INFORMATION PAPER

MCJA
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SUBJECT: Impact of Misconduct during Army Physical Disability Evaluation System Process

1. PURPOSE: To provide guidance on the process of separating Soldiers for misconduct who are undergoing the Army Physical Disability Evaluation System (APDES).

2. BLUF: An administrative or UCMJ - based action initiated against a Soldier who is undergoing a Medical Evaluation Board (MEB) or Physical Evaluation Board (PEB) may impact the Soldier's eligibility for continued APDES processing. Discontinuing the disability process and proceeding with separation under administrative regulations or the UCMJ should be done only when warranted by the facts and in compliance with the law.

3. NOTICE OF MEDICAL CONDITION. Per AR 40-501, 3-3(d), physicians who identify Soldiers with medical conditions listed in this chapter should initiate an MEB at the time of identification and should not defer initiating the MEB until the Soldier is being processed for nondisability retirement. The initiation of an MEB puts the command on notice that a medical condition exists that may result in the Soldier being separated for disability. The MEB is formally initiated upon the second signature of an authorized physician on a DA Form 3349, Physical Profile, when there is a designator of a 3 or 4 in the PUHLES factors and it is a permanent profile. This also constitutes the Medical Retention Determination Point (MRDP). (MOD 1 to HQDA EXORD 185-11: Reduction of Non-Deployables.) Commanders must understand that although the formal MEB processing may not have started, a condition has been identified by a medical professional that requires additional medical and command attention.

4. CIRCUMVENTION OF THE ARMY PHYSICAL DISABILITY EVALUATION SYSTEM (APDES) PROCESS. As explained below, there are laws, regulations and policies in effect that govern whether a Soldier should be processed for disability separation or for misconduct. Intentional circumvention of the APDES process is never acceptable. Commanders must ensure these decisions are well-reasoned and made in the best interests of the Soldier and the Army. The commander's recommendation or decision to pursue administrative or UCMJ action for a Soldier in the APDES should be based on, among other factors, the sound legal advice provided by the Staff Judge Advocate and may be subject to considerable scrutiny.

5. CROSSROADS. Careful attention must be given to situations where a commander is at the crossroads of determining whether to pursue APDES processing or an administrative/punitive separation. Although regulations may allow the commander to

pursue either route, your legal advice should take into consideration the best interests of the Soldier, the unit, and the Army. Therefore, a commander's decision must be made with all relevant information available, to include the Soldier's medical condition and whether there is a connection to the alleged misconduct.

6. PUNITIVE ACTION. Soldiers who are in an AWOL status, in military confinement, or under investigation for or facing charges that could result in dismissal or punitive discharge are not eligible for referral or processing in the APDES, unless: (1) the investigation ends without charges; (2) the charges are dismissed; or (3) the charges are referred for trial to a court-martial that cannot adjudge a punitive discharge. (AR 635-40, para 4-1)

7. ADMINISTRATIVE ACTION.

a. APDES processing takes priority for all administrative separation actions, unless the separation action authorizes separation Under Other Than Honorable (OTH) conditions. (AR 635-200, para 1-33b; AR 635-40, para 4-3)

b. Dual Processing. If the Chapter authorizes an OTH, the MEB and administrative separation action will both continue processing but final action will not be taken. If the MEB determines that a medical condition fails retention standards per AR 40-501, Chapter 3, the completed MEB and Chapter action will be provided to the General Court-Martial Convening Authority (GCMCA), who will determine whether processing under the APDES will continue. (AR 635-200, para 1-33b) Note that the regulation does not state that the Soldier has to be in the MEB process to require dual processing. AR 40-400, para 7-1, requires physicians who identify Soldiers with medical conditions that do not meet retention standards to initiate a DA Form 3349 referring them to the Physical Disability Evaluation System (PDES). If the Soldier does not meet retention standards, an MEB is mandatory.

c. GCMCA Action. An enlisted Soldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes an OTH characterization of service except when the commander exercising general court-martial jurisdiction over the Soldier decides to abate the administrative separation. This authority may not be delegated. (AR 635-40, para 4-3 and AR 635-200, para 1-33) There are two bases for the GCMCA to elect APDES processing:

(1) The GCMCA finds the disability is the direct or a substantial contributing cause of the misconduct that might result in a discharge under other than honorable conditions; or

(2) Other circumstances warrant disability processing instead of alternate administrative separation. (AR 635-200, para 1-33b(1))

d. Personality Disorder (PD). If a personality disorder is the basis for the separation, special rules apply.

(1) A Soldier will not be processed for administrative separation under AR 635-200, paragraph 5-13, if PTSD, TBI and/or other co-morbid mental illness are significant factors to a diagnosis of PD, but will be evaluated under physical disability system in IAW AR 635-40. (ALARACT 036-2009)

(2) The following cases require review and endorsement by OTSG for administrative separation prior to Soldiers being processed for discharge, per OTSG/MEDCOM Policy Memo 11-010:

(a) Chapter 5-13 recommendations based on a diagnosis of PD. Note that this section is authorized for Soldiers with less than 24 months of active duty service.

(b) Chapter 5-17 recommendations based on a diagnosis of PD. Note that this section is authorized for Soldiers with 24 or more months of active duty service.

(c) All other Chapter 5-17 recommendations for Soldiers who are currently deployed, or have <u>ever</u> been deployed, to an imminent danger pay area.

e. Civil Court Action. If civilian criminal court action is pending and the Soldier is present for duty, disability processing continues. (AR 635-40, para 4-1b)

f. Officers. A commissioned or warrant officer will not be referred for disability processing instead of an administrative separation that could result in an OTH separation. However, if the officer is believed to be unfit because of physical disability, the case will be processed simultaneously for administrative separation and physical disability evaluation. Upon completion, the matter will be forwarded by the GCMCA through Commander, HRC, for Secretary of Army determination. (AR 635-40, para 4-4)

8. After MEB/PEB Processing. Even after a Soldier has completed the MEB/PEB processing and is awaiting separation (e.g., pending retirement date or on transitional leave), a separation action for serious misconduct may still be initiated. However, a Soldier's disability processing or separation may not be delayed in order to process actions under Article 15, UCMJ, or Summary Court-Martial and any actions imposed must be completed prior to the date of the Soldier's final separation. For serious offenses that could result in separation under OTH or a punitive discharge, the disability

separation action can be stopped and reviewed by the GCMCA. The authority of the GCMCA to determine whether the administrative separation action will proceed or be abated for completion of disability evaluation will not be delegated.

9. PRACTICAL EXAMPLES. The following scenarios will help explain when a Soldier is eligible for the Medical Evaluation Board and Physical Evaluation Board Process.

a. An enlisted Soldier is pending separation under Chapter 13, AR 635-40 (unsatisfactory duty performance).

YES. The lowest characterization authorized for a Chapter 13 is "general under honorable conditions." Disability processing takes precedence. Only those Chapters that allow for an OTH characterization of discharge require GCMCA review.

b. Enlisted Soldier is pending separation for misconduct under Chapter 14, AR 635-200, but the command is recommending a general characterization of service.

MAYBE. The fact that a Chapter 14 authorizes an OTH requires that the MEB and Chapter actions be completed and forwarded to the GCMCA for decision. The commander's recommendation for a more favorable characterization is not determinative. The Soldier is ineligible for PEB processing unless the GCMCA suspends the separation action. **The MEB is still completed.** If the GCMCA suspends the separation action and the PEB finds the Soldier "fit" for duty, the misconduct separation action proceeds.

c. Soldier assaults his First Sergeant and charges are preferred under Art. 128.

NO. Soldier would be under investigation for an offense that could result in a bad conduct discharge. Per AR 635-40, para 4-1, he is ineligible for the MEB and the PEB. The disability processing will resume if the investigation ends without charges, the charges are dismissed, or the charges are referred to court-martial not empowered to adjudge a punitive discharge. Discontinuing the disability process and proceeding with court-martial when similar types of offenses have routinely been dealt with via Article 15 may be viewed as an attempt by the command to circumvent the APDES process (e.g., a onetime drug use that would normally result in an Article 15 and an administrative separation action under AR 635-200, para 14-12c). Caution should be given to ensure that Soldiers requiring APDES processing and those not requiring APDES processing are treated the same given similar violations of the UCMJ.

d. Enlisted Soldier completed the MEB/PEB process and was issued disability retirement orders. While awaiting separation, there is credible evidence that he engaged in serious misconduct and the command desires to initiate action under Chapter 14.

MAYBE. The Soldier is still on active duty and subject to an administrative separation action for serious misconduct under Chapter 14 while awaiting disability disposition. Review by the GCMCA would be required.

10. SUMMARY. Below is a summary of separation actions and their affect on PEB processing when the command is considering whether to separate a Soldier under AR 635-200:

a. Ch 5-13, Separation Because of Personality Disorder: Follow ALARACT message 036-2009 and OTSG/MEDCOM Policy Memo 11-010.

b. Ch 5-17, Other Designated Physical or Mental Conditions: Follow ALARACT message 036-2009 and OTSG/MEDCOM Policy Memo 11-010.

c. Ch 6, Dependency or Hardship: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

d. Ch 7 Fraudulent Enlistment: MEB case is completed; however, GCMCA approval is needed for PEB processing.

e. Ch 9, Alcohol Drug Rehab Failure: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

f. Ch 10, Discharge in Lieu of Trial by Court-Martial: MEB and PEB process both stopped.

g. Ch 11, Entry Level Performance and Conduct: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

h. Ch 12, Retirement for Length of Service: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

i. Ch 13, Unsatisfactory Performance: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

j. Ch 14, Misconduct: MEB case is completed; however, GCMCA approval is needed for PEB processing.

k. Ch 18, Failure to Meet Weight Control Standards: MEB and PEB process continue uninterrupted and take precedence over administrative separation actions.

l. Separation Based on UCMJ, Civilian Criminal Confinement, or AWOL: If the Soldier is:

(a) Under criminal charges that could result in dismissal, dishonorable or bad conduct discharge: both MEB and PEB process stop.

(b) Currently in Civilian Confinement: both MEB and PEB process stop.

(c) AWOL: both MEB and PEB process stop.

11. It is of paramount importance that judge advocates carefully consider all relevant factors when advising commanders regarding whether to discontinue disability processing and proceed with separation under administrative regulations or the UCMJ. Recommendations must be warranted by the facts and in compliance with the laws, regulations and policies.

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