

Comparison: Old vs. New Rule 38 C.F.R. § 3.12

Old Rule

§ 3.12(d) Regulatory Bars:

(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

1. Acceptance of an undesirable discharge to escape trial by general court-martial.
2. Mutiny or spying.
3. An offense involving moral turpitude. This includes, generally, conviction of a felony.
4. Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.
5. Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

VS

New Rule

§ 3.12(d) Regulatory Bars:

(d) Benefits are not payable where the former service member was discharged or released under one of the conditions listed in paragraph (d)(1) or (2) of this section.

1. Compelling circumstances exception is not applicable for:

- i. **Discharge in lieu of trial.** Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by general court-martial.
- ii. **Mutiny or espionage. Mutiny or spying.**

2. Compelling circumstances exception* is applicable for:

- i. **An offense involving moral turpitude.*** This paragraph (d)(2)(i) includes, generally, conviction of a felony.
- ii. **Willful and persistent misconduct.** For purposes of this section, instances of minor misconduct occurring within two years of each other are persistent; an instance of minor misconduct occurring within two years of more serious misconduct is persistent; and instances of more serious misconduct occurring within five years of each other are persistent. For purposes of this section, minor misconduct is misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.

CHANGE: Introductory paragraph language changed to explicitly state that benefits are not payable where one of the below conditions is met.

EXPANSION: Extends the “compelling circumstances” exception from the statutory AWOL bar to apply to some regulatory bars to benefits.

LIMITATION: Veterans discharged in lieu of trial by general court-martial not eligible for “compelling circumstances” exception.

LIMITATION: Veterans discharged for mutiny or espionage also ineligible for “compelling circumstances” exception.

EXPANSION: Definition of instances in which “compelling circumstances” exception is applicable expanded to now consider length and character of service and mitigating factors like mental impairment, abuse, or physical health.

CHANGE: Previous definition of “willful and persistent misconduct” replaced with new, more detailed definition.

DELETION: Homosexual acts bar deleted as VA stated the bar was “outdated and unnecessary.”



*The following circumstances will be considered in determination on this matter: (1) Length and character of service exclusive of the period of prolonged AWOL or misconduct; (2) Reasons for prolonged AWOL or misconduct, such as mental or cognitive impairment, physical health, combat-related or overseas-related hardship, sexual abuse/assault, duress, coercion, desperation, family or comparable obligations, age, education, cultural background, and judgmental maturity; and (3) Whether a valid legal defense would have precluded a conviction for AWOL or misconduct.

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