

Wisconsin Department of Veterans Affairs

Policy Bulletin: Impact of a USDVA Character of Service Discharge Determination

Date of Origin: November 2, 2022	Policy Bulletin No.: 22-101
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I. Policy Statement:

If the USDVA Character of Service Discharge Determination provides that the veteran's service was honorable, this determination shall satisfy the character of service requirement for non-chapter 45 Wisconsin benefits.

II. Purpose:

The purpose of this Policy Bulletin is to provide a legal position relating to the administration of USDVA Character of Service Discharge Determinations. If a USDVA Character of Service Discharge Determination holds that a veteran's service was honorable, this determination shall satisfy the character of service requirement for non-chapter 45 Wisconsin benefits. This policy shall only impact applications for benefits from the effective date of this Policy Bulletin forward.

III. Related Bulletins:

This bulletin supercedes any previous WDVA legal opinions or internal procedures relating to how to handle upgrades of USDVA character of service discharge determinations.

IV. Issue:

Most non-chapter 45 Wisconsin benefits require the servicemember's character of service to have been honorableⁱ, among other requirements, to qualify for benefits. The U.S. Armed Forces initially determines the servicemember's character of service. Subsequently, in certain circumstances, both the Armed Forces and the United States Department of Veterans Affairs (USDVA) have procedures that permit the veteran to upgrade their character of service. However, the Wisconsin laws authorizing these benefits do not specify which entity's character of service determination should control eligibility for the benefits for the servicemember.

If the Armed Forces categorizes a servicemember's service as "Other than Honorable", the servicemember may request a Character of Service Discharge Determination from the USDVA. The USDVA will then review the veteran's military records, which may result in categorizing the veteran's character of service as "Honorable". The servicemember's character of service is no longer a bar to qualify the servicemember for most USDVA benefits. Yet for purposes of the Armed Forces, the character of the veteran's discharge status remains the same as initially determined by the Armed Forces.

If this occurs, the issue then becomes which federal entity's character of service determination should control for non-chapter 45 Wisconsin benefits for these servicemembers.

The respective statutory language relating to non-chapter 45 Wisconsin benefits, fails to specify which federal entity's character of service determination should control in determining if a servicemember satisfies the character of service requirement for the non-chapter 45 benefit.ⁱⁱ

V. Background and Legal Rationale:

Both the federal government and the State of Wisconsin grant benefits to servicemembers to honor their service to our nation. To qualify for most federal benefits, the servicemember must have,

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amongst other requirements, been “discharged or released under conditions other than dishonorable.”ⁱⁱⁱ Similarly, to qualify for most Wisconsin veteran benefits, a servicemember generally must satisfy a character of service requirement. Typically, Wisconsin requires that the servicemember’s character of service must be honorable.

The Armed Forces initially characterizes a servicemember’s discharge or release from service into one of five categories: honorable, under honorable conditions (general), other than honorable (OTH), bad conduct (adjudicated by a general court or special court-martial), or dishonorable (or dismissal in the case of commissioned officers). The Armed Forces also has three categories of uncharacterized administrative separations: entry-level separation, void enlistment, or dropped from the rolls.

If the Armed Forces’ determination of character of service does not satisfy the necessary character of service requirement for a particular benefit, many times the servicemember has two non-mutually exclusive options. One option is the servicemember may request an upgrade of their character of service with the appropriate Service Discharge Review Board or Board for Correction of Military/Naval Records.^{iv} The second option is if the Armed Forces denotes the character of service as “other than honorable” conditions, “bad conduct,” or “uncharacterized” separation (categorized as either “void enlistment” or “dropped from the rolls”), then the USDVA is authorized to assess eligibility for USDVA benefits and services and can make a USDVA character of discharge determination on whether the period of military service is “under conditions other than dishonorable”.^v

These two upgrade options are retrospective modifications of the Armed Forces prior determination regarding the categorization of the servicemember’s character of service and only occur after a thorough review of the servicemember’s military record and extenuating circumstances. Generally, Discharge Review Boards will only upgrade discharges on grounds of equity or propriety.^{vi} Ten U.S.C. § 1552 and the federal regulations corresponding to each branch of the military state that the Board for Correction of Military Records may amend military records of any member or former member of the armed forces to correct any “error or injustice.”^{vii} Generally, while the standards are not clearly laid out in federal regulations, the USDVA will only upgrade discharges if the discipline problems were minor, if the servicemember’s service was “otherwise honest, faithful, and meritorious”, or if the servicemember had a mental health problem that caused the servicemember to act very differently than the servicemember normally would.^{viii}

If the servicemember uses the first option, the Wisconsin Department of Veterans Affairs (WDVA) accepts the decision with respect to determining if the servicemember’s character of service satisfies the requirement for a particular State benefit. The same should therefore hold true with respect to the USDVA’s character of discharge determination.

An argument could be made that at least with respect to the largest non-chapter 45 benefits (i.e., Wisconsin Property Tax Credit for Veterans and the Wisconsin GI Bill), the WDVA should accept the upgrade provided by the USDVA character of discharge determination with respect to the Property Tax Credit but not the GI Bill. The rationale for this distinction relating to the federal GI Bill, is this is how the federal government handles eligibility for the federal GI Bill when a servicemember receives an upgrade via a USDVA character of discharge determination. Specifically, 31 CFR §21.7302(c)(2) provides, “[a]ny determination of the character of a veteran’s discharge made

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by VA in connection with the veteran's eligibility for a benefit other than educational assistance under 38 U.S.C. chapter 30, shall not affect his or her eligibility for educational assistance."^{ix}

However, several reasons support that an upgrade made by the USDVA should control whether the veteran satisfies the character of service requirement with respect to the Wisconsin GI Bill. Preliminary, the Wisconsin GI Bill is a Wisconsin benefit funded entirely by the Wisconsin Legislature. Consequently, the determination made by the federal government regarding the federal benefit does not control policy decisions that the WDVA makes with respect to the Wisconsin GI Bill. Secondly, as noted previously, the Wisconsin statutory language for both the Wisconsin GI Bill and Wisconsin Veteran Property Tax Credit are similarly silent regarding what federal entity's character of service determination should control. This is in direct contrast to how the federal government handles this matter because it has been explicitly written in a federal regulation that a USDVA character of service determination that upgrades a veteran's character of service shall not control a veteran's eligibility for the federal GI Bill. Consequently, it would be inconsistent to have the USDVA's character of service determination upgrade control for one Wisconsin benefit and not the other when the applicable Wisconsin statutes make no similar distinction.^x

When the USDVA amended 38 CFR Part 3 relating to its process for reviewing and possibly upgrading a servicemember's character of discharge, the USDVA noted that it will attempt to look at all relevant factors before upgrading a servicemember's character of service:

During VA's administrative review of the servicemember's character of discharge, it examines the facts and circumstances that surround the Armed Forces' characterization of service and assesses the statutory and regulatory bars to VA benefits. VA will request all available records, including service treatment and personnel records from the relevant military service department. VA will also send advance notice to the former servicemember, with an applicable response time limit for the servicemember to submit any evidence, contention, or argument surrounding facts and circumstances that led to the Armed Forces' characterization of military service.^{xi}

The USDVA has also developed a manual (M21-1MR, Part III, Subpart v, Chapter 1, Section B) that outlines the procedures it uses to make this determination.^{xii} This manual reinforces the fact that a Character of Service Discharge Determination that upgrades the veteran's character of service only occurs after the USDVA reviews any military service records, including facts and circumstances surrounding the incident leading to the discharge. This further supports that WDVA may rely upon these determinations with respect to the character of service for a veteran who is applying for a non-chapter 45 benefit.

VI. Determination:

If, after the federal USDVA reviews the matter and determines that the federal government should award benefits by upgrading a veteran's character of service, WDVA shall use the servicemember's modified character of service to qualify the veteran for non-Chapter 45 benefits. This policy shall only impact applications for benefits from the effective date of this Policy Bulletin forward.

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VII. Endnotes:

ⁱ Some of the non-chapter 45 benefits that require an honorable character of service determination but also fail to annunciate what entity makes this determination include the following:

- **Wisconsin Veteran Property Tax**

Wis. Stat. §71.07(6e)(a)3.a. provides a servicemember must satisfy several requirements to qualify for the Veteran Property Tax Credit. One of the requirements is the servicemember's character of service. The servicemember's character of service must be that the servicemember must have "served . . . *under honorable conditions*". In relevant part Wis. Stat. §71.07(6e)(a)3. Provides in relevant part "3. 'Eligible veteran' means an individual who is verified by the department of veterans affairs as meeting all of the following conditions: a. Served on active duty under honorable conditions in the U.S. armed forces or in forces incorporated in the U.S. armed forces."

Of note, the statute clearly provides that the determination of what State agency makes the determination with respect to whether the servicemember satisfies the character of service requirement is the Wisconsin Department of Veterans Affairs.

Wisconsin Stat. §71.07(6e)(a)1. provides that potential additional claimants for the veteran property tax credit includes an unremarried surviving spouse and a spouse. When it is necessary for the servicemember, who potentially makes these claimants eligible for the veteran property tax credit, to have served under honorable conditions, the analysis laid out within this policy bulletin would not vary.

- **Wisconsin GI Bill**

- **For the University of Wisconsin system**

Wis. Stat. §36.27(3p)(a)1r. provides a servicemember must satisfy several requirements to qualify for the Wisconsin GI Bill for the University of Wisconsin system. One of the requirements is the servicemember's character of service. The servicemember's character of service must be that the servicemember must have "served . . . under honorable conditions". In relevant part Wis. Stat. §36.27(3p)(a)1r. requires that the servicemember's character of service was under honorable conditions and provides:

1r. "Veteran" means a person who is verified by the department of veterans affairs as being a resident of this state for purposes of receiving benefits under ch. 45; as being a resident of this state at the time of his or her entry into the U.S. armed forces or forces incorporated in the U.S. armed forces or as being a resident of this state for at least 5 consecutive years immediately preceding the beginning of any semester or session for which the person registers at an institution; and as meeting any of the following conditions:

- a. The person has served on active duty for at least one qualifying term of service under subd. 1r. b. to d. under honorable conditions in the U.S. armed forces or in forces incorporated as part of the U.S. armed forces during a war period or in a crisis zone.
- b. The person has served on active duty in the U.S. armed forces or in forces incorporated in the U.S. armed forces under honorable conditions, for 2 continuous years or more or for the full period of his or her initial service obligation, whichever is less.
- c. The person has served on active duty for 90 days or more under honorable conditions in the U.S. armed forces or in forces incorporated in the U.S. armed forces during a war period

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or for any period of service under section 1 of executive order 10957 dated August 10, 1961.

- d. The term of service in the U.S. armed forces or in forces incorporated as part of the U.S. armed forces under honorable conditions entitled the person to receive the Armed Forces Expeditionary Medal, established by executive order 10977 on December 4, 1961, the Vietnam Service Medal established by executive order 11231 on July 8, 1965, the Navy Expeditionary Medal, the Marine Corps Expeditionary Medal, or an equivalent expeditionary or service medal.
- e. The person was honorably discharged from the U.S. armed forces or from forces incorporated in the U.S. armed forces for a service-connected disability, for a disability subsequently adjudicated to have been service connected, or for reasons of hardship.
- f. The person was released under honorable conditions from the U.S. armed forces or from forces incorporated in the U.S. armed forces due to a reduction in the U.S. armed forces.

Individuals whose relationship with a servicemember create a derivative benefit that can enable the individual to qualify for the Wisconsin GI Bill include a spouse, surviving spouse, and child of the veteran. This derivative benefit for these individuals is authorized by Wis. Stat. §36.27(3n). For some of these individuals the character of service for the servicemember, whose service enables them to qualify for the benefit, must have been under honorable conditions. In relevant part, Wis. Stat. §36.27(3n)(a)1m. provides:

1m. "Eligible veteran" means a person verified by the department of veterans affairs to be either of the following:

- a. A person who has served on active duty under honorable conditions in the U.S. armed forces, in forces incorporated as part of the U.S. armed forces, in the national guard, or in a reserve component of the U.S. armed forces; who was a resident of this state at the time of entry into that service or resided in this state for at least 5 consecutive years after the person attained the age of 18; and who, while a resident of this state, died on active duty, died as the result of a service-connected disability, or died in the line of duty while on active or inactive duty for training purposes.
- b. A person who was a resident of this state at the time of entry into service described in subd. 1m. a. or resided in this state for at least 5 consecutive years immediately preceding the beginning of any semester or session for which the person's spouse or child described in par. (b) 1., 2., or 3. registers at an institution, and who the U.S. department of veteran affairs has awarded at least a 30 percent service-connected disability rating under 38 USC 1114 or 1134.
[Subparagraph b. does not have a character of service requirement.]

When it is necessary for the servicemember, who potentially makes these individuals eligible for the Wisconsin GI Bill through the University of Wisconsin system, to have served under honorable conditions, the analysis laid out within this policy bulletin would not vary with respect to whether individuals whose relationship with a servicemember qualify for the derivative benefit.

➤ For the Wisconsin Technical College system

Wis. Stat. §38.24(8)(a)1r. provides a servicemember must satisfy several requirements to qualify for the Wisconsin GI Bill for the Wisconsin Technical College system. One of the requirements is the servicemember's character of service. The servicemember's character of service must be that the servicemember must have "served . . . under honorable conditions".

In relevant part Wis. Stat. §38.24(8)(a)1r. requires that the servicemember's character of service was under honorable conditions and provides:

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1r. “Veteran” means a person who is verified by the department of veterans affairs as being a resident of this state for purposes of receiving benefits under ch. 45; as being a resident of this state at the time of his or her entry into the U.S. armed forces or forces incorporated in the U.S. armed forces or as being a resident of this state for at least 5 consecutive years immediately preceding the beginning of any semester or session for which the person registers at a technical college; and as meeting any of the following conditions:

- a. The person has served on active duty for at least one qualifying term of service under subd. 1r. b. to d. under honorable conditions in the U.S. armed forces or in forces incorporated as part of the U.S. armed forces during a war period or in a crisis zone.
- b. The person has served on active duty in the U.S. armed forces or in forces incorporated in the U.S. armed forces under honorable conditions, for 2 continuous years or more or for the full period of his or her initial service obligation, whichever is less.
- c. The person has served on active duty for 90 days or more under honorable conditions in the U.S. armed forces or in forces incorporated in the U.S. armed forces during a war period or for any period of service under section 1 of executive order 10957 dated August 10, 1961.
- d. The term of service in the U.S. armed forces or in forces incorporated as part of the U.S. armed forces under honorable conditions entitled the person to receive the Armed Forces Expeditionary Medal, established by executive order 10977 on December 4, 1961, the Vietnam Service Medal established by executive order 11231 on July 8, 1965, the Navy Expeditionary Medal, the Marine Corps Expeditionary Medal, or an equivalent expeditionary or service medal.
- e. The person was honorably discharged from the U.S. armed forces or from forces incorporated in the U.S. armed forces for a service-connected disability, for a disability subsequently adjudicated to have been service connected, or for reasons of hardship.
- f. The person was released under honorable conditions from the U.S. armed forces or from forces incorporated in the U.S. armed forces due to a reduction in the U.S. armed forces.

Individuals whose relationship with a servicemember create a derivative benefit that can enable the individual to qualify for the Wisconsin GI Bill at the Wisconsin Technical College system include a spouse, surviving spouse, and child of the veteran. This derivative benefit for these individuals is authorized by Wis. Stat. §38.24 (7). For some of these individuals the character of service for the servicemember, whose service enables them to qualify for the benefit, must have been under honorable conditions. In relevant part, Wis. Stat. §38.24 (7)(a)1m. provides:

1m. “Eligible veteran” means a person verified by the department of veterans affairs to be either of the following:

- a. A person who has served on active duty under honorable conditions in the U.S. armed forces, in forces incorporated as part of the U.S. armed forces, in the national guard, or in a reserve component of the U.S. armed forces; who was a resident of this state at the time of entry into that service or resided in this state for at least 5 consecutive years after the person attained the age of 18; and who, while a resident of this state, died on active duty, died as the result of a service-connected disability, or died in the line of duty while on active or inactive duty for training purposes.

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- b. A person who was a resident of this state at the time of entry into service described in subd. 1m. a. or resided in this state for at least 5 consecutive years immediately preceding the beginning of any semester or session for which the person's spouse or child described in par. (b) 1., 2., or 3. registers at a technical college, and who the U.S. department of veteran affairs has awarded at least a 30 percent service-connected disability rating under 38 USC 1114 or 1134.

[Subparagraph b. does not have a character of service requirement.]

When it is necessary for the servicemember, who potentially makes these individuals eligible for the Wisconsin GI Bill through the Wisconsin Technical College system, to have served under honorable conditions, the analysis laid out within this policy bulletin would not vary.

ⁱⁱ See, e.g., statutory language contained in endnote I for both the Wisconsin Veteran Property Tax Credit and Wisconsin GI Bill.

ⁱⁱⁱ 38 U.S.C. §101(2).

^{iv} 10 U.S.C. §§1551-1557 (2022). However, any character of service less favorable than honorable renders a former servicemember ineligible to receive their earned G.I. Bill education benefits. See 38 C.F.R. § 21.9520 (2009) (describing the basic eligibility requirements for the G.I. Bill).

^v See 38 U.S.C. §101(2); see also 38 CFR §3.12(a) and (k)(2) and (3). This USDVA character of discharge determination has no effect on what is listed on the former servicemember's discharge paperwork, such as his or her DD-214. Nor does it change how the Armed Forces would view the servicemember's character of service. For a servicemember to change the discharge status or narrative reason for separation, the servicemember must apply for a discharge upgrade to the Department of Defense discharge review and/or corrections board.

A former servicemember must be denied benefits, regardless of the Armed Forces' characterization of service, if the reason for separation from the period of service that benefits would be predicated upon falls within one of the six statutory bars. See 38 U.S.C. §5303(a).

Federal law does provide certain bars to USDVA eligibility in which a character of discharge determination will not make the former servicemember eligible for benefits. 38 U.S.C. §5503; 38 C.F.R. §3.12(c). A release or discharge for any of the following reasons constitutes a statutory bar to benefits, unless it is determined the servicemember was mentally ill or otherwise mentally or psychologically incapacitated at the time the servicemember committed the offense that resulted in the servicemember's discharge:

- As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities;
- By reason of the sentence of a general court-martial;
- Resignation by an officer for the good of the service;
- As a deserter;
- As an alien during a period of hostilities, where it is affirmatively shown that the former servicemember requested his or her release; OR
- By reason of a discharge under other than honorable conditions issued because of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence.

^{vi} See 32 C.F.R. § 70.9 (2022).

^{vii} 10 U.S.C. §1552(a)(1)(2022); 32 C.F.R. §§ 581.3(b)(4)(i), 723.1, 865.0; 33 C.F.R. § 52.12(a).

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^{viii} Swords to Plowshares, “VA Character of Discharge Review: An Alternative to a Discharge Upgrade” available at https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5e67d0fdecbe0581c91a9adc_VA-Character-Of-Service.pdf.

^{ix} 31 C.F.R. §21.7302(c)(2).

^x This legal determination is further supported by Wis. Stat. §45.03(14), titled, “LIBERAL CONSTRUCTION INTENDED.” and then provides, “This chapter shall be construed as liberally as the language permits in favor of applicants”, which supports a general legislative intent to interpret all Wisconsin veterans benefits broadly in favor of applicants.

^{xi} See Proposed Rule amending 38 CFR Part 3 titled “Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge” RIN 2900-AQ95 Federal Register Vol. 85, No. 133 (July 10, 2020) available at <https://www.federalregister.gov/documents/2020/07/10/2020-14559/update-and-clarify-regulatory-bars-to-benefits-based-on-character-of-discharge>.

^{xii} The manual also enumerates when the USDVA is legally not permitted to upgrade a veteran’s character of discharge, i.e., a servicemember who was a deserter. Manual is available at