



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
HEADQUARTERS, 8th INFANTRY DIVISION AND FORT SNUFFY
FORT SNUFFY, VIRGINIA 12345-6789

ATXX-CG

MEMORANDUM THRU

Commander, 3d Brigade Combat Team, 8th Infantry Division, Fort Snuffy, Virginia 12345
Commander, 103d Brigade Support Battalion, 3rd Brigade Combat Team, 8th Infantry Division,
Fort Snuffy, Virginia 12345
Commander, A Company, 103d Brigade Support Battalion, 3rd Brigade Combat Team, 8th
Infantry Division, Fort Snuffy, Virginia 12345

FOR Specialist John Q. Soldier, 987-65-4321, A Company, 103d Brigade Support Battalion, 3rd
Brigade Combat Team, 8th Infantry Division, Fort Snuffy, Virginia 12345

SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist John Q.
Soldier, 987-65-4321

1. The request for discharge in lieu of trial by court-martial pertaining to SPC John Q. Soldier, 9087-65-4321, A Company, 103d Brigade Support Battalion, Fort Snuffy, Virginia, is approved.
2. Specialist Soldier will be discharged from the U.S. Army under the provisions of AR 635-200, Chapter 10, with an under other than honorable conditions characterization of service.
3. The court-martial charges pending against SPC Soldier will be withdrawn and dismissed effective upon date of separation.
4. In accordance with AR 635-200, paragraph 1-32a and AR 40-501, Table 8-2, SPC Soldier will be discharged without separation physical or mental examination unless he/she submits a written request for such. No written waiver is necessary. In the event that he/she requests either a physical or mental examination, separation will not be delayed for completion of the examination, and the examination(s) may be completed at Department of Veterans Affairs (VA) facilities after discharge.
5. Specialist Soldier will be reduced to the lowest enlisted grade IAW AR 600-8-19, paragraph 10-1(d).
6. Specialist Soldier will not be transferred to the Individual Ready Reserves (IRR).
7. Information Regarding VA Benefits.

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All Discharges In Lieu of Court-Martial Granted Without Prior GCM Referral

Add this paragraph in all cases for which a request for discharge in lieu of court-martial is granted without a prior referral to general court-martial. While other statutory or regulatory bars to VA benefits may apply, adding this paragraph will help to prevent VA benefits adjudicators from mistakenly applying the VA regulatory bar to benefits for Soldiers discharged to avoid trial by general court-martial.

a. This is not a discharge to escape trial by general court-martial, as the charges and specifications have not been referred to general court-martial. Accordingly, the regulatory bar to VA benefits set forth in 38 C.F.R. § 3.12(d)(1) for acceptance of an undesirable discharge to avoid trial by general court-martial should not apply.

Excluding AWOL ≥ 180 Continuous Days as a Basis for Discharge

If an accused is charged with violating Article 85, UCMJ, Desertion, or Article 86, UCMJ, AWOL for a period of continuous absence of at least 180 days, add this paragraph if the convening authority decides that the statutory bar to VA benefits for AWOL ≥ 180 Continuous Days should not apply. Statutory bars to benefits generally preclude receipt of VA health care benefits, while regulatory bars generally do not. The convening authority must ensure that a proper reason to grant the request remains. For example, approving the request based on a period of AWOL of greater than 30 days, but less than 180 days, would be a proper basis for approving the request while preventing application of the statutory bar. Additional explanation is permissible, but not required.

b. This discharge under other than honorable conditions is not issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. The statutory bar to benefits set forth in 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(6) for absence without leave for a period of at least 180 continuous days should not apply. [Optional: Insert additional explanation.]

Excluding Other Charge(s) and Specification(s) as a Basis for Discharge

Add this paragraph if the convening authority does not wish to include a specific charged offense as the basis for approving the request. The application of several statutory and regulatory bars to VA benefits depends on the type and nature of the charged misconduct. Specifically excluding certain charged offenses from the basis of the separation can prevent the application of a statutory or regulatory bar that would deny a Soldier benefits.

c. This discharge in lieu of court-martial is not based on the following charged offense(s): [Insert Charge(s) and Specification(s) that do not form any basis for approving the discharge in lieu of court-martial]. When making a decision on VA benefits eligibility, benefits adjudicators should not consider the charged offense(s) listed in this paragraph, as I did not consider these charged offense(s) when granting this request for discharge in lieu of court-martial. [Optional: Insert additional explanation.]

Recommendation Against Moral Turpitude Bar to VA Benefits

Add this paragraph if the convening authority does not believe that an/the offense(s) on which the discharge is based involve(s) moral turpitude. Granting a request for discharge in lieu of court-martial with an OTH characterization of service generally serves as a regulatory bar to VA benefits if an offense involving moral turpitude is all or part of the basis for separation. Findings and recommendations set forth in this paragraph are not binding on VA benefits adjudicators, but may be persuasive.

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d. After a thorough review of the charges and factual circumstances, I find that the offense(s) on which this discharge is based do(es) not involve moral turpitude for the purposes of a VA benefits determination. I recommend that 38 C.F.R. § 3.12(d)(3) not serve as a bar to VA benefits. The offense(s) on which this discharge is based do(es) not involve moral turpitude because [, for the offenses on which this discharge is based, a Dishonorable Discharge/Dismissal is not among the permissible sentences at a court-martial,] [,] [none of the offense(s) are analogous to a felony level offense under the circumstances] [,] [all absence offenses on which this discharge is based did not occur during times of War or national peril] [,] [and] [military courts and the Manual for Courts-Martial have not recognized the offense(s) on which this discharge is based as constituting crimes involving moral turpitude]. [Optional: Insert additional or alternate explanation.]

Recommendation Against Willful and Persistent Misconduct Bar to VA Benefits

Add this paragraph if the convening authority does not believe that an/the offense(s) on which the discharge is based constitute(s) willful and persistent misconduct. Granting a request for discharge in lieu of court-martial with an OTH characterization of service generally serves as a regulatory bar to VA benefits if misconduct determined to be willful and persistent is all or part of the basis for separation. Findings and recommendations set forth in this paragraph are not binding on VA benefits adjudicators, but may be persuasive.

e. After a thorough review of the charges and factual circumstances, I find that the offense(s) on which this discharge is based (was)(were) not willful and persistent misconduct for the purposes of a VA benefits determination. I recommend that 38 C.F.R. § 3.12(d)(4) not serve as a bar to VA benefits. The offense(s) on which this discharge is based do(es) not involve willful and persistent misconduct because [it involves] [they all share a nexus in] a single incident and should rightfully be considered a single one-time event] [,] [the offense(s) on which this discharge is based did not materially interfere with or prevent the accused's ability to meaningfully perform military duties], [the offense(s) was/were minor in nature and the accused's conduct was otherwise Honest, Faithful, and Meritorious]. [Optional: Insert additional explanation.]

Compelling Circumstances Recommendation for Continuous AWOL ≥ 180 Days

If an accused is charged with violating Article 86, UCMJ, AWOL for a continuous period of at least 180 days, and the convening authority does not make an affirmative finding that the discharge in lieu of court-martial with an OTH characterization of service is not based on a continuous period of AWOL for at least 180 days, the accused will likely be statutorily barred from VA benefits. The convening authority can likely prevent this statutory bar from applying by specifically finding that the request for discharge in lieu of court-martial is not based on a continuous period of AWOL for at least 180 days. If the accused is statutorily barred, the convening authority may also make a finding and recommendation to the VA benefits adjudicators that there were compelling circumstances that warranted the prolonged unauthorized absence for the purpose of VA benefits. This finding, however, is simply a recommendation to VA benefits adjudicators in the event that the accused later applies for VA benefits. While this recommendation may persuade VA benefits adjudicators to apply the compelling circumstances exception to this statutory bar, it does not prevent the application of the statutory bar.

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f. Because this discharge is based on a violation of Article 86, UCMJ, Absence Without Leave, for a period of at least 180 continuous days, 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(6) may serve as a statutory bar to VA benefits. I find, however, that for the purposes of VA benefits eligibility, there are compelling circumstances that warranted the prolonged unauthorized absence. While these compelling circumstances do not present a valid legal defense, they are sufficiently extenuating and mitigating for me to recommend that this statutory bar to benefits not apply. In making this determination, I have considered the [length and character of service exclusive of the period of prolonged AWOL] [and] [the reasons that the accused has given for the period of prolonged AWOL. I have evaluated these reasons in terms of the accused's age, cultural background, educational level and judgmental maturity [, to include the [hardship][and][suffering] [incurred as a result of overseas service] [,][and] [as a result of combat wounds] [,][and] [other service incurred or aggravated disability]. [Optional: Insert additional explanation.]

Proper Use of These Findings and Recommendations

This paragraph is recommended in all cases for which the convening authority includes information regarding VA benefits. This paragraph clarifies the limited purposes of the convening authority's findings and recommendations regarding VA benefits determinations.

g. These findings and recommendations are solely for the purpose of assisting VA benefits adjudicators in making their decisions on eligibility for veterans benefits. I have made the findings and recommendations in this paragraph after being advised by my Staff Judge Advocate on the applicable legal standards, definitions, and regulations. These recommendations are not made for any purpose other than assisting with determining the appropriate VA benefits determination.

Statement of Gratuitous Nature of VA Benefits Findings and Recommendations

This paragraph is recommended in all cases for which the convening authority includes information regarding VA benefits. Convening Authorities, Judge Advocates, and other legal counsel are advised against negotiating for the inclusion of language. Because VA and other judicial officials retain complete authority to make VA benefits eligibility determinations, convening authorities have neither the statutory nor regulatory authority to make final determinations on whether or not an accused is eligible for VA benefits. Convening authorities also have no authority to make binding precedential determinations regarding the interpretation of VA-related statutes and regulations. In addition, Army Regulation (AR) 635-200 does not provide any authority for an accused to include conditional language as a part of a request for discharge in lieu of court-martial. The accused and defense counsel should request the inclusion of VA benefit-related language in the request for discharge in lieu of court-martial under the authority of AR 635-200, para. 10-9.

h. No member of the command has made any promises, assurances, or other representations to the accused or defense counsel regarding the accused's eligibility for VA benefits. There was no negotiation with the accused or defense counsel for the inclusion of any VA benefits-related language in this approval document. The determinations, findings, and recommendations in this paragraph were not made in exchange for the submission of this request for discharge in lieu of court-martial. I believe that granting this discharge in lieu of court-martial is the correct action in this case regardless of any final decision on the accused's eligibility for VA benefits. I have granted this request for discharge in lieu of court-martial and

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made these specific findings and recommendations regarding VA benefits eligibility with full knowledge that VA and other judicial officials are the proper arbiters of VA benefits eligibility determinations. If the determinations, findings, and recommendations included in this paragraph are found to be legally invalid, inapplicable, or unpersuasive, or they do not result in the preservation of any VA benefits for the accused, this discharge in lieu of court-martial shall remain valid, and the characterization of discharge shall remain unchanged unless upgraded or otherwise modified by another proper administrative, judicial, or legal process.

ALBERT T. VANDALEIGH
Major General, USA
Commanding

CF:
ATXX-AG (Transition)
TDS