Are you considering going AWOL? Do you have a client who was discharged because of their AWOL status, but is considering a discharge upgrade? If so, there are a few things that need to be considered.

An AWOL status is not an automatic disqualification for a discharge upgrade; however, it should be noted that upgrading an AWOL discharge is extremely hard and requires the veteran or veteran’s representative to make a case that 1) the AWOL status was not warranted or 2) the command broke policies and regulations regarding the status and discharge, thus the AWOL is unjust.

The previous article examined the first of the options, the "easiest" way. This article examines the second of the options, advocating that the command broke policies and regulations regarding the status and discharge, thus making the AWOL unjust. This article cites Army regulations; however, all military branches have specific regulations that pertain to that branch.

The Uniform Code of Military Justice defines AWOL as a soldier who without authority fails to go to his or her appointed place of duty at the time prescribed, goes from their place of duty without proper authority or is absent and remains absent from their unit, organization, or place of duty. AR 630-10 governs absence without leave, desertion and administration of personnel involved in civilian court proceedings. Under this regulation, it is the Company Commander’s responsibility to conduct an immediate inquiry to determine the Soldier’s location and probable reason for absence, to change the Soldier’s duty status to AWOL, to notify the Provost Marshall and deserter control officer within 48 hours of the soldier’s absence, and to contact the next of kin to determine contact.

The biggest opportunity to argue that a command broke policies and regulations comes during the time period between 48 hours and 30 days of absence. During the first 48 hours it is the command’s responsibility to make an inquiry as to the status of the soldier. Most often the commander’s inquiry is one of pure curiosity and follow up of their missing soldier. However, the longer the soldier is missing, the inquiry can shift from one of curiosity (making sure the soldier is okay) to one of preliminary inquiry for disciplinary action. Prior to deciding how to handle a disciplinary issue at hand, Commanders need to conduct a preliminary inquiry under R.C.M. 303. The inquiry should gather all reasonably available evidence related to guilt or innocence, aggravation, and extenuation and mitigation. Under the Manual for Court Martial the commander then decides whether to impose non-judicial punishment based on the nature of the offense, the record of the servicemember, the need for good order and discipline, and the effect of the punishment on the servicemember and the servicemember’s record.

This is precisely the place you can look for inadequacies of the Command inquiry. Did they fail to do their due diligence? This is particularly important if there are significant mitigating factors as to the soldier’s absence. After the inquiry, it is the discretion of the Command as to what type of punishment to pursue. AWOL does not automatically equate to courts-martial. Various non-judicial punishments are available, including not chactoring out the soldier. Granted, this is rare, due to the nature of the AWOL discretion; however, it is possible. Thus, if mitigating factors do exists (such as family emergencies, health issues, etc.) it can be argued that the failure of the Command to take the circumstances into account when discharging the veteran was unjust, and given the servicemember’s record of service, there is merit to an upgrade of the discharge.

At the 30-day mark, the Soldier is Dropped from the Rolls as a deserter. This provides another opportunity to look for evidence of injustice. Under AR 630-10, an absent soldier cannot be dropped for the rolls if they are under military control, they were confined by civilian authorities (if less than six months), or while receiving treatment in a civilian medical facility. If the discharge occurred due to desertion, and the veteran falls within one of these categories, then it can be argued that under the regulations this characterization of discharge was unjust, should be corrected in the records, and there is merit to an upgrade of discharge.

In summary, it is difficult to overcome a discharge due to AWOL or desertion, however, it is not impossible. The most realistic opportunity will come in the form of arguing the veteran was, in fact, not AWOL. When you can’t argue this then look for mitigating evidence in the way the Command investigated it or if it was misclassified. While a complete discharge upgrade may not occur, there are instances in which the review board has changed the characterization of the discharge based on unjustness. And to the VA, a change in characterization can make a world of difference to the types of benefits the veteran can receive. Thus, even if it is hard, it might very well be worth a shot.

Resources:
All Army Regulations can be found at the Army Publishing Directorate: www.armypubs.army.mil

AR 630-10: ABSENCE WITHOUT LEAVE, DESERTION, AND ADMINISTRATION OF PERSONNEL INVOLVED IN CIVILIAN COURT PROCEEDINGS


MANUAL FOR COURTS-MARTIAL, UNITED STATES: Article 86


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