benefits for which they may be eligible. The knowledge that other veterans with bad paper discharges have been turned away from the VA intensifies the impact of this stigma, confirming fears that they do not belong to the veteran community, that they will be treated unjustly by veteran service providers, and that they will not receive help from the only institution that understands the service-connected issues they face. Even when help is offered, as in the VA's 2017 mental health pilot program from bad paper veterans, only limited access to care is granted, and the stigma associated with their status as a veteran with a bad paper discharge prevents many from fully engaging in the limited care they receive.

This deprivation is more insidious in the lives of minority veterans given the pervasive bias and structural discrimination they experience regularly based on their identity and status in society. Even when minority veterans have been discharged under other than dishonorable conditions, they have been ostracized from the veteran community, turned away from the VA, been prevented from using their hard-earned benefits, and made to feel as if their service was underappreciated and undervalued by the very people with whom and for whom they served. Bad paper discharges compound the already unjust and inequitable social and structural conditions which categorically disadvantage minority veterans.

Bad Paper Discharges

The term “bad paper discharge” colloquially refers to military discharge characterizations that are not fully “Honorable.” This includes characterizations listed as “Other Than Honorable” (OTH), “Bad Conduct Discharge” (BCD), and “Dishonorable Discharge.” For the majority of this

testimony, we will be using the term “bad paper discharge” to refer to OTH and BCD characterizations, which are respectively the most severe administrative discharge and the result of a court-martial. These discharge characterizations are generally reserved for conduct related to security violations, involvement with civilian authorities, alcohol and drug violations, and assault.

In the public and private sector, when an employee is discharged from their job for cause—whether it be not showing up for work, showing up to work intoxicated, or even insubordinate behaviors—they are not unilaterally prohibited from accessing due and necessary care for or compensation for their documented job-related injuries. In the military sector however, veterans dismissed for similar infractions are almost unilaterally prevented from accessing similar services, if not in theory then in practice.

A. Race

Racial bias in the military justice system has led to disparities in the rates and types of discharges. One report found that black service members were substantially more likely than white service members to face military justice or disciplinary action, a key factor in the characterization of service on discharge paperwork. This is a clear indication of racial bias, whether implicit or explicit, functioning within the framework of structural racism. As such, military decision-makers cannot be separated from the communities in which they live, nor the society in which they were raised, both of which continue to perpetuate racism. In interpreting actions and behaviors, there is a wealth of research demonstrating that implicit bias shapes perceptions of black people as more aggressive, more violent, and more prone to criminality. As such, extra care should be taken in military justice proceedings with racial and ethnic minority service members, including consideration of the disproportionate impact that a bad paper discharge will have on them for the rest of their lives due solely to the color of their skin.

B. Sexual Orientation and Gender Identity

Under the now-defunct “Don’t Ask, Don’t Tell” (DADT) policy and its predecessors, more than 100,000 service members were discharged solely due to their actual or perceived sexual orientation. Most of those administratively separated veterans received bad paper discharges. Additionally, transgender service members were explicitly banned under various policies until

2016, and then again from 2017 to the present. Despite these bans, there are more than 134,000 transgender veterans and an estimated 15,500 transgender service members currently serving in the armed forces. In contrast to the *de facto* racial bias in the military justice system, the military's *de jure* discrimination has led to innumerable bad paper discharges, highlighting the pattern of institutionalized discrimination and disproportionate impact on minority veterans.

C. Mental Health and Military Sexual Trauma

Actions and behaviors that are considered to be misconduct or criminal in nature, are often categorized without consideration of the impact that mental health issues and military sexual trauma (MST) have on service members. The prevalence of post-traumatic stress disorder (PTSD) and traumatic brain injuries (TBIs) among service members has been noted in relation to bad paper discharges. Despite efforts to increase screening for mental health conditions in the military, many service members with PTSD symptoms do not seek mental health care due to widespread stigmatization and fear of losing their careers. In an effort to cope with symptoms of PTSD, including the traumatic effects of MST, many service members self-medicate by using illicit substances and alcohol as a substitute for professional mental health care. The existence of other justicial and cultural categories for understanding behaviors and actions make their expressions illegible in the framework of mental health and MST. These include insubordination, failure to appear, absent without leave, and at times malingering.

The social barriers created by the stigma against seeking mental health care disproportionately impact minority service members in various ways. For example, the powerful, historical association between LGBTQ+ identity and severe mental illness has discouraged many LGBTQ+ people from seeking mental health care. The same is true for women, as sexist attitudes about women's mental health and disturbingly commonplace practices such as forced institutionalization have prevented many women from seeking care and being honest with mental health care providers that they have seen. Finally, racist ideas about pain tolerance among Black people, as well as structural racism and bias against people of color, in all aspects of American society, is a powerful contributing factor for racial and ethnic minorities in seeking mental health care.

Due to the strict policies in the military and the lack of analysis for certain contributing factors in military justice proceedings, consideration of mental health conditions and MST are often absent when military decision-makers assign a discharge characterization. Even if these factors were considered, it is important to recognize that many service members who experience MST do not report their experiences for fear of being punished, whether formally, socially, or both. Overall, attention must be given to the circumstances surrounding the characterization of behavior and actions as misconduct or criminal, particularly for minority service members.

D. Entry Level Separation Discharge Characterizations

While generally deemed an uncharacterized discharge, we would also like to highlight the apparent parallels between bad paper discharges and those characterized as an “Entry Level Separation” (ELS) discharge. Generally, an ELS characterization is granted in situations where a service member fails one or more military standards that have been deemed necessary for both individual and unit success. These can range from physical and personal grooming standards to mental health and the ability to show up to work on time. If, during a service member’s first 180 days of service, a service member has shown they did not have the ability or desire to continue a life of military service, they can be released with an uncharacterized discharge. While receipt of an ELS characterization when being discharged within the first 180 days of service is not prescriptive, commanders retain the ability to issue Honorable or even OTH and BCD discharges, it is fairly common.

In order to then access necessary and due services or benefits through the Department of Veterans Affairs, individuals with an uncharacterized ELS discharge are required to undergo the same “independent testing standard” required of individuals with bad paper discharges. While in theory this would avail many individuals to the benefits they need to maintain or enhance their quality of life, the lack of regulatory standards often leads to these individuals being denied services when their discharge documents are submitted or facing the same denial of services when self-medicinal practices as a result of in-service trauma are deemed to be aggravating or to induce a less than honorable characterization through the Department of Veterans Affairs.

(Administrative/Military) Due Process

Following the United States Supreme Court's opinion in *Burns v. Wilson*,² penned by Chief Justice Vinson, the Court of Military Appeals affirmed that military due process is rooted in the nation's Bill of Rights and that all rights which are not expressly or necessarily deemed inapplicable shall be availed to members of the armed forces.³ The protections provided to service members through the Due Process Clauses of the Fifth and Fourteenth Amendments and the universal maxim that all are deemed *innocent until proven guilty*⁴ are furthered by the Uniform Code of Military Justice. The foundational document of military law provides the assurance that there shall be no requirement for a statement in any situation which a person is accused or suspected of, even when self-incrimination is a non-issue⁵ and that they may appoint civilian counsel for comprehensive representation.⁶ Nevertheless, in a majority of administrative discharge proceedings, especially those conducted in the field or onboard a naval vessel, the accused is often

denied the right to subpoena witnesses on his own behalf, confront and cross-examine the witnesses against him, require the prosecution to adhere to the rules of evidence or expect the prosecution to shoulder the burden of proving him guilty beyond a reasonable doubt.⁷

The apparent disregard of fair and just processes are blatant violations of the very same due process rights that the Courts have affirmed shall be innately endowed to our nation's service members.

We raise this contention to highlight the disproportionate impact these discharge proceedings have on our minority veteran communities. Though we no longer live in a society that promotes *de jure* discriminatory practices, identity-based disparities rooted in social, economic, and even justicial lenses continue to persist. The rising rates of income inequality continue to exacerbate those disparities and have direct impacts on minority individuals' educational

² Powers, R. D. 1963. Administrative Due Process in Military Proceedings, 20 Wash. & Lee L. Rev. 1, fn. 11. (*Burns v. Wilson*, 346 U.S. 137, 142 (1953)). See also *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205, 207 (1947). "It would seem to go without saying that these amendments apply as well to military tribunals as to civil ones."

³ *Id.*, fn. 12. (*United States v. Jacoby*, 11 USCMA 428, 430, 29 CMR 244, 246 (1960)).

⁴ See, U.S. Const. Amend. XIV. See also, UN General Assembly. 1948. Universal Declaration of Human Rights (11).

⁵ Article 31(a, b), Uniform Code of Military Justice, 10 USC § 831.

⁶ Articles 27, 32, 38, 70, Uniform Code of Military Justice, 10 USC §§ 827, 832, 838, 870.

⁷ Cysts, D. L. 1971. Due Process and Military Discharges. 57 A.B.A. J. 875.

attainment, involvement with the judicial system, and overall physical and mental health.⁸ According to a recent study funded by the Defense Department, four of the five top reasons a lower enlisted service member chose to join the military are rooted in their desire to receive life-changing training and benefits, while removing them from negative home life environments.⁹ The circumvention of procedural and substantive due process, coupled with the lack of standardized procedures and benchmarks, directly results in an excessive number of incorrectly characterized administrative separations and emboldens a suppressive benefits system that continues to perpetuate cycles of poverty and systemic oppression.

Benefits Access

Bad paper discharges have lifelong consequences for veterans, including a permanent bar from government jobs, a loss of access to VA care and benefits, loss of assistance in the transition from military to civilian life, and serious disadvantages in the job market. This perpetual deprivation of benefits and opportunities is exacerbated by existing social conditions for minority veterans, particularly the pervasiveness of discrimination in employment, housing, and health care.

A. Employment

Despite an array of legal protections, racial discrimination remains “the most frequent ground for discrimination alleged under Title VII,” according to the U.S. Equal Employment Opportunity Commission (EEOC).¹⁰ This problem is echoed in the veteran community, with racial minority veterans having “a 44-percent higher risk of unemployment” than their white and non-Hispanic counterparts.¹¹ Among all women in the United States, 42% have experienced gender

⁸ Sundquist, C.B. *Genetics, Race, and Substantive Due Process*, 20 Wash. & Lee J. Civ. Rts. & Soc. Just. 341, 43 (2014).

⁹ Helmus, T.C., Zimmerman, S.R., Posared, M.N., et. al. 2018. *A study of the motivations and experiences of junior enlisted personnel in the U.S. Army*. Santa Monica, CA: Rand Corporation. https://www.rand.org/pubs/research_reports/RR2252.html

¹⁰ EEOC. n.d. “African-Americans in the American Workforce.” Washington, DC: U.S. Equal Employment Opportunity Commission. <https://www.eeoc.gov/special-report/african-americans-american-workforce>.

¹¹ Aponte, M. et al. 2017. “Minority Veterans Report: Military Service History and VA Benefit Utilization Statistics.” Washington, DC: Office of Data Governance and Analytics, Department of Veterans Affairs.

discrimination in the workplace,¹² with nearly 20,000 unique instances reported to the EEOC in FY2014.¹³ Lesbian, gay, bisexual, transgender, and queer (LGBTQ+) people in the United States experience unemployment at nearly twice the rate of their cisgender, heterosexual counterparts.¹⁴ These employment circumstances are particularly detrimental to minority veterans seeking employment when considered in the context of a 2018 study in which discharge status was a salient concern among veterans “due to consistent experiences that employers are most interested in this detail of veterans’ service histories.”¹⁵

B. Housing

While men in the United States represent nearly two-thirds of people experiencing homelessness,¹⁶ women veterans are experiencing homelessness at an increasing rate.¹⁷ Research shows that women veterans “are three to four times more likely to become homeless than are non-veteran women,”¹⁸ and the VA home loan benefit contingent upon a discharge under other than dishonorable conditions¹⁹ coupled with the barriers of stigmatization for bad paper discharges means that women veterans are structurally disadvantaged when it comes to attaining stable housing. These problems exist for other minority veterans, with a long history of housing

¹² Parker, K., and C. Funk. 2017. “Gender discrimination comes in many forms for today’s working women.” Washington, DC: Pew Research Center. <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/>.

¹³ EEOC. n.d. “Women in the American Workforce.” Washington, DC: U.S. Equal Opportunity Employment Commission. <https://www.eeoc.gov/special-report/women-american-workforce>.

¹⁴ <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density>

¹⁵ Keeling, M., S. Kintzle, and C. A. Castro. 2018. “Exploring U.S. Veterans’ post-service employment experiences.” *Military Psychology* 30 (1): 63-69, 65.

Further consideration should be given for the circumstances of bad paper discharges, as noted by the authors: “Their discharge status meant their exit was abrupt and were not afforded time to prepare. Moreover, their discharge status made them ineligible for benefits and access to VA services” (65).

¹⁶ 2020. “State of Homelessness, 2020 Edition.” Washington, DC: National Alliance to End Homelessness. <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2020/>

¹⁷ Aponte, M. et al. 2017. “Women Veterans Report: The Past, Present, and Future of Women Veterans.” Washington, DC: Office of Data Governance and Analytics, Department of Veterans Affairs.

¹⁸ Washington, D. L. et al. 2010. “Risk Factors for Homelessness among Women Veterans.” *Journal of Health Care for the Poor and Underserved* 21 (1): 82-91, 82.

¹⁹ Veterans Benefits Administration. 2015. “Applying for Benefits and Your Character of Discharge.” https://www.benefits.va.gov/benefits/character_of_discharge.asp.

discrimination against racial minorities²⁰ and LGBTQ+ people²¹ in the United States. Despite the nominal provision of benefits to minority veterans, veteran status has historically made no difference in rates of discrimination against minorities, particularly against black veterans.²²

C. Health Care

Various social determinants of health contribute to the disproportionate impact that bad paper discharges have on minority veterans. For example, racial minorities experience healthcare disparities along several axes compared to white non-Hispanic individuals in the United States, leading to worse health outcomes overall.²³ Women have long experienced discrimination in mental health care, and research shows that sex differences in diagnosis and treatments for women lead to worse health outcomes,²⁴ particularly for black women in the United States.²⁵ Despite the VA's strong non-discrimination policy against veterans based on sexual orientation and gender identity,²⁶ the Department of Health and Human Services (HHS) recently finalized a rule reversing

²⁰ Turner, M. A. et al. 2013. "Housing Discrimination Against Racial and Ethnic Minorities 2012." Washington, DC: Office of Policy Development and Research, U.S. Department of Housing and Urban Development. "Although the most blatant forms of housing discrimination (refusing to meet with a minority homeseeker or provide information about any available units) have declined since the first national paired-testing study in 1977, the forms of discrimination that persist (providing information about fewer units) raise the costs of housing search for minorities and restrict their housing options" (xi).

²¹ Currently, only 22 states and the District of Columbia provide nondiscrimination protections in housing for LGBTQ+ people.

For more information, see MAP. 2020. "Nondiscrimination Laws." Boulder, CO: Movement Advancement Project. https://www.lgbtmap.org/equality-maps/non_discrimination_laws/housing.

²² EJI. 2017. "Lynching in America: Targeting Black Veterans." Montgomery, AL: Equal Justice Initiative. "Racial discrimination pervaded veterans' programs, but the effects were particularly acute in the provision of home loans" (38).

²³ Artiga, S., and K. Orgera. 2019. "Key Facts on Health and Health Care by Race and Ethnicity." San Francisco, CA: Henry J. Kaiser Family Foundation. <https://www.kff.org/disparities-policy/report/key-facts-on-health-and-health-care-by-race-and-ethnicity/>.

²⁴ Alspach, J. G. 2012. "Is There Gender Bias in Critical Care?" *Crit Care Nurse* 32 (6): 8-14.

"In health care, the literature related to gender bias primarily refers to instances in which female patients are assessed, diagnosed, referred, and treated not only differently but at a lower level of quality or to a lesser degree of adherence to established standards of care than men with comparable health problems. This inequality can lead to comparatively worse outcomes for women, marked by higher complication rates, higher morbidity, and higher mortality" (8).

²⁵ T.H. Chan School of Public Health. 2018. "How discrimination can harm black women's health." News. Cambridge, MA: Harvard. <https://www.hsph.harvard.edu/news/hsph-in-the-news/discrimination-black-womens-health/>

"Black women face risks to their health from discrimination—both from health professionals who don't take their concerns seriously and from biological wear and tear caused by chronic stress."

²⁶ VHA. 2020. "VA LGBT Policies." Washington, DC: Office of Patient Care Services, Veterans Health Administration, Department of Veterans Affairs. https://www.patientcare.va.gov/LGBT/VA_LGBT_Policies.asp

protections for LGBTQ+ individuals in healthcare.²⁷ Upon its implementation in August, we expect to see an increase in healthcare discrimination against LGBTQ+ veterans outside of the VA,²⁸ including the potential use of the rule by VA healthcare providers to defend discrimination against LGBTQ+ veterans seeking care in VA facilities. Finally, the existing issues in employment and housing for minority veterans contribute to disparities in healthcare, from the inability to get adequate healthcare coverage, to cost barriers with co-pays, and simple yet powerful issues that are often overlooked, such as access to reliable transportation and ability to take time off work to make appointments.

Taken together, these various barriers explain the higher rates of homelessness, substance abuse, incarceration, and death by suicide among minority veterans. The discrimination that exists in the process of deciding whether a minority veteran receives a bad paper discharge is inextricable from larger societal attitudes and structures which foster and perpetuate racism, sexism, homophobia and transphobia, and religious discrimination. **The structural barriers that come with a bad paper discharge are not mere quality of life abatements for our nation’s minority veterans. They are, unfortunately and regularly, a matter of life and death.**

Advancing comprehensive and equitable protections for minority veterans begins with the recognition that the heart of the problem is inextricably bound to social and structural forces, and it requires social and structural change. We have identified three opportunities that we strongly believe will directly address the concerns reviewed during this oversight hearing and ensure that future veterans are not faced with similar circumstances.

²⁷ HHS Press Office. 2020. “HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs.” Washington, DC: U.S. Department of Health and Human Services. <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>

²⁸ In addition to a lack of federal nondiscrimination policy protecting LGBTQ+ patients seeking health care, 30 states and four territories lack nondiscrimination policies to protect LGBTQ+ patients. This widespread refusal to protect LGBTQ+ patients has always impacted LGBTQ+ veterans, many of whom have been forced to seek healthcare outside of the VA due to the categorical exclusions instituted through DADT and the transgender ban prior to the VA’s inclusive policies put in place only within the last decade. For more information, see MAP. 2020. “Healthcare Laws and Policies.” Boulder, CO: Movement Advancement Project. https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies.

(1) Significant attention must be paid to revitalizing VA processes to ensure that current frameworks do not prevent veterans from accessing life-changing care and services. Mandatory training should be developed and provided to all VA points of entry to ensure that proper investigative procedures are conducted, and that no veteran is erroneously dismissed from accessing their earned benefits.

(2) Congress should examine the weaponizing of military discharges and applied categorizations. Administrative processes, standards of review, and records correction appeals should be codified where necessary, to ensure a universal standard is both applied and met in all administrative separation proceedings.

(3) The President should invoke his executive authority to clear records of infractions for post-traumatic stress disorder, traumatic brain injury, military sexual trauma, and administrative discharges conducted under now-defunct military laws. With cleared records, veterans in receipt of bad paper discharges should be automatically upgraded to an honorable status where appropriate. A clear and established precedent for these actions has been documented through the Administrations of Presidents Andrew Johnson, Gerald Ford, and Jimmy Carter.

Thank you, again, for the opportunity to submit this testimony. If we can ever be of further assistance, please feel free to contact us at ablevins@minorityvets.org.

Respectfully Submitted,

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