



OTHER THAN HONORABLE DISCHARGE

**A NATIONAL VETERANS CRISIS:
A NEW JERSEY SOLUTION**



THE NEW JERSEY REENTRY CORPORATION

LEGISLATIVE PROPOSAL



Submitted By Heather Roth and Jonathan Reda
(NJRC Legal Interns and Seton Hall University School of Law Students)

ACKNOWLEDGMENTS

The New Jersey Reentry Corporation thanks the countless veterans who have bravely served our nation. In particular, we are most grateful for the research, scholarship, and writing of Heather Roth and Jonathan Reda, Seton Hall Law School students, who drafted this report. NJRC is indebted to the National Veterans Legal Services Program for their advocacy, Dr. Shuvendu Sen, Mark Curtis, Suzanne Kunis of Horizon Blue Cross Blue Shield of New Jersey, Meghan Brooks of the Yale Legal Clinic, Jen Burch of IAVA, Stephanie Keegan, Mr. and Mrs. Duffy, James Fitzgerald, Corporal Tim Shea, Dean Kathleen Boozang and Professor Jennifer Oliva of Seton Hall Law School.

We are indebted to William Sheehan, chair NJRC Veterans Task Force, as well as, Michael Boll, Brett D'Alessandro, Dr. Frank Dos Santos, Daniel Dunn, Brian Gillespie, Kenneth Hagemann, Richard Leibler, Robert Lobby, Alexa Modero, Dave Pearson, James Plousis, Johnnie Walker, Dr. Denise Warren, Gary White.

Lastly, we are grateful to Senate President Scutari, Speaker Coughlin, Senators Cryan, Cunningham, and Vitale, and to those legislators who have demonstrated strength and leadership on behalf of our state's veterans.

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Dear Governor Murphy,
Senate President Scutari,
Speaker Coughlin, Members of the State Legislative,
Veterans, Clergy, and our fellow New Jerseyans,

Thank you for your commitment to our veterans. Listening to combat veterans, mothers, and fathers, who have lost sons and daughters, we know that veterans, particularly combat veterans, may have been impacted by combat trauma and brain injury, have sought relief, and have suffered disproportionately from mental illness, homelessness, and most tragically, suicide.

Indeed, veterans comprise upwards of 8% of the state's prison population. Many of these veterans whether by virtue of discharge classification or Veterans Affairs allocation of benefits have struggled to secure needed treatment. For the 8,000 New Jersey Veterans with "less than honorable discharge" status, the ability to access critically needed services is often a difficult and frustrating experience.

For the estimated 1,000 New Jersey Veterans, many of whom have served in Iraq and Afghanistan and have received "Other than Honorable" (OTH) discharge, their Veterans Affairs benefits are limited, if not nonexistent, due to their discharge classification.

Whether necessary medical services, comprehensive psychiatric care, and addiction treatment, our state's veterans must be provided the needed medical and behavioral services to assist healing and the voyage home.

Until the federal government responds, this NJRC report entitled, ***A National Veterans Crisis: A New Jersey Solution***, recommends that we follow course with Connecticut, New York, and California; namely, to address the substantial gap in services for those uniformed men and women, who returning home require medical and behavioral treatment to heal the pains of war and combat.

This report was prepared by Seton Hall Law School students Heather Roth and Jonathan Reda with the guidance of Will Sheehan, U.S. Naval Academy '06, Naval Intelligence.

We are grateful for your consideration of the report's recommendations. We look forward to working with the State Legislature to craft legislation to provide those services, which veterans have earned by placing themselves in harm's way in the defense of the nation.

Respectfully submitted,

A handwritten signature in blue ink, which appears to read "James E. McGowan". The signature is stylized with a large, sweeping flourish at the end.



NEW JERSEY SENATE

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February 3, 2022

Dear Veteran Community,

Thank you for your service to our Country both overseas and right here at home. Whether it is fighting for our freedom around the world or helping us battle a worldwide pandemic here at home, you have always put yourself on the front lines to keep us safe and for that, I am forever grateful. As the proud son of a navy war veteran, I have a deep and abiding respect for our nation's veterans and those who have personally sacrificed to preserve the freedoms of our country.

This NJRC report entitled, *National Veterans Crisis: A New Jersey Solution* highlights the sad, if not tragic consequences of denial of basic mental health and addiction treatment services for those veterans with "Other than Honorable" discharge.

The United States Department of Defense and the respective branch of service may determine the status of discharge. Yet, it is noteworthy that Veterans Affairs in large measure relies upon that discharge classification to determine veteran's benefits.

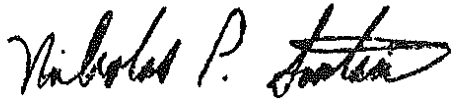
While I applaud NJRC for entering an agreement with the prestigious National Veterans Legal Services Program to provide for discharge upgrades, this process may require years to effectuate a change in status.

Therefore, it is imperative that the State of New Jersey provides for basic services, particularly those mental health and addiction treatment services that so many combat veterans may require to properly address the combat trauma they have confronted.

This report offers a detailed and at times difficult assessment of the trials and tribulations of combat traumatized and brain injured veterans and the needed medical assistance they seek. I strongly believe that our nation's veterans need to be provided those basic services required to resume their lives upon reentry to American society.

Lastly, I look forward to working with colleagues on both sides of the aisle to provide critically needed services to those veterans. We will not turn our backs on the men and women who have placed themselves in harm's way for the sake of our nation.

Sincerely,

A handwritten signature in black ink, reading "Nicholas P. Scutari". The signature is written in a cursive style with a large, stylized "N" and a prominent "S" at the end.

Senate President Nicholas Scutari



NEW JERSEY GENERAL ASSEMBLY

CRAIG J. COUGHLIN
SPEAKER

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Dear Veteran Community,

For persons serving our nation in uniform, there can be no greater responsibility upon the end of service than to ensure that our veterans receive those services, which are so critical to successful reentry into civilian life.

As many veterans all too well know, the Department of Defense discharge process is often complex, at times arbitrary, and may have a profound impact on the eligibility for United States Department of Veterans Affairs benefits.

Over time I have heard the stories of returning veterans who have received "Other than Honorable" (OTH) discharge and the impact of that discharge classification on the ability to secure medical, behavioral, including mental health, psyche, and addiction treatment benefits. It is fundamentally the duty of our nation to return veterans, and to make every effort, that veterans return home in as healthy and sound a manner as possible.

Particularly recognizing the impact of combat trauma and brain injury upon our veterans, as a State, we need to be mindful that even the inappropriate use of narcotics requires the necessity for mental health and addiction treatment. The not too often sad irony is that for persons who have been less than honorably discharged, these veterans may actually require more services than those "honorably discharged," not fewer services.

This NJRC report entitled, *National Veterans Crisis: A New Jersey Solution* offers a state legislative response to filling the gaps in VA services for those "Other than Honorable" discharge veterans.

Over the years, I have worked closely to ensure that our veteran community is recognized for their contributions. The legislation proposed in this report reflects those values. I look forward to working with the veteran's community, veterans advocates, fellow legislators, and the Governor's Office to draft responsive legislation to this crisis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Craig Coughlin", written over a horizontal line.

Speaker Craig Coughlin



Dear Veterans Community and fellow New Jerseyans,

For our nation's veterans, for those who placed themselves in harm's way, particularly veterans who suffered combat trauma and brain injury due to combat, we have a sacred duty to provide these veterans with the services required for successful reentry into civilian life. The United States Department of Defense and individual branches of service may determine discharge classification, yet, this discharge decision profoundly impacts the scope of services that Veterans Affairs offers to a returning veteran.

There are approximately 8,000 New Jersey veterans with less than honorable discharge, of which approximately 1,000 New Jersey veterans, many having served in Iraq and Afghanistan, have "Other than Honorable" discharge status and require critically needed medical, mental health, and addiction treatment services. Until there is a federal change in the law, New Jersey believes it is necessary to provide those veterans with "Other than Honorable" discharge status with basic services required to grapple with the trauma of war while returning home.

The New Jersey Reentry Corporation's report entitled, ***National Veterans Crisis: A New Jersey Solution*** offers a compelling critique of the present allocation of veteran services. As New Jersey legislators, we are beneficiaries of a long history of bipartisan support for this State's veterans.

We support the intent of this report to address the severity in the gap of services for veterans, especially those most recently transitioning from military combat service in Iraq and Afghanistan. It is incumbent upon New Jersey that we deliver these services, while and until the nation responds.

Respectfully submitted,

Senator Kristin M. Corrado - 40th Legislative District

Senator Joseph P. Cryan - 20th Legislative District

Senator Sandra Cunningham - 31st Legislative District

Senator Patrick Diegan - 18th Legislative District

Senator Vin Gopal - 11th Legislative District

Senator Troy Singleton - 7th Legislative District

Senator Jean Stanfield - 8th Legislative District

Senator Joseph Vitale - 19th Legislative District

Assemblyman Christian E. Barranco - 26th Legislative District

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DEAN

Dear Veteran Community,

The Seton Hall University School of Law writes this letter in support of the New Jersey Reentry Corporation's legislative proposal, A National Veteran's Crisis: A New Jersey Solution. This legislative proposal brings awareness to the veteran population most in need. The "Other Than Honorable" Veteran, as a result of their discharge status, is frequently excluded from receiving benefits and the consequences of this discharge rating can be daunting.

The brave individuals who serve our Nation deserve access to state benefits. These benefits will help bridge the gap between military service and the return to civilian life. Far too many "Other Than Honorable" servicemembers succumb to taking their lives by suicide. In many instances, access to state benefits will save the lives of those servicemembers who received an "Other Than Honorable" Discharge.

The New Jersey Reentry Corporation has been a force in providing critically needed legal services to our veterans. Additionally, through their partnership with the National Veterans Legal Services Program, they are providing veterans with access to the best lawyers. They should not be alone in the fight.

Sincerely,

Kathleen M. Boozang

Dean and Professor of Law



Dear Veteran Community,

As a combat veteran and Chair of the New Jersey Re-Entry Corporation's Veterans Task Force, I write to express my upmost support for the New Jersey legislature to expeditiously pass legislation that would provide benefits to veterans with Other Than Honorable (OTH) discharges as a result of Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), and Military Sexual Trauma (MST). The creation of comprehensive state policies that ensure that veterans with OTH discharges can receive state, local, and county level benefits will help mend the invisible wounds of service-related trauma for so many New Jersey veterans and their families. Additionally, it will provide a social safety net for those whose discharge status renders them ineligible for federal benefits outside of mental health care from the U.S. Department of Veterans Affairs (VA).

Following the September 11th attacks, I, like so many veterans, chose service in response to tragedy. I accepted a nomination to the U.S Naval Academy at Annapolis, received a commission upon graduation, and served in support of the SEAL Teams across the globe as an Intelligence Officer. While deployed to combat zones downrange, I had the honor of serving with heroes – young men and women who gave up parts of their youth, and parts of themselves in service to our nation. Combat teaches you many things, but most importantly, it taught me that there is no arsenal more formidable than the will of the American soldier – men and women who travel to the far corners of the globe and into harm's way without hesitation or pause, not because of an act of Congress, but because of the person next to them.

There is nothing natural about war, the only natural part of war is the instrumentality it takes out on the young. Those who survive it are promised support however, too often we fall short on that sacred obligation. Today, over 400,000 New Jersey veterans call New Jersey home, over 8,000 have OTH discharges – of which around a 1,000 suffer from PTSD, TBI, and MST. Because of their discharge status these veterans are unable to receive any type of assistance at the state, county, or municipal levels – locking them out of vital healthcare, housing and employment benefits that are essential for both the transition back into civilian life, and suicide reduction. Veterans with OTH discharges are not criminals they have not faced a court martial or military tribunal. They are soldiers, sailors, marines, and airmen who have borne the brunt of battle, bear the burden of war, and when they call on their country to assist them, their calls are left unanswered by the very systems designed to support them. These 1,000 or so New Jersey veterans, are veterans who have made mistakes of the mind, but not of the heart in response to Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), and Military Sexual Trauma (MST). Their discharge status should not be punitive, nor a lifelong barrier to care.

I urge the state of New Jersey to follow in the footsteps of the Connecticut and New York Legislatures in righting this administrative wrong.

We owe our veterans and their families a debt of gratitude that can never be repaid, and while the State of New Jersey has made great strides, there is still so much work to be done. The creation of legislation that would expand state, county, and municipal benefits for veterans with OTH discharges will not only serve as an invaluable resource for those who have given so much to our nation, but will ensure our veterans have access to the benefits they earned and deserved in exchange for protecting the freedoms we hold dear.

Thank you for your time and consideration into this matter. The team at the New Jersey Re-Entry Corporation stands ready to work with you as you bring this policy proposal forward.

Sincerely,

A handwritten signature in blue ink, appearing to read 'W. Sheehan', with a large, stylized flourish at the end.

Will Sheehan
Chair, Veterans Task Force
New Jersey Reentry Corporation

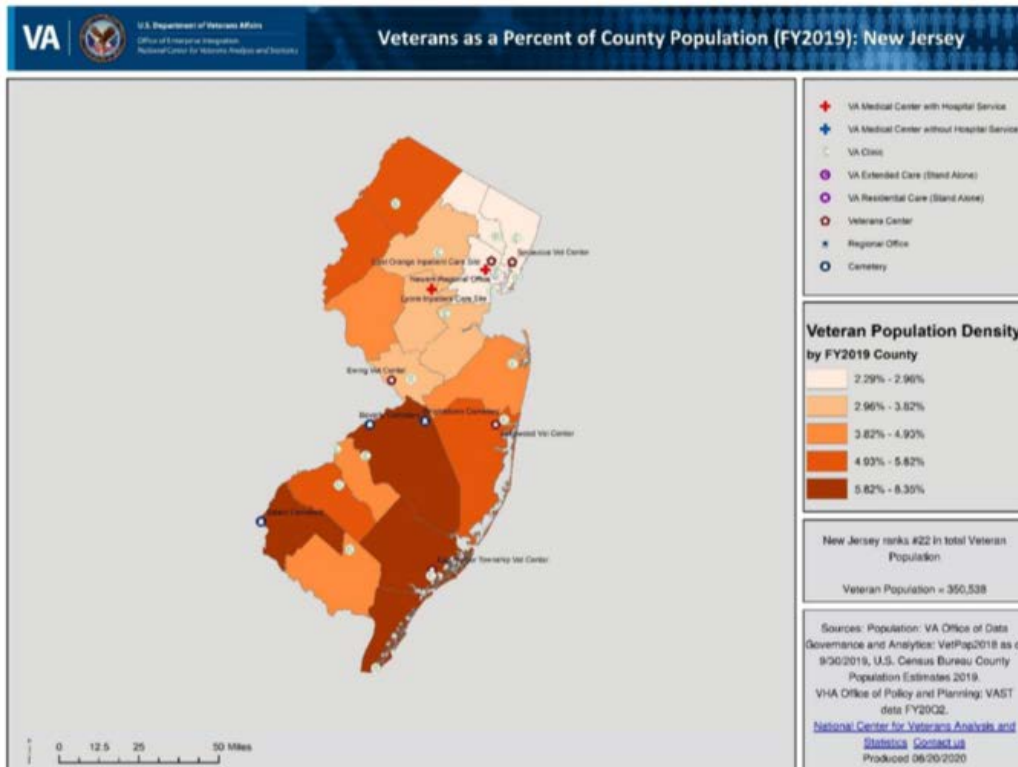


I. INTRODUCTION

Honoring New Jersey's veteran population requires legislative action, rather than mere words. Despite serving their country, not all veterans are eligible for critically needed benefits to facilitate their transition back to civilian life. Veterans with "Other than Honorable Discharges" (OTH) are frequently barred from accessing important federal, as well as state, services and benefits. Many of the veterans with Other than Honorable

benefits. While appeals for discharge upgrades have been inadequate and significantly backlogged.

The New Jersey Reentry Corporation's Veteran Outreach Initiative is working hard to help veterans with OTH Discharges get the immediate care they need while they trying to get the benefits, they deserve from the VA. NJ Reentry should not be alone in the fight to help



the estimated 8,000 veterans with OTH discharges who reside in the state. New Jersey can ensure equal access to its benefits system for bad paper veterans who suffer from service-related trauma.

New Jersey has recently recognized the harmful and discriminatory consequences as a result of OTH discharges for LGBTQ+ veterans. Now it is time expand that recognition to assist the veteran population most in need.

This report proposes that the New Jersey Legislature act quickly to pass legislation that

Discharges were discharged because of conduct related to trauma experienced during service, such as Post Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), and Military Sexual Trauma (MST). These veterans are more likely to face encounters with the judicial system and are more prone to suicide. Federal legislation has not provided solutions to these veterans to obtain

restores benefits to veterans with bad paper discharges as a result of PTSD, TBI, MST, and "Don't Ask Don't Tell" (DADT). The creation of comprehensive state policies that ensure veterans with OTH discharges can receive state, local, and county level benefits will help ameliorate the invisible wounds of service-related trauma for so many New Jersey veterans.

II. TESTIMONY AT THE NEW JERSEY REENTRY CORPORATION'S VETERANS ROUNDTABLE JANUARY 21, 2022

CORPORAL TIM SHEA'S STORY (UNITED STATES MARINE CORPS VETERAN, OTH, NJ RESIDENT)



CORPORAL TIM SHEA

"I am a former Active-Duty US Marine; I joined the Corps in December of 2006, did my one and only deployment to Iraq in 2008, and came home in May of 2009. I did everything I needed to do. I was a stellar Marine and was promoted to Corporal within 20 months.

When I came home, I visited some friends in North Carolina. They were college kids; we did some stupid things. When I was with them, I smoked a joint and then I failed my pre-leave urinalysis test. So, one joint, and it was all over.

The military standards for the blood content of drugs are actually about 10% of what it would be for a corporate pre-employment drug exam. It's a very small amount. After I failed my urinalysis, they took me straight to the NCIS to investigate. After I went through all that, I had a choice to make. I could either go through a Special Court Martial or a Summary Court Martial.

The difference between those is that I would be tried in front of a judge and jury in the Special Court and, in the summary, I'm on my own. I would not be allowed to have a lawyer and I would have had to advocate for myself.

I chose the Summary Court because, if found guilty in the Special Court, I would have gotten a Bad Conduct or Dishonorable discharge and would have left the service with a civilian criminal record of a felony drug offense. After I went through Summary Court, I was discharged with an Other than Honorable discharge. Once discharged, I tried to go through the VA's disability process for a wrist injury I had suffered while I was in Iraq and other service-related hearing loss. It took 12 to 18 months to get a first appointment. There, the doctors confirmed my disability status but the VA subsequently denied all of my benefits. I had no option of getting any VA benefits because the VA determined that my discharge status was dishonorable for their purposes."

JEN BURCH'S STORY (AIR FORCE VETERAN AND COMM'S/ GOV'T AFFAIRS ASSOCIATE OF IAVA)



JEN BURCH

"I was in the Air Force for six and a half years. I deployed to Afghanistan with less than 24-hour notice. I was studying to become a physician assistant, so I was able to volunteer as a combat medic between 2010 to 2011. I worked in the mortuary and I saw the very worst of war. When I got home, I got off a plane and went straight to the ER because I was so sick. I spent the following two weeks on bed rest and that was my transition back into civilization. I went back to my former Civil Engineering Unit to people who had no idea the extent to what I had just seen [in combat].

I received a permanent change in station and went to Japan. So, now I am with brand-new leadership that really has no idea who I was before my deployment where I was winning awards and I was Airman of the Month. I started to quickly fall apart. PTSD quickly took over my life and I was too scared to say anything. The combination of that and toxic leadership, I quickly fell apart.

In 2012, I tried to take my life. I was in the hospital for a few weeks and when I came back, my commander gave me an Article 15 for trying to take my life and I lost my rank. It destroyed me. My future was gone. Then, I just kept falling apart. When it came time to decide whether to stay or leave, the medical board put me up for discharge because I had PTSD, TBI, and other medical problems. My Commander came in and tried to give me an Other Than Honorable discharge, but thankfully I knew some Generals and Colonels from before my incident. They fought so hard for me and fought to get me an Honorable discharge. If I didn't have them fighting for me, I would have gotten an OTH discharge, I would have not my benefits, and I guarantee I would not have been sitting here today. I would have been six feet under the ground."

STEPHANIE KEEGAN'S STORY (MOTHER OF SERGEANT DANIEL ROBERT KEEGAN, ARMY VETERAN)



SGT. DANIEL ROBERT KEEGAN

"My son, Sgt. Daniel Robert Keegan, served 26 months in Afghanistan. When he came back, he came back clearly broken. After he left the Army, he had to wait 16 months for help and died two weeks before he was scheduled to go in on January 8th, 2016. It took 13 months for him to get his disability rating and another 3 months to get him a date for dual diagnosis treatment facility. In an effort to treat himself and keep his demons at bay, he became an addict. His drug of choice was heroin.

When he was discharged from the military, the Army knew he had been to a treatment program, they knew he was diagnosed with PTSD, they knew that he was diagnosed with an addiction problem. Yet, he still had to wait 13 months for a disability rating. From the day he left the Army, through the 16 months that followed, nothing came easily. He couldn't get the help he needed because he couldn't find a way to navigate the system on his own."

TOM AND DINA DUFFY (PARENTS OF TOM DUFFY, UNITED STATES MARINE CORPS VETERAN, NEW JERSEY RESIDENTS)

"My son, Tom, was a Marine. He entered the Corps 2011 and was discharged in 2015 because of drug use. He did not know this was the reason at the time of his discharge, he believed he had completed his assignment. When he came back home from Afghanistan, he was self-medicating. He was suffering.

He suffered from PTSD, but he did not want to admit it and no one wanted to acknowledge it. He suffered from nightmares. I kept telling him to go to the VA, but he was not eligible for benefits. About a year and a half later, he wound up in a drug rehab center."

STEVE KENNEDY'S STORY (ARMY VETERAN)RESIDENTS)

"I'm a former Airborne Infantryman and an Iraq War Veteran. I did 14 months in Iraq. I went AWOL for about 10 days and was discharged on a medical discharge. I had been a good soldier up until that point and I was just promoted to Sergeant. Because of me going AWOL, I was discharged with a General (Under Honorable Conditions). The difference between a General and an Other Than Honorable discharge is the level of benefits.

With a General, you get benefits. With an Other Than Honorable, you get nothing. You cannot overstate the difference of benefits afforded to you. When I got back, I was not diagnosed at the time, but I had PTSD and major depressive disorder. I was drinking heavily and I was suicidal. I am alive today because I got a General discharge and not an Other Than Honorable discharge. But it could have just as easily gone the other way."

JAMES FITZGERALD (ARMY VETERAN, LGBTQ ADVOCATE)



JAMES FITZGERALD

"I served in the Army for nine years as an infantryman. I was deployed to Iraq and Afghanistan, where I was injured in 2010. I suffered some injuries to my lower extremities that ultimately led to my discharge. I loved every day of being in the service, but one thing I must highlight is that I was a closeted gay at the time. When I signed the dotted line to serve in the military, I was signing in to Don't Ask Don't Tell. Many of those who fell under the LGBTQ umbrella were treated poorly and discharged unjustly.

Many LGBTQ veterans were discharged Other than Honorably, which bars them from services and increases troubling statistics about veteran homelessness, unemployment, and underemployment. This just exacerbates potential mental health issues and lack of access [to benefits] is going to increase those factors."

III. BACKGROUND: THE MILITARY DISCHARGE AND UPGRADE PROCESS

When a member of the armed forces leaves their branch of service, voluntarily or involuntarily, the Department of Defense issues a discharge status. There are five characterizations of Department of Defense Discharges: (1) Honorable, (2) General (Under Honorable Conditions), (3) Other than Honorable, (4) Bad-Conduct, and (5) Dishonorable.

An Honorable or General (under Honorable Conditions) discharge status usually denotes a completed length of service without any disciplinary actions causing the discharge. Other than Honorable, Bad conduct, or Dishonorable discharges can result from disciplinary actions taken against the servicemember. An Other than

Honorable (OTH) discharge occurs when the veteran’s service records show some misconduct, but the servicemember has not been involved with a court-martial.¹ Bad conduct discharges can occur in two ways; either the veteran has received a misdemeanor conviction from special court martial or has been convicted of a felony by a general court-martial.² Dishonorable discharges are also given to servicemembers after a conviction of a felony by a general court-martial, but this felony warrants more severe punishment than the bad conduct felony discharge.³ Bad Paper veterans may seek a discharge upgrade to eventually receive VA benefits.

Administrative Separation			Punitive (Court-Martial)	
Honorable	General or Under Honorable Conditions	Other Than Honorable or Undesirable	Bad Conduct	Dishonorable
VA Decided Presumptive Eligible			VA Decided Presumptive Ineligible	

Source: *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*, supra note 10, page 9

A. Methods for Discharge Upgrades

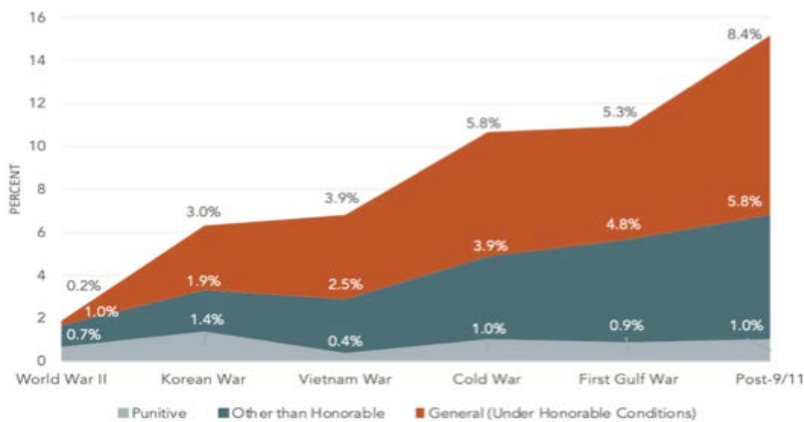
i. Discharge Upgrade Review Board

Each branch of the military currently contains a board which reviews servicemembers’ discharge determinations and characterizations.⁴ The DRB has the authority to upgrade a discharge unless the discharge was the result of a court-martial. So, the DRB can upgrade an “Other than Honorable” discharge to a General or Honorable discharge but it would be unable

to upgrade a Dishonorable discharge. A DRB can only upgrade a bad conduct discharge that is a result of a special court-martial for clemency reasons.

The veteran seeking an upgrade has the burden of proof to provide “substantial credible evidence” that their discharge should be changed, and the DRB must determine the propriety and equity of the discharge status. Propriety for DRB purposes involves “an error of fact, law, procedure, or discretion associated with the discharge” or a

PERCENT ENLISTED SERVICEMEMBERS WITH BAD PAPER DISCHARGES



Source: *Turned Away*, supra note 22, page 7

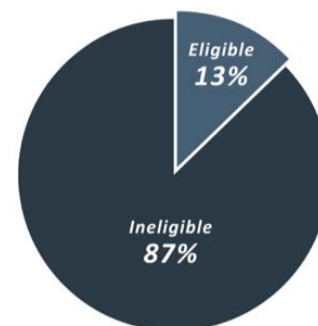
retroactive change in policy.⁵ So if a servicemember's discharge did not follow proper procedure or a military policy changed since the discharge, they could be granted an upgrade. A discharge is considered equitable unless the veteran shows that: (1) current military policies would afford them more rights or there is doubt that they would have received the discharge under current policies; (2) the discharge was inconsistent with military policy when it was issued; or (3) an upgrade is warranted based on their service record and other evidence presented.⁶ The DRB is authorized to consider any evidence submitted by the veteran and the regulations list several nonexclusive factors to consider when deciding if their current discharge status is still equitable, even if it was equitable and proper at the time it was issued.⁷ The point of the equitable evidence is to show that the misconduct that led to the discharge was an aberration in an otherwise good service record. The DRB also considers post-discharge evidence to highlight the character of the applicant, but testimony or evidence around the time of the discharge may be more persuasive to show how they behaved during their service. Previous decisions by the DRB may be used to support an applicant's argument but they are not binding on the DRB.⁸

Since 2017, the Department of Defense instructed DRBs for each branch of the military to give "liberal consideration" to applications that claim that their discharge is due in whole or in part on mental health conditions, traumatic brain injury, sexual assault, and sexual harassment.⁹ A diagnosis is not required but

submitting evidence of the alleged mental health condition is encouraged. If the applicant claims their discharge was based on PTSD or a mental health condition, then the DRB must have a mental health professional review the application.¹⁰

Recently, the Army settled a class action lawsuit, *Kennedy v. Whitley*.¹¹ The lawsuit involved former servicemembers who served since 2001 that received less than honorable discharges and had a diagnosis or symptoms of PTSD or TBI at the time of discharge. The plaintiffs claimed the Army DRB did not give adequate consideration of their PTSD or TBI when they applied for a discharge upgrade. As part of the settlement, the Army DRB will *automatically* review denied servicemembers application for a discharge upgrade if they claimed PTSD or TBI as a mitigating factor and they applied to the DRB in 2011 or later. If the servicemembers application was submitted and denied before 2011, the Army will send them a letter informing them that they can reapply to the DRB. The distinction reflects the six-year statute of limitations under the Administrative Procedure Act. The servicemembers in the second group need to affirmatively reapply and many may not think it would make a difference or it is possible they do not have assistance to reapply.

Board of Veterans' Appeals Character of Discharge Determinations 1992-2015



Source: *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*, supra note 10, page 11

A servicemember applies to have their discharge reviewed by submitting a "DD-293" form to their military branch and the applicant can attach any evidence they would like the DRB to take into

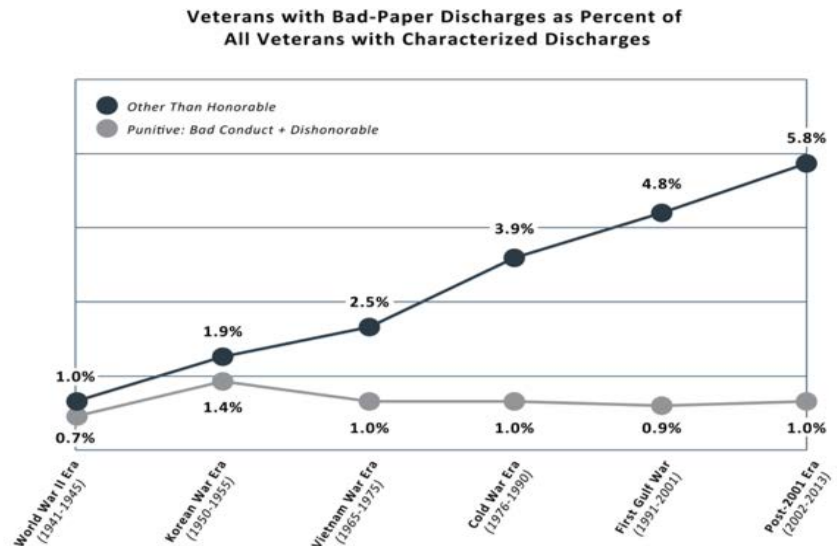
consideration. This should include a personal statement by the applicant laying out their argument about why they believe their discharge should be upgraded.

When the servicemember submits their application, they have two chances to get their discharge upgraded. The first attempt would be a record review, where the applicant simply sends in the form and any supporting documents then the wait for the DRB's decision. If the DRB denies their upgrade, then the applicant can ask for an in-person rehearing. The DRB will reconsider the prior decision *de novo*. While this is an option, it requires the applicant to come to Washington, D.C. to appear before the Board of their specific branch. The time and travel costs will stop many applicants from going. But as part of the previously mentioned class-action settlement, the Army DRB will allow applicants to appear before the Board by telephone. This would certainly make the process more accessible to those who want to plead their case before the Board. As of right now, it is unconfirmed that other DRBs have implemented the option for a telephonic appearance.

If the DRB denies their upgrade, the applicant still has ways to appeal. They can apply to the Board of Correction of Military Records (BCMR) or appeal the decision to federal court. The process of the BCMR will be discussed in the next section. In federal court the applicant can appeal under the Administrative Procedure Act and must show that the DRB's decision was arbitrary and capricious.

ii. Character of Discharge Determination
Even without a discharge upgrade from the DRB or BCMR a servicemember may still receive their benefits if their local VA regional office determines, through a Character of Discharge (COD) determination, that their discharge was "under conditions other than dishonorable." The VA decides whether the servicemember meets their definition of a veteran that requires the servicemember to have served honorably for VA purposes. Servicemembers with an

Honorable, General, Other than Honorable, or Bad Conduct (through a special court-martial) discharge may qualify. The COD process is a little easier to begin than the other administrative procedures; however, the process has less guidance and transparency than the DRB or BCMR.



Source: *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*, supra note 10, page 10

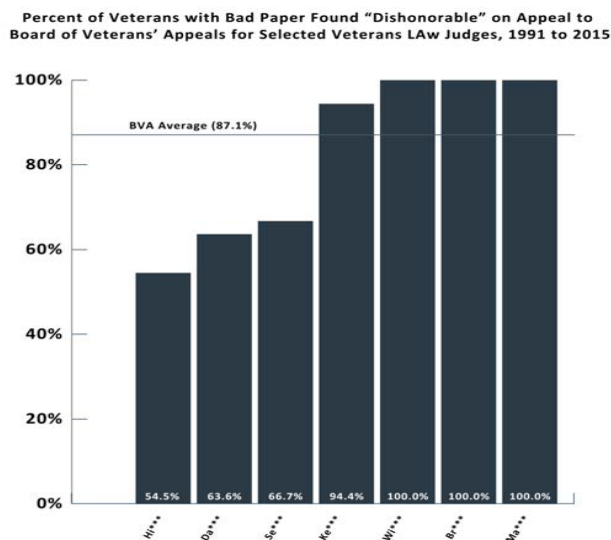
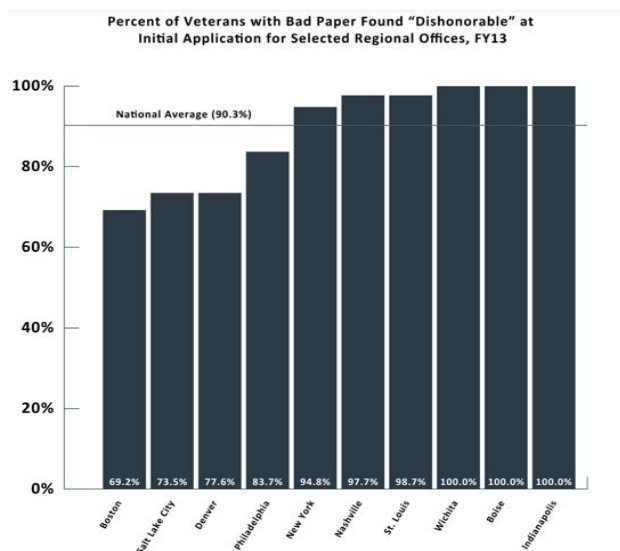
The first step in the COD process is the VA checking to see if there are any statutory or regulatory bars to benefits. Under 38 USC § 5303, statutory bars to VA benefits includes: (1) a sentence from a general court-martial; (2) a conscientious objector who refused to perform military duty or follow a lawful order; (3) AWOL without authority for at least 180 days without "compelling circumstances to warrant such prolonged unauthorized absence"; (4) an officer's resignation for the good of the service; (5) a discharge as an alien during a period of hostilities. Under 38 CFR § 3.12(d), regulatory bars to VA benefits includes: (1) acceptance of an undesirable discharge to escape a general court-martial; (2) mutiny or spying; (3) an offense involving moral turpitude; (4) willful and persistent conduct; (5) homosexual acts including aggravating circumstances or factors affecting performance of duty. If any of the statutory or regulatory bars apply to the servicemember then they do not qualify for the VA benefits unless they are found to be insane at the time of the incident

leading to the discharge.¹⁴ Insanity for VA purposes requires that, due to disease, the servicemember: (1) has a deviation from normal behavior; (2) interferes with peace of society; and (3) departs from standards of the community they belong to.¹⁵

Second, if there is no statutory or regulatory bar to benefits the COD process continues by examining other considerations about the servicemember and the incident that led to their discharge. The other considerations are similar to the factors considered by the DRB and BCMR. The main inquiry is whether, all things considered, the servicemember served honorably despite the misconduct. Some of the considerations include: (1) any mitigating factors; (2) evidence from third parties who are familiar with the servicemember and the misconduct; (3) length of service; (4) performance during service; (5) nature of the misconduct; (6) character of service before the misconduct.¹⁶ The servicemember can submit a statement or brief laying out their argument for why their service should be considered Honorable and any evidence that they want the VA to consider. The servicemember can also ask to have an in-person

hearing. The COD determination can happen simultaneously with the DRB or BCMR process. If the DRB or BCMR grant an upgrade to Honorable, they must honor the upgrade even if they disagree or previously denied a COD review.

The COD determination can consider mental health issues and sexual trauma as part of the mitigating circumstances but, unlike the DRB and BCMR, they do not have to give any special weight to that evidence. The DRBs and BCMRs were directed by the Department of Defense to give “liberal consideration” to evidence of mental illnesses and sexual trauma that may have contributed to the misconduct leading to a less than honorable discharge. This directive was later codified by Congress. The DOD memo and subsequent law do not apply to the COD determinations. The individual VA regional offices have wide discretion on COD decisions. These decisions can be appealed to the Board of Veterans’ Appeals and the U.S. Court of Appeals for Veterans Claims, but they will give factual determinations made by the VA deference unless they are clearly erroneous.



Source: *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*, supra note 10, pages 16-17

IV. VETERANS AND BAD PAPER DISCHARGES: THE CONSEQUENCES

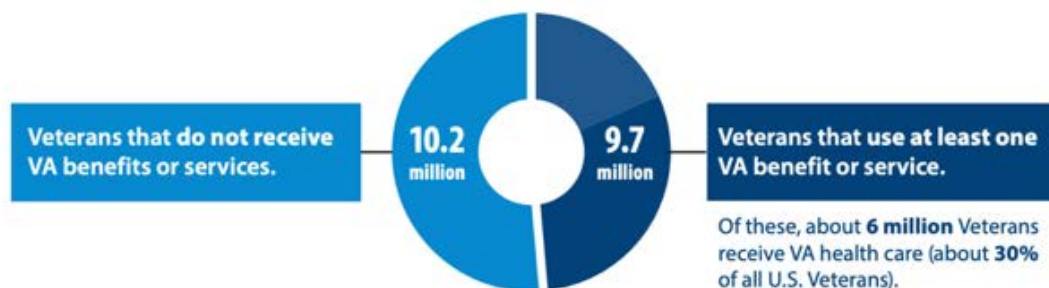
Procedurally, pursuing a COD determination is difficult; for many OTH veterans, the VA will not conduct a COD unless the veteran asks.¹⁷ Once the veteran asks the VA for a COD determination, VA employees must gather extensive records and evidence pertaining to the veteran's service. The VA must then review those records and make their findings. To facilitate the process, veterans may gather and submit their own evidentiary findings. The VA's website reports that it takes approximately 120 days to make a determination for benefit eligibility. However, veteran's advocacy groups have found that, when the VA conducts a COD determination for a bad paper veteran, it may take approximately 1,200 days.¹⁸

There is a high rate of exclusion of VA benefits due to this procedural inadequacy. Many veterans with bad paper discharges may not pursue a COD claim because of the longstanding presumption that bad paper discharges are ineligible for VA benefits.¹⁹ As of 2015, only 10% of post-2001 veterans with bad paper discharges receive a COD determination, but many are found ultimately Dishonorable because of inconsistent regulatory and statutory interpretations.²⁰ The same study shows that there is a 65% overall denial rate by the

Board of Veteran's Appeals for a post-2001 veteran who appeals their initial COD determination.²¹ Without easily applicable, bright-line rules, many veterans are wrongfully excluded from critically needed VA benefits.

Similarly, seeking an upgrade through a Discharge Review Board does not prove to be an adequate alternative. There is a common misconception that a veteran can easily change their discharge status once transitioning back to civilian life.²² Unfortunately, the DRB's upgrade process is often complex and difficult for veterans to accomplish on their own. The DRB's legal and factual inquiries are quite different than the VA's legal and factual inquiries.²³ Importantly, seeking a Military Discharge Upgrade does not automatically make a veteran eligible for VA benefits. The determination for veteran's benefits eligibility is separate and distinct from correcting a servicemembers military record.²⁴ For those who do seek a corrected military record, the rates of success are quite low, and applicants wait on average nearly twelve to twenty-four months on average for a decision.²⁵ In 2018, the percentage of veteran-applicants granted a discharge upgrade after seeking review from their respective DRBs averaged about 11%.²⁶

Figure 2: Number of Veterans Who Do and Do Not Receive VA Benefits or Services



Source: Department of Veterans Affairs' 2018 National Suicide Prevention Strategy Report

The link between bad paper discharges and service-related injuries or traumas is stark.²⁷ The VA estimates that about 11-20% of veterans who have served in the Iraq or Afghanistan Wars, 12% of veterans who served in the Gulf War, and 15% of Vietnam War veterans are diagnosed with PTSD. Additionally, approximately 313,000 veterans have been diagnosed with a traumatic brain injury (TBI).²⁸ Both PTSD and TBI “produce dysfunction through an exaggerated startle response, inability to control reflexive behavior, irritability, or attraction to high-risk behavior.”²⁹

Sexual assault and harassment in the military is called Military Sexual Trauma (MST) and is found to be another cause of PTSD.³⁰ The VA estimates 23% women have reported sexual assault while serving in the military and 55% of women have experienced and 38% of men have experienced sexual harassment while serving in the military. While more men serve in the military than women, sexual harassment and assault impact women at higher rates. Approximately one in four women and over 1000,000 servicemembers have been separated from services after having experienced MST.

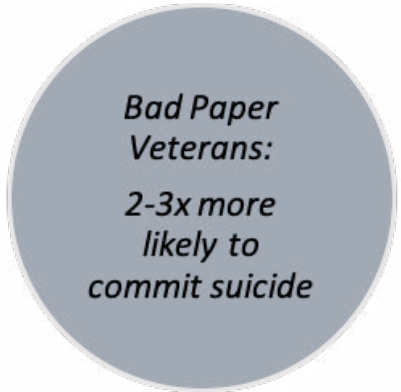
The fallout from a bad paper discharge is dangerous. Veterans with bad paper are at an increased risk of untreated mental health conditions, suicide, involvement with the criminal justice system, and

homelessness.³¹ Importantly, veterans with bad paper discharges are two times more likely to commit suicide and three times more likely to have suicidal ideations than their counterparts with Honorable discharges.³² In 2019, the VA disclosed that the annual total number of veterans who have committed suicide was 6,261.³³ While the overall veteran suicide rate from prior years has decreased, this data suggests that an average of 17.2 veterans committed suicide *each day* in 2019.³⁴ In the same report, the VA disclosed that almost two-thirds of veterans who died by suicide in 2019 did not receive VHA services.³⁵

The VA has made efforts to decrease the overall veteran suicide rate and increase mental health outreach. In doing so, the VA tries to connect with the individual veteran by partnering with nongovernmental organizations. However, findings from the Government Accountability Office’s January 2022 report have indicated that the VA struggles to track and oversee these partnerships.³⁶ While there a concerted effort between the VA and the Federal Government to address veteran suicides, the regulatory and procedural challenges imposed by the VA to access VHA healthcare directly conflicts with these efforts. The most at-risk veterans are the ones who are more likely to be excluded from VHA eligibility.

V. NEW JERSEY’S VETERANS BENEFITS

New Jersey has a myriad of benefits designed to supplement veteran’s receipt of federal benefits and honor the service of New Jersey’s veterans. New Jersey offers income and property tax deductions, education benefits, veteran or disabled veteran employment preferences, pensions, housing assistance, and veteran recognition on state licenses or ID cards. The generally applicable statutory definition of a veteran means “any person who has served in any branch of the



***Bad Paper
Veterans:
2-3x more
likely to
commit suicide***

armed forces of the United States for at least 90 days, except that if the term ‘veteran’ is defined differently in any of the statutes cited by this act or in any federal statute, that definition shall be applicable for the purposes of those statutes.”³⁷ Unfortunately, many of the New Jersey programs that grant state veterans benefits, the veteran must show that they were released honorably.

For example, a recently enacted New Jersey statute that expanded education benefits to veterans defines a veteran as “an individual who served as a member of a Reserve component of the Armed Forces of the United States, or as a member of the National Guard, or on active duty in the Armed Forces of the United States, and who was *honorably discharged or released under honorable circumstances from active service*.”³⁸

Another example is shown in New Jersey’s homeless veterans assistance program.³⁹ The Veteran’s Haven Transitional Housing Program cares for veterans to support them while they are enduring homelessness.⁴⁰

To be eligible, a veteran must be homeless, must be a veteran under USDVA guidelines, must be eligible for VA healthcare and benefits, and the applicant must be drug and alcohol free at the time of admission.⁴¹ Requiring a veteran to be eligible for VHA benefits unintentionally excludes OTH veterans for all the reasons outlined in section III.

While New Jersey has recognized the importance for critically needed veteran’s benefits, it excludes the veterans who receive an “Other than Honorable” discharge. The State’s definition of a veteran is more restrictive than the federal definition of a veteran, which states “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other *than Dishonorable*.”⁴² The result restricts some OTH veterans from state benefits as the veterans undergo the lengthy discharge upgrade process through the Department of Defense or the Character of Discharge Determination through the Department of Veterans Affairs.

VI. LEGISLATIVE SOLUTIONS: EXAMPLES FROM OTHER STATES AND PROPOSED FEDERAL ACTION

A. California’s 2017 Act to Amend Section 5600.3 of the Welfare and Institutions Code, Relating to Mental Health Services⁴³

In 2017, California enacted A 2325. This bill prohibits eligible California veterans from being denied county medical or behavioral health services while waiting for a determination of eligibility for, and availability of, services provided by the VA. The bill progresses the state’s legislative intent to address the mental and behavioral health needs of California veterans by improving access to services closer to the veteran’s home regardless of insurance coverage or eligibility for Medi-Cal or any other federal health care services.

This bill serves to increase mental health accessibility for veterans who would otherwise be denied as a result of their veteran status. The bill adds veterans to the meaning of a “qualified adult” and mandates that veterans shall be treated in the same manner as any other adult in need of mental health services, irrespective of funding. A “qualified adult” according to the bill is an adult who has a “serious mental disorder”. A “serious mental disorder” includes post-traumatic stress disorder and shall not be construed to exclude persons with a serious mental health disorder and a diagnosis of substance abuse.

B. Connecticut's 2018 Act Concerning Benefits for Certain Veterans Who Have Been Diagnosed with Post-Traumatic Stress Disorder or Traumatic Brain Injury or Who Have Has an Experience of Military Sexual Trauma⁴⁴

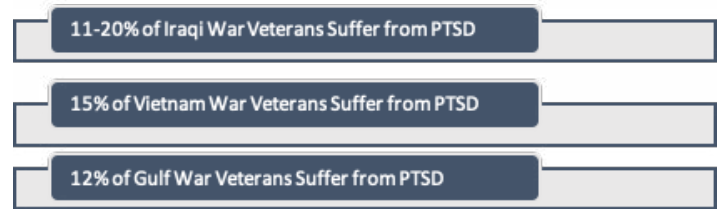
In May 2018, Governor Malloy of Connecticut signed a bill extending a broad range of state and municipal benefits to veterans who received an Other than Honorable discharge characterization as a result of PTSD, TBI, or MST. The bill acknowledges the impact of service-related mental health conditions on discharge characterizations and the need for transitional assistance beyond mental health to fully recover. OTH veterans with PTSD, TBI, or MST also receive education, employment, and housing assistance to reintegrate themselves into the community.

The Act defines a veteran as "any person (i) Honorably discharged from, or released under Honorable conditions from active service in, the armed forces, . . . or (ii) with a qualifying condition, . . . who has received a discharge other than bad conduct or dishonorable from active service in the armed forces." A qualifying condition "means a diagnosis of post-traumatic stress disorder or traumatic brain injury made by, or an experience of military sexual trauma, as described in 38 USC 1720D, . . . disclosed to an individual licensed to provide health care services at a United States Department of Veterans Affairs facility."

C. New York's 2019 Restoration of Honor Act⁴⁵

In November 2019, Governor Cuomo enacted S.45B/A.8097 which extended state benefits to veterans who received Other than Honorable discharges as a result of their sexual orientation, gender identity, PTSD, TBI, or MST. This bill acknowledges and addresses the discriminatory practices of granting benefits based solely on an Honorable discharge. OTH veterans who are a member of the LGBTQIA+ community or have a PTSD, TBI, or MST receive election, economic, public health, insurance, housing, property tax, social service, and worker's compensation benefits.

The Act defines a veteran as "a person who has served in the armed forces of the United States or the



reserves thereof, or in the army national guard, air national guard, New York guard, or the New York naval militia." Under this Act, a veteran is someone who

- (1) has been honorably discharged or released from such service under honorable conditions, or
- (2) has a qualifying condition, as defined in section three hundred fifty of the executive law, and has received a discharge other than bad conduct or dishonorable from such service, or
- (3) is a discharged LGBT veteran, as defined in section three hundred fifty of the executive law, and has received a discharge other than bad conduct or dishonorable from such service.

D. Honor Our Commitment Act

Senator Chris Murphy of Connecticut proposed changing federal law requiring the VA to provide mental and behavioral healthcare to OTH veterans. This legislation recognizes that OTH veterans suffer from severe mental illnesses related to service-related trauma and sexual violence. OTH veterans served their country, and that service should not be forgotten even if some misconduct led to a bad paper discharge. This proposed change comes in response to the VA offering only 90 days of healthcare to OTH veterans. OTH veterans need long-term care to manage their trauma. The Act would eliminate the COD determination by the VA in regard to mental and behavioral healthcare for OTH veterans who served in a combat zone or OTH veterans who suffered sexual trauma. The COD determination would remain in place if the OTH veterans applied to any other VA benefit or program. But since mental health issues are the biggest issue effecting OTH veterans the Act would go a long way to putting OTH veterans on a better path. The Act also allows veterans to receive care outside the VA if it is better for the veteran or the VA facility is not close by.

Public Act No. 18-47*

WELFARE AND INSTITUTIONS CODE Section 5600.3 5600.3.

To the extent resources are available, the primary goal of the use of funds deposited in the mental health account of the local health and welfare trust fund should be to serve the target populations identified in the following categories, which shall not be construed as establishing an order of priority:

(a) (1) Seriously emotionally disturbed children or adolescents.

(2) For the purposes of this part, "seriously emotionally disturbed children or adolescents" means minors under the age of 18 years who have a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, other than a primary substance use disorder or developmental disorder, which results in behavior inappropriate to the child's age according to expected developmental norms. Members of this target population shall meet one or more of the following criteria:

(A) As a result of the mental disorder, the child has substantial impairment in at least two of the following areas: self-care, school functioning, family relationships, or ability to function in the community; and either of the following occur:

(i) The child is at risk of removal from home or has already been removed from the home.

(ii) The mental disorder and impairments have been present for more than six months or are likely to continue for more than one year without treatment.

(B) The child displays one of the following: psychotic features, risk of suicide or risk of violence due to a mental disorder.

(C) The child has been assessed pursuant to Article 2 (commencing with Section 56320) of Chapter 4 of Part 30 of Division 4 of Title 2 of the Education Code and determined to have an emotional disturbance, as defined in paragraph (4) of subdivision (c) of Section 300.8 of Title 34 of the Code of Federal Regulations.

(b) (1) Adults and older adults who have a serious mental disorder.

(2) For the purposes of this part, "serious mental disorder" means a mental disorder that is severe in degree and persistent in duration, which may cause behavioral functioning which interferes substantially with the primary activities of daily living, and which may result in an inability to maintain stable adjustment and independent functioning without treatment, support, and rehabilitation for a long or indefinite period of time. Serious mental disorders include, but are not limited to, schizophrenia, bipolar disorder, post-traumatic stress disorder, as well as major affective disorders or other severely disabling mental disorders. This section shall not be construed to exclude persons with a serious mental disorder and a diagnosis of substance abuse, developmental disability, or other physical or mental disorder

(3) Members of this target population shall meet all of the following criteria:

(A) The person has a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, other than a substance use disorder or developmental disorder or acquired traumatic brain injury pursuant to subdivision (a) of Section 4354 unless that person also has a serious mental disorder as defined in paragraph (2).

(B) (i) As a result of the mental disorder, the person has substantial functional impairments or symptoms, or a

psychiatric history demonstrating that without treatment there is an imminent risk of decompensation to having substantial impairments or symptoms.

(ii) For the purposes of this part, “functional impairment” means being substantially impaired as the result of a mental disorder in independent living, social relationships, vocational skills, or physical condition.

(C) As a result of a mental functional impairment and circumstances, the person is likely to become so disabled as to require public assistance, services, or entitlements. (4) For the purpose of organizing outreach and treatment options, to the extent resources are available, this target population includes, but is not limited to, persons who are any of the following:

(A) Homeless persons who are mentally ill.

(B) Persons evaluated by appropriately licensed persons as requiring care in acute treatment facilities including state hospitals, acute inpatient facilities, institutes for mental disease, and crisis residential programs. (C) Persons arrested or convicted of crimes. (D) Persons who require acute treatment as a result of a first episode of mental illness with psychotic features. (5) California veterans in need of mental health services and who meet the existing eligibility requirements of this section, shall be provided services to the extent services are available to other adults pursuant to this section. Veterans who may be eligible for mental health services through the United States Department of Veterans Affairs should be advised of these services by the county and assisted in linking to those services, but the eligible veteran shall not be denied county mental or behavioral health services while waiting for a determination of eligibility for, and availability of, mental or behavioral health services provided by the United States Department of Veterans Affairs.

(A) An eligible veteran shall not be denied county mental health services based solely on his or her status as a veteran, including whether or not the person is eligible for services provided by the United States Department of Veterans Affairs.

(B) Counties shall refer a veteran to the county veterans service officer, if any, to determine the veteran’s eligibility for, and the availability of, mental health services provided by the United States Department of Veterans Affairs or other federal health care provider.

(C) Counties should consider contracting with community-based veterans’ services agencies, where possible, to provide high-quality, veteran specific mental health services.

(c) Adults or older adults who require or are at risk of requiring acute psychiatric inpatient care, residential treatment, or outpatient crisis intervention because of a mental disorder with symptoms of psychosis, suicidality, or violence.

(d) Persons who need brief treatment as a result of a natural disaster or severe local emergency.

(Amended by Stats. 2018, Ch. 128, Sec. 2. (AB 2325) Effective January 1, 2019.)

(*Example excerpt to fit the document, for full text of the bill, see https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=5600.3)

Substitute Senate Bill No. 284

Public Act No. 18-47*

AN ACT CONCERNING BENEFITS FOR CERTAIN VETERANS WHO HAVE BEEN DIAGNOSED WITH POST-TRAUMATIC STRESS DISORDER OR TRAUMATIC BRAIN INJURY OR WHO HAVE HAD AN EXPERIENCE OF MILITARY SEXUAL TRAUMA.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (a) of section 27-103 of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2018):

(a) As used in the general statutes, except chapter 504, and except as otherwise provided: (1) "Armed forces" means the United States Army, Navy, Marine Corps, Coast Guard and Air Force and any reserve component thereof, including the Connecticut National Guard performing duty as provided in Title 32 of the United States Code; (2) "veteran" means any person honorably discharged from, or released under honorable conditions from active service in, the armed forces; (3) "service in time of war" means service of ninety or more cumulative days except, if the period of war lasted less than ninety days, "service in time of war" means service for the entire period of war, unless separated from service earlier because of a service-connected disability rated by the [Veterans' Administration] United States Department of Veterans Affairs, during a period of war; [and] (4) "period of war" has the same meaning as provided in 38 USC 101, as amended from time to time, except that the "Vietnam Era" means the period beginning on February 28, 1961, and ending on July 1, 1975, in all cases; and "period of war" shall include service while engaged in combat or a combat support role in Lebanon, July 1, 1958, to November 1, 1958, or September 29, 1982, to March 30, 1984; Grenada, October 25, 1983, to December 15, 1983; Operation Earnest Will, involving the escort of Kuwaiti oil tankers flying the United States flag in the Persian Gulf, July 24, 1987, to August 1, 1990; and Panama, December 20, 1989, to January 31, 1990, and shall include service during such periods with the armed forces of any government associated with the United States; and (5) "qualifying condition" means a diagnosis of post-traumatic stress disorder or traumatic brain injury made by, or an experience of military sexual trauma, as described in 38 USC 1720D, as amended from time to time, disclosed to, an individual licensed to provide health care services at a United States Department of Veterans Affairs facility.

Sec. 3. Subdivision (28) of section 5-196 of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2018):

"Veteran", when used in this chapter and in section 5-180, means any person [who has been] (A) (i) honorably discharged from, or released under honorable conditions from active service in, the armed forces of the United States, or (ii) with a qualifying condition, as defined in section 27-103, as amended by this act, who has received a discharge other than bad conduct or dishonorable from active service in the armed forces of the United States, and (B) who has performed such service in time of war, as [such terms are] defined in [section 27- 103] said section, except that the final date for service in time of war during World War II shall be December 31, 1947

Sec. 5. Section 8-75 of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2018):

As among applicants eligible for occupancy at the rent involved whose needs for housing accommodations are substantially equal, as determined by the developer, preference shall be given to veterans. As used in this section, "veteran" means any person (1) honorably discharged from, or released under honorable conditions from active service in, the armed forces, as defined in section 27-103, as amended by this act, or (2) with a qualifying condition, as defined in said section, who has received a discharge other than bad conduct or dishonorable from active service in the armed forces.

*(*Example excerpt to fit the document, for full text of the bill, see <https://www.cga.ct.gov/2018/ACT/pa/pdf/2018PA-00047-R00SB-00284-PA.pdf>)*

45--B

Cal. No. 1020*

2019-2020 Regular Sessions

IN SENATE

(Prefiled)

January 9, 2019

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1 Section 350 of the executive law is amended by adding two new subdivisions and to read as follows:

8. The term "qualifying condition" means a diagnosis of post-traumatic stress disorder or traumatic brain injury made by, or an experience of military sexual trauma, as described in 38 USC 1720D, as amended from time to time, disclosed to, an individual licensed to provide health care services at a United States Department of Veterans Affairs facility. The division shall develop a standardized form used to confirm that 9 the veteran has a qualifying condition under this subdivision.

9. The term "discharged LGBT veteran" means a veteran who was discharged less than honorably from military or naval service due to their sexual orientation or gender identity or expression, as those terms are defined in section two hundred ninety-two of this chapter, or statements, consensual sexual conduct, or consensual acts relating to sexual orientation, gender identity or expression, or the disclosure of such statements, conduct, or acts, that were prohibited by the military or naval service at the time of discharge. The division shall establish a consistent and uniform process to determine whether a veteran qualifies as a discharged LGBT veteran under this subdivision, including, at 11 a minimum, standards for verifying a veteran's status as a discharged LGBT veteran, and a method of demonstrating eligibility as a discharged LGBT veteran.

(*Example excerpt to fit the document, for full text of the bill, see <https://legislation.nysenate.gov/pdf/bills/2019/S45B>).

VII. RECOMMENDATIONS

New Jersey should ensure that veterans with OTH discharges and PTSD, TBI, or MST have access to state benefits, particularly because the federal government's procedural and regulatory inadequacies fall flat in providing redress to these veteran populations.

OTH veterans are typically eligible to upgrade their discharge statuses through the Department of Defense or can appeal their Character of Discharge determination at the VA. Additionally, in cases of mental health emergencies, the VA may admit an OTH veteran for 90 days to a VA Hospital and then conduct an eligibility inquiry to determine whether the OTH veteran can

traumas. New Jersey can open benefits to OTH veterans with trauma is to amend the generally applicable definition of a veteran. Under this approach, the OTH veteran could be considered Honorable for state benefit purposes after the veteran receives a written confirmation that the veteran has a qualifying condition from a mental healthcare professional. A qualifying condition would be defined as PTSD, TBI, MST or any service-related trauma.

These programs are not intended to deter the veteran from going to the VA to receive benefits. They are intended, however, to provide supplementary aid

12.9% OF ALL VETERANS SUFFER FROM PTSD

receive long-term care.⁴⁶ In 2018, the VA reported that 1,818 OTH veterans received mental health treatment.⁴⁷ Contrarily, the Government Accountability Office reported that 18 veterans died by suicide each day in 2018.⁴⁸ Alarming, bad paper veterans are two times more likely to commit suicide and three times more likely to have suicidal ideations.⁴⁹ Further, veterans with bad paper are at an increased risk of untreated mental health conditions, suicide, involvement with the criminal justice system, and homelessness.⁵⁰

Recognizing the need to support OTH veterans, New Jersey should enact legislation that would make veterans eligible for state benefits based on a medical diagnosis of PTSD, TBI, MST, or other service-related

while the veteran awaits eligibility or while the veteran is in the appeals process. However, this State must recognize the difficulty for an OTH veteran to even step foot inside a VA Healthcare Clinic because of a longstanding presumption of ineligibility as a result of an OTH discharge status. Therefore, this State should provide supplementary aid without the VA's intervention.

This report cannot provide an in-depth fiscal impact analysis because there is no precise data on how many bad paper veterans are in New Jersey, nor is it precise estimates on the prevalence of PTSD, TBI, or MST within New Jersey's bad paper veteran population. However, data provided to the New Jersey Reentry Corporation suggests that there may be approximately 8,000

veterans with OTH discharges residing in the state. A 2017 National Institute of Health study that estimates 12.9% of veterans received a PTSD diagnosis. This would mean that of those 8,000 veterans, approximately 1,032 veterans in New Jersey would be both OTH and have a qualifying condition of PTSD, MST, or TBI.⁵¹ The veterans directly impacted by this proposal represent approximately 0.3% of New Jersey's veteran population of 350,538.⁵²

Such a small increase in the population of eligible veterans is unlikely to result in a substantial impact on the state's budget. The result of the expansion of state benefits to New Jersey's OTH veterans with qualifying conditions may be immeasurable. Legislation in response to this proposal would be an investment to support transitioning veterans to positively contribute to the state and its economy. Importantly, in some instances, this proposed legislation could save lives.

VIII. CONCLUSION



The approximately 1,000 New Jersey veterans with bad paper as a result of PTSD, TBI, or MST should have never been given an "Other than Honorable" discharge status and, thus, been excluded from the delivery of benefits. These veterans are members of the New Jersey community who need access to jobs, healthcare, and housing. Legislation implemented in response to this proposal would provide these veterans with the resources to live stable, fulfilling lives in New Jersey. New Jersey should follow the trend among states that find reference to an Honorable military discharge status unnecessary.

IX. RESOURCES FOR VETERANS

If you are, or know of, a veteran who needs legal assistance, the New Jersey Reentry Corporation is here to help. Please contact our New Jersey Reentry Corporation's Veterans Legal expert.

Brian McGillivray

(848)-238-7006
310 Main Street, Suite 3B
Toms River, New Jersey 08753
Phone: 848.238.7000
Fax: 201.604.5433

The New Jersey Reentry Corporation has partnered with the National Veterans Legal Services Program (NVLSP). The NVLSP is an independent, nonprofit that provides free legal representation to veterans seeking a discharge upgrade.

For more information, please visit www.nvlsp.org.

If you are, or know of a veteran, who is in a medical emergency, the VA encourages all Veterans to seek help immediately. Notifying the VA of an emergency event allows Veterans to have their emergency treatment authorized by the VA. Failure to report within 72 hours may impact your eligibility for the VA to cover the cost of treatment.

1. Call 911 or go to the nearest emergency department right away.
2. Inform the emergency care provider to report your emergency to the VA's Centralized Emergency Care Reporting Center as soon as possible by
 - a. Using the **VA Emergency Care Reporting portal** OR
 - b. Calling 844-72HRVHA (844-724-7842)

VA MEDICAL CENTERS (VAMC) / CLINICS IN NEW JERSEY

VAMC East Orange Campus, 385 Tremont Avenue (973) 676-1000

VAMC Lyons Campus, 151 Knollcroft Road (908) 647-0180

Brick, James J. Howard Clinic, 970 Route 70 (732) 206-8900

Camden Clinic, 300 Broadway, Suite 103 (877) 232-5240

Cape May Clinic, 1 Munro Avenue (800) 461-8262 Ext. 2850

Elizabeth Clinic, 654 East Jersey Street, Suite 2A (908) 994-0120

Hackensack Clinic, 385 Prospect Avenue (201) 487-1390 / (201) 342-4536

Hamilton Clinic, 3635 Quakerbridge Road (609) 570-6600

Jersey City Clinic, 115 Christopher Columbus Drive (201) 435-3055

Marlton Clinic, 3000 Lincoln Drive East (844) 441-5499

Morristown Clinic, 540 West Hanover Avenue (973) 539-9791/9794

Northfield Clinic, 1909 New Road (800) 461-8262 Ext. 2800

Paterson Clinic, 11 Getty Ave, Bldg. 275 (973) 247-1666
Piscataway Clinic, 14 Wills Way, Building 5 (732) 981-8193
Sewell Clinic, 211 County House Road (877) 823-5230
Sussex Outpatient Clinic, 222 High Street, Suite 103, (973) 756-1504
Tinton Falls Clinic, 55 N. Gilbert Street, Building 4 (732) 842-4751
Vineland Clinic, 79 W. Landis Avenue (800) 461-8262 Ext. 6500

VA COMMUNITY BASED OUTPATIENT CLINICS

Atlantic County Community Outpatient Clinic 1909 New Road Northfield, NJ 08225-1537
Phone: 1-800-461-8262 ext. 2800
Camden VA Outpatient Clinic 300 Broadway Suite 103 Camden, NJ 08104 Phone: 1-877-232-5240
Cape May Community Based Outpatient Clinic 1 Monroe Avenue Cape May, NJ 08204
Phone: 1-800-481-8286 ext. 2850
Cumberland Community Outpatient Clinic 79 Landis Avenue Vineland, NJ 08360-8122
Phone: 1-800-461-8262 ext. 6500
Elizabeth CBOC 654 East Jersey St, Suite 2A Elizabeth, NJ 07206 Phone: 1-908-994-0120
Gloucester CBOC 211 County House Road Sewell, NJ 08080-2525 Phone: 1-877-823-5230
Hackensack CBOC 385 Prospect Avenue Hackensack, NJ 07601 Phone: 1-201-342-4536
Hamilton CBOC 3635 Quakerbridge Road Hamilton, NJ 08619 Phone: 1-609-570-6600
James J. Howard CBOC 970 Rt. 70 Brick, NJ 08724 Phone: 1-732-206-8900
Jersey City CBOC 115 Christopher Columbus Dr Suite #210 Jersey City, NJ 07302 Phone: 1-201-435-3055
Marlton CBOC 3000 Lincoln Drive East, Suite E Marlton, NJ 08053 Phone: 1-267-292-9400
Morristown CBOC 540 West Hanover Avenue Morristown, NJ 07960 Phone: 1-973-539-9791
Paterson CBOC 11 Getty Avenue, Bldg #275 St. Joseph's Medical Center Paterson, NJ 07503
Phone: 1-973-247-1666
Piscataway CBOC 14 Wills Way, Bldg 5 Piscataway, NJ 08854 Phone: 1-732-981-8193
Sussex CBOC 222 High Street Newton, NJ 07860 Phone: 1-973-756-1504
Tinton Falls CBOC 55 Gilbert Street Tinton Falls, NJ 07701 Phone: 1-732-842-4751

VET CENTERS IN NEW JERSEY

Bloomfield Vet Center 2 Broad Street, Suite 703 Bloomfield, NJ 07003 (973) 748-0980
Lakewood Vet Center 1255 Route 70, Unit 22N Parkway Seventy Plaza Lakewood,
NJ 08701 (908) 607-6364 / (732) 905-0327
Secaucus Vet Center 110A Meadowlands Parkway, Suite 102 Secaucus, NJ 07094 (201) 223-7787
South Jersey Vet Center 2900 Fire Road Egg Harbor Township, NJ 08234 (609) 487-8387
Trenton Vet Center 934 Parkway Avenue, Suite 201 Ewing, NJ 08618 (609) 882-5744
Ventnor Vet Center 6601 Ventnor Avenue Suite 105, Ventnor Building Ventnor, NJ 08406 Phone: 1-609-487-8387

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- ¹ Swords to Plowshares, *Assisting Bad Paper Veterans Discharge Upgrades & Character of Discharge Determinations*, INST. FOR VETERAN POLICY, 2021, https://www.njreentry.org/application/files/9116/3655/7759/Assisting_Bad_Paper_Veterans_COD_DU_Training_-_2021.pdf
- ² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8)(A)-(C).
- ³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8)(B)).
- ⁴ 10 USC § 1553
- ⁵ 32 C.F.R. § 70.9(b)
- ⁶ 32 C.F.R. § 70.9(c)
- ⁷ 32 C.F.R. § 70.9(c)(3)(i-ii) (factors the DRB considers include service history, awards, promotions, demotions, acts of merit, length of service, prior military service, education, and family problems)
- ⁸ 32 C.F.R. § 70.9(b)(3)
- ⁹ See Department of Defense, CLARIFYING GUIDANCE TO DISCHARGE REVIEW BOARDS, <https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf>
- ¹⁰ 10 USC § 1553(d)(1)(B)
- ¹¹ *Kennedy v. Whitley*, No. 316CV2010CSH, 2021 WL 4533198 (D. Conn. Apr. 26, 2021).
- ¹² 38 USC § 101(2)
- ¹³ Unless there is a statutory or regulatory bar to VA benefits, but that is unlikely with an honorable or a general under honorable circumstances discharge.
- ¹⁴ 38 CFR § 3.354(b)
- ¹⁵ 38 CFR § 3.354(a)
- ¹⁶ See https://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf
- ¹⁷ See *Underserved*, at 10, https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5e67da6782e5f4e6b19760b0_Underserved.pdf
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *Id.* at 12
- ²² See *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges*, at 8, <https://www.legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf>.
- ²³ *Id.*
- ²⁴ *Id.*
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ *Id.*
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ See Department of Veterans Affairs, UNDERSTANDING PTSD, https://www.ptsd.va.gov/understand/common/common_veterans.asp
- ³¹ See *Underserved*, supra note 2, at 21.
- ³² *Assisting Bad Paper Veterans*, supra note 6.
- ³³ See Department of Veterans Affairs, 2021 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, <https://www.mentalhealth.va.gov/docs/data-sheets/2021/2021-National-Veteran-Suicide-Prevention-Annual-Report-FINAL-9-8-21.pdf>

³⁴ *Id.*

³⁵ *Id.*

³⁶ See <https://www.gao.gov/prerelease/cfh3>

³⁷ NJ Rev Stat § 38A:3-1.2 (2020)

³⁸ NJ S278 C.18A:62-4.3c(2) (emphasis added)

³⁹ See <https://www.nj.gov/military/veterans/services/vetshavensouth/>

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 38 U.S.C. § 101(2) (emphasis added).

⁴³ For the full text of the bill, see https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=5600.3.

⁴⁴ For full text, see <https://www.cga.ct.gov/2018/ACT/pa/pdf/2018PA-00047-R00SB-00284-PA.pdf>

⁴⁵ For full text, see <https://legislation.nysenate.gov/pdf/bills/2019/S45B>

⁴⁶ See <https://blogs.va.gov/VAntage/60349/other-than-honorable-discharge/>

⁴⁷ *Id.*

⁴⁸ See <https://www.gao.gov/products/gao-21-326>

⁴⁹ *Assisting Bad Paper Veterans*, supra note 6.

⁵⁰ See *Turned Away*, supra note 22, at 21.

⁵¹ See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5526531/#pone.0181647.ref002>

⁵² See https://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_New_Jersey.pdf



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