

No. 19-1410

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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RICHARD ROE, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants-Appellants.

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On Appeal from the United States District Court  
for the Eastern District of Virginia

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**JOINT APPENDIX VOLUME 1 OF 5**

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APPEAL

**U.S. District Court  
Eastern District of Virginia - (Alexandria)  
CIVIL DOCKET FOR CASE #: 1:18-cv-01565-LMB-IDD**

Roe et al v. Defense et al  
Assigned to: District Judge Leonie M. Brinkema  
Referred to: Magistrate Judge Ivan D. Davis  
Case in other court: 4th Circuit, 19-01410  
Cause: 28:1331 Federal Question

Date Filed: 12/19/2018  
Jury Demand: None  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: U.S. Government  
Defendant

**Plaintiff****Richard Roe**

represented by **John Webster Hunter Harding**  
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**Plaintiff****Victor Voe**

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*ATTORNEY TO BE NOTICED*

**Andrew Ryan Sommer**  
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*ATTORNEY TO BE NOTICED*

**Plaintiff**

**OutServe-SLDN, Inc.**

represented by **John Webster Hunter Harding**  
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*ATTORNEY TO BE NOTICED*

**Laura Joy Cooley**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Andrew Ryan Sommer**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**United States Department of Defense**

represented by **R. Trent McCotter**  
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*ATTORNEY TO BE NOTICED*

**Defendant**

**James N. Mattis**  
*in his official capacity as Secretary of  
Defense*

represented by **R. Trent McCotter**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Heather A. Wilson**  
*in her official capacity as Secretary of  
the Air Force*

represented by **R. Trent McCotter**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
12/19/2018	<a href="#"><u>1</u></a>	Complaint ( Filing fee \$ 400, receipt number 0422-6414179.), filed by Richard Roe, OutServe-SLDN, Inc., Victor Voe. (Attachments: # <a href="#"><u>1</u></a> Civil Cover Sheet) (Sommer, Andrew) (Entered: 12/19/2018)

12/19/2018	<a href="#">2</a>	NOTICE of Appearance by Andrew Ryan Sommer on behalf of OutServe-SLDN, Inc., Richard Roe, Victor Voe (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">3</a>	Financial Interest Disclosure Statement (Local Rule 7.1) by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">4</a>	Proposed Summons <i>as to Acting Attorney General of the United States Matthew Whitaker</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">5</a>	Proposed Summons <i>as to G. Zachary Terwilliger US Attorney for Eastern District of Virginia</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">6</a>	Proposed Summons <i>as to James Mattis Secretary of Defense</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">7</a>	Proposed Summons <i>as to Heather A. Wilson, Secretary of the Air Force</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">8</a>	MOTION to Proceed Under Pseudonyms and for All of Plaintiff Roe's and Plaintiff Voe's Identifying Information to be Redacted from Documents filed in the Public Record by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Proposed Order)(Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">9</a>	Memorandum in Support re <a href="#">8</a> MOTION to Proceed Under Pseudonyms and for All of Plaintiff Roe's and Plaintiff Voe's Identifying Information to be Redacted from Documents filed in the Public Record filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">10</a>	Notice of Hearing Date set for 1/4/2019 re <a href="#">8</a> MOTION to Proceed Under Pseudonyms and for All of Plaintiff Roe's and Plaintiff Voe's Identifying Information to be Redacted from Documents filed in the Public Record (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018		Initial Case Assignment to District Judge Leonie M. Brinkema and Magistrate Judge Ivan D. Davis. (acha, ) (Entered: 12/19/2018)
12/19/2018	<a href="#">11</a>	Proposed Summons <i>as to the U.S. Department of Defense</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">12</a>	Motion to appear Pro Hac Vice by Julie Anne Bauer and Certification of Local Counsel Andrew R. Sommer by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">13</a>	Motion to appear Pro Hac Vice by Kara Nicole Ingelhart and Certification of Local Counsel Andrew R. Sommer Filing fee \$ 75, receipt number 0422-6414747. by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">14</a>	

		Motion to appear Pro Hac Vice by Lauren Gailey and Certification of Local Counsel Andrew R. Sommer Filing fee \$ 75, receipt number 0422-6414754. by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">15</a>	Motion to appear Pro Hac Vice by Peter Edward Perkowski and Certification of Local Counsel Andrew R. Sommer Filing fee \$ 75, receipt number 0422-6414767. by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">16</a>	Motion to appear Pro Hac Vice by Scott Schoettes and Certification of Local Counsel Andrew R. Sommer Filing fee \$ 75, receipt number 0422-6414790. by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 12/19/2018)
12/19/2018	<a href="#">17</a>	Summons Issued as to James N. Mattis, United States Department of Defense, Heather A. Wilson, U.S. Attorney and U.S. Attorney General NOTICE TO ATTORNEY: Print out two electronically issued summons and one copy of the attachments for each defendant to be served with the complaint. (Attachments: # <a href="#">1</a> Notice to Attorney)(acha, ) (Entered: 12/19/2018)
12/20/2018		Set Deadlines as to <a href="#">8</a> MOTION to Proceed Under Pseudonyms and for All of Plaintiff Roe's and Plaintiff Voe's Identifying Information to be Redacted from Documents filed in the Public Record . Motion Hearing set for 1/4/2019 at 10:00 AM in Alexandria Courtroom 700 before District Judge Leonie M. Brinkema. (clar, ) (Entered: 12/20/2018)
12/21/2018	<a href="#">18</a>	ORDER granting <a href="#">12</a> Motion for Pro hac vice for Julie Anne Bauer. Signed by District Judge Leonie M. Brinkema on 12/21/2018. (acha, ) (Entered: 12/21/2018)
12/21/2018	<a href="#">19</a>	ORDER granting <a href="#">13</a> Motion for Pro hac vice for Kara Nicole Ingelhart. Signed by District Judge Leonie M. Brinkema on 12/21/2018. (acha, ) (Entered: 12/21/2018)
12/21/2018	<a href="#">20</a>	ORDER granting <a href="#">14</a> Motion for Pro hac vice for Lauren Gailey. Signed by District Judge Leonie M. Brinkema on 12/21/2018. (acha, ) (Entered: 12/21/2018)
12/21/2018	<a href="#">21</a>	ORDER granting <a href="#">15</a> Motion for Pro hac vice for Peter Edward Perkowski. Signed by District Judge Leonie M. Brinkema on 12/21/2018. (acha, ) (Entered: 12/21/2018)
12/21/2018	<a href="#">22</a>	ORDER granting <a href="#">16</a> Motion for Pro hac vice for Scott Schoettes. Signed by District Judge Leonie M. Brinkema on 12/21/2018. (acha, ) (Entered: 12/21/2018)
12/21/2018	<a href="#">23</a>	ORDER: Before the Court is plaintiffs' Motion to Proceed Under Pseudonyms and for All of Plaintiff Roe's and Plaintiff Voe's Identifying Information to Be Redacted from Documents Filed in the Public Record [Dkt. No. 8]. The Court has considered plaintiffs' submission and finds it is well made. Accordingly, the Motion is GRANTED, and it is hereby ORDERED that plaintiffs shall be entitled to proceed pseudonymously and to have any personal identifying

		information redacted from publicly filed documents.Signed by District Judge Leonie M. Brinkema on 12/21/18. (yguy) (Entered: 12/21/2018)
01/02/2019	<a href="#">24</a>	AFFIDAVIT of Service as to Matthew Whitaker by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 01/02/2019)
01/02/2019	<a href="#">25</a>	AFFIDAVIT of Service as to Department of Defense by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 01/02/2019)
01/02/2019	<a href="#">26</a>	AFFIDAVIT of Service as to Heather A. Wilson by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 01/02/2019)
01/02/2019	<a href="#">27</a>	AFFIDAVIT of Service as to James Mattis by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 01/02/2019)
01/02/2019	<a href="#">28</a>	AFFIDAVIT of Service as to G. Zachary Terwilliger by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 01/02/2019)
01/04/2019	<a href="#">29</a>	Joint MOTION to Modify the Scheduling Order in the Harrison Case and for Entry of Briefing Schedule and Scheduling Order in the Roe Case by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 01/04/2019)
01/04/2019	<a href="#">30</a>	Memorandum in Support re <a href="#">29</a> Joint MOTION to Modify the Scheduling Order in the Harrison Case and for Entry of Briefing Schedule and Scheduling Order in the Roe Case filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Proposed Order)(Sommer, Andrew) (Entered: 01/04/2019)
01/04/2019	<a href="#">31</a>	NOTICE of Appearance by R. Trent McCotter on behalf of James N. Mattis, United States Department of Defense, Heather A. Wilson (McCotter, R.) (Entered: 01/04/2019)
01/04/2019	<a href="#">32</a>	ORDER- It is hereby ORDERED that the joint motion is GRANTED with the following exceptions: the cut-off date for all discovery is Friday, May 10, 2019 and the final pretrial for both civil actions will be held at 10:00 a.m. on Thursday, May 16, 2019, and it is further ORDERED that the parties Proposed Consolidated Discovery Schedule is approved and shall control discovery to the extent of its application unless further modified by the Court. Signed by District Judge Leonie M. Brinkema on 1/4/2019. (See order for further details). (acha, ). (Entered: 01/04/2019)
01/04/2019		Set Deadlines/Hearings Discovery due by 5/10/2019. Final Pretrial Conference set for 5/16/2019 at 10:00 AM in Alexandria Courtroom 700 before District Judge Leonie M. Brinkema. (acha, ) (Entered: 01/04/2019)
01/11/2019	<a href="#">33</a>	MOTION for Preliminary Injunction by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 01/11/2019)
01/11/2019	<a href="#">34</a>	Memorandum in Support re <a href="#">33</a> MOTION for Preliminary Injunction filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Proposed Order)(Sommer, Andrew) (Entered: 01/11/2019)
01/11/2019	<a href="#">35</a>	

		Notice of Hearing Date set for February 15, 2019 re <a href="#">33</a> MOTION for Preliminary Injunction (Sommer, Andrew) (Entered: 01/11/2019)
01/11/2019	<a href="#">36</a>	MOTION to Seal <i>Exhibits A &amp; B and Attachments</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Proposed Order)(Sommer, Andrew) (Entered: 01/11/2019)
01/11/2019	<a href="#">37</a>	Notice of Filing Sealing Motion LCvR5(C) by OutServe-SLDN, Inc., Richard Roe, Victor Voe re <a href="#">36</a> MOTION to Seal <i>Exhibits A &amp; B and Attachments</i> (Sommer, Andrew) (Entered: 01/11/2019)
01/11/2019	<a href="#">38</a>	Sealed Attachment/Exhibit(s) re <a href="#">36</a> MOTION to Seal <i>Exhibits A &amp; B and Attachments</i> . (Attachments: # <a href="#">1</a> Exhibit A1, # <a href="#">2</a> Exhibit A2, # <a href="#">3</a> Exhibit A3, # <a href="#">4</a> Exhibit A4, # <a href="#">5</a> Exhibit A5, # <a href="#">6</a> Exhibit A6, # <a href="#">7</a> Exhibit B, # <a href="#">8</a> Exhibit B1, # <a href="#">9</a> Exhibit B2, # <a href="#">10</a> Exhibit B3, # <a href="#">11</a> Exhibit B4)(Sommer, Andrew) (Entered: 01/11/2019)
01/11/2019	<a href="#">39</a>	Memorandum in Support re <a href="#">36</a> MOTION to Seal <i>Exhibits A &amp; B and Attachments</i> filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 01/11/2019)
01/11/2019	<a href="#">40</a>	EXHIBIT <i>C-J for Memorandum in Support of Preliminary Injunction</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe.. (Attachments: # <a href="#">1</a> Exhibit C1, # <a href="#">2</a> Exhibit C2, # <a href="#">3</a> Exhibit C3, # <a href="#">4</a> Exhibit C4, # <a href="#">5</a> Exhibit D, # <a href="#">6</a> Exhibit E, # <a href="#">7</a> Exhibit F, # <a href="#">8</a> Exhibit G, # <a href="#">9</a> Exhibit H, # <a href="#">10</a> Exhibit I, # <a href="#">11</a> Exhibit J) (Sommer, Andrew) (Entered: 01/11/2019)
01/11/2019	<a href="#">41</a>	CERTIFICATE of Service <i>as to Sealed Exhibits A &amp; B and attachments</i> by Andrew Ryan Sommer on behalf of OutServe-SLDN, Inc., Richard Roe, Victor Voe (Sommer, Andrew) (Entered: 01/11/2019)
01/15/2019		Set Deadlines as to <a href="#">33</a> MOTION for Preliminary Injunction . Motion Hearing set for 2/15/2019 at 10:00 AM in Alexandria Courtroom 700 before District Judge Leonie M. Brinkema. (clar, ) (Entered: 01/15/2019)
01/18/2019	<a href="#">42</a>	ORDER- It is hereby ORDERED that plaintiff's <a href="#">36</a> motion is GRANTED IN PART, and that Exhibits A and B in support of plaintiff's motion for preliminary injunction may remain filed under seal; and it is further ORDERED that plaintiff's publicly file redacted versions of every document filed under seal. Signed by District Judge Leonie M. Brinkema on 1/18/2019. (See order for further details). (acha, ) (Entered: 01/18/2019)
01/18/2019	<a href="#">43</a>	MOTION For Entry of Agreed-Upon Protective Order and Agreed-Upon Electronically-Stored Information Order by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Exhibit A - Proposed Protective Order, # <a href="#">2</a> Exhibit B - Proposed ESI Order)(Sommer, Andrew) (Entered: 01/18/2019)
01/22/2019	<a href="#">44</a>	Redacted version of <i>Exhibits A and B and Supporting Attachments to <a href="#">34</a> Memorandum in Support of Plaintiffs Motion for Preliminary Injunction</i> . (Attachments: # <a href="#">1</a> Exhibit A1, # <a href="#">2</a> Exhibit A2, # <a href="#">3</a> Exhibit A3, # <a href="#">4</a> Exhibit A4, # <a href="#">5</a> Exhibit A5, # <a href="#">6</a> Exhibit A6, # <a href="#">7</a> Exhibit B, # <a href="#">8</a> Exhibit B1, # <a href="#">9</a> Exhibit B2, # <a href="#">10</a> Exhibit B3, # <a href="#">11</a> Exhibit B4)(Sommer, Andrew) (Entered: 01/22/2019)

01/22/2019	<a href="#">45</a>	ORDER granting <a href="#">43</a> Motion for Entry of Agreed-Upon Protective Order Signed by Magistrate Judge Ivan D. Davis on 1/22/2019. (See order for further details). (acha, ) (Entered: 01/22/2019)
01/22/2019	<a href="#">46</a>	ORDER GRANTING <a href="#">43</a> MOTION For Agreed-Upon Electronically-Stored Information Order. Signed by Magistrate Judge Ivan D. Davis on 1/22/2019. (See order for further details). (acha, ) (Entered: 01/22/2019)
01/25/2019	<a href="#">47</a>	Memorandum in Opposition re <a href="#">33</a> MOTION for Preliminary Injunction filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Appendix Index, # <a href="#">2</a> Appendix Public Part 1, # <a href="#">3</a> Appendix Public Part 2)(McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">48</a>	MOTION to Dismiss for Lack of Jurisdiction by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">49</a>	MOTION to Dismiss for Failure to State a Claim by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">50</a>	Memorandum in Support re <a href="#">49</a> MOTION to Dismiss for Failure to State a Claim , <a href="#">48</a> MOTION to Dismiss for Lack of Jurisdiction filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Appendix Index, # <a href="#">2</a> Appendix Public Part 1, # <a href="#">3</a> Appendix Public Part 2)(McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">51</a>	Notice of Hearing Date set for February 15, 2019 re <a href="#">49</a> MOTION to Dismiss for Failure to State a Claim , <a href="#">48</a> MOTION to Dismiss for Lack of Jurisdiction (McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">52</a>	MOTION to Seal by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">53</a>	Notice of Under Seal Filing LCvR5 (B) by James N. Mattis, United States Department of Defense, Heather A. Wilson re <a href="#">52</a> MOTION to Seal (McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">54</a>	Memorandum in Support re <a href="#">52</a> MOTION to Seal filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Proposed Order)(McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">55</a>	Sealed Appendix Part 1. (McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">56</a>	Sealed Appendix Part 2. (McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">57</a>	Sealed Appendix Part 3. (McCotter, R.) (Entered: 01/25/2019)
01/25/2019	<a href="#">58</a>	Sealed Appendix Part 4. (McCotter, R.) (Entered: 01/25/2019)
01/28/2019	<a href="#">59</a>	ORDER granting <a href="#">52</a> Motion to Seal. Signed by District Judge Leonie M. Brinkema on 1/28/2019. (See order for further details). (acha, ) (Entered: 01/28/2019)
01/28/2019		

		Set Deadlines as to <a href="#">49</a> MOTION to Dismiss for Failure to State a Claim , <a href="#">48</a> MOTION to Dismiss for Lack of Jurisdiction . Motion Hearing set for 2/15/2019 at 10:00 AM in Alexandria Courtroom 700 before District Judge Leonie M. Brinkema. (clar, ) (Entered: 01/28/2019)
02/01/2019	<a href="#">60</a>	Opposition to the Motion to Dismiss filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Exhibit A, # <a href="#">2</a> Exhibit B, # <a href="#">3</a> Exhibit C, # <a href="#">4</a> Exhibit C1, # <a href="#">5</a> Exhibit D, # <a href="#">6</a> Exhibit E, # <a href="#">7</a> Exhibit F, # <a href="#">8</a> Exhibit G) (Sommer, Andrew) (Entered: 02/01/2019)
02/01/2019	<a href="#">61</a>	Reply to Opposition to Preliminary Injunction filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 02/01/2019)
02/01/2019	<a href="#">62</a>	MOTION to Seal Exhibits A & B to Plaintiffs' Opposition to the Motion to Dismiss and Reply in Support of their Motion for a Preliminary Injunction by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Proposed Order)(Sommer, Andrew) (Entered: 02/01/2019)
02/01/2019	<a href="#">63</a>	Notice of Filing Sealing Motion LCvR5(C) by OutServe-SLDN, Inc., Richard Roe, Victor Voe re <a href="#">62</a> MOTION to Seal Exhibits A & B to Plaintiffs' Opposition to the Motion to Dismiss and Reply in Support of their Motion for a Preliminary Injunction (Sommer, Andrew) (Entered: 02/01/2019)
02/01/2019	<a href="#">64</a>	Sealed Attachment/Exhibit(s) re <a href="#">62</a> MOTION to Seal Exhibits A & B to Plaintiffs' Opposition to the Motion to Dismiss and Reply in Support of their Motion for a Preliminary Injunction. (Attachments: # <a href="#">1</a> Exhibit B)(Sommer, Andrew) (Entered: 02/01/2019)
02/01/2019	<a href="#">65</a>	Memorandum in Support re <a href="#">62</a> MOTION to Seal Exhibits A & B to Plaintiffs' Opposition to the Motion to Dismiss and Reply in Support of their Motion for a Preliminary Injunction filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 02/01/2019)
02/01/2019	<a href="#">66</a>	CERTIFICATE of Service as to Sealed Exhibits A & B by Andrew Ryan Sommer on behalf of OutServe-SLDN, Inc., Richard Roe, Victor Voe (Sommer, Andrew) (Entered: 02/01/2019)
02/01/2019	<a href="#">67</a>	NOTICE by James N. Mattis, United States Department of Defense, Heather A. Wilson FILING OF REDACTED ADMINISTRATIVE RECORD (Attachments: # <a href="#">1</a> Exhibit AR1, # <a href="#">2</a> Exhibit AR2, # <a href="#">3</a> Exhibit AR3, # <a href="#">4</a> Exhibit AR4)(McCotter, R.) (Entered: 02/01/2019)
02/01/2019	<a href="#">68</a>	NOTICE of Appearance by Laura Joy Cooley on behalf of OutServe-SLDN, Inc., Richard Roe, Victor Voe (Cooley, Laura) (Entered: 02/01/2019)
02/04/2019	<a href="#">69</a>	ORDER granting <a href="#">62</a> Motion to Seal Exhibits A & B to Plaintiffs' Opposition to the Motion to Dismiss and Reply in Support of their Motion for a Preliminary Injunction. Signed by District Judge Leonie M. Brinkema on 2/4/2019. (see Order for details) (dest, ) (Entered: 02/04/2019)
02/08/2019	<a href="#">70</a>	REPLY to Response to Motion re <a href="#">49</a> MOTION to Dismiss for Failure to State a Claim , <a href="#">48</a> MOTION to Dismiss for Lack of Jurisdiction filed by James N.

		Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, R.) (Entered: 02/08/2019)
02/15/2019	<a href="#">71</a>	Minute Entry for proceedings held before District Judge Leonie M. Brinkema: Motion Hearing held on 2/15/2019. Appearances of counsel. Motions are argued. Pltfs' <a href="#">33</a> MOTION for Preliminary Injunction is GRANTED IN PART AND DENIED IN PART. Defts' <a href="#">48</a> MOTION to Dismiss for Lack of Jurisdiction and <a href="#">49</a> MOTION to Dismiss for Failure to State a Claim are DENIED. (memorandum opinion and order to follow) (Court Reporter A. Thomson.)(yguy) (Entered: 02/15/2019)
02/15/2019	<a href="#">72</a>	MEMORANDUM OPINION: Accordingly, plaintiffs' motion for a preliminary injunction will be granted in part and denied in part, and defendants' motion to dismiss denied, by an appropriate Order to be issued with this Memorandum Opinion. Signed by District Judge Leonie M. Brinkema on 2/15/19. (yguy) (Entered: 02/15/2019)
02/15/2019	<a href="#">73</a>	ORDER: For the reasons stated in the accompanying Memorandum Opinion, defendants' Motion to Dismiss [Dkt. Nos. 48-49] is DENIED, plaintiffs' Motion for a Preliminary Injunction [Dkt. No. 33] is GRANTED IN PART and DENIED IN PART, and it is hereby ORDERED, ADJUDGED, and DECREED that defendants be and are ENJOINED from separating or discharging from military service Richard Roe, Victor Voe, and any other similarly situated active-duty member of the Air Force because they are classified as ineligible for worldwide deployment or deployment to the United States Central Command ("CENTCOM" ) area due to their HIV-positive status. Signed by District Judge Leonie M. Brinkema on 2/15/19. (yguy) (Entered: 02/15/2019)
02/15/2019	<a href="#">74</a>	MOTION to Amend/Correct <i>Preliminary Injunction</i> by OutServe-SLDN, Inc.. (Sommer, Andrew) (Entered: 02/15/2019)
02/15/2019	<a href="#">75</a>	Memorandum in Support re <a href="#">74</a> MOTION to Amend/Correct <i>Preliminary Injunction</i> filed by OutServe-SLDN, Inc.. (Attachments: # <a href="#">1</a> Proposed Order) (Sommer, Andrew) (Entered: 02/15/2019)
02/15/2019	<a href="#">76</a>	NOTICE by James N. Mattis, United States Department of Defense, Heather A. Wilson <i>FORTHCOMING RESPONSE</i> (McCotter, R.) (Entered: 02/15/2019)
02/19/2019	<a href="#">77</a>	Memorandum in Opposition re <a href="#">74</a> MOTION to Amend/Correct <i>Preliminary Injunction</i> filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, R.) (Entered: 02/19/2019)
02/19/2019	<a href="#">78</a>	ORDERED that OutServe's Motion to Amend Preliminary Injunction [Dkt. No. 74] be and is DENIED WITHOUT PREJUDICE. (see order for details). Signed by District Judge Leonie M. Brinkema on 2/19/19. (yguy) (Entered: 02/19/2019)
02/21/2019	<a href="#">79</a>	TRANSCRIPT of proceedings held on 2/15/2019, before Judge Leonie M. Brinkema, Court Reporter Anneliese Thomson, Telephone number 703-299-8595. <b>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have thirty(30) calendar days to file with the Court a Notice of Intent to</b>

		<b>Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at <a href="http://www.vaed.uscourts.gov">www.vaed.uscourts.gov</a> Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 3/25/2019. Redacted Transcript Deadline set for 4/23/2019. Release of Transcript Restriction set for 5/22/2019.(thomson, anneliese) (Entered: 02/21/2019)</b>
03/01/2019	<a href="#">80</a>	NOTICE by James N. Mattis, United States Department of Defense, Heather A. Wilson <i>FILING OF SUPPLEMENTAL ADMINISTRATIVE RECORD</i> (McCotter, R.) (Entered: 03/01/2019)
03/01/2019	<a href="#">81</a>	MOTION TO FILE UNDER SEAL by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Proposed Order)(McCotter, R.) (Entered: 03/01/2019)
03/01/2019	<a href="#">82</a>	Memorandum in Support re <a href="#">81</a> MOTION TO FILE UNDER SEAL filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Exhibit Declaration)(McCotter, R.) (Entered: 03/01/2019)
03/01/2019	<a href="#">83</a>	Notice of Under Seal Filing LCvR5 (B) by James N. Mattis, United States Department of Defense, Heather A. Wilson (McCotter, R.) (Entered: 03/01/2019)
03/01/2019	<a href="#">84</a>	Sealed Document SUPPLEMENTAL ADMINISTRATIVE RECORD. (McCotter, R.) (Entered: 03/01/2019)
03/01/2019	<a href="#">85</a>	ORDER granting <a href="#">81</a> MOTION TO FILE UNDER SEAL SUPPLEMENTAL ADMINISTRATIVE RECORD. Signed by District Judge Leonie M. Brinkema on 3/1/2019. (See order for further details). (acha, ) (Entered: 03/01/2019)
03/06/2019	<a href="#">86</a>	NOTICE by James N. Mattis, United States Department of Defense, Heather A. Wilson re <a href="#">80</a> NOTICE <i>FILING OF REDACTED SUPPLEMENTAL ADMINISTRATIVE RECORD</i> (McCotter, R.) (Entered: 03/06/2019)
03/06/2019	<a href="#">87</a>	Consent MOTION for Extension of Time to File Answer by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Proposed Order)(McCotter, R.) (Entered: 03/06/2019)
03/06/2019	<a href="#">88</a>	Memorandum in Support re <a href="#">87</a> Consent MOTION for Extension of Time to File Answer filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, R.) (Entered: 03/06/2019)
03/07/2019	<a href="#">89</a>	ORDER granting <a href="#">87</a> Motion for Extension of Time to Answer. Defendants may file and Answer to Plaintiffs' Complaint no later than March 8, 2019. Signed by District Judge Leonie M. Brinkema on 3/7/2019. (dvanm, ) (Entered: 03/07/2019)
03/08/2019	<a href="#">90</a>	ANSWER to Complaint by James N. Mattis, United States Department of Defense, Heather A. Wilson.(McCotter, R.) (Entered: 03/08/2019)
03/15/2019	<a href="#">91</a>	

		Joint MOTION to Amend/Correct <i>the Scheduling Order for the Limited Purpose of Taking Several Depositions Out of Time</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 03/15/2019)
03/15/2019	<a href="#">92</a>	Memorandum in Support re <a href="#">91</a> Joint MOTION to Amend/Correct <i>the Scheduling Order for the Limited Purpose of Taking Several Depositions Out of Time</i> filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Proposed Order)(Sommer, Andrew) (Entered: 03/15/2019)
03/15/2019	<a href="#">93</a>	ORDER granting <a href="#">91</a> Joint MOTION to Amend/Correct the Scheduling Order for the Limited Purpose of Taking Several Depositions Out of Time by OutServe-SLDN, Inc., Signed by Magistrate Judge Ivan D. Davis on 3/15/2019. (See order for further details).(acha, ) (Entered: 03/15/2019)
03/20/2019	<a href="#">94</a>	NOTICE of Appearance by John Webster Hunter Harding on behalf of OutServe-SLDN, Inc., Richard Roe, Victor Voe (Harding, John) (Entered: 03/20/2019)
03/22/2019	<a href="#">95</a>	MOTION to Compel <i>Documents and Information Withheld on the Basis of Deliberative Process Privilege</i> by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 03/22/2019)
03/22/2019	<a href="#">96</a>	Memorandum in Support re <a href="#">95</a> MOTION to Compel <i>Documents and Information Withheld on the Basis of Deliberative Process Privilege</i> filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Exhibit A, # <a href="#">2</a> Exhibit B, # <a href="#">3</a> Exhibit C, # <a href="#">4</a> Exhibit D, # <a href="#">5</a> Proposed Order)(Sommer, Andrew) (Entered: 03/22/2019)
03/22/2019	<a href="#">97</a>	Notice of Hearing Date set for March 29, 2019 re <a href="#">95</a> MOTION to Compel <i>Documents and Information Withheld on the Basis of Deliberative Process Privilege</i> (Sommer, Andrew) (Entered: 03/22/2019)
03/25/2019		Set Deadlines as to <a href="#">95</a> MOTION to Compel <i>Documents and Information Withheld on the Basis of Deliberative Process Privilege</i> . Motion Hearing set for 3/29/2019 at 10:00 AM in Alexandria Courtroom 301 before Magistrate Judge Ivan D. Davis. (clar, ) (Entered: 03/25/2019)
03/25/2019		MOTIONS REFERRED to Magistrate Judge: Davis. <a href="#">95</a> MOTION to Compel <i>Documents and Information Withheld on the Basis of Deliberative Process Privilege</i> (clar, ) (Entered: 03/25/2019)
03/27/2019	<a href="#">98</a>	Opposition to <a href="#">95</a> MOTION to Compel <i>Documents and Information Withheld on the Basis of Deliberative Process Privilege</i> filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Exhibit Declaration, # <a href="#">2</a> Exhibit Privilege Log, # <a href="#">3</a> Exhibit Privilege Log)(McCotter, Richard) (Entered: 03/27/2019)
03/28/2019	<a href="#">99</a>	REPLY to Response to Motion re <a href="#">95</a> MOTION to Compel <i>Documents and Information Withheld on the Basis of Deliberative Process Privilege</i> filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Sommer, Andrew) (Entered: 03/28/2019)
03/29/2019	<a href="#">100</a>	

		Minute Entry for proceedings held before Magistrate Judge Ivan D. Davis: Motion Hearing held on 3/29/2019 re <a href="#">95</a> MOTION to Compel Documents and Information Withheld on the Basis of Deliberative Process Privilege filed by Richard Roe, Victor Voe, OutServe-SLDN, Inc. Appearance of Counsel for the Plaintiff and Defendant. Motion argued and held in abeyance. Order to follow. (Tape #FTR.)(lgue, ) (Entered: 03/29/2019)
03/29/2019	<a href="#">101</a>	ORDER - FOR REASONS stated from the bench and in accord with specific rulings and instructions thereto, it is hereby ORDERED that Plaintiffs' Motion to Compel Production of Documents <a href="#">95</a> is HELD IN ABEYANCE pending review of the objections in the companion case Harrison et al. v. Shanahan et al., 18-cv-641. Signed by Magistrate Judge Ivan D. Davis on 03/29/2019. (lgue, ) (Entered: 03/29/2019)
04/03/2019	<a href="#">102</a>	Motion to appear Pro Hac Vice by Alexandra Jane Hemmings and Certification of Local Counsel John W.H. Harding Filing fee \$ 75, receipt number 0422-6571827. by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Harding, John) (Entered: 04/03/2019)
04/04/2019	<a href="#">103</a>	ORDER granting <a href="#">102</a> Motion for Pro hac vice for Alexandra Jane Hemmings. Signed by District Judge Leonie M. Brinkema on 4/4/2019. (acha, ) (Entered: 04/04/2019)
04/05/2019	<a href="#">104</a>	Consent MOTION to Amend/Correct <a href="#">73</a> Order,, by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Proposed Order)(McCotter, Richard) (Entered: 04/05/2019)
04/05/2019	<a href="#">105</a>	Memorandum in Support re <a href="#">104</a> Consent MOTION to Amend/Correct <a href="#">73</a> Order,, filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Exhibit Menendez Declaration) (McCotter, Richard) (Entered: 04/05/2019)
04/05/2019	<a href="#">106</a>	MOTION to Seal by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Proposed Order)(McCotter, Richard) (Entered: 04/05/2019)
04/05/2019	<a href="#">107</a>	Memorandum in Support re <a href="#">106</a> MOTION to Seal filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, Richard) (Entered: 04/05/2019)
04/05/2019	<a href="#">108</a>	Notice of Under Seal Filing LCvR5 (B) by James N. Mattis, United States Department of Defense, Heather A. Wilson (McCotter, Richard) (Entered: 04/05/2019)
04/05/2019	<a href="#">109</a>	Sealed Attachment/Exhibit(s). (McCotter, Richard) (Entered: 04/05/2019)
04/08/2019	<a href="#">110</a>	ORDER granting <a href="#">106</a> Motion to Seal. The Court ORDERS that Exhibits A-D to the Declaration of Col. Damon Menendez ("Menendez Decl."), filed simultaneously with Defendants' Motion to Modify the Preliminary Injunction, be filed under seal. Signed by District Judge Leonie M. Brinkema on 4/8/2019. (dest, ) (Entered: 04/08/2019)
04/08/2019	<a href="#">111</a>	

		ORDER granting <a href="#">104</a> Motion to Amend/Correct. The Court hereby GRANTS Defendants' Motion, and AMENDS its February 15, 2019 Order, ECF No. 73, to state that it is "ORDERED, ADJUDGED, and DECREED that defendants be and are ENJOINED from separating or discharging from military service Richard Roe, Victor Voe, and any other similarly situated active duty member of the Air Force. Signed by District Judge Leonie M. Brinkema on 4/8/2019. (see Order for further details) (dest, ) (Entered: 04/08/2019)
04/16/2019	<a href="#">112</a>	NOTICE OF APPEAL as to <a href="#">73</a> Order,, <a href="#">111</a> Order on Motion to Amend/Correct, <a href="#">72</a> Memorandum Opinion, by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, Richard) (Entered: 04/16/2019)
04/17/2019	<a href="#">113</a>	Transmission of Notice of Appeal to US Court of Appeals re <a href="#">112</a> Notice of Appeal (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (acha, ) (Entered: 04/17/2019)
04/18/2019	<a href="#">114</a>	USCA Case Number 19-1410 4th Circuit, Case Manager J. Neal for <a href="#">112</a> Notice of Appeal filed by United States Department of Defense, James N. Mattis, Heather A. Wilson. (rban, ) (Entered: 04/18/2019)
05/02/2019	<a href="#">115</a>	Joint MOTION to Modify the Scheduling Order for the Limited Purpose of Taking a Deposition Out of Time by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Harding, John) (Entered: 05/02/2019)
05/02/2019	<a href="#">116</a>	Memorandum in Support re <a href="#">115</a> Joint MOTION to Modify the Scheduling Order for the Limited Purpose of Taking a Deposition Out of Time filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Proposed Order)(Harding, John) (Entered: 05/02/2019)
05/03/2019		Notice of Correction re <a href="#">115</a> Joint MOTION to Modify the Scheduling Order for the Limited Purpose of Taking a Deposition Out of Time . The filing user has been notified to file a Notice of Hearing Date or a Notice of Waiver of Oral Argument.(acha, ) (Entered: 05/03/2019)
05/03/2019	<a href="#">117</a>	ORDER granting <a href="#">115</a> Joint MOTION to Modify the Scheduling Order for the Limited Purpose of Taking a Deposition Out of Time by OutServe-SLDN, Inc., Richard Roe, Victor Voe. Signed by Magistrate Judge Ivan D. Davis on 5/3/2019. (See order for further details).(acha, ) (Entered: 05/03/2019)
05/03/2019	<a href="#">118</a>	MOTION to Dismiss for Lack of Jurisdiction <i>IN PART</i> by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, R.) (Entered: 05/03/2019)
05/03/2019	<a href="#">119</a>	Memorandum in Support re <a href="#">118</a> MOTION to Dismiss for Lack of Jurisdiction <i>IN PART</i> filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Exhibit B, # <a href="#">2</a> Exhibit C, # <a href="#">3</a> Exhibit E, # <a href="#">4</a> Exhibit N, # <a href="#">5</a> Exhibit O, # <a href="#">6</a> Exhibit Q, # <a href="#">7</a> Exhibit R)(McCotter, R.) (Entered: 05/03/2019)
05/03/2019	<a href="#">120</a>	

		MOTION to Seal by James N. Mattis, United States Department of Defense, Heather A. Wilson. (Attachments: # <a href="#">1</a> Proposed Order)(McCotter, R.) (Entered: 05/03/2019)
05/03/2019	<a href="#">121</a>	Memorandum in Support re <a href="#">120</a> MOTION to Seal filed by James N. Mattis, United States Department of Defense, Heather A. Wilson. (McCotter, R.) (Entered: 05/03/2019)
05/03/2019	<a href="#">122</a>	Notice of Under Seal Filing LCvR5 (B) by James N. Mattis, United States Department of Defense, Heather A. Wilson (McCotter, R.) (Entered: 05/03/2019)
05/03/2019	<a href="#">123</a>	Sealed Attachment/Exhibit(s) FOR PARTIAL MOTION TO DISMISS. (McCotter, R.) (Entered: 05/03/2019)
05/03/2019	<a href="#">124</a>	Notice of Hearing Date set for MAY 31, 2019 re <a href="#">118</a> MOTION to Dismiss for Lack of Jurisdiction <i>IN PART</i> (McCotter, R.) (Entered: 05/03/2019)
05/06/2019	<a href="#">125</a>	ORDER granting <a href="#">120</a> MOTION to Seal by James N. Mattis, United States Department of Defense, Heather A. Wilson. Signed by District Judge Leonie M. Brinkema on 5/6/2019. (See order for further details). (acha, ) (Entered: 05/06/2019)
05/06/2019		Set Deadlines as to <a href="#">118</a> MOTION to Dismiss for Lack of Jurisdiction <i>IN PART</i> . Motion Hearing set for 5/31/2019 at 10:00 AM in Alexandria Courtroom 700 before District Judge Leonie M. Brinkema. (clar, ) (Entered: 05/06/2019)
05/13/2019		Set/Reset Hearings: Final Pretrial Conference reset for 5/16/2019 at 09:00 AM in Alexandria Courtroom 700 before District Judge Leonie M. Brinkema. (yguy) (Entered: 05/13/2019)
05/14/2019	<a href="#">126</a>	Joint MOTION to Enlarge Time to File Pretrial Disclosures by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Harding, John) (Entered: 05/14/2019)
05/14/2019	<a href="#">127</a>	Memorandum in Support re <a href="#">126</a> Joint MOTION to Enlarge Time to File Pretrial Disclosures filed by OutServe-SLDN, Inc., Richard Roe, Victor Voe. (Attachments: # <a href="#">1</a> Proposed Order)(Harding, John) (Entered: 05/14/2019)
05/14/2019	<a href="#">128</a>	ORDERED that the <a href="#">126</a> Parties' Joint Motion to Enlarge Time to File Pretrial Disclosures is granted, and that the Parties shall file the pretrial disclosures required by the scheduling order entered in Harrison v. Shanahan see Dkt. 64 on or before May 30,2019. Signed by District Judge Leonie M. Brinkema on 05/14/2019. (dvanm, ) (Entered: 05/14/2019)
05/16/2019	<a href="#">129</a>	Minute Entry for proceedings held before District Judge Leonie M. Brinkema:Final Pretrial Conference held on 5/16/2019. Appearances of counsel. Court advised of case status. Deadline to file witness/exhibits list previously extended to May 30th. Trial estimate - 1 week. Bench Trial set for 9/9/2019 at 09:30 AM in Alexandria Courtroom 700 before District Judge Leonie M. Brinkema. (Court Reporter A. Thomson.)(yguy) (Entered: 05/16/2019)

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<b>Billable Pages:</b>	11	<b>Cost:</b>	1.10

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

RICHARD ROE,

VICTOR VOE, and

OUTSERVE-SLDN, INC.

*Plaintiffs,*

v.

JAMES N. MATTIS, in his official capacity as  
Secretary of Defense; HEATHER A. WILSON,  
in her official capacity as Secretary of the Air  
Force; and the UNITED STATES  
DEPARTMENT OF DEFENSE,

*Defendants.*

CIVIL ACTION NO. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Richard Roe, Victor Voe, and OutServe-SLDN, Inc. (collectively, “Plaintiffs”), by and through their attorneys, bring this action for declaratory and injunctive relief stemming from Roe’s and Voe’s unconstitutional and improper impending discharges from the United States Air Force. Roe and Voe are being discharged despite the contrary recommendations of their commanding officers and physicians solely because they have tested positive for the human immunodeficiency virus (“HIV”)—even though they are asymptomatic, they adhere to a treatment regimen that has been scientifically established to halt the progression of HIV, and their viral loads are undetectable. As such, their discharges violate the U.S. Constitution and federal statutes and regulations. (In order to protect their medical privacy and to reduce further stigma and

discrimination if their HIV diagnoses were made public, Plaintiffs Roe and Voe have sought leave to proceed under pseudonyms simultaneously with this complaint.)

### **STATEMENT OF THE CASE**

1. Members of the U.S. Armed Forces embody the best of the American spirit. They serve and defend us for love of country and community. Our military treats Service members' wounds and illnesses, and, when able, they continue to serve. When military physicians determine that Service members are unable to continue serving, they are afforded a process to be medically separated or to retire.

2. Service members with HIV, however, do not enjoy the same treatment. Asymptomatic HIV has been diagnosed in a significant number of active-duty Service members. Contrary to widespread misunderstandings about HIV, a new diagnosis does not have the same ramifications it did when HIV first entered the public consciousness decades ago. For most people living with HIV, medication renders their HIV inconsequential to their daily lives. Those who adhere to these medication regimens have no symptoms or significant effects on their immune systems. The number of copies of the virus in their blood is suppressed to a level so low that they can no longer transmit it to others. Service members with HIV continue to contribute meaningfully to the military and to their country, just as any other Service member would.

3. Dating back to 1988—at the height of the AIDS crisis—and continuing today, the Department of Defense (“DoD”) has had clear policies and regulations favoring the retention of Service members who are diagnosed with HIV while on active duty. While these policies unduly (and unnecessarily) restrict the ability of Service members living with HIV to deploy and change duty stations or assignments, even as of late 2017, the Air Force allowed at least 13 Airmen living with HIV to serve overseas and support vital missions. According to DoD publications, from 2011 to 2016, the Air Force diagnosed 181 Airmen and the Navy diagnosed 388 sailors with HIV. In

2016, 119 of those Airmen—more than 65 percent—and 266 of those sailors—more than 68 percent—were still serving. In 2011, the U.S. Army counted 480 soldiers with HIV serving on active duty, with some serving for more than 20 years after they were diagnosed. Indisputably, these Service members are fit for duty, have the skills they need to contribute, and are able to manage their HIV without it affecting their ability to perform their duties.

4. Unfortunately, current military policies make Service members with HIV who are allowed to deploy the exception rather than the rule, even though one's HIV status has no effect on deployability for the vast majority of Service members with HIV. Requiring Service members to secure a waiver or exception to policy from those who lack both medical training and a complete understanding of HIV in 2018 often invites or facilitates discrimination. This case highlights two such examples: Air Force personnel ignored the recommendations of their own medical officers and operational commanders and instead arbitrarily and wrongly decided to separate Airmen based solely on their HIV status.

5. Plaintiff Roe fulfilled a childhood dream—and a family legacy—by enlisting in the Air Force in 2012. He has been stationed in two foreign countries. The Air Force recognized Roe's leadership skills and outstanding job performance by promoting him to a non-commissioned officer position earlier than anticipated. He aspires to one day commission as an officer. But his dream was placed in peril when he was diagnosed with HIV in October 2017.

6. Roe began treatment immediately and his viral load was soon undetectable. Yet under current regulations he is restricted from deploying outside the continental United States solely because of his HIV status.

7. Because of his HIV status, Roe underwent a standard medical evaluation process to determine whether he should be retained or separated from the Air Force. Despite the

recommendations of Roe’s doctor and commanding officer that he be returned to duty, the Secretary of the Air Force (“SAF”) decided that he must be discharged. Accordingly, the Air Force will soon separate him solely because of his HIV status.

8. Plaintiff Voe enlisted in 2011 and has spent almost all of his adult life in the Air Force. He has been stationed in two foreign countries and deployed to the Middle East twice. In fact, in an effort to further the Air Force’s mission and support his comrades, Voe cut short his “dwell time” between deployments so that he could return to the Middle East sooner than scheduled.

9. Voe was diagnosed with HIV in March 2017. He quickly began treatment, and his viral load was undetectable within months. Nevertheless, solely because of his HIV status, under current regulations Voe is restricted from deploying outside the continental United States.

10. Because of his HIV status, Voe underwent a standard medical evaluation process to determine whether he should be retained or separated from the Air Force. Despite the recommendations of Voe’s doctors and commanding officer that he be returned to duty, the SAF decided that he must be discharged. Accordingly, the Air Force will separate him imminently, likely in early 2019, solely because of his HIV status.

11. The SAF’s actions as to Roe and Voe violate the Administrative Procedures Act because they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Moreover, the SAF’s actions, as well as DoD and Air Force policies and practices that treat Roe and Voe—and others living with HIV—differently from other Service members (including those with manageable chronic medical conditions that have no effect on their ability to serve), violate Roe’s and Voe’s rights of equal protection under law, and are therefore contrary to the United States Constitution.

12. In early 2018, the DoD issued a policy memorandum mandating that all Service members who are not worldwide-deployable for 12 consecutive months be separated from military service. (Memorandum from Robert L. Wilkie, Under Secretary of Defense for Personnel and Readiness, to the Secretaries of the Military Departments et al. (Feb. 14, 2018) (announcing interim guidance regarding “DoD Retention Policy for Non-Deployable Service Members”) (hereinafter “Deploy or Get Out Policy” or “DOGO Policy”). This directive arguably would have applied to almost all Service members living with HIV. *See* Department of Defense Instruction 6490.07 (“Medical Conditions Usually Precluding Contingency Deployment”), Encl. 3(e)(2), at p. 11 (classifying HIV as a “medical condition[] usually precluding contingency deployment”).

13. Then, in July 2018, the DoD issued DoDI 1332.45 (the “DOGO Instruction”), which provides that Service members living with HIV will be categorized as “deployable with limitations.”

14. Air Force officials determined that Roe and Voe have severely limited deployability, and therefore will be separated from the Air Force, yet other Airmen living with HIV have been retained and continue to serve.

15. If the military is not required to re-examine its irrational and arbitrary policies and practices regarding the deployability of Service members living with HIV and bring those policies into compliance with the Constitution and federal law, Roe, Voe, and others in the same situation will be forced out solely because of their HIV status—even though hundreds of individuals living with HIV, including Roe and Voe, have served honorably in the Armed Forces after being diagnosed with HIV.

16. At best, DoD and Air Force policies singling out Service members living with HIV for starkly different treatment are an unfortunate vestige of a time when HIV was untreatable and

invariably fatal. These anachronistic policies are no longer justified in light of modern medical science. Whether the policies reflected animus at the time they originally were created, now that the original justification for them has been undermined, they currently constitute outright discrimination. When faced with other conditions or illnesses, each Service member is given due consideration that takes into account his or her circumstances and physical condition. By contrast, when Roe and Voe attempted to simply maintain the status quo and continue to serve in their present capacities while living with HIV, they faced ill-informed, categorical limitations on their deployability that will have the consequence of prohibiting them from serving at all.

17. Defendants' purported justifications for discharging otherwise-fit Service members like Roe and Voe are supported by neither the law nor the facts. This case seeks to correct that injustice and prevent Roe, Voe, and others with HIV or who may acquire it in the future from being subjected to the same mistreatment.

### **JURISDICTION AND VENUE**

18. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1343, and 2201–02. This case poses federal questions that arise under the U.S. Constitution and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–06.

19. Venue is proper in the Eastern District of Virginia under 28 U.S.C. § 1391(b) and (e)(1). On information and belief, a substantial part of the events and omissions giving rise to these claims occurred in this district.

20. This court has personal jurisdiction over Defendants because their enforcement of the service restrictions for people living with HIV occurs within the Eastern District of Virginia.

## THE PARTIES

### A. Plaintiffs

21. Plaintiff Roe is a Staff Sergeant who has served in the Air Force since 2012. Roe proceeds under a pseudonym not only for reasons of medical privacy but also because of the stigma, discrimination, and common misconceptions associated with HIV.

22. Plaintiff Voe is a Senior Airman who has served in the Air Force since 2011. Voe proceeds under a pseudonym not only for reasons of medical privacy but also because of the stigma, discrimination, and common misconceptions associated with HIV.

23. Roe and Voe are members of Plaintiff OutServe-SLDN, Inc.

24. Plaintiff OutServe-SLDN, Inc., formed through the merger of OutServe and the Servicemembers Legal Defense Network, is a nationwide, non-partisan, non-profit, legal services, watchdog, and policy organization that represents the LGBTQ+ military community—Service members, veterans, civilian DoD, and their spouses and families—worldwide. The organization’s mission is to address and end—through litigation, policy advocacy, and education—all forms of unequal or unfair treatment against members of its community on the basis of sexual orientation, gender identity, or HIV status.

25. OutServe-SLDN is, in part, a membership organization, or the functional equivalent of a membership organization. It has well over 7,000 members—veterans, active-duty Service members, and civilian DoD workers throughout the world who identify as LGBTQ+ or are living with HIV—and more than 54,000 supporters. It operates more than 54 chapters worldwide, including 35 in the United States covering every region of the country. It has 20 additional special group forums, one of which is the “Positive Forum” for people living with HIV. These group forums are not just social groups: because Service members who are LGBTQ+ and/or

living with HIV are minority groups that are still sometimes marginalized, stigmatized, or ostracized in the military, the chapters allow these Service members to establish emotional support networks and to exchange information that is important for career advancement and professional growth. The chapters also provide a direct link for Service members to access services and programs that OutServe-SLDN offers.

26. OutServe-SLDN provides pro-bono advocacy and legal services for members of the military living with HIV. Advocacy work includes working with Congress to change or approve legislation and regulations affecting Service members with HIV, as well as working directly with the DoD, the Secretary of Defense, and the service Secretaries on the same issues. Legal services work includes writing and submitting amicus briefs in cases involving HIV-related issues (e.g., *United States v. Forbes*, Court of Appeals for the Armed Forces Case No. 18-0304/NA); filing and litigating impact litigation to change Department of Defense policies; directly representing Service members with HIV in administrative-separation and court-martial proceedings; and providing cultural-competency assistance, education and information, and training to Judge Advocate General defense lawyers in all service branches.

27. In this action, OutServe-SLDN represents the interests of its members currently living with HIV, including Roe and Voe, as well as those who may acquire HIV in the future, and therefore are or will be adversely affected by the challenged regulations and policies.

#### **B. Defendants**

28. Defendant James N. Mattis is the Secretary of the Department of Defense. He leads the DoD and is responsible for the administration and enforcement of the challenged policies and practices.

29. Defendant United States Department of Defense is an executive branch department of the U.S. federal government comprising the office of the Secretary of Defense; the Joint Chiefs of Staff; the Joint Staff; the Departments of the Army, Navy, and Air Force; the unified and specified combatant commands; such other offices, agencies, activities, and commands as may be established or designated by the President or by law; and all offices, agencies, activities, and commands under any of their control or supervision. Under the direction of Secretary Mattis, the Department of Defense is also responsible for administration and enforcement of the Department's service restrictions on people living with HIV.

30. Defendant Heather A. Wilson is the Secretary of the U.S. Air Force. She is the leader of the Department of the Air Force and is responsible for its regulations and the actions taken against Roe and Voe.

31. All Defendants are sued in their official capacities, and the counts below are alleged against the Defendants as enumerated therein.

## **BACKGROUND**

### **A. Regulatory Background**

32. Several sets of regulations are relevant to active duty service members who are diagnosed with HIV: Department of Defense Instructions ("DoDIs") DoDI 6490.07, Medical Conditions Usually Precluding Contingency Deployment (February 5, 2010); DoDI 6485.01, Human Immunodeficiency Virus (HIV) in Military Service Members (June 7, 2013); DoDI 1332.18, Disability Evaluation System (DES) (August 5, 2014); and DoDI 1332.45, Retention Determinations for Non-Deployable Service Members (July 30, 2018), as well as Air Force Instructions ("AFIs") AFI 44-178, Human Immunodeficiency Virus Program (March 4, 2014, certified current June 28, 2016); AFI 10-403, Air Force Guidance Memorandum to Air Force

Instruction 10-403, Deployment Planning and Execution (February 23, 2018); and AFI 48-122, Deployment Health (revised August 18, 2014).

33. DoDI 6490.07, “Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees” describes the standard for assessing whether a medical condition is deployment-limiting:

(1) The condition is not of such a nature or duration that an unexpected worsening or physical trauma is likely to have a grave medical outcome or negative impact on mission execution.

(2) The condition is stable and reasonably anticipated by the pre-deployment medical evaluator not to worsen during the deployment in light of physical, physiological, psychological, and nutritional effects of the duties and location.

(3) Any required, ongoing health care or medications anticipated to be needed for the duration of the deployment are available in theater within the Military Health System. Medication must have no special handling, storage, or other requirements (e.g., refrigeration, cold chain, or electrical power requirements). Medication must be well tolerated within harsh environmental conditions (e.g. heat or cold stress, sunlight) and should not cause significant side effects in the setting of moderate dehydration.

(4) There is no need for routine evacuation out of theater for continuing diagnostics or other evaluations. (All such evaluations should be accomplished before deployment.)

(5) In the case of civilian employees covered by The Rehabilitation Act of 1973, as amended, it is determined, based upon an individualized assessment, that the employee can perform the essential functions of the position in the deployed environment, with or without a reasonable accommodation, without causing undue hardship. In evaluating undue hardship, the nature of the accommodation and the location of the deployment must be considered. Further, the employee’s medical condition must not pose a significant risk of substantial harm to the employee or others taking into account the condition of the relevant deployed environment.

DoDI 6490.07, Sec. 4(b).

34. In Enclosure 3 to DoDI 6490.07, the DoD makes categorical deployability determinations in the form of a list of conditions for which a waiver is required before a Service member would be permitted to deploy.

35. “A diagnosis of human immunodeficiency (HIV) antibody positive with the presence of progressive clinical illness or immunological deficiency” is included on the list in Enclosure 3.

36. On information and belief, Defendants require a waiver for Service members with a confirmed diagnosis of HIV to deploy, regardless of whether there is the “presence of progressive clinical illness or immunological deficiency.” Neither Roe’s nor Voe’s medical condition is characterized by “the presence of progressive clinical illness or immunological deficiency” beyond that required to confirm the accuracy of a positive HIV antibody test.

37. DoDI 6490.07 contemplates that Service members will be able to continue to serve despite restrictions on their *deployability*.

38. DoDI 6485.01 states that active-duty Service members are to be retained if they clear medical evaluations.

39. DoDI 6485.01, titled “Human Immunodeficiency Virus (HIV) in Military Service Members,” provides that “[a]n [active-duty] Service member with laboratory evidence of HIV infection will be referred for appropriate treatment and a medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses.” The Instruction presumes that some Service members will be “fit for duty” and “will be allowed to serve.”

40. DoDI 1332.18 (referenced in DoDI 6485.01) presumes that a return to duty is a possibility when a Service member is otherwise fit for duty.

41. DoDI 1332.45, the Deploy or Get Out (“DOGO”) Instruction, applies to Defendants’ assessments and determinations regarding the retention or separation of Service members living with HIV that are based on deployability.

42. The DOGO Instruction states that “Service members with a medical condition that requires additional medical screening, or Combatant Command approval prior to deployment outside the continental United States, will be categorized as Deployable with Limitations. This includes, but is not limited to, conditions referred to in DoDI 6490.07 [“Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees”].”

43. According to the DOGO Instruction, Service members classified as “Deployable with Limitations” may be retained for service despite limitations on their deployability.

44. HIV is a condition referred to in DoDI 6490.07. Therefore, according to Defendants’ own policies, people living with HIV should be classified as “Deployable with Limitations” *and not separated*.

45. Attachment 9 of AFI 44-178 directs retention for active-duty Service members living with HIV.

46. AFI 44-178, titled “Human Immunodeficiency Virus Program,” sets forth the Air Force’s procedures following a positive HIV test. Active-duty Airmen who test positive are first “counseled by a physician” about “the significance of a positive test,” “precautions to mitigate transmission,” and “prognosis.” They are also “administered an order to follow preventive medicine requirements.”

47. Under AFI 44-178, active-duty Airmen who test positive for HIV “must [then] undergo medical evaluation for the purpose of determining status for continued military service.” After an initial evaluation and return visit at six months, they are required to be tested “yearly thereafter” while they remain on active duty. This provision presumes Airmen living with HIV who are serving on active duty may continue to do so indefinitely.

48. AFI 44-178 also provides that “HIV seropositivity alone is not grounds for medical separation or retirement for [active-duty Air Force] members.” Procedures for retention and separation are governed by an attachment to the Instruction providing that Airmen living with HIV must be retained as long as they “are able to perform the duties of their office, grade, rank and/or rating.” They “may not be separated solely on the basis of laboratory evidence of HIV infection.”

### **B. Treatment of HIV**

49. The landscape of HIV treatment and prevention, the ramifications of an HIV diagnosis, and the prognosis for people living with HIV have all changed dramatically since the virus was first identified in the 1980s.

50. In 1996, the advent of new antiretroviral medications to prevent the virus from replicating transformed the landscape of HIV treatment and prevention and radically shifted health outcomes for people living with HIV.

51. The effectiveness of these antiretroviral medications is measured by the reduction in the number of copies of the virus in a milliliter of a person’s blood, which is referred to as the “viral load.” While a person in the acute or secondary stage of infection could have a viral load of one million or more, a person in successful treatment will have a viral load of less than 200, which is considered “virally suppressed,” or a viral load of less than 48 to 50, which is referred to as an “undetectable” viral load.

52. With adherence to these medications, people living with HIV are restored to good health. Over time, researchers and clinicians have been able to refine the use of these medications to make treatment adherence easier and health outcomes even better. Though the side effects of the initial antiretroviral drugs were generally tolerable, researchers have developed new medications that have few or no discernible side effects for most people. The standard of care

shifted to starting treatment with antiretroviral drugs almost immediately after diagnosis—a recognition that the benefits of treatment far outweighed any negative consequences of being on these medications.

53. Today, though still incurable, HIV is a chronic, manageable condition rather than the terminal diagnosis it once was. In fact, the average life span of a 25-year-old who is diagnosed in a timely fashion and provided appropriate treatment is only a few months shorter than that of a 25-year-old who does not have HIV.

54. Furthermore, medical researchers have now established that a person with a suppressed viral load is incapable of transmitting HIV. Even without viral suppression, contrary to popular belief, HIV is not easily transmitted. The Centers for Disease Control and Prevention (“CDC”) estimates that, in the absence of treatment or other preventive measures, such as condom use, the risk of HIV transmission through a single act of receptive anal sex—the riskiest sexual activity—is approximately 1.38 percent. The per-act risk of transmission for other sexual activities is between zero and 0.08 percent. However, *with adherence to HIV medications and the resulting viral suppression, the risk of transmission is essentially zero for any sexual activity.* Antiretroviral treatment therefore not only dramatically improves personal health outcomes, but also improves public health outcomes by reducing the rate of transmission and the number of new cases.

55. Transmission of HIV is extremely rare outside of the context of sexual activity, sharing of injection drug equipment, blood transfusion, needle sticks, or perinatal exposure (including breastfeeding). For all other activities—including biting, spitting, and throwing of body fluids—the CDC characterizes the risk as “negligible” and further states that “HIV transmission through these exposure routes is technically possible but unlikely and not well documented.” The

theoretical possibility of HIV transmission in these other contexts is eliminated entirely by adherence to medications and the viral suppression that results.

56. In sum, HIV is not the same disease it was once perceived to be. But despite the tremendous breakthroughs in the treatment and prevention of HIV, people living with HIV continue to be subjected to stigma, ostracism, and discrimination rooted in misconceptions, fear, and ignorance that are deeply rooted in our society's collective consciousness.

### **C. Roe's Impending Discharge from the Air Force**

57. From a young age, Roe dreamed of serving in the military, as his parents had. He enlisted in the Air Force in June 2012 at the age of 18.

58. The Air Force has recognized Roe's leadership ability and work ethic. When he was a Senior Airman stationed in Germany, he was placed in charge of a Small Arms Light Weapons Program—a position normally reserved for a non-commissioned officer. Roe was promoted to Senior Airman earlier than expected, which enabled him to test for Staff Sergeant sooner than the average Airman, and he was successful in achieving a non-commissioned officer rank upon his first test. He enjoys serving as a mentor to the Airmen he supervises and has sought out additional opportunities for leadership and responsibility, such as training to become a certified Sexual Assault Victim Advocate when he was stationed in South Korea.

59. In October 2017, Roe was diagnosed with HIV while on active duty and immediately started a course of antiretroviral treatment ("ART"). The first time he was tested after beginning ART, his viral load was undetectable. It has remained so ever since. Roe's current ART treatment regimen consists of a single pill taken by mouth once a day. The pills are stored in ordinary pill bottles, do not require any special storage conditions, and are refilled every 90 days like many other long-term medications.

60. Even though Roe's doctors have never recommended that his work be restricted in any way, he is no longer considered worldwide-deployable under DoDI 6490.07 and AFI 44-178, solely on account of his HIV status.

61. As a result of his HIV status, AFI 44-178 required that Roe undergo a standard medical evaluation process to determine whether he would be retained in or separated from the Air Force. *See* AFI 44-178, ¶ 2.4, at p. 5.

62. Roe's commanding officer wrote an evaluation recommending retention on the grounds that Roe was fit to serve and was "a valued team member." Roe's primary care doctor also recommended that he be returned to duty.

63. Despite these recommendations, on February 22, 2018, Roe's local Informal Physical Evaluation Board ("IPEB") concluded that his "condition is not compatible with the fundamental expectations of military service," because it is "subject to sudden and unpredictable progression and will result in deployment restrictions." The IPEB recommended that Roe be discharged.

64. The IPEB's determination was contrary to current medical science, under which the progression of Roe's condition *is* predictable: as long as he continues his once-daily medication regimen, which is required by the Air Force as a condition of continued service and as Roe has done since his diagnosis, his condition is not expected to progress.

65. Roe appealed to the Formal Physical Evaluation Board ("FPEB") of the Air Force, located at Randolph Air Force Base near San Antonio, Texas. In preparation for the FPEB hearing, Roe's commanding officers and colleagues wrote letters of support requesting that he be retained. Lt. Col. Jason Okulicz, Director of the HIV Medical Evaluation Unit at San Antonio Military

Medical Center, stated that there was “[no] medical reason to explain why [Roe] would not be returned to duty.”

66. Roe traveled from his duty station to San Antonio to attend the FPEB hearing. He was dismissed from the hearing in less than 30 minutes, however.

67. Although Roe had been told it would likely take weeks or months for the FPEB to reach its determination, he learned just three hours after the hearing concluded that the FPEB had affirmed the IPEB’s decision. Reasoning that Roe’s condition “place[d an] increased burden on others within his career field” because he was no longer worldwide-deployable, the FPEB recommended that he be discharged with a 10 percent disability rating.

68. Roe appealed to the SAF. On November 9, 2018, he received a memorandum dated November 7, 2018, from John K. Vallario, Deputy Director of the SAF Personnel Council, which is part of the Air Force Personnel Board (“AFPB”). The memorandum informed Roe that the AFPB had rejected his appeal and directed that he be discharged.

69. The SAF acknowledged that Roe had been “compliant with all treatment, is currently asymptomatic, and has an undetectable human immunodeficiency virus (HIV) viral load.” The SAF further noted that Roe is “able to perform all in garrison duties, has passed his most recent fitness assessment without any component exemptions, and his commander strongly supports his retention.”

70. Nevertheless, the memorandum stated that Roe was “unfit for continued military service” because his condition precludes him from being designated worldwide-deployable without a waiver. Accordingly, the SAF concluded that Roe is to be discharged with a disability rating of 10 percent.

71. Roe is currently awaiting notice of his date of separation from the Air Force, which will most likely occur in early- to mid-2019.

72. In the meantime, Roe continues support of the Air Force's mission as a logistics specialist, in his regular capacity and with no physical restrictions.

73. Roe's physicians do not foresee any restrictions on his work as a result of his condition, which is under control; he is virally suppressed and will remain so as long as he continues his ART.

74. Roe wishes to continue to serve with pride and would like to be classified as worldwide-deployable. He intends to make the Air Force his lifelong career and aspires to commission as an officer. But for the medical evaluation process that began with his HIV diagnosis, Roe would have re-enlisted for an additional term of service in the Air Force. However, the more than year-long evaluation and appeals process described above prevented him from doing so. His term of service originally expired almost six months ago but has been extended twice during the pendency of the medical evaluation process.

75. The regulations restricting Roe's deployability do not accurately reflect his health status or ability to serve. As Roe's case illustrates, Defendants' regulations preventing Service members living with HIV from deploying do not further any legitimate governmental interest. Instead, they have the effect of separating able-bodied, committed individuals from a future dedicated to the Armed Services.

76. Roe is currently awaiting notice from the Air Force Personnel Center ("AFPC") of his separation date. This notice will arrive any day.

#### **D. Voe's Impending Discharge from the Air Force**

77. Voe enlisted in the Air Force in 2011, at the age of 19, and trained to become a munitions systems technician.

78. Voe was deployed for six months to the Middle East to support the Air Force's mission there. Upon his return, he sought and received special approval from the Wing Commander to cut short his "dwell time," during which returning Service members are non-deployable to give them an opportunity to rest and enjoy the comforts of home, to return to the Middle East a few months early for a second deployment.

79. In March 2017, Voe was diagnosed with HIV while on active duty. He began ART within two weeks, and by August 2017 his viral load was undetectable. It has remained undetectable ever since.

80. Voe's ART regimen consists of two pills taken at the same time, once per day. The pills are stored in ordinary pill bottles, do not require any special storage conditions, and are refilled every 90 days like many other long-term medications.

81. Even though Voe's doctors have never recommended restricting his work in any way as a result of his diagnosis, he is no longer worldwide-deployable under DoDI 6490.07 and AFI 44-178 on account of his HIV status.

82. As a result of his HIV status, AFI 44-178 required that Voe undergo a standard medical evaluation process to determine whether he would be retained in or separated from the Air Force. His commanding officer called Voe a "valuable [Air Force] asset" and recommended his retention. Voe's doctors offered the opinion that his medical condition—including his HIV status—did not affect his ability to do his job.

83. In October 2017, Voe was notified that his local IPEB recommended that he be discharged from the Air Force based on his HIV status. This decision was medically unsound, as Voe's condition has been under control since shortly after his diagnosis and can be expected to remain so for as long as he is in treatment, as required under AFI 44-178.

84. Voe appealed the IPEB's recommendation to the FPEB and went on temporary duty to travel to San Antonio to attend the December 2017 hearing. The hearing lasted only 20 minutes. After just half an hour of post-hearing deliberation, the FPEB recommended that Voe be separated based on his HIV status.

85. Voe appealed the FPEB's recommendation to the SAF. On November 15, 2018, Voe received a memorandum dated November 7, 2018 from John K. Vallario of the AFPB denying his appeal and directing on behalf of the SAF that he be discharged.

86. The SAF reached this decision even though the memorandum acknowledged that Voe was "compliant with all treatment, is currently asymptomatic, and has an undetectable human immunodeficiency virus (HIV) viral load." The memorandum also noted that Voe is "able to perform all in garrison duties, has passed his most recent fitness assessment without any component exemptions, and his commander strongly supports his retention." Even so, the SAF concluded that because Voe's condition precludes him from deploying worldwide without a waiver, it renders him "unfit for continued military service." Accordingly, the SAF directed that Voe be discharged with a disability rating of 10 percent.

87. Consequently, Voe must separate from the Air Force even though he is able to and wishes to continue to serve in his regular capacity with no physical restrictions. Voe would like to be classified as worldwide-deployable.

88. Before his HIV diagnosis, Voe intended to re-enlist for another term of service in the Air Force. However, the year-long evaluation and appeals process described above prevented him from doing so. His term of service originally expired almost a year ago but has been extended three times during the pendency of the medical evaluation process.

89. Voe is currently awaiting notice from the AFPC of his separation date. This notice will arrive any day. His separation could occur as soon as mid-February 2019.

\* \* \*

90. Plaintiffs are capable and willing to deploy to any geographic location across the globe and wish to be classified as worldwide-deployable. Predetermined and arbitrarily-applied categorical bars rooted in anachronistic biases and stigmas should not interfere. Categorical bars requiring a special waiver in order for Service members living with HIV to deploy violate the federal Constitution and the Administrative Procedures Act.

91. In the alternative, to the extent that any limitations on the deployment of Service members living with HIV, in general, or Plaintiffs, in particular, are appropriate, determinations that they should be separated from service based solely on deployment limitations resulting from their HIV status alone violate the Constitution and the Administrative Procedures Act.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **Violation of Equal Protection Under the Fifth Amendment's Due Process Clause (Based on HIV Status) Against All Defendants**

92. All prior paragraphs are incorporated as if fully set forth here.

93. The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The Due Process Clause includes within it a prohibition against the denial of equal protection by the federal government, its agencies, its officials, or its employees.

94. Defendants' policies limiting the deployability of Airmen and other Service members living with HIV discriminate impermissibly against people living with HIV, both on their

face and as applied, and preclude otherwise-qualified individuals from further service based solely on their HIV status.

95. Defendants routinely permit similarly situated individuals who do not have HIV, including but not limited to people with comparable chronic, manageable conditions, to deploy worldwide and to continue to serve.

96. Defendants have determined that Roe and Voe are not worldwide-deployable and, therefore, are to be discharged solely on the basis of their HIV status.

97. Although some individuals living with HIV may qualify under certain statutory schemes as having a disability or as being disabled, discrimination targeting people based on their HIV-positive status warrants a more rigorous degree of scrutiny than was described in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

98. Government discrimination against individuals living with HIV bears all the indicia of a suspect classification requiring heightened scrutiny by the courts.

- a. People living with HIV have suffered through a unique history of misinformation, stigma, ostracism, and discrimination for decades, and continue to suffer such discrimination to this day.
- b. People living with HIV are a discrete and insular group and lack the political power to protect their rights through the legislative process. A small minority of the overall population is currently living with HIV. People living with HIV fear to disclose their status, rarely choose to live openly with HIV, and continue to lack representation at any level of the federal government. For the first decade of the HIV epidemic, the needs of people living with and at higher risk for HIV were ignored and/or not adequately resourced by federal, state, and local governments. Even today, many

people living with HIV do not have access to care, and there are aspects of the criminal law that unfairly single out and discriminate against people living with HIV.

- c. Particularly in light of dramatic medical advances—the benefits of which have only recently been fully understood and documented—a person’s HIV status bears no relation to that person’s ability to contribute to society.
- d. Even with medical treatment rendering their viral load undetectable, a person cannot change their HIV status. While HIV is treatable and manageable, it is not curable. There is no available course of treatment that a person could undergo to change their HIV status as a condition of equal treatment.

99. Defendants’ disparate and unfavorable treatment of Plaintiffs Roe and Voe, as well as other individuals living with HIV, deprives them of their right to equal dignity and treats them as second-class citizens in violation of the Constitution’s guarantee of equal protection.

100. Now that HIV can be managed like other chronic medical conditions, there is no longer a valid justification for this disparate treatment between Airmen living with HIV and Airmen who are not. Nor is the classification at issue—HIV status—adequately tailored to serve any governmental interest. This disparate treatment is not even rationally related to a legitimate governmental interest, let alone serving an important or compelling governmental interest, or being substantially related or narrowly tailored to such an interest. Thus, the policies discriminating against Airmen with HIV cannot withstand any form of scrutiny and are invalid.

## COUNT II

### **Violation of the APA Against Wilson as to Deployability and Separation Determinations as Contrary to Law**

101. All prior paragraphs are incorporated as if fully set forth here.

102. Plaintiffs have no adequate or available administrative remedies and/or have exhausted them; in the alternative, any effort to obtain an administrative remedy would be futile.

103. Defendant failed to abide by DoD and Air Force regulations in deciding that Roe and Voe should be separated. Had the Air Force followed applicable regulations, Roe and Voe would have been retained, returned to duty, and allowed to deploy worldwide.

104. DoDI 6490.07 sets forth general standards for determining the deployability of Service members with potentially deployment-limiting medical conditions. (DoDI 6490.07, Sec. 4(b)).

105. In Enclosure 3 to DoDI 6490.07, the DoD makes categorical deployability determinations in the form of a list of conditions for which a waiver is required before a Service member would be permitted to deploy.

106. “A diagnosis of human immunodeficiency virus (HIV) antibody positive with the presence of progressive clinical illness or immunological deficiency” is included on the list in Enclosure 3.

107. On information and belief, Defendant requires a waiver for Service members with a confirmed diagnosis of HIV to deploy, regardless of whether there is “the presence of progressive clinical illness or immunological deficiency” beyond that required to confirm an HIV diagnosis.

108. Neither Roe’s nor Voe’s medical condition is characterized by “the presence of progressive clinical illness or immunological deficiency” beyond that required to confirm an HIV diagnosis. Both Roe and Voe are HIV positive, but have a suppressed or undetectable viral load, and are otherwise healthy.

109. The application of 6490.07 to both Roe and Voe, classifying them as non-deployable without a waiver, is therefore contrary to law in violation of the APA.

110. Defendant also failed to abide by the DoD's own regulations in deciding that Roe and Voe should be separated. Had Defendant followed the DoD's own regulations, Roe and Voe would have been retained and returned to Duty.

111. Specifically, Defendant's determinations that Roe and Voe should be separated is contrary to DoD regulations requiring that Service members living with HIV be classified as "Deployable with Limitations" and not separated because of non-deployability. Defendant's determinations are also contrary to DoD representations about the prospective application of DoDI 1332.45.

112. On information and belief, DoDI 1332.45, the DOGO Instruction, applied to Defendant Wilson's assessments and determinations regarding the separation of Roe and Voe insofar as those assessments centered on deployability restrictions.

113. The DOGO Instruction states that "Service members with a medical condition that requires additional medical screening, or Combatant Command approval prior to deployment outside the continental United States, will be categorized as Deployable with Limitations. This includes, but is not limited to, conditions referred to in DoDI 6490.07."

114. DoDI 6490.07 lists HIV "with progressive clinical illness or immunological deficiency" as one of these conditions.

115. According to the DOGO Instruction, Service members classified as "Deployable with Limitations" are to be retained, not separated based on deployability restrictions.

116. Though it should have been part of Defendant Wilson's assessments and determinations regarding the retention or separation of Roe and Voe, insofar as those assessments centered on deployability restrictions, the DOGO Instruction (DoDI 1332.45) was not referenced

nor its application (or lack of applicability) explained in the decisions ordering the separation of Roe and Voe.

117. Through the acts and omissions alleged above, the decisions to separate Plaintiffs from service based on purported restrictions to their deployability as a result of their HIV status were not guided by DoDI 1332.45 and are therefore arbitrary, capricious, an abuse of discretion and/or otherwise not in accordance with law.

118. Defendant further failed to abide by the Air Force's own regulation in deciding that Roe and Voe should be separated. Had Defendant Wilson abided by this regulation, Roe and Voe would have been retained and returned to duty.

119. Specifically, Defendant's determination that Roe and Voe should be separated is contrary to AFI 44-178, which sets forth the Air Force's procedures following a positive HIV test.

120. Though it should have been part of Defendant Wilson's assessments and determinations regarding the retention or separation of Roe and Voe insofar as those assessments centered on deployability restrictions, AFI 44-178 was not referenced nor its application (or lack of applicability) explained in the decisions ordering the separation of Roe and Voe.

121. AFI 44-178 provides that "HIV seropositivity alone is not grounds for medical separation or retirement for [active-duty Air force] members." They "may not be separated solely on the basis of laboratory evidence of HIV infection." Rather, procedures for retention and separation are governed by an attachment to the Instruction providing that Airmen living with HIV may be retained if they "are able to perform the duties of their office, grade, rank and/or rating."

122. Roe's and Voe's commanding officers confirmed their ability to continue performing their duties. Roe's and Voe's doctors imposed no work restrictions as a result of their

diagnoses. Therefore, Roe and Voe “are able to perform the duties of their office, grade, rank and/or rating.”

123. Roe and Voe were separated because they were classified as non-deployable. But Roe and Voe were classified as non-deployable not because there is any physical or medical reason they cannot deploy, but solely because they are HIV seropositive. Roe and Voe were therefore separated “solely on the basis of laboratory evidence of HIV infection.”

124. The decisions to separate Roe and Voe are, in this way, contrary to the provisions of AFI 44-178, and therefore arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

125. Through the actions and omissions above, Defendant Wilson violated the APA, 5 U.S.C. § 706(2)(A).

### **COUNT III**

#### **Violation of the APA Against Wilson as to Deployability and Separation Determinations as Arbitrary and Capricious or an Abuse of Discretion**

126. All prior paragraphs are incorporated as if fully set forth here.

127. Plaintiffs have no adequate or available administrative remedies and/or have exhausted them; in the alternative, any effort to obtain an administrative remedy would be futile.

128. Defendant Wilson applied the Air Force’s own regulations inconsistently in discharging Roe and Voe. Had she applied the regulations consistently, Roe and Voe would have been retained and returned to duty, like other similarly situated Airmen living with HIV.

129. The November 7, 2018 memoranda notifying Roe and Voe of the SAF’s discharge decisions in both of their cases state that their HIV diagnoses “preclude[] [them] from being able to deploy worldwide without a waiver and render[] [them] ineligible for deployment to the Central

Command (CENTCOM) Area of Responsibility (AOR), where the majority of Air Force members are expected to deploy,” and that “[d]eployability is a key factor in determining fitness for duty.”

130. This decision was different from other recent SAF decisions involving similarly situated Airmen living with HIV.

131. In a memorandum dated January 22, 2018, the SAF directed that an Airman living with HIV who had been placed on a two-medication ART regimen and “remained symptom free and with an undetectable viral load” since March 2016 would be retained and returned to duty. This was so even though the SAF acknowledged that the Airman “may require an Assignment Limitation Code ‘C’ and, if so, [she] would require waivers to deploy.”

132. Reaching such different conclusions in cases involving similarly situated Airmen is arbitrary and capricious and an abuse of discretion.

133. Further, the decisions to separate Roe and Voe, regardless of the SAF’s decisions in similar cases, are on their own arbitrary and capricious, and an abuse of discretion, because the SAF failed to consider the advances that have been made in the treatment and prevention of HIV, and the physical and medical conditions of Roe and Voe, and ultimately made decisions that run counter to the evidence that individuals living with HIV are physically and medically capable of deploying.

134. For these reasons, Roe’s and Voe’s classifications as non-deployable and impeding discharges on the basis of their HIV status are arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

135. Through the actions and omissions above, Defendant Wilson violated the APA, 5 U.S.C. § 706(2)(A).

## COUNT IV

### **Violation of the APA Against Defendants United States Department of Defense and Mattis as to DoDI 6490.07**

136. All prior paragraphs are incorporated as if fully set forth here.

137. Plaintiffs have no adequate or available administrative remedies and/or have exhausted them; in the alternative, any effort to obtain an administrative remedy would be futile.

138. On information and belief, Defendants' classification of Roe and Voe as unable to deploy was based, at least in part, on DoDI 6490.07.

139. Yet the provisions of DoDI 6490.07 that limit the deployability of Service members living with HIV are based on outdated thinking that does not comport with the current state of HIV medical science.

140. Defendants' failure to update DoDI 6490.07, as it relates to the deployability of Service members living with HIV, to reflect the current state of HIV medical science, is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

141. Through the actions and omissions above, Defendants DoD and Mattis violated the APA, 5 U.S.C. § 706(2)(A).

## COUNT V

### **Violation of the APA Against Defendant Wilson as to AFI 10-403, AFI 48-122, and AFI 44-178**

142. All prior paragraphs are incorporated as if fully set forth here.

143. Plaintiffs have no adequate or available administrative remedies and/or have exhausted them; in the alternative, any effort to obtain an administrative remedy would be futile.

144. AFI 10-403, AFI 48-122, and AFI 44-178, to the extent that they limit the deployability of Airmen living with HIV, are based on outdated thinking that does not comport

with the current state of HIV medical science. Because of their failure to comport with current medical science, these provisions are indefensible.

145. These regulations as they currently stand, and Defendant's failure to update these regulations, are arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

146. Through the actions and omissions above, Defendants violated 5 U.S.C. §706(2)(A).

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Preliminarily enjoin Defendant Wilson from involuntarily separating Roe and Voe during the pendency of this matter and through final judgment;
- B. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that Roe's and Voe's impending discharges are arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law;
- C. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that Roe's and Voe's impending discharges are unconstitutional;
- D. Vacate and set aside the decisions to discharge Roe and Voe;
- E. Enter an injunction directing the Department of Defense to permit Plaintiff Roe to re-enlist and to continue to serve as a Staff Sergeant; or, in the alternative, requiring the Air Force to re-evaluate Roe's eligibility for continued service in light of any order of this Court enjoining enforcement of the regulations identified below;
- F. Enter an injunction directing the Department of Defense to permit Plaintiff Voe to re-enlist and to continue to serve as a Senior Airman; or, in the alternative, requiring the

Air Force to re-evaluate Plaintiff Voe's eligibility for continued service in light of any order of this Court enjoining enforcement of the regulations identified below;

- G. Enjoin the Department of Defense from applying or enforcing the HIV-specific provision on the list of "Medical Conditions Usually Precluding Contingency Deployment" (DoDI 6490.07, Enclosure 3, subsection (e)(2)), thereby allowing Service members with HIV to be considered deployable as a default and evaluated, if clinically indicated, on a case-by-case basis under DoDI 6490.07, subsection 4(b);
- H. Enjoin the Air Force from applying or enforcing the HIV-specific portions of AFI 10-403, AFI 48-122, and AFI 44-178 in a manner that limits the deployability of Airmen diagnosed with HIV while on active duty;
- I. Award Plaintiffs reasonable costs and attorneys' fees; and
- J. Award such further relief as this Court deems appropriate.

Dated: December 19, 2018

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*Attorneys for Plaintiffs*

*\*Pro hac vice application forthcoming*

*\*\* Application for admission forthcoming*

JS 44 (Rev. 06/17)

### CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

Roe, Richard; Voe, Victor; OutServe-SLDN, Inc.

(b) County of Residence of First Listed Plaintiff Otero County, New Mexico  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See attachment

**DEFENDANTS**

United States Department of Defense; Mattis, James N, Secretary of Defense; Wilson, Heather A, Secretary of the Air Force

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

<b>CONTRACT</b>	<b>TORTS</b>	<b>FORFEITURE/PENALTY</b>	<b>BANKRUPTCY</b>	<b>OTHER STATUTES</b>	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b>	<b>CIVIL RIGHTS</b>	<b>PRISONER PETITIONS</b>	<b>LABOR</b>	<b>FEDERAL TAX SUITS</b>	
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

**V. ORIGIN** (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (Specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
 The Fifth Amendment of the United States Constitution; 5 U.S.C. §§ 701-706

Brief description of cause:

The suit challenges current Department of Defense and Air Force policies that discriminate against HIV+ members

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

**DEMAND \$**

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE Leonie M. Brinkema

DOCKET NUMBER 1:18-cv-00641-LMB-IDD

DATE  
 12/19/2018

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFF \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

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# Department of Defense INSTRUCTION

NUMBER 1332.18

August 5, 2014

*Incorporating Change 1, Effective May 17, 2018*

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USD(P&R)

SUBJECT: Disability Evaluation System (DES)

References: See Enclosure 1

1. PURPOSE. This instruction:

a. Reissues DoD Directive (DoDD) 1332.18 (Reference (a)) as a DoD instruction (DoDI) in accordance with the authority in DoDD 5124.02 (Reference (b)).

b. Establishes policy, assigns responsibilities, and provides procedures for referral, evaluation, return to duty, separation, or retirement of Service members for disability in accordance with Title 10, United States Code (U.S.C.) (Reference (c)); and related determinations pursuant to sections ~~3501~~, 6303, 8332, and 8411 of Title 5, U.S.C. (Reference (d)); section 104 of Title 26, U.S.C. (Reference (e)); and section 2082 of Title 50, U.S.C. (Reference (f)).

c. Incorporates and cancels DoDI 1332.38 (Reference (g)) and the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) Memorandums (References (h) through (o)).

2. APPLICABILITY. This instruction applies to the OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

3. POLICY. It is DoD policy that:

a. The DES will be the mechanism for determining ~~return to fitness for~~ duty, separation, or retirement of Service members because of disability in accordance with Reference (c).

b. Service members will proceed through one of ~~three the~~ DES processes: the Legacy Disability Evaluation System (LDES), *or* the Integrated Disability Evaluation System (IDES). ~~or the Expedited Disability Evaluation System (EDES).~~ DoD's objective in all DES processes is to

DoDI 1332.18, August 5, 2014

collaborate with the Department of Veterans Affairs (VA) to ensure continuity of care, timely processing, and seamless transition of the Service member from DoD to VA in cases of disability separation or retirement. *It is DoD policy for Service members to process through the IDES unless a compelling and individualized reason for process through the LDES is approved by the Secretary of the Military Department.*

c. The standards for all determinations related to disability evaluation will be consistently and equitably applied, in accordance with Reference (c), to all Service members, and be uniform within the components of the Military Departments.

d. Reserve Component (RC) Service members who are not on a call to active duty of more than 30 days and who are pending separation for non-duty related medical conditions may enter the DES for a determination of fitness and whether the condition is duty related.

e. In determining a Service member's disability rating, the Military Department will consider all medical conditions, whether individually or collectively, that render the Service member unfit to perform the duties of the member's office, grade, rank, or rating.

f. Service members who are pending permanent or temporary disability retirement and who are eligible for a length of service retirement at the time of their disability evaluation may elect to be retired for disability or for length of service. However, when retirement for length of service is elected, the member's retirement date must occur within the time frame that a disability retirement is expected to occur.

g. A Service member may not be discharged or released from active duty because of a disability until he or she has made a claim for compensation, pension, or hospitalization with the VA or has signed a statement that his or her right to make such a claim has been explained, or has refused to sign such a statement. The Secretaries of the Military Departments may not deny a Service member who refuses to sign such a claim any privileges within DES policy as noted in this instruction.

h. RC Service members on active duty orders specifying a period of more than 30 days will, with their consent, be kept on active duty for disability evaluation processing until final disposition by the Secretary of the Military Department concerned. *In accordance with DoDI 1241.01 (Reference (p)), RC Service members may elect to be released from active duty before completion of DES processing. These Service members may receive legal counseling in accordance with the regulations of the Military Department concerned.*

i. The Secretaries of the Military Departments may authorize separation on the basis of congenital or developmental defects not being compensable under the Veterans Affairs Schedule for Rating Disabilities (VASRD) if defects, circumstances or conditions interfere with assignment to or performance of duty. ~~These Service members will not be referred to the DES.~~ *The basis for separation will be appropriately documented following guidelines and criteria in accordance with DoDI 6040.42 (Reference (q)). These Service members will not be referred to the DES unless the defect was subject to super imposed disease or injury during military service, or other potentially unfitting conditions exist that may have been incurred or aggravated by*

DoDI 1332.18, August 5, 2014

*military service.*

4. RESPONSIBILITIES. See Enclosure 2.

5. PROCEDURES. See Enclosure 3 of this instruction. Additional procedural guidance for the LDES is included in DoD Manual (DoDM) 1332.18, Volume 1 (Reference ~~(p)(r)~~). Additional procedural guidance for the IDES is included in DoDM 1332.18, Volume 2 (Reference ~~(q)(s)~~). ~~Procedural guidance for EDES will be published in a separate DoD issuance.~~

6. INFORMATION COLLECTION REQUIREMENTS

a. The DES Annual Report, referred to in paragraphs ~~1d(6)(a) I.d.(6)(a)~~, ~~1d(6)(b) I.d.(6)(a)~~, and ~~1e(4) I.e.(4)~~ of Enclosure 2 of this instruction, has been assigned report control symbol DD-HA(A,Q)2547 in accordance with the procedures in Volume 1 of DoD Manual 8910.01 (Reference ~~(+)(t)~~).

b. The DES quarterly data submission, referred to in paragraphs ~~1d(6)(b) I.d.(6)(b)~~ and ~~1d(4) I.d.(4)~~ of Enclosure 2 of this instruction, has been assigned report control symbol DD-HA(A,Q)2547 in accordance with the procedures in Reference ~~(+)(t)~~.

7. RELEASABILITY. **Cleared for public release.** This instruction is available on ~~the Internet~~ from the DoD Issuances Website at ~~http://www/dtic/mil/whs/directives~~ ~~http://www.esd.whs.mil/DD~~.

8. EFFECTIVE DATE. This instruction ~~is effective August 5, 2014.~~

~~a. Is effective August 5, 2014.~~

~~— b. Will expire effective August 5, 2024 if it hasn't been reissued or cancelled before this date in accordance with DoDI 5025.01 (Reference (s)).~~

  
Jessica L. Wright  
Under Secretary of Defense for  
Personnel and Readiness

*DoDI 1332.18, August 5, 2014*

Enclosures

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2. Responsibilities
3. Operational Standards for the DES

Glossary

DoDI 1332.18, August 5, 2014

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ENCLOSURE 1

REFERENCES

- (a) DoD Directive 1332.18, "Separation or Retirement for Physical Disability," November 4, 1996 (hereby cancelled)
- (b) DoD Directive 5124.02, "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," June 23, 2008
- (c) Title 10, United States Code
- (d) Title 5, United States Code
- (e) Section 104 of Title 26, United States Code
- (f) Section 2082 of Title 50, United States Code
- (g) DoD Instruction 1332.38, "Physical Disability Evaluation," November 14, 1996, as amended (hereby cancelled)
- (h) Under Secretary of Defense for Personnel and Readiness Memorandum, "Policy Guidance for the Disability Evaluation System and Establishment of Recurring Directive-Type Memoranda," May 3, 2007 (hereby cancelled)
- (i) Under Secretary of Defense for Personnel and Readiness Memorandum, "Directive-Type Memoranda (DTM) on Standards for Determining Unfitness Due to Medical Impairment (Deployability)," December 19, 2007 (hereby cancelled)
- (j) Under Secretary of Defense for Personnel and Readiness Memorandum, "Directive-Type Memorandum (DTM) on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008 (Pub. L. 110-181)," March 13, 2008 (hereby cancelled)
- (k) Under Secretary of Defense for Personnel and Readiness Memorandum, "Policy Memorandum on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008 (Pub. L. 110-181)," October 14, 2008 (hereby cancelled)
- (l) Under Secretary of Defense for Personnel and Readiness Memorandum, "Policy and Procedural Memorandum for the DES Pilot Program," November 21, 2007 (hereby cancelled)
- (m) Under Secretary of Defense for Personnel and Readiness Memorandum "Policy and Procedural Update for the Disability Evaluation System (DES) Pilot Program," December 11, 2008 (hereby cancelled)
- (n) Under Secretary of Defense for Personnel and Readiness Memorandum "Cross Service Support and Service Organization Role at Disability Evaluation System (DES) Pilot Locations," March 29, 2010 (hereby cancelled)
- (o) Under Secretary of Defense for Personnel and Readiness Memorandum, "Directive-Type Memorandum – Integrated Disability Evaluation System," December 19, 2011 (hereby cancelled)
- ~~(p) DoD Manual 1332.18, Volume 1, "Disability Evaluation System (DES) Manual: General Information and Legacy Disability Evaluation System (LDES) Time Standards," August 5, 2014~~
- (p) DoD Instruction 1241.01, "Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements," April 19, 2016*

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- ~~(q) DoD Manual 1332.18, Volume 1, "Disability Evaluation System (DES) Manual: General Information and Legacy Disability Evaluation System (LDES) Time Standards," August 5, 2014~~
- ~~(q) DoD Instruction 6040.42, "Management Standards for Medical Coding of DoD Health Records," June 8, 2016~~
- ~~(pr) DoD Manual 1332.18, Volume 1, "Disability Evaluation System (DES) Manual: General Information and Legacy Disability Evaluation System (LDES) Time Standards," August 5, 2014~~
- ~~(qs) DoD Manual 1332.18, Volume 2, "Disability Evaluation System (DES) Manual: Integrated Disability Evaluation System," August 5, 2014~~
- ~~(s) DoD Instruction 5025.01, "DoD Issuances Program," June 6, 2014~~
- ~~(#t) DoD Manual 8910.01, Volume 1, "DoD Information Collections Manual: Procedures for DoD Internal Information Collections," June 30, 2014, as amended~~
- ~~(t) Title 38, Code of Federal Regulations, Part 4 (part 4 is also known as "the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD)")~~
- ~~(u) DoD Directive 5136.01, "Assistant Secretary of Defense for Health Affairs (ASD(HA)), " September 30, 2013, as amended~~
- ~~(u) Under Secretary of Defense for Personnel and Readiness Memorandum, "Expedited DES Process for Members with Catastrophic Conditions and Combat Related Causes," January 6, 2009~~
- ~~(tv) Title 38, Code of Federal Regulations, Part 4 (part 4 is also known as "the Department of Veterans Affairs Schedule for Rating Disabilities (VASRD)")~~
- ~~(vw) Memorandum of Agreement Between the Department of Defense and Department of Veterans Affairs, January 16, 2009~~
- ~~(wx) Memorandum of Agreement Between the Department of Defense and Department of Veterans Affairs, June 16, 2010~~
- ~~(xy) DoD 5400.11-R, "Department of Defense Privacy Program," May 14, 2007~~
- ~~(y) Section 1612 of Public Law 110-181, "National Defense Authorization Act for Fiscal Year 2008," January 28, 2008~~
- ~~(z) Joint Federal Travel Regulations, Volume 1, "Uniformed Service Members," current edition~~
- ~~(aa) Joint Federal Travel Regulations, Volume 2, "Department of Defense Civilian Personnel," current edition~~
- ~~(ab) DoD Directive 1332.27, "Survivor Annuity Programs for the Uniformed Services," June 26, 2003~~
- ~~(z) DoD Directive 5400.11, "DoD Privacy Program," October 29, 2014~~
- ~~(aa) DoD Instruction 1000.30, "Reduction of Social Security Number (SSN) Use Within DoD," August 1, 2012~~
- ~~(ab) Administrative Instruction 15, "OSD Records and Information Management Program," May 3, 2013, as amended~~
- ~~(ac) DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 24, 2003~~
- ~~(yad) Section 1612 of Public Law 110-181, "National Defense Authorization Act for Fiscal Year 2008," January 28, 2008~~
- ~~(zae) Joint Federal Travel Regulations, Volume 1, "Uniformed Service Members," current edition~~

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- (~~aaaf~~) Joint ~~Federal~~ Travel Regulations, Volume 2, "Department of Defense Civilian Personnel," current edition
- (~~abag~~) DoD Directive 1332.27, "Survivor Annuity Programs for the Uniformed Services," June 26, 2003
- ~~(ae) DoD Directive 1332.35, "Transition Assistance for Military Personnel," December 9, 1993~~
- (~~ah~~) *DoD Instruction 1332.35, "Transition Assistance Program (TAP) for Military Personnel," February 29, 2016*
- (~~ada~~) DoD Instruction 1332.14, "Enlisted Administrative Separations," January 27, 2014, *as amended*
- (~~aeaj~~) Section 115 of Title 32, United States Code
- (~~afak~~) Title 37, United States Code
- (~~agal~~) Title 38, United States Code
- ~~(ah) DoD Instruction 1332.30, "Separation of Regular and Reserve Commissioned Officers," November 25, 2013~~
- (~~am~~) *DoD Instruction 1332.30, "Commissioned Officer Administration Separations," May 11, 2018*
- ~~(ai) Joint Publication 1-02, "Department of Defense Dictionary of Military and Associated Terms," current edition~~
- (~~an~~) *Office of the Chairman of the Joint Chiefs of Staff, "DoD Dictionary of Military and Associated Terms," current edition*

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ENCLOSURE 2

RESPONSIBILITIES

1. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS (ASD(HA)). Under the authority, direction, and control of the USD(P&R), the ASD(HA):

*a. Oversees the Director, Defense Health Agency (DHA), in the execution of programmatic and operational responsibilities in accordance with DoDD 5136.01 (Reference (u)).*

*ab.* Establishes the Disability Advisory Council (DAC) to advise and recommend improvement of the DES and designates its chair.

*bc.* Monitors the performance of the DES and recommends improvements in DES policy.

*cd.* Reviews DES policies, including those proposed by the Military Departments.

*de.* Through the Deputy Assistant Secretary of Defense for ~~Warrior Care Policy (DASD)(WCP))~~ *Health Services Policy and Oversight (DASD(HSP&O))*:

(1) In coordination with the ~~Assistant Secretary of Defense for Reserve Affairs (ASD(RA))~~ *Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA))* and the Secretaries of the Military Departments, oversees, assesses, and reports on the performance of the DES and recommends to the ASD(HA) changes in policy, procedure, or resources to improve DES performance.

(2) Monitors changes to military personnel, ~~and~~ compensation statutes and DoD policy, and other pertinent authorities, to assess their impact on disability evaluation, RC medical disqualification, and related benefits.

(3) Reviews Military Departments' policies and procedures for disability evaluation that affect the uniformity of standards for separation or retirement for unfitness because of disability, or separation of RC members for medical disqualification.

(4) Develops quality assurance procedures to ensure that policies are applied fairly and consistently and reports to ASD(HA) the results of Military Department DES quality control programs.

(5) Develops and executes a strategic communications plan for the DES in coordination with:

(a) Assistant *to the* Secretary of Defense for Public Affairs

(b) Secretaries of the Military Departments

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(c) Under Secretary for Benefits, Veterans Benefits Administration, VA

(d) Under Secretary for Health, Veterans Health Administration, VA

(6) Establishes reporting requirements necessary to monitor and assess the performance of the DES and compliance of the Military Departments with this instruction.

(a) Not later than July 1 of each year, publishes the information the Military Departments must include in the DES Annual Report.

(b) Analyzes quarterly data submitted by the Military Departments and provides the DES Annual Report to the ASD(HA).

(c) Analyzes monthly DES data to assess trends that might inform policy adjustments.

~~e. Through the Deputy Assistant Secretary of Defense for Health Services Policy and Oversight:~~

~~(47)~~ Reviews Military Departments' policies and procedures for disability evaluation that affect the uniformity of standards for separation or retirement for unfitness because of disability or separation of RC members for medical disqualification.

~~(28)~~ Monitors changes to the laws, and regulations of the VA to assess their impact on the DoD's application of the VASRD (Reference (~~tu~~)) to Service members determined unfit because of disability, and recommends timely guidance to the ASD(HA).

~~(39)~~ Recommends guidance and performance monitoring necessary to implement this instruction, including recommending performance metrics and areas of emphasis.

~~(410)~~ ~~DASD(WCP) advises~~ *Advises* on the accurateness and completeness of the DES Annual Report and DES quarterly data submitted by the Military Departments to propose improvements to the DES based upon the submitted performance data.

~~(511)~~ In conjunction with the Secretaries of the Military Departments and the Director, ~~Defense Health Agency DHA~~, develops program planning, allocation, and use of healthcare resources for activities within the DoD related to the DES.

~~(612)~~ In coordination with the Military Departments *and DHA* information technology (IT) offices, ensures IT support and access to programs used at the military treatment facilities (MTFs) and other related systems for medical record input and retrieval are available to each Military Department physical evaluation board (PEB).

~~(713)~~ Provides grade O-6 or civilian equivalent representation with a sufficient understanding of the DES to the DAC.

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2. ~~ASD(RA) ASD(M&RA)~~. Under the authority, direction, and control of the USD(P&R), the ~~ASD(RA) ASD(M&RA)~~:

a. In coordination with the ASD(HA) and the Secretaries of the Military Departments, ensures that policies for the DES are applied for RC personnel consistent with those established for Active Component (AC) personnel and reflect the needs of RC members as required by Reference (c).

b. Provides O-6 level or civilian-equivalent representation with sufficient understanding of the DES to the DAC.

c. Reviews annual DES performance and recommends improvements to ASD(HA) to ensure process efficiency and equity for members of the RC.

3. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE (GC DoD). In consultation with the General Counsels and the Judge Advocates General of the Military Departments, the GC DoD provides policy guidance on legal matters relating to DES policy, issuances, proposed exceptions to policy, legislative proposals, and provide legal representation for the DAC as set forth in Enclosure 7 of Reference (~~pr~~).

4. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments:

a. Comply with chapter 61 of Reference (c), this instruction, and any implementing guidance.

b. Implement the DES in accordance with this instruction.

c. Manage the temporary disability retired list (TDRL) in accordance with Appendix 4 of Enclosure 3 of this instruction.

d. Staff and provide resources to meet DES performance goals, without reducing Service members' access to due process consistent with Reference (~~pr~~).

e. Establish procedures to develop and implement standardized training programs, guidelines, and curricula for Military Department personnel who administer DES processes, including physical evaluation board liaison officers (PEBLOs), non-medical case managers, and personnel assigned to the medical evaluation board (MEB), the PEB, and appellate review authorities.

f. Establish and execute agreements to support the disability processing of members who receive medical care from another Military Department.

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- g. Establish procedures to ensure Service members who are hospitalized or receiving treatment at a VA or a non-governmental facility are referred, processed, and counseled in a manner similar to their peers.
- h. In consultation with their respective Judge Advocates General, establish policy, training and procedures for the provision of legal counsel to Service members in the DES.
- i. Establish a quality assurance process to:
  - (1) Ensure policies and procedures established by this instruction are fairly and consistently implemented.
  - (2) Establish procedures to ensure the accuracy and consistency of MEB and PEB determinations and decisions.
  - (3) Establish procedures to monitor and sustain proper performance of the duties of MEBs, PEBs, and PEBLOs.
- j. Prepare and forward data submissions for the DES Annual Report to the ~~DASD(WCP)~~ *DASD(HSP&O)*.
- k. Through their respective Inspectors General, review compliance with the requirements contained in Enclosure 3 of this instruction every 3 fiscal years for the preceding 3-fiscal-year period. Forward a copy of their final Inspectors General compliance reports to the USD(P&R).
- l. Investigate all matters of potential fraud pertaining to the DES and resolve as appropriate.
- m. Provide grade O-6 or civilian-equivalent representation with a sufficient understanding of the DES to the DAC.
- ~~n. Comply with USD(P&R) Memorandum (Reference (u)).~~
- ~~on.~~ Comply with the Memorandums of Agreement between the DoD and the VA pertaining to the IDES (References (~~v~~w) and (~~w~~x)).
- ~~po.~~ Comply with the *privacy* procedures outlined in DoD 5400.11-R (Reference (~~x~~y)), *DoDD 5400.11 (Reference (z))*, *DoDI 1000.30 (Reference (aa))*, *Administrative Instruction 15 (Reference (ab))*, and *DoD 6025.18-R (Reference (ac))*.
- ~~qp.~~ Establish procedures to ensure that, with the consent of the Service member, the address and contact information of the Service member are transmitted to the department or agency for other appropriate veterans affairs of the State in which the Service member intends to reside after retirement or separation.
- ~~rq.~~ Establish procedures to provide, with consent of the Service member, notification of the hospitalization of a Service member under their jurisdiction evacuated from a theater of combat

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and admitted to an MTF within the United States to the Senators representing the State, and the Member, Delegate or Resident Commissioner of the House of Representatives representing the district, that includes the Service member's home ~~of~~ *of* record or a different location as provided by the Service member.

*sr.* Before demobilizing or separating an RC member who incurred an injury or illness while on active duty, provide to the Service member information on:

(1) The availability of care and administrative processing through military-affiliated or community support services.

(2) The location of the support services, whether military-affiliated or community, located nearest to the permanent place of residence of the Service member.

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ENCLOSURE 3

OPERATIONAL STANDARDS FOR THE DES

1. OVERVIEW OF THE DES

a. Under the supervision of the Secretary of the Military Department concerned, the DES consists of:

(1) Medical evaluation to include the MEB, impartial medical reviews, and rebuttal.

(2) Disability evaluation to include the PEB and appellate review, counseling, case management, and final disposition.

b. The Secretaries of the Military Departments:

~~(1) Will use the LDES process for non-duty related disability cases and for Service members who entered the DES prior to the IDES being implemented at a given MTF.~~

~~(2) Subject to the written approval of the USD(P&R), may also use the LDES process for Service members who are in initial entry training status, including trainees, recruits, cadets, and midshipmen. Secretaries of the Military Departments who enroll initial entry trainees, recruits, cadets, and midshipmen in the LDES must offer to enroll these Service members in the VA Benefits Delivery at Discharge or Quick Start programs.~~

~~(3) Will use the EDES process for consenting Service members designated with a catastrophic illness or injury incurred in the line of duty.~~

~~(4) May designate a Service member's condition as catastrophic if he or she has a permanent and severely disabling injury or illness that compromises the ability to carry out the activities of daily living. Guidance for procedures unique to the EDES is available in Reference (u).~~

~~c. Except for initial entry trainees, Military Academy cadets, and midshipmen entered into the LDES and catastrophically ill or injured Service members entered in the EDES, will use the IDES process for all newly initiated cases referred under the duty related process (see Glossary). Guidance for procedures unique to the IDES is available in Reference (q).~~

~~(1) Will use the IDES process for all newly initiated cases referred under the duty-related process except for Service members approved for the LDES process.~~

~~(2) For cases initiated on or after May 17, 2018, may either:~~

~~(a) Authorize, if requested by a Service member (to include initial entry trainees, Military Academy cadets, and midshipmen), processing through the LDES rather than the IDES.~~

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*Before the Secretary concerned approves such a request, the Service member must acknowledge, in writing, that he or she was offered the opportunity to receive a legal briefing regarding the procedural differences between the LDES and the IDES;*

*(b) Enroll Service members into the LDES after providing information to these Service members about the VA Benefits Delivery at Discharge program before enrollment; or*

*(c) Use the LDES process for consenting Service members designated with a catastrophic illness or injury incurred in the line of duty.*

~~d.c.~~ *LDES and* IDES disability examinations will include a general medical examination and any other applicable medical examinations performed to VA compensation and pension standards. Collectively, the *LDES and IDES* examinations will be sufficient to assess the Service member's referred and claimed condition(s), assist VA in ratings determinations and assist Military Departments to determine if the medical conditions, individually or collectively, prevent the Service member from performing the duties of his office, grade, rank, or rating.

## 2. MEB

a. Purpose. An MEB *reviews all available medical evidence, to include any examinations completed as a part of DES processing, and* documents the medical status and duty limitations of Service members who meet referral eligibility criteria in Appendix 1 to this enclosure.

b. Composition. The MEB will be comprised of two or more physicians (civilian employee or military). One of these physicians must have detailed knowledge of the standards pertaining to medical *fitness retention standards*, the disposition of patients, and disability separation processing. Any MEB listing a behavioral health diagnosis must contain a thorough behavioral health evaluation and include the signature of at least one psychiatrist or psychologist with a doctorate in psychology.

c. Resourcing. The Secretary of the Military Department concerned will develop standards on the maximum number of MEB cases that are pending before a MEB at any one time.

d. Referral to PEB. The MEB documents whether the Service member has a medical condition*s, whether singularly, collectively or through combined effect*, that will prevent them from reasonably performing the duties of their office, grade, rank, or rating. If the Service member cannot perform the duties of his office, grade, rank, or rating, the MEB refers the case to the PEB.

### e. Service Member Medical Evaluations

(1) Medical Evaluations. An MEB will evaluate the medical status and duty limitations of:

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(a) Service members referred into the DES who incurred or aggravated an illness or injury while under order to active duty specifying a period of more than 30 days.

(b) RC members referred for a duty-related determination.

(2) MEB Exemptions. An MEB is not required:

(a) For Service members temporarily retired for disabilities who are due for a periodic physical medical examination.

(b) When an RC member *who is not on active duty* is referred for *impairments conditions* unrelated to military status and performance of duty (see Glossary for the definition of non-duty-related *impairments condition*).

(3) MEB Prerequisites. A Service member will not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury.

(4) Impartial Medical Reviews. Consistent with section 1612 of Public Law 110-181 (Reference (*yad*)), the Secretary of the Military Department concerned will, upon request of the Service member, assign an impartial physician or other appropriate health care professional who is independent of the MEB to:

(a) Serve as an independent source of review of the MEB findings and recommendations.

(b) Advise and counsel the Service member regarding the findings and recommendations of the MEB.

(c) Advise the Service member on whether the MEB findings adequately reflect the complete spectrum of the Service member's injuries and illnesses.

(5) MEB Rebuttal. Service members referred into the DES will upon request be permitted to at least one rebuttal of the MEB findings.

f. Content

(1) Medical information used in the DES must be sufficiently recent to substantiate the existence or severity of potentially unfitting conditions. The Secretaries of the Military Departments will not perform additional medical exams or diagnostic tests if more current information would not substantially affect identification of the existence or severity of potentially unfitting conditions.

(2) MEBs will confirm the medical diagnosis for and document the full clinical information, including history, treatment status, and potential for recovery of the Service member's medical conditions that, individually or collectively *or through combined effect, may*

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*will* prevent the Service member from performing the duties of his office, grade, rank, or rating and state whether each condition is cause for referral to a PEB.

g. Competency. When the Service member's ability to handle his or her financial affairs is unclear, the MEB or TDRL packet will include the results of a competency board.

h. Medical Documentation for RC Members with Non-duty Related Conditions. The medical documentation for RC members with non-duty related conditions referred for disability evaluation must provide clear and adequate written description of the medical condition(s) that, individually or collectively, may prevent the RC member from performing the duties of his office, grade, rank, or rating.

i. Non-medical Documentation. The MTF will forward the cases of Service members with a duty-related determination to the PEB with the MEB documentation and:

(1) The line of duty (LOD) determination, when required by section 6 of Appendix 3 of this enclosure.

(2) Except in cases in which the illness or injury is so severe that return to duty is not likely, a statement from the Service member's immediate commanding officer describing the impact of the member's medical condition on the ability to perform his or her normal military duties.

(3) An official document identifying the next of kin, court-appointed guardian, or trustee when a Service member is determined incompetent to manage his or her financial affairs.

### 3. DISABILITY EVALUATION

a. Purpose. PEBs determine the fitness of Service members with medical conditions to perform their military duties and, for members determined unfit because of duty-related *impairments conditions*, their eligibility for benefits pursuant to chapter 61 of Reference (c). Service members may appeal the decision of the PEB. The PEB process includes the informal physical evaluation board (IPEB), formal physical evaluation board (FPEB) and appellate review of PEB results.

b. IPEB. The IPEB reviews the case file to make initial findings and recommendations without the Service member present. The Service member may accept the finding, rebut the finding, or request a FPEB. The Secretary of the Military Department concerned will allow the Service member a minimum of 10 calendar days from receipt of the informal findings to rebut the findings of the IPEB or request an FPEB. In addition to this timeline, Military Departments must publish timelines for presentation and consideration of cases.

c. FPEB. In accordance with section 1214 of Reference (c), Service members who are found unfit are entitled to a formal hearing, an FPEB, to contest their IPEB findings. The PEBLO will document the Service member's declination of an FPEB. If the Secretary of the Military

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Department concerned changes those findings or determinations following a Service member's concurrence, the Service member will be entitled to a formal hearing to contest the changes.

d. Composition

(1) The IPEB will be comprised of at least two military personnel at field grade or civilian equivalent or higher. In cases of a split opinion, a third voting member will be assigned to provide the majority vote.

(2) The FPEB must be comprised of at least three members and may be comprised of military and civilian personnel representatives. A majority of the FPEB members could not have participated in the adjudication process of the same case at the Informal Physical Evaluation Board.

(a) The FPEB will consist of at least a president, who should be a military ~~O-6~~ O-6, or civilian equivalent; a medical officer; and a line officer (or non-commissioned officer at the E-9 level for enlisted cases) familiar with duty assignments.

(b) The physician cannot be the Service member's physician, cannot have served on the Service member's MEB, and cannot have participated in a TDRL re-examination of the Service member.

(c) In the case of RC members, Secretaries of the Military Departments will ensure RC representation on the PEBs is consistent with section 12643 of Reference (c) and related policies. Secretaries of the Military Departments may adjust member composition of the FPEB to enhance the adjudication process consistent with applicable laws and regulations.

(d) Contract personnel may not serve as PEB adjudicators or PEB appellate review members.

e. Eligibility. Service members determined unfit and TDRL members determined fit may demand, and are entitled to, an FPEB. At its discretion, the Military Department may grant a formal hearing to Service members who are determined fit but are not on the TDRL.

f. Resourcing. The Secretary of the Military Department concerned will direct the allocation of additional personnel to the PEB process if deemed appropriate for proper and expeditious adjudication of case load.

g. Issues. At the FPEB, the Service member will be entitled to address issues pertaining to his or her fitness, the percentage of disability, degree or stability of disability, administrative determinations, or a determination that his or her injury or disease was non-duty related.

h. Hearing Rights. Service members will have, at a minimum, the following rights before the FPEB:

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(1) To have their case considered by board members, a majority of whom were not voting members of their IPEB.

(2) To appear personally, through a designated representative, by videoconference, or by any other means determined practical by the Secretary of the Military Department concerned. Unless the Secretary of the Military Department directs the FPEB to fund the personal travel and other expenses, RC members with non-duty related determinations are responsible for their personal travel and other expenses.

(3) To be represented by Government appointed counsel provided by the Military Department. Service members may choose their own civilian counsel at no expense to the Government. The PEB president should notify the Secretary of the Military Department concerned if the lack of Government appointed counsel affects timely PEB caseload adjudication.

(4) To make a sworn or an unsworn statement. A Service member will not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury.

(5) To remain silent. When the Service member exercises this right, the member may not selectively respond, but must remain silent throughout the hearing.

(6) To introduce witnesses, depositions, documents, sworn or unsworn statements, declarations, or other evidence in the Service member's behalf and to question all witnesses who testify at the hearing. The FPEB president determines whether witnesses are essential. If the FPEB president determines witnesses essential, travel expenses and per diem may be reimbursed or paid in accordance with the Joint ~~Federal~~ Travel Regulation, Volumes 1 and 2 (References ~~(zae)~~ and ~~(aaaf)~~). Witnesses not deemed essential by the FPEB president may attend formal hearings at no expense to the Government.

(7) To access all records and information received by the PEB before, during, and after the formal hearing.

i. Record of Proceedings. ~~Upon a Service member's written request, the~~ *The* Military Department will provide the Service member a record of the PEB proceedings. The PEB record of proceedings must convey the PEB findings and conclusions in an orderly and itemized fashion, with specific attention to each issue presented by the Service member regarding his or her case, and the basis for applying total or extra-schedular ratings or unemployability determinations, as applicable.

j. Duty-related Determinations. The record of proceedings for active duty Service members and RC members referred for duty-related determinations will document, at a minimum:

(1) The determination of fit or unfit.

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(2) The code and percentage rating assigned an unfitting and compensable disability based on the VASRD. The standards for determining compensable disabilities are specified in Appendix 3 of this enclosure.

(3) The reason an unfitting condition is not compensable.

(a) The specific accepted medical principle, as stated in Appendix 3 of this enclosure, for overcoming the presumption of service aggravation for all cases with a finding of preexisting condition without service aggravation.

(b) The accepted medical principle justifying findings that an RC member performing inactive duty training (IDT), active duty training, or on active duty of 30 days or less, has a preexisting disability that was not permanently aggravated by service.

(c) The rationale justifying findings that a disability that was incurred in the LOD prior to September 24, 1996, and that was not permanently service aggravated since September 23, 1996, was not the proximate result of military service.

(4) For Service members being placed on the TDRL or permanently retired, the nature of the disability and the stability and permanency of the disability.

(5) Administrative determinations made consistent with Appendix 5 of this enclosure.

(6) The record of all proceedings for PEB evaluation including the evidence used to overcome a presumption listed in this instruction and changes made as a result of review by subsequent reviewing authority will include a written explanation in support of each finding and recommendation. If applicable, the basis for applying or not applying total or extra-schedular ratings or unemployability determinations.

k. Non-duty Related Determinations. For RC members referred for non-duty related determinations, the record of proceedings will document only:

(1) The fitness determination.

(2) For RC members determined fit, a determination of whether the member is deployable, if Service regulations require such a determination.

l. Appellate Review. The Military Department will review the findings and recommendations of the FPEB when requested by the Service member or designated representative or as required by the regulations of the Military Department concerned. The Military Department will also provide to the Service member a written response to an FPEB appeal that specifically addresses each issue presented in the appeal.

m. Quality Assurance. Each Military Department will establish and publish quality review procedures particular to the PEB and conduct quality assurance reviews in accordance with the laws, directives, and regulations governing disability evaluation.

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#### 4. COUNSELING

a. Purpose. Service members undergoing evaluation by the DES must be advised of the significance and consequences of the determinations being made and their associated rights, benefits, and entitlements. Each Military Department will publish and provide standard information booklets that contain specific information on the MEB and PEB processes. These publications must include the rights and responsibilities of the Service member while navigating through the DES. The information will be made available at the servicing MTFs and PEBs.

#### b. Topics

(1) PEBLOs will inform Service members of the:

- (a) Sequence and nature of the steps in the disability process.
- (b) Statutory rights and requirements but will not provide legal advice.
- (c) Effect of findings and recommendations.
- (d) Process to submit rebuttals.
- (e) Probable retired grade.
- (f) Estimated timeframe for completing the DES at their installation.

(2) PEBLOs will inform Service members or refer them to the appropriate subject matter experts on:

- (a) Potential veterans' benefits.
- (b) Post-retirement insurance programs and the Survivor Benefit Plan in accordance with DoDD 1332.27 (Reference (~~ab~~ag)), if appropriate.
- (c) Applicable transition benefits, in accordance with ~~DoDD~~ DoDI 1332.35 (Reference (~~ae~~ah)).
- (d) Applicable standards detailed in the VASRD, which would have to be recognized to increase the percentage of disability, prior to acting on a Service member's request for a formal PEB.
- (e) Services provided by military, veteran, or national service organizations.
- (f) Electronic resources for ill and injured Service members such as National Resource Directory, eBenefits, etc.

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(g) Availability and processes for obtaining legal counsel to assist in rebutting or appealing MEB and PEB findings.

(h) The appropriate Defense Finance and Accounting Service finance representative for payment calculations for severance pay or retirement pay.

c. Incompetent Service Members. When a Service member has been determined incompetent by a competency board, his or her designated representative (e.g., court appointed guardian, trustee, or primary next of kin) will be counseled and afforded the opportunity to assert the rights granted to the Service member, unless prohibited by law.

d. Pre-separation Counseling. Service members on orders to active duty for more than 30 days will not be separated or retired because of disability before completing pre-separation counseling pursuant to Reference (~~aeah~~).

## 5. CASE MANAGEMENT

a. Service members undergoing evaluation by the DES must be advised on the status of their case, issues that must be resolved for their case to progress, and expected time frame for completing DES at their installation.

b. PEBLOs will contact Service members undergoing disability evaluation at least monthly and provide any necessary DES assistance.

6. FINAL DISPOSITION. After adjudicating all appeals, the personnel authorities specified in Appendix 6 to this enclosure will:

a. Issue orders and instructions to implement the determination of the respective Service's final reviewing authority.

b. Consider Service member requests to continue on active duty or in the RC in a permanent limited duty status if the member is determined unfit.

## 7. ADMINISTRATIVE DECISIONS

a. The Secretary of the Military Department concerned may:

(1) Direct the PEB to reevaluate any Service member determined to be unsuitable for continued military service.

(2) Retire or separate for disability any Service member determined upon re-evaluation to be unfit to perform the duties of the member's office, grade, rank, or rating.

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b. The Secretary of the Military Department concerned may not:

(1) Authorize the involuntary administrative separation of a member based on a determination that the member is unsuitable for deployment or worldwide assignment after a PEB has found the member fit for the same medical condition; or

(2) Deny the member's request to reenlist based on a determination that the member is unsuitable for deployment or worldwide assignment after a PEB has found the member fit for the same medical condition.

c. Consistent with DoDI 1332.14 (Reference (~~adai~~)), any Service member found fit for duty by the PEB but determined unsuitable for continued service by the Secretary of the Military Department concerned for the same medical condition considered by the PEB may appeal to the Secretary of Defense, who is the final authority.

## 8. TRAINING AND EDUCATION

a. Assignment of Personnel to the DES. The Secretaries of the Military Departments will certify annually that the following personnel assigned to or impacting the DES were formally trained prior to being assigned to performing DES duties.

- (1) Medical officers.
- (2) PEBLOs.
- (3) Patient administration officers.
- (4) PEB adjudicators.
- (5) PEB appellate review members.
- (6) Judge advocates.
- (7) Military Department civilian attorneys.

b. Training. Training programs for all personnel assigned to the DES must be formal and documented. At a minimum, training curricula will consist of:

(1) An overview of the statutory and policy requirements of the DES, the electronic and paper recordkeeping policies of the Military Department, customer service philosophies, and VA processes, services and benefits.

- (2) Familiarization with medical administration processes.

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(3) Knowledge of online and other resources pertaining to the DES and DoD and VA services, the chain of supervision and command, and the Military Department Inspectors General hotlines for resolution of issues.

c. Mentoring. Individuals assigned for duty as PEBLOs must receive at least 1 week of on-the-job training with an experienced PEBLO.

#### Appendixes

1. DES Referral
2. Standards for Determining Unfitness Due to Disability or Medical Disqualification
3. Standards for Determining Compensable Disabilities
4. TDRL Management
5. Administrative Determinations
6. Final Disposition

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## APPENDIX 1 TO ENCLOSURE 3

### DES REFERRAL

1. GENERAL. The Secretary of the Military Department concerned will refer Service members who meet the criteria for disability evaluation regardless of eligibility for disability compensation.

### 2. CRITERIA FOR REFERRAL

a. When the course of further recovery is relatively predictable or within 1 year of diagnosis, whichever is sooner, medical authorities will refer eligible Service members into the DES who:

(1) Have one or more medical conditions that may, individually or collectively, prevent the Service member from reasonably performing the duties of their office, grade, rank, or rating including those duties remaining on a Reserve obligation for more than 1 year after diagnosis;

(2) Have a medical condition that represents an obvious medical risk to the health of the member or to the health or safety of other members; or

(3) Have a medical condition that imposes unreasonable requirements on the military to maintain or protect the Service member.

b. In all cases, competent medical authorities will refer into the DES eligible Service members who meet the criteria in paragraph ~~2a~~ *2.a. of this appendix* within 1 year of diagnosis.

### 3. ELIGIBILITY FOR REFERRAL

a. Duty-related Determinations. Except as provided in section 4 of this appendix, the following categories of Service members who meet the criteria in section 2 of this appendix are eligible for referral to the DES for duty-related determinations:

(1) Service members on active duty or in the RC who are on orders to active duty specifying a period of more than 30 days.

(2) RC members who are not on orders to active duty specifying a period of more than 30 days but who incurred or aggravated a medical condition while the member was ordered to active duty for more than 30 days.

(3) Cadets at the United States Military Academy, the United States Air Force Academy, or Midshipmen of the United States Naval Academy.

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(4) Service members previously determined unfit, serving in a permanent limited duty status, and for whom the period of continuation has expired.

(5) Other Service members who are on orders to active duty specifying a period of 30 days or less if they have a medical condition that was incurred or aggravated in the LOD while the Service member was:

(a) Performing active duty or IDT.

(b) Traveling directly to or from the place at which such duty is performed.

(c) Remaining overnight immediately before the commencement of IDT or while remaining overnight between successive periods of IDT at or in the vicinity of the site of the IDT.

(d) Serving on funeral honors duty pursuant to section 12503 of Reference (c) or section 115 of Title 32, U.S.C. (Reference (~~aeaj~~)) while the Service member was traveling to or from the place at which the member was to serve; or while the member remained overnight at or in the vicinity of that place immediately before serving.

(6) Service members with duty-related determinations, as described in paragraph 3.a. of this appendix, will be referred into the DES for a determination of fitness. If found unfit, a determination will be made as to the Service member's entitlement to separation or retirement for disability with benefits pursuant to chapter 61 of Reference (c) and administrative determinations in accordance with Appendix 5 to this enclosure.

(7) A member of an RC who is ordered to active duty for a period of more than 30 days and is released from active duty within 30 days of commencing such period of active duty for failure to meet physical standards for retention due to a pre-existing condition not aggravated during the period of active duty or medical or dental standards for deployment due to a pre-existing condition not aggravated during the period of active duty will be considered to have been serving under an order to active duty for a period of 30 days or less.

b. Non-duty Related Determinations. Members of the RC with non-duty related determinations, who are otherwise eligible as described in section 2 of this appendix, will be referred solely for a fitness for duty determination when one of the following exist:

(1) The RC member does not qualify under paragraph ~~3a-3.a.~~ of this appendix.

(2) The RC member requests referral for a fitness determination upon being notified that they do not meet medical retention standards.

(3) Service regulations direct the RC member be referred to the DES for a determination of fitness before being separated by the Reserve for not meeting medical retention standards.

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#### 4. INELIGIBILITY FOR REFERRAL

a. Service members are ineligible for referral to the disability evaluation process when:

(1) The Service member has a condition, circumstance, or defect of a developmental nature, not constituting a physical disability, as described in paragraph ~~3i.3.i~~ above the signature of this instruction, that interferes with assignment to or performance of duty and that was not service aggravated.

(2) The Service member is pending an approved, unsuspended punitive discharge or dismissal, except as provided by Service regulations.

(3) The Service member is pending separation under provisions that authorize a characterization of service of under other than honorable conditions, except as provided by Service regulations. This restriction is based on the provisions upon which the member is being separated and not on the actual characterization the member receives.

(4) The Service member is not physically present or accounted for.

(5) Disability results from intentional misconduct or willful neglect or was incurred during a period of unauthorized absence or excess leave.

b. However, the Secretaries of the Military Departments should normally evaluate for disability those Service members who would be ineligible for referral to the DES due to paragraphs ~~4a(2) 4.a.(2)~~ and ~~4a(3) 4.a.(3)~~ of this appendix when the medical **impairment condition** or disability evaluation is warranted as a matter of equity or good conscience.

#### 5. SERVICE MEMBERS WITH MEDICAL WAIVERS

a. Provided no permanent aggravation has occurred, Service members who enter the military with a medical waiver may be separated without disability evaluation when the responsible medical authority designated by Service regulations determines within 6 months of the member's entry into active service that the waived condition represents a risk to the member or prejudices the best interests of the Government.

b. Once 6 months have elapsed the Secretary of the Military Department concerned will refer the Service member for disability evaluation when the Service member meets the criteria in section 2 of this appendix and is eligible for referral in accordance with section 3 of this appendix.

c. Members who entered the Service with a medical waiver for a pre-existing condition and who are subsequently determined unfit for the condition will not be entitled to disability separation or retired pay unless military service permanently aggravated the condition. Members granted medical waivers will be advised of this provision at the time of waiver application and when it is granted.

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6. WAIVER OF PEB EVALUATION. Except as prohibited by section 7 of this appendix, Service members may waive referral to the PEB with the approval of the Secretary of the Military Department concerned.

a. The Service member must be counseled on the DES process, the right to a PEB, and the potential benefits of remaining in an active duty or active reserve status to complete evaluation by the DES.

b. The Service member must request a waiver in writing and such request or an affidavit must attest that the member has received the counseling described and declines referral to the PEB.

7. PROHIBITION FROM WAIVING DISABILITY EVALUATION. A Service member approved for voluntary early separation from active duty who incurs a Reserve obligation and who has conditions that are cause for referral into the DES cannot waive disability evaluation.

8. REFERRAL IMPLICATIONS. Neither referral into the DES nor a finding of unfitness constitutes entitlement to disability benefits.

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APPENDIX 2 TO ENCLOSURE 3

STANDARDS FOR DETERMINING UNFITNESS DUE TO  
DISABILITY OR MEDICAL DISQUALIFICATION

1. UNIFORMITY OF STANDARDS. The standards listed in this instruction for determining unfitness due to disability will be followed unless the USD(P&R) approves exceptions on the basis of the unique needs of the respective Military Department.

2. GENERAL CRITERIA FOR MAKING UNFITNESS DETERMINATIONS

a. A Service member will be considered unfit when the evidence establishes that the member, due to disability, is unable to reasonably perform duties of his or her office, grade, rank, or rating, including those during a remaining period of Reserve obligation.

b. A Service member may also be considered unfit when the evidence establishes that:

(1) The Service member's disability represents a decided medical risk to the health of the member or to the welfare or safety of other members; or

(2) The Service member's disability imposes unreasonable requirements on the military to maintain or protect the Service member.

3. RELEVANT EVIDENCE. The Secretaries of the Military Departments will consider all relevant evidence in assessing Service member fitness, including the circumstances of referral. To reach a finding of unfit, the PEB must be satisfied that the evidence supports that finding.

a. Referral Following Illness or Injury. When referral for disability evaluation immediately follows acute, grave illness or injury, the medical evaluation may stand alone, particularly if medical evidence establishes that continued service would be harmful to the member's health or is not in the best interest of the respective Service.

b. Referral for Chronic Impairment Condition. When a Service member is referred for disability evaluation under circumstances other than as described in paragraph ~~3a~~-3.a. of this appendix, an evaluation of the Service member's performance of duty by supervisors may more accurately reflect the capacity to perform. Supervisors may include letters, efficiency reports, credential reports, status of physician medical privileges, or personal testimony of the Service member's performance of duty to provide evidence of the Service member's ability to perform his or her duties.

c. Cause-and-effect Relationship. Regardless of the presence of illness or injury, inadequate performance of duty, by itself, will not be considered evidence of unfitness due to disability, unless a cause-and-effect relationship is established between the two factors.

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#### 4. REASONABLE PERFORMANCE OF DUTIES

a. Considerations. Determining whether a Service member can reasonably perform his or her duties includes consideration of:

(1) Common Military Tasks. Whether the Service member can perform the common military tasks required for the Service member's office, grade, rank, or rating including those during a remaining period of Reserve obligation. Examples include routinely firing a weapon, performing field duty, or wearing load-bearing equipment or protective gear.

(2) Physical Fitness Test. Whether the Service member is medically prohibited from taking the respective Service's required physical fitness test. When an individual has been found fit by a PEB for a condition that prevents the member from taking the Service physical fitness test, the inability to take the physical fitness test will not form the basis for an adverse personnel action against the member.

(3) Deployability. Whether the Service member is deployable individually or as part of a unit, with or without prior notification, to any vessel or location specified by the Military Department. When deployability is used by a Service as a consideration in determining fitness, the standard must be applied uniformly to both the AC and RC of that Service.

(4) Special Qualifications. For Service members whose medical condition disqualifies them for specialized duties, whether the specialized duties constitute the member's current duty assignment; the member has an alternate branch or specialty; or reclassification or reassignment is feasible.

b. General, Flag, and Medical Officers. An officer in pay grade O-7 or higher, or a medical officer in any grade, being processed for retirement by reason of age or length of service, will not be determined unfit unless the determination of the Secretary of the Military Department concerned with respect to unfitness is approved by the USD(P&R) on the recommendation of the ASD(HA).

c. Service Members on Permanent Limited Duty. A Service member previously determined unfit and continued in a permanent limited duty status or otherwise continued on active duty will normally be found unfit at the expiration of his or her period of continuation. However, the Service member may be determined fit when the condition has healed or improved such that the Service member would be capable of performing his or her duties in other than a limited-duty status.

d. Combined Effect. A Service member may be determined unfit as a result of the combined effect of two or more *impairments conditions* even though each of them, standing alone, would not cause the Service member to be referred into the DES or be found unfit because of disability. *The PEB will include in its official findings, in cases where two or more medical conditions (referred or claimed) are present in the service treatment record, that the combined effect was*

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*considered in the fitness determination as referred by the MEB. Combined effect includes the pairing of a singularly unfitting condition with a condition that standing alone would not be unfitting.*

## 5. PRESUMPTION OF FITNESS

a. Application. The DES compensates disabilities when they cause or contribute to career termination. Service members who are pending retirement at the time they are referred for disability evaluation are presumed fit for military service.

(1) Service members may overcome this presumption by presenting a preponderance of evidence that he or she is unfit for military service. The presumption of fitness may be overcome when:

(a) An illness or injury occurs within the presumptive period that would prevent the Service member from performing further duty if they were not retiring.

(b) A serious deterioration of a previously diagnosed condition, including a chronic one, occurs within the presumptive period, and the deterioration would preclude further duty if the Service member were not retiring.

(c) The condition for which the Service member is referred is a chronic condition and a preponderance of evidence establishes that the Service member was not performing duties befitting either his or her experience in the office, grade, rank, or rating before entering the presumptive period because of the condition.

(2) Service members are not presumed fit for military service in these instances of a pending retirement:

(a) The disability is one for which a Service member was previously determined unfit and continued in a permanent limited duty status. The presumption of fitness will be applied to other medical ~~impairments~~ *conditions* unless the medical evidence establishes they were impacted by the original unfitting disabilities.

(b) Selected Reserve members who are eligible to qualify for non-regular retirement pursuant to the provisions of section 12731b of Reference (c).

(c) RC members referred for non-duty-related determinations.

b. Presumptive Period. The Secretaries of the Military Departments will presume Service members are pending retirement when the ~~preparation of the Service member's MEB narrative summary~~ *Service member's referral into the DES* occurs after any of these circumstances:

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(1) A Service member's request for voluntary retirement has been approved. Revocation of voluntary retirement orders for purposes of referral into the DES does not negate application of the presumption.

(2) An officer has been approved for selective early retirement or is within 12 months of mandatory retirement due to age or length of service.

(3) An enlisted member is within 12 months of his or her retention control point or expiration of active obligated service, but will be eligible for retirement at his or her retention control point or expiration of active obligated service.

(4) An RC member is within 12 months of mandatory retirement or removal date and qualifies for a 20-year letter at the time of referral for disability evaluation.

(5) A retiree is recalled, to include those who transferred to the Retired Reserve, with eligibility to draw retired pay upon reaching the age prescribed by statute unless the recalled retiree incurred or aggravated the medical condition while on their current active duty orders and overcomes the presumption of fitness.

## 6. EVIDENTIARY STANDARDS FOR DETERMINING UNFITNESS BECAUSE OF DISABILITY

### a. Objective Evidence

(1) The Secretary of the Military Department concerned must cite objective evidence in the record, as distinguished from personal opinion, speculation, or conjecture, to determine a Service member is unfit because of disability.

(2) Doubt that cannot be resolved with evidence will be resolved in favor of the Service member's fitness through the presumption that the Service member desires to be found fit for duty.

b. Preponderance of Evidence. With the exception of presumption of fitness cases, the Secretary of the Military Department concerned will determine fitness or unfitness for military service on the basis of the preponderance of the objective evidence in the record.

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APPENDIX 3 TO ENCLOSURE 3

STANDARDS FOR DETERMINING COMPENSABLE DISABILITIES

1. OVERVIEW OF DISABILITY COMPENSATION CRITERIA. Service members who are determined unfit to perform the duties of the member's office, grade, rank, or rating because of disability in accordance with Appendix 2 of this enclosure may be eligible for disability benefits when:

a. The disability is not the result of the member's intentional misconduct or willful neglect and was not incurred during unauthorized absence or excess leave.

b. The Service member incurred or aggravated the disability while he or she was:

(1) A member of a regular component of the Military Services entitled to basic pay;

(2) A member of the Military Services entitled to basic pay, called or ordered to active duty (other than for training pursuant to section 10148 of Reference (c)) for a period of more than 30 days;

(3) A member of the Military Services on active duty for a period greater than 30 days but not entitled to basic pay pursuant to section 502(b) of Title 37, U.S.C. (Reference (~~afak~~)) due to authorized absence to participate in an educational program or for an emergency purpose, as determined by the Secretary of the Military Department concerned;

(4) A cadet at the United States Military Academy or the United States Air Force Academy or a midshipman of the United States Naval Academy after October 28, 2004; or

(5) A member of the Military Services called or ordered to active duty for a period of 30 days or less, performing IDT or traveling directly to or from the place of IDT, to funeral honors duty, or for training pursuant to section 10148 of Reference (c).

2. DISABILITY RETIREMENT CRITERIA FOR REGULAR COMPONENT MEMBERS AND MEMBERS ON ACTIVE DUTY FOR MORE THAN 30 DAYS. Service members

described in paragraphs ~~1a~~ 1.a. and ~~1b(1)~~ 1.b.(1) through ~~1b(4)~~ 1.b.(4) of this appendix will be retired with disability benefits when:

a. The disability is permanent and stable.

b. The member has:

(1) At least 20 years of service computed in accordance with section 1208 of Reference (c); or

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(2) A disability of at least 30 percent, pursuant to Reference (~~tv~~), and that disability:

(a) Was not noted at the time of the member's entrance on active duty unless the Secretary of the Military Department concerned demonstrates with clear and unmistakable evidence that the disability existed before the member's entrance on active duty and was not aggravated by active military service;

(b) Is the proximate result of performing active duty;

(c) Was incurred in the LOD in time of war or national emergency; or

(d) Was incurred in the LOD after September 14, 1978.

3. DISABILITY RETIREMENT CRITERIA FOR MEMBERS ON ACTIVE DUTY FOR 30 DAYS OR LESS, ON IDT, FUNERAL HONORS DUTY, OR TRAINING PURSUANT TO SECTION 10148 OF REFERENCE (C). Service members described in paragraphs ~~1a~~ *I.a.* and ~~1b(5)~~ *I.b.(5)* of this appendix will be retired with disability benefits when:

a. The disability is permanent and stable.

b. The Service member has:

(1) At least 20 years of service computed in accordance with section 1208 of Reference (c); or

(2) A disability of at least 30 percent, pursuant to Reference (~~tu~~), and that disability meets at least one of the following criteria:

(a) The disability was incurred or aggravated before September 24, 1996, as the proximate result of:

1. Performing active duty or IDT;

2. Traveling directly to or from the place of active duty or IDT; or

3. An injury, illness, or disease incurred or aggravated immediately before the commencement of IDT or while remaining overnight, between successive periods of IDT, at or in the vicinity of the site of the IDT, if the site of the IDT is outside reasonable commuting distance of the Service member's residence.

(b) The disability is a result of injury, illness, or disease that was incurred or aggravated in the LOD after September 23, 1996:

1. While performing active duty or IDT;

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2. While traveling directly to or from the place of active duty or IDT;
3. While remaining overnight immediately before the commencement of IDT; or
4. While remaining overnight between successive periods of IDT at or in the vicinity of the site of the IDT.

(c) The disability is a result of an injury, illness, or disease incurred or aggravated in the LOD:

1. While serving on funeral honors duty pursuant to section 12503 of Reference (c) or section 115 of Reference (~~aeaj~~);
2. While the Service member was traveling to or from the place at which the member was to serve; or
3. While the Service member remained overnight at or in the vicinity of that place immediately before serving, if it is outside reasonable commuting distance from the member's residence.

4. DISABILITY SEPARATION CRITERIA FOR REGULAR COMPONENT MEMBERS AND MEMBERS ON ACTIVE DUTY FOR MORE THAN 30 DAYS. Service members described in paragraphs ~~1a~~ 1.a. and ~~1b(1)~~ 1.b.(1) through ~~1b(4)~~ 1.b.(4) of this appendix will be separated with disability benefits when:

- a. The Service member has less than 20 years of service.
- b. The disability meets one of the following criteria:
  - (1) Is or may be permanent and less than 30 percent, pursuant to Reference (~~fv~~), and:
    - (a) Is the proximate result of performing active duty;
    - (b) Was incurred in the LOD in time of war or national emergency; or
    - (c) Was incurred in the LOD after September 14, 1978.
  - (2) Is less than 30 percent, pursuant to Reference (~~fv~~), at the time of the determination and was not noted at the time of the Service member's entrance on active duty (unless clear and unmistakable evidence demonstrates the disability existed before the Service member's entrance on active duty and was not aggravated by active military service).
  - (3) Is at least 30 percent, pursuant to Reference (~~fv~~), and at the time of the determination, the disability was neither:

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- (a) The proximate result of performing active duty;
- (b) Incurred in the LOD in time of war or national emergency; nor
- (c) Incurred in the LOD after September 14, 1978, and the Service member had less than 8 years of service computed pursuant to section 1208 of Reference (c) on the date when he or she:
  - 1. Would otherwise be retired pursuant to section 1201 of Reference (c); or
  - 2. Was placed on the TDRL pursuant to section 1202 of Reference (c).

5. DISABILITY SEPARATION CRITERIA FOR MEMBERS ON ACTIVE DUTY FOR 30 DAYS OR LESS, ON IDT, FUNERAL HONORS DUTY, OR TRAINING PURSUANT TO SECTION 10148 OF REFERENCE (C)

a. Service members described in paragraphs ~~1a~~*1.a.* and ~~1b(5)~~*1.b.(5)* of this appendix will be separated with disability benefits when:

- (1) The Service member has less than 20 years of service.
- (2) The disability meets one of the following criteria:
  - (a) Is or may be permanent.
  - (b) Is the result of an injury, illness, or disease incurred or aggravated in line of duty while:
    - 1. Performing active duty or IDT;
    - 2. Traveling directly to or from the place of active duty;
    - 3. Remaining overnight immediately before the commencement of IDT, between successive periods of IDT, at or in the vicinity of the site of the IDT if the site is outside reasonable commuting distance of the Service member's residence; or
    - 4. Serving on funeral honors duty pursuant to section 12503 of Reference (c) or section 115 of Reference (~~aeai~~) while the Service member was traveling to or from the place at which he or she was to serve; or while the Service member remained overnight at or in the vicinity of that place immediately before serving.
  - (c) Is less than 30 percent under the VASRD at the time of the determination and, in the case of a disability incurred before October 5, 1999, was the proximate result of performing active duty or IDT or of traveling directly to or from the place at which such duty is performed.

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b. If the Service member is eligible for transfer to the inactive status list pursuant to section 1209 of Reference (c) and chooses to, he or she may be transferred to that list instead of being separated.

6. LOD REQUIREMENTS. In the DES, LOD determinations assist the PEB and appellate review authority in meeting the statutory requirements under chapter 61 of Reference (c) for separation or retirement for disability.

a. Relationship of LOD Findings to DES Determinations

(1) LOD determinations will be made in accordance with the regulations of the respective Military Department. When an LOD determination is required, the DES will consider the finding made for those issues mutually applicable to LOD and DES determinations. These issues include whether a condition is pre-existing and whether it is aggravated by military service and any issues of misconduct or negligence.

(2) When the PEB has reasonable cause to believe an LOD finding appears to be contrary to the evidence, disability evaluation will be suspended for a review of the LOD determination in accordance with Service regulations. The PEB will forward the case to the final LOD reviewing authority designated by the Secretary of the Military Department concerned with a memorandum documenting the reasons for questioning the LOD finding.

b. Referral Requirement. When an LOD determination is required, it will be done before sending a Service member's case to the PEB.

c. Presumptive Determinations. The determination is presumed to be in the LOD without an investigation in the case of:

(1) Disease, except as described in paragraphs ~~6e(1) to 6e(6)~~ *6.d.(1) to 6.d.(6)* of this appendix.

(2) Injuries clearly incurred as a result of enemy action or attack by terrorists.

(3) Injuries while a passenger in a common commercial or military carrier.

d. Required Determinations. At a minimum, LOD determinations will be required in these circumstances.

(1) Injury, disease, or medical condition that may be due to the Service member's intentional misconduct or willful negligence, such as a motor vehicle accident.

(2) Injury involving the abuse of alcohol or other drugs.

(3) Self-inflicted injury.

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(4) Injury or disease possibly incurred during a period of unauthorized absence.

(5) Injury or disease apparently incurred during a course of conduct for which charges have been preferred.

(6) Injury, illness, or disease of RC members on orders specifying a period of active duty of 30 days or less while:

(a) Performing active duty or IDT;

(b) Traveling directly to or from the place of active duty;

(c) Remaining overnight immediately before the commencement of IDT, between successive periods of IDT, at or in the vicinity of the site of the IDT if the site is outside reasonable commuting distance of the Service member's residence; or

(d) Serving on funeral honors duty pursuant to section 12503 of Reference (c) or section 115 of Reference (~~aeai~~) while the Service member was traveling to or from the place at which he or she was to serve; or while the Service member remained overnight at or in the vicinity of that place immediately before serving.

## 7. EVIDENTIARY STANDARDS FOR DETERMINING COMPENSABILITY OF UNFITTING CONDITIONS

a. Misconduct and Negligence. LOD determinations concerning intentional misconduct and willful negligence will be judged by the evidentiary standards established by the Secretary of the Military Department concerned.

b. Presumption of Sound Condition for Members on Continuous Orders to Active Duty Specifying a Period of More Than 30 Days

(1) The Secretaries of the Military Departments will presume Service members, including RC members and recalled retirees, on continuous orders to active duty specifying a period of more than 30 days entered their current period of military service in sound condition when the disability was not noted at the time of the Service member's entrance to the current period of active duty.

(2) The Secretaries of the Military Departments may overcome this presumption if clear and unmistakable evidence demonstrates that the disability existed before the Service member's entrance on their current period of active duty and was not aggravated by their current period of military service. Absent such clear and unmistakable evidence, the Secretary of the Military Department concerned will conclude that the disability was incurred or aggravated during their current period of military service.

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(3) The Secretary of the Military Department concerned must base a finding that the Service member's condition was not incurred in or aggravated by their current period of military service on objective evidence in the record, as distinguished from personal opinion, speculation, or conjecture. When the evidence is unclear concerning whether the condition existed prior to their current period of military service or if the evidence is equivocal, the presumption of sound condition at entry to the current period of military service has not been rebutted and the Secretary of the Military Department concerned will find the Service member's condition was incurred in or aggravated by military service.

(4) Any hereditary or genetic disease will be evaluated to determine whether clear and unmistakable evidence demonstrates the disability existed before the Service member's entrance on active duty and was not aggravated by their current period of military service. However, even if the disability is determined to have been incurred prior to entry on their current period of active duty, any aggravation of that disease, incurred during the Service member's current period of active duty, beyond that determined to be due to natural progression will be determined to be service-aggravated.

(5) There is no presumption of sound condition for RC members serving on orders of 30 days or less.

c. Presumption of Incurrence or Aggravation in the LOD for Members on Continuous Orders to Active Duty Specifying a Period of More Than 30 Days

(1) The Secretaries of the Military Departments will presume that diseases or injuries incurred by Service members on continuous orders to active duty specifying a period of more than 30 days were incurred or aggravated in the LOD unless the disease or injury was noted at time of entry into service. The Secretaries of the Military Departments may overcome the presumption that a disease or injury was incurred or aggravated in the LOD only when clear and unmistakable evidence indicates the disease or injury existed prior to their current period of military service and was not aggravated by their current period of military service.

~~(2) There is no presumption of incurrence or aggravation in the LOD for RC members serving on orders of 30 days or less.~~

(3) Pursuant to the provisions of sections 1206(a) and 1207(a) of Reference (c), a preexisting condition is deemed to have been incurred while entitled to basic pay and will be considered for purposes of determining whether the disability was incurred in the LOD when:

(a) The Service member was ordered to active duty for more than 30 days (other than for training pursuant to section 10148(a) of Reference (c)) when the disease or injury was determined to be unfitting as subsequently determined by the PEB.

(b) The Service member was not a member of the RC released within 30 days of his or her orders to active duty in accordance with section 1206a of Reference (c) due to the identification of a preexisting condition not aggravated by the current call to duty.

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(c) The Service member will have a career total of at least 8 years of active service at the time of separation.

(d) The disability was not the result of intentional misconduct or willful neglect or was incurred during a period of unauthorized absence.

d. RC Members Serving on Orders of 30 Days or Less

(1) The Secretary of the Military Department concerned will determine if injuries and diseases to RC members serving on orders of 30 days or less were incurred or aggravated in the LOD as described in section 4 of this appendix.

(2) For RC members being examined in accordance with section 3 of this appendix, aggravation must constitute the worsening of a preexisting medical condition as a direct result of military duty and over and above the natural progression of the condition.

*(3) There is no presumption of incurrence or aggravation in the LOD for RC Service members serving on orders of 30 days or less.*

e. Prior Service Impairment Condition. Any medical condition incurred or aggravated during one period of active service or authorized training in any of the Military Services that recurs, is aggravated, or otherwise causes the member to be unfit, should be considered incurred in the LOD, provided the origin of such impairment condition or its current state is not due to the Service member's misconduct or willful negligence, or progressed to unfitness as the result of intervening events when the Service member was not in a duty status.

f. Medical Waivers

(1) Service members who entered the Military Service with a medical waiver for a preexisting condition and are subsequently determined unfit for the condition will not be entitled to disability separation or retired pay unless:

(a) Military service permanently aggravated the condition or hastened the condition's rate of natural progression; or

(b) The member will have 8 years of active service at the time of separation.

(2) Service members granted medical waivers will be advised of the waiver application process when applying for a waiver and when it is granted.

g. Treatment of Pre-existing Conditions. Generally recognized risks associated with treating preexisting conditions will not be considered service aggravation. Unexpected adverse events, over and above known hazards, directly attributable to treatment, anesthetic, or operation performed or administered for a medical condition existing before entry on active duty, may be considered service aggravation.

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h. Elective Surgery or Treatment. A Service member choosing to have elective surgery or treatment done at his or her own expense will not be eligible for compensation in accordance with the provisions of this instruction for any adverse residual effect resulting from the elected treatment, unless it can be shown that such election was reasonable or resulted from a significant impairment of judgment that is the product of a ratable medical condition.

i. Rating Disabilities. When a disability is established as compensable, it will be rated in accordance with Reference (tv). When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability, such doubt will be resolved in favor of the Service member.

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## APPENDIX 4 TO ENCLOSURE 3

### TDRL MANAGEMENT

#### 1. INITIAL PLACEMENT ON THE TDRL

a. A Service member will be placed on the TDRL when the member meets the requirements for permanent disability retirement except that the disability is not determined to be stable but may be permanent. A disability will be determined stable when the preponderance of medical evidence indicates the severity of the condition will probably not change enough within the next ~~5~~3 years to increase or decrease the disability rating percentage, *pursuant to section 1210 of Reference (c)*.

b. Service members with unstable conditions rated at a minimum of 80 percent that are not expected to improve to less than an 80 percent rating will be permanently retired.

2. TDRL RE-EVALUATION. The TDRL will be managed to meet the requirements for periodic disability examination, suspension of retired pay, and prompt removal from the TDRL pursuant to chapter 61 of Reference (c), including the reexamination of temporary retirees at least once every 18 months to determine whether there has been a change in the disability for which the member was temporarily retired.

a. Initiating the TDRL Re-evaluation Process. No later than 16 months after temporarily retiring a Service member for disability or after his or her previous re-evaluation, the Military Department will obtain and review available DoD medical treatment documentation and VA or veteran-provided medical treatment, or disability examination that occurred within 16 months of being placed on the TDRL, and rating documentation. If the documents reviewed are deemed sufficient and consistent with the requirements of chapter 61, of Reference (c), the Military Department may rely on that documentation to determine whether there has been a change in disability for which the Service member was temporarily retired. The PEB will review the available evidence to determine if the documentation is sufficient to:

(1) Fully describe each disability that the Secretary of the Military Department concerned determined was unfitting and may be permanent but was unstable at the time the Service member was placed on the TDRL, the current status of such disabilities, the progress of the disability and a suggested time frame (not to exceed 18 months) for the next examination.

(2) Fully describe, including treatment and etiology, any new disability that was caused by or directly related to the treatment of a disability for which the Service member was previously placed on the TDRL.

b. Conduct of Disability Re-examinations. If the Military Department determines the available medical records and examination reports, including those available from VA, do not meet the requirements in paragraphs ~~2a(1)~~ *2.a.(1)* and ~~2a(2)~~ *2.a.(2)* of this appendix, the Military

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Department will comply with their responsibilities in chapter 61 of Reference (c) regarding the TDRL, to include performing TDRL examinations that meet the requirements of paragraph ~~2a(1)~~ *2.a.(1)* and ~~2a(2)~~ *2.a.(2)* of this appendix.

c. PEB Re-adjudication. The Military Department will request that VA provide their most current rating and medical evidence upon which the most current rating was based for the condition for which the veteran was placed on the TDRL. The PEB ~~may use~~ *will consider* the future examination requirements set by the disability rating activity site (D-RAS) as an indicator of stability when making the recommendations of stability determinations and case disposition to the Secretary of the Military Department. If the PEB decides to continue a Service member on temporary retirement for disability for which the D-RAS has not scheduled a future examination, the Military Department will execute required TDRL examinations and ratings in accordance with chapter 61 of Reference (c).

d. PEB Disposition

(1) If the PEB finds the veteran fit for duty for the condition(s) for which he or she was placed on the TDRL; that the condition(s) is now stable; and the veteran wishes to return to active duty, the Military Department will administer any additional examinations required to evaluate whether the veteran is otherwise fit for duty in accordance with the Military Department's regulations and the guidance in this instruction. The Military Department will administer other dispositions in accordance with the guidance in this instruction.

(2) If upon re-evaluation while on the TDRL, the Service member is still found unfit ~~for~~ *due to* the unstable condition for which he or she was placed on the TDRL, evaluation of other conditions is not required. If the Service member is no longer found unfit for the unstable condition for which he or she was placed on the TDRL, an assessment will be made as to whether any other condition exists that would prevent a return to duty. If other conditions exist that render the Service member unfit, a determination will be made that the condition is unfitting but not compensable in the DES.

e. Cases on VA Appeal. When a Service member who was temporarily retired for disability has appealed a VA decision and the appeal resides with the Board of Veterans Appeals or Court of Appeals for Veterans' Claims, the Military Department will obtain from the VA a copy of the most current rating and medical evidence available.

(1) The Military Department will obtain and review the available DoD and the VA medical treatment and disability examination documentation available for the condition for which the Service member was placed on the TDRL.

(2) The Military Department will review the available medical evidence to determine if the documentation is sufficient to conduct the TDRL re-evaluation process without a disability examination of the Service member.

(3) If the PEB determines that the Service member requires an additional disability examination, the PEB will coordinate the actions needed to meet the statutory, 18-month

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examination requirement in chapter 61 of Reference (c). Upon receipt of all necessary medical evidence, the PEB will adjudicate the case.

f. Administrative Finality. During TDRL re-evaluation, as described in paragraph ~~2a-2.a.~~ of this appendix, previous determinations concerning application of any presumption established by this instruction, LOD, misconduct, and whether a medical ~~impairment condition~~ was permanent, service-incurred, or preexisting and aggravated will be considered administratively final for conditions for which the Service member was placed on the TDRL unless there is:

- (1) Evidence of fraud.
- (2) A change of diagnosis that warrants the application of accepted medical principles for a preexisting condition.
- (3) A correction of error in favor of the Service member.

g. Required Determinations. The Secretary of the Military Department concerned will determine whether the conditions for which the Service member was placed on the TDRL are unfitting and compensable. When, upon re-evaluation, a temporarily retired veteran is determined fit for the conditions for which he or she was placed on the TDRL and has no other DoD compensable disabilities, the veteran will be separated from the TDRL without entitlement to DoD disability benefits.

h. Service Member Medical Records. The Service member will provide to the examining physician, for submission to the PEB, copies of all his or her medical records (e.g., civilian, VA, and military) documenting treatment since the last TDRL re-evaluation.

i. Compensability of New Diagnoses. Conditions newly diagnosed during temporary retirement will be compensable when:

- (1) The condition is unfitting and;
- (2) The condition was caused by or directly related to the treatment of a condition for which the Service member was previously placed on the TDRL.
- (3) To correct an error in favor of the Service member, the Secretary of the Military Department concerned determines the condition was unfitting and compensable at the time the member was placed on the TDRL.

j. Current Physical Examination. Service members on the TDRL are not entitled to permanent retirement or separation with disability severance pay without a current periodic physical examination acceptable to the Secretary of the Military Department concerned as required by chapter 61 of Reference (c).

k. Refusal or Failure to Report. In accordance with chapter 61 of Reference (c), when a Service member on the TDRL refuses or fails to report for a required periodic physical

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examination or provide his or her medical records in accordance with paragraph ~~2h~~ 2.h. of this appendix, disability retired pay will be suspended.

(1) If the Service member later reports for the physical examination, retired pay will be resumed effective on the date the examination was actually performed.

(2) If the Service member subsequently shows just cause for failure to report, disability retired pay may be paid retroactively for a period not to exceed 1 year prior to the actual performance of the physical examination.

(3) If the Service member does not undergo a periodic physical examination after disability retired pay has been suspended, he or she will be administratively removed from the TDRL on the ~~five~~ *third* anniversary of the original placement on the list.

l. Priority. TDRL examinations, including hospitalization in connection with the conduct of the examination, will be furnished with the same priority given to active duty members.

m. Reports From Non-MTFs. MTFs designated to conduct TDRL periodic physical examinations may use disability examination reports from any medical facility or physician. The designated MTF remains responsible for the adequacy of the examination and the completeness of the report. The report must include the competency information specified in paragraph ~~2e~~ 2.e. of this appendix.

n. Incarcerated Members. A report of disability examination will be requested from the appropriate authorities in the case of a Service member imprisoned by civil authorities. In the event no report, or an inadequate report, is received, documented efforts will be made to obtain an acceptable report. If an examination is not received, disposition of the case will be in accordance with paragraph ~~2k~~ 2.k. of this appendix. The Service member will be advised of the disposition and that remedy rests with the respective Military Department Board for Correction of Military Records.

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APPENDIX 5 TO ENCLOSURE 3

ADMINISTRATIVE DETERMINATIONS

1. ADMINISTRATIVE DETERMINATIONS FOR PURPOSES OF EMPLOYMENT UNDER FEDERAL CIVIL SERVICE

a. The PEB renders a final decision on whether an injury or disease that makes the Service member unfit or that contributes to unfitness was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during war.

b. These determinations pertain to whether a military retiree later employed in federal civil service is entitled to credit of military service toward a federal civil service retirement in accordance with sections 8332 and 8411 of Reference (d); in accordance with section 2082 of Reference (f); ~~retention preference in accordance with section 3501 of Reference (d)~~; credit of military service for civil service annual leave accrual in accordance with section 6303 of Reference (d); and exclusion of federal income taxation in accordance with section 104 of Reference (e).

(1) Incurred in Combat with an Enemy of the United States. The disease or injury was incurred in the LOD in combat with an enemy of the United States.

(2) Armed Conflict. The disease or injury was incurred in the LOD as a direct result of armed conflict (see Glossary) in accordance with sections ~~3501 and~~ 6303 of Reference (d). The fact that a Service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

(3) Instrumentality of War During a Period of War. The injury or disease was caused by an instrumentality of war, incurred in the LOD during a period of war as defined in sections 101 and 302 of Title 38, U.S.C. (Reference (~~agal~~)), and makes the Service member unfit in accordance with sections ~~3501 and~~ 6303 of Reference (d). Applicable periods are:

(a) World War II. The period beginning December 7, 1941, and ending December 31, 1946; and any period of continuous service performed after December 31, 1946, and before July 26, 1947, if such period began before January 1, 1947.

(b) Korean Conflict. The period beginning June 27, 1950, and ending January 31, 1955.

(c) Vietnam Era. The period beginning August 5, 1964, and ending May 7, 1975.

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(d) Persian Gulf. The period beginning August 2, 1990, through date to be prescribed by Presidential proclamation or law.

2. DETERMINATIONS FOR FEDERAL TAX BENEFITS. Disability evaluation includes a determination and supporting documentation on whether the Service member's disability compensation is excluded from federal gross income in accordance with Reference (e). For compensation to be excluded, the Service member must meet the criteria in either paragraph ~~2a~~ *2.a.* or ~~2b~~ *2.b.* of this appendix.

a. Status. On September 24, 1975, the individual was a military Service member, including the RC, or was under binding written agreement to become a Service member.

(1) A Service member who was a member of an armed force of another country on that date is entitled to the exclusion.

(2) A Service member who was a contracted cadet of the Reserve Officers Training Corps on that date is entitled to the exclusion.

(3) A Service member who separates from the Military Service after that date and incurs a disability during a subsequent enlistment is entitled to the exclusion.

b. Combat Related. This standard covers injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A disability is considered combat-related if it makes the Service member unfit or contributes to unfitness and the preponderance of evidence shows it was incurred under any of the following circumstances.

(1) As a Direct Result of Armed Conflict. The criteria are the same as those in paragraph 1.b. of this appendix.

(2) While Engaged in Hazardous Service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

(3) Under Conditions Simulating War. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

(4) Caused by an Instrumentality of War. Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality

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of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

3. RECOUPMENT OF BENEFITS. In accordance with sections 303a and 373 of Reference (~~a~~*ak*), when a Service member is retired, separated or dies as a result of a combat-related disability and has received a bonus, incentive pay, or similar benefit, the Secretary of the Military Department concerned:

a. Will not require repayment by the Service member or his or her family of the unearned portion of any bonus, incentive pay, or similar benefit previously paid to the Service member.

b. Will require the payment to the Service member or his or her family of the remainder of any bonus, incentive pay, or similar benefit that was not yet paid to the member, but to which he or she was entitled immediately before the death, retirement, or separation.

c. Will not apply paragraphs ~~3a~~*3.a.* and ~~3b~~*3.b.* of this appendix if the death or disability was the result of the Service member's misconduct.

4. DETERMINATION FOR RC MEMBERS WHO ARE TECHNICIANS AND DETERMINED UNFIT BY THE DES. In accordance with section 10216(g) of Reference (c), the record of proceedings for RC members who are technicians and determined unfit by the DES must include whether the member was determined unfit due to a combat-related event.

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## APPENDIX 6 TO ENCLOSURE 3

### FINAL DISPOSITION

#### 1. FINAL DECISION AUTHORITY

a. Secretary of Defense. The Secretary of Defense, after considering the recommendation of the USD(P&R), approves or disapproves the appeal of any Service member found fit for duty by the PEB but determined unsuitable for continued service by the Secretary of the Military Department concerned for the same medical condition considered by the PEB.

b. USD(P&R). The USD(P&R), after considering the recommendation of the ASD(HA), approves or disapproves the disability retirement of any general or flag officer or medical officer being processed for, scheduled for, or receiving non-disability retirement for age or length of service.

c. Secretaries of the Military Departments. Except as stated in paragraphs ~~1a~~ *1.a.* and ~~1b~~ *1.b* of this appendix, the Secretary of the Military Department concerned has the authority to make all determinations in accordance with this instruction regarding unfitness, disability percentage, and entitlement to disability severance and retired pay.

#### 2. GENERAL RULES REGARDING DISPOSITION

##### a. Retirement

(1) Except for Service members approved for permanent limited duty consistent with section 3 of this appendix, any Service member on active duty or in the RC who is found to be unfit will be retired, if eligible, or separated. This general rule does not prevent disciplinary or other administrative separations from the Military Services.

(2) Selected Reserve members with at least 15 but no more than 20 years of qualifying service pursuant to section 12732 of Reference (c) who are to be separated, may elect either separation for disability or early qualification for retired pay at age 60 pursuant to sections 12731 and ~~12731(b)~~ *12731b* of Reference (c). However, the separation or retirement for disability cannot be due to the member's intentional misconduct, willful failure to comply with standards and qualifications for retention, or willful neglect, and cannot have been incurred during a period of unauthorized absence or excess leave.

b. Removal From the TDRL. Service members determined fit as a result of TDRL re-evaluation will be processed as:

(1) Appointment and/or Enlistment. Upon the Service member's request, and provided he or she is otherwise eligible, the Secretary of the Military Department concerned will appoint

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or enlist the Service member in the applicable grade and component as outlined in section 1211 of Reference (c).

(2) Recall to Active Duty

(a) Regular Officers and Enlisted Members. Subject to their consent, regular officers and enlisted members will be recalled to duty, if they are otherwise eligible and were not separated in accordance with law or regulation at the time they were placed on the TDRL. They will be deemed medically qualified for those conditions on which a finding of fit was determined. Any new condition arising between DES evaluation and recall must meet the respective Military Service's medical standards for retention.

(b) RC. Subject to their consent, RC officers, warrant officers, and enlisted members will be reappointed or reenlisted as a Reserve for service in their respective RC in accordance with section 1211 of Reference (c). RC members determined fit by TDRL re-evaluation will not be involuntarily assigned to the Individual Ready Reserve.

(3) Separation. In accordance with section 1210(f) of Reference (c), Service members required to be separated or retired for non-disability reasons at the time they were referred for disability evaluation and placed on the TDRL, if determined fit, will be separated or retired, as applicable.

(4) Termination of TDRL Status. TDRL status and retired pay will terminate upon discharge, recall, reappointment, or reenlistment, as outlined in section 1211 of Reference (c).

(5) Right to Apply for VA Benefits. A Service member may not be discharged or released from active duty due to a disability until he or she has been counseled on their right to make a claim for compensation, pension, or hospitalization with the VA.

3. CONTINUANCE OF UNFIT SERVICE MEMBERS ON ACTIVE DUTY OR IN THE RESERVES. Upon the request of the Service member or upon the exercise of discretion based on the needs of the Military Departments, the Secretary of the Military Department concerned may allow unfit Service members to continue in a permanent limited-duty status, either active or reserve duty in the same or different rating or occupational specialty. Such continuation may be justified by the Service member's service obligation or special skill and experience. The Secretaries of the Military Department concerned may also consider transfer to another Military Service.

4. TRANSITION BENEFITS. AC and RC members on active duty are entitled to the transition benefits established by Reference (*aeah*) when being separated or retired for disability unless waived by the DoD or prohibited by federal law.

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## 5. DISPOSITIONS FOR UNFIT SERVICE MEMBERS

a. Permanent Disability Retirement. If the Service member is unfit, retirement for a permanent and stable compensable disability is directed pursuant to section 1201 or 1204 of Reference (c) either:

(1) When the total disability rating is at least 30 percent in accordance with the VASRD and the Service member has less than 20 years of service computed pursuant to section 1208 of Reference (c); or

(2) When the Service member has at least 20 years of service computed pursuant to section 1208 of Reference (c) and the disability is rated at less than 30 percent.

b. Placement on the TDRL. Retirement is directed pursuant to section 1202 or 1205 of Reference (c) when the requirements for permanent disability retirement are met, except the disability is not stable and may be permanent.

### c. Separation With Disability Severance Pay

(1) Criteria. Separation is directed pursuant to section 1203 or 1206 of Reference (c) when the member is unfit for a compensable disability determined in accordance with the standards of this instruction, and the following requirements are met. Stability is not a factor for this disposition.

(a) The Service member has less than 20 years of service computed pursuant to section 1208 of Reference (c).

(b) The disability is rated at less than 30 percent.

#### (2) Service Credit

(a) Pursuant to section 1212 of Reference (c), a part of a year of active service that is 6 months or more is counted as a whole year, and a part of a year that is less than 6 months is disregarded.

(b) The Secretary of the Military Department concerned will credit members separated from the Military Services for a disability with a minimum of 3 years of service.

(c) The Secretary of the Military Department concerned will credit members separated from the Military Services for a disability incurred in the LOD in a designated combat zone tax exclusion area or incurred during the performance of duty in combat-related operations consistent with the criteria in paragraph ~~2b~~ 2.b. of Appendix 5 to this enclosure with a minimum of 6 years of service.

(d) For the purposes of calculating active service for disability severance pay, the Secretary of the Military Department concerned will consider disabilities to be incurred in

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combat-related operations when they are consistent with the criteria in paragraph ~~2b~~ 2.b. of Appendix 5 to this enclosure.

(3) Transfer to Retired Reserve

(a) Pursuant to section 1209 of Reference (c), RC members who have completed at least 20 qualifying years of Reserve service and who would otherwise be qualified for retirement may forfeit disability severance pay and request transfer to an inactive status list for the purpose of receiving non-disability retired pay at age 60. The Secretary of the Military Department concerned may offer the member the option to transfer to the Retired Reserve.

(b) When disability severance pay is accepted, the Service member forfeits all rights to receive retired pay pursuant to chapter 1223 of Reference (c) at age 60. There are no provisions pursuant to Reference (c) to repay disability severance pay to then receive retired pay.

(4) Selected Reserve Early Qualification for Retired Pay. Pursuant to section 12731 of Reference (c), RC members with at least 15 and less than 20 years of qualifying service who would otherwise be qualified for ~~nonregular~~ non-regular retirement may waive disability disposition and request early qualification for retired pay in accordance with ~~12731(b)~~ section 12731b of Reference (c).

d. Separation Without Entitlement to Benefits. Discharge is directed in accordance with section 1207 of Reference (c) when the Service member is unfit for a disability incurred as a result of intentional misconduct or willful neglect or during a period of unauthorized absence.

e. Discharge Pursuant to Other Than Chapter 61 of Reference (c). An unfit Service member is directed for discharge in accordance with other provisions of Reference (c) and Reference (ada) and DoDI 1332.30 (Reference (aham)) when he or she is not entitled to disability compensation due to the circumstances when either:

(1) The Service member is not entitled to disability compensation, but may be entitled to benefits under section 1174 of Reference (c); or

(2) The medical ~~impairment~~ condition of an RC member is non-duty related and it disqualifies the member for retention in the RC.

f. Revert with Disability Benefits. Revert with disability benefits is used to return a retiree recalled to active duty who was:

(1) Previously retired for disability.

(2) Determined unfit during the period of recall. For Service members previously retired for age or years of service, the compensable percentage of disability must be 30 percent or more to receive disability benefits.

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GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

AC	Active Component
ASD(HA)	Assistant Secretary of Defense for Health Affairs
<del>ASD(RA)</del>	<del>Assistant Secretary of Defense for Reserve Affairs</del>
<i>ASD(M&amp;RA)</i>	<i>Assistant Secretary of Defense for Manpower and Reserve Affairs</i>
DAC	Disability Advisory Council
<del>DASD(WCP)</del>	<del>Deputy Assistant Secretary of Defense for Warrior Care Policy</del>
<i>DASD(HSP&amp;O)</i>	<i>Deputy Assistant Secretary of Defense for Health Services Policy and Oversight</i>
DES	disability evaluation system
DoDD	DoD Directive
DoDI	DoD Instruction
D-RAS	disability rating activity site
<del>EDES</del>	<del>Expedited Disability Evaluation System</del>
FPEB	formal physical evaluation board
GC DoD	General Counsel of the Department of Defense
IDES	Integrated Disability Evaluation System
IDT	inactive duty training
IPEB	informal physical evaluation board
IT	information technology
LDES	Legacy Disability Evaluation System
LOD	line of duty
MEB	medical evaluation board
MTF	military treatment facility
PEB	physical evaluation board

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PEBLO	physical evaluation board liaison officer
RC	Reserve Component
TDRL	temporary disability retired list
U.S.C.	United States Code
USD(P&R)	Under Secretary of Defense for Personnel and Readiness
VA	Department of Veterans Affairs
VASRD	Department of Veterans Affairs Schedule for Rating Disabilities

## PART II. DEFINITIONS

Unless otherwise noted, these terms and their definitions are for the purpose of this instruction.

accepted medical principles. Fundamental deductions, consistent with medical facts, that are so reasonable and logical as to create a virtual certainty that they are correct. *The Service PEB will state with specificity the basis(es) for the conclusion.*

active duty. Defined in ~~Joint Publication 1-02~~ *the DoD Dictionary of Military and Associated Terms* (Reference (~~ai~~an)).

acute. Characterized by sharpness or severity.

armed conflict. A war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which Service members are engaged with a hostile or belligerent nation, faction, force, or terrorist. Armed conflict may also include such situations as incidents involving a member while interned as a prisoner of war or while detained against his or her will in the custody of a hostile or belligerent force or while escaping or attempting to escape from such confinement, prisoner-of-war, or detained status.

catastrophic injury or illness. A permanent, severely disabling injury, disorder, or disease incurred or aggravated in the LOD that compromises the ability to carry out the activities of daily living to such a degree that a Service member requires personal or mechanical assistance to leave home or bed or requires constant supervision to avoid physical harm to self or others.

clear and unmistakable evidence. Undebatable information that the condition existed prior to military service or if increased in service was not aggravated by military service. In other words, reasonable minds could only conclude that the condition existed prior to military service from a review of all of the evidence in the record.

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compensable disability. A medical condition that is determined to be unfitting due to disability and that meets the statutory criteria of chapter 61 of Reference (c) for entitlement to disability retired or severance pay.

competency board. A board consisting of at least three medical officers or physicians (including one psychiatrist) convened to determine whether a member is competent (capable of making a rational decision regarding his or her personal and financial affairs).

DAC. A DoD-only group that evaluates DES functions, identifies best practices, addresses inconsistencies in policy, discusses inconsistencies in law, addresses problems and issues in the administration of the DES, and provides a forum to develop and plan improvements.

DES. The DoD mechanism for determining return to duty, separation, or retirement of Service members because of disability in accordance with chapter 61 of Reference (c).

disability. Any **impairment condition** due to disease or injury, regardless of degree, that reduces or prevents an individual's actual or presumed ability to engage in gainful employment or normal activity. The term "disability" or "physical disability" includes mental disease, but not such inherent defects as developmental or behavioral disorders. A medical **impairment condition**, mental disease, or physical defect standing alone does not constitute a disability. To constitute a disability, the medical **impairment condition**, mental disease, or physical defect must be severe enough to interfere with the Service member's ability to adequately perform his or her duties.

*duty-related medical conditions. Conditions that were incurred or aggravated while the AC or RC Service member was performing duty.*

~~EDES. A voluntary expedited process to authorize benefits, compensation, and specialty care to Service members who sustain catastrophic injuries or illnesses.~~

elective surgery. Surgery that is not essential, especially surgery to correct a condition that is not life-threatening; surgery that is not required for survival.

final reviewing authority. The final approving authority for the findings and recommendations of the PEB.

grave. Very serious: dangerous to life-used of an illness or its prospects.

IDES. The joint DoD -VA process by which DoD determines whether ill or injured Service members are fit for continued military service and DoD and VA determine appropriate benefits for Service members who are separated or retired for disability.

instrumentality of war. A vehicle, vessel, or device designed primarily for military service and intended for use in such service at the time of the occurrence or injury.

DoDI 1332.18, August 5, 2014

LDES. A DES process by which DoD determines whether eligible wounded, ill, or injured Service members are fit for continued military service and determines appropriate benefits for Service members who are separated or retired for disability. Service members processed through the LDES may also apply for veterans' disability benefits through the VA pre-discharge Benefits Delivery at Discharge or Quick Start programs, or upon attaining veteran status.

LOD determination. An inquiry to determine whether an injury or illness was incurred when the Service member was in a military duty status. If the Service member was not in a military duty status, whether it was aggravated by military duty; or whether it was incurred or aggravated due to the Service member's intentional misconduct or willful negligence.

MEB convening authority. A senior medical officer, appointed by the MTF commander, who has detailed knowledge of standards of medical fitness and disposition of patients and disability separation processing and who is familiar with the VASRD.

MEB process. For Service members entering the DES, the MEB conducts the medical evaluation on conditions that potentially affect the Service member's fitness for duty. The MEB documents the Service member's medical condition(s) and history with an MEB narrative summary as part of an MEB packet.

medical impairment condition. Any disease or residual of an injury that results in a lessening or weakening of the capacity of the body or its parts to perform normally, according to accepted medical principles.

non-duty-related medical conditions. *Impairments Conditions* that were neither incurred nor aggravated while the *AC or RC Service* member was performing duty.

office, grade, rank, or rating

office. A position of duty, trust, and authority to which an individual is appointed.

grade. A step or degree in a graduated scale of office or military rank that is established and designated as a grade by law or regulation.

rank. The order of precedence among members of the Military Services.

rating. The name (such as "Boatswain's Mate") prescribed for Service members of a Military Service in an occupational field.

PEBLO. The non-medical case manager who provides information, assistance, and case status updates to the affected Service member throughout the DES process.

permanent limited duty. The continuation on active duty or in the Ready Reserve in a limited-duty capacity of a Service member determined unfit because of disability evaluation or medical disqualification.

DoDI 1332.18, August 5, 2014

presumption. An inference of the truth of a proposition or fact reached through a process of reasoning and based on the existence of other facts. Matters that are presumed need no proof to support them, but may be rebutted by evidence to the contrary.

proximate result. A permanent disability the result of, arising from, or connected with active duty, annual training, active duty for training, or IDT, to include travel to and from such duty or remaining overnight between successive periods of IDT. Proximate result is a statutory criterion for entitlement to disability compensation under chapter 61 of Reference (c) applicable to RC members who incur or aggravate a disability while performing an ordered period of military duty of 30 days or less.

retention standards. Guidelines that establish medical conditions or physical defects that could render a Service member unfit for further military service and may be cause for referral of the Service member into the DES.

service aggravation. The permanent worsening of a pre-Service medical condition over and above the natural progression of the condition.

service treatment record. ~~A chronological record documenting the medical care, dental care and treatment received primarily outside of a hospital (outpatient), but may contain a synopsis of any inpatient hospital care and behavioral health treatment.~~ *The chronologic record of medical, dental, and mental health care received by Service members during the course of their military career. It includes documentation of all outpatient appointments (i.e., without overnight admittance to a hospital, clinic, or treatment facility), as well as summaries of any inpatient care (discharge summaries) and care received while in a military theater of operations. The service treatment record is the official record used to support continuity of clinical care and the administrative, business-related, and evidentiary needs of the DoD, the VA, and the individual.*



## DoD INSTRUCTION 1332.45

### RETENTION DETERMINATIONS FOR NON-DEPLOYABLE SERVICE MEMBERS

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**Originating Component:** Office of the Under Secretary of Defense for Personnel and Readiness

**Effective:** July 30, 2018

**Releasability:** Cleared for public release. Available on the Directives Division Website at <http://www.esd.whs.mil/DD/>.

**Incorporates and Cancels:** Office of the Under Secretary of Defense for Personnel and Readiness Memorandum, "DoD Retention Policy for Non-Deployable Service Members," February 14, 2018

**Approved by:** Robert L. Wilkie, Under Secretary of Defense for Personnel and Readiness

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**Purpose:** In accordance with the authority in DoD Directive 5124.02, this issuance:

- Establishes policy, assigns responsibilities, and provides direction for retention determinations for non-deployable Service members.
- Provides guidance and instructions for reporting deployability data for the Total Force.

DoDI 1332.45, July 30, 2018

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## SECTION 1: GENERAL ISSUANCE INFORMATION

**1.1. APPLICABILITY.** This issuance applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this issuance as the “DoD Components”).

**1.2. POLICY.** It is DoD policy that:

a. To maximize the lethality and readiness of the joint force, all Service members are expected to be deployable.

b. Service members who are considered non-deployable for more than 12 consecutive months will be evaluated for:

(1) A retention determination by their respective Military Departments.

(2) As appropriate, referral into the Disability Evaluation System (DES) in accordance with DoD Instruction (DoDI) 1332.18 or initiation of processing for administrative separation in accordance with DoDI 1332.14 or DoDI 1332.30. This policy on retention determinations for non-deployable Service members does not supersede the policies and processes concerning referral to the DES or the initiation of administrative separation proceedings found in these issuances.

c. Implementation for this policy is October 1, 2018.

**1.3. INFORMATION COLLECTIONS.** The Monthly Non-deployable Report, referred to in Paragraph 3.2. of this issuance, has been assigned report control symbol DD-P&R(M)2671 in accordance with the procedures in Volume 1 of DoD Manual 8910.01. The expiration date of this information collection is listed in the DoD Information Collections System at <https://apps.sp.pentagon.mil/sites/dodiic/Pages/default.aspx>.

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## **SECTION 2: RESPONSIBILITIES**

### **2.1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS**

**(USD(P&R)).** The USD(P&R) establishes and oversees policy on retention determinations for non-deployable Service members.

### **2.2. ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS (ASD(M&RA)).** Under the authority, direction, and control of the USD(P&R), the ASD(M&RA):

- a. Develops policy on the retention of non-deployable Service members.
- b. Monitors the implementation of this guidance.
- c. Tracks the number of non-deployable Service members and those non-deployable Service members retained in military service and the justification for such retention, in accordance with Section 3 of this issuance.

### **2.3. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS.** Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Health Affairs:

- a. Develops policy recommendations to the USD(P&R) for uniform retention medical standards in coordination with the Secretaries of the Military Departments.
- b. Provides oversight of related medical policies and programs.

### **2.4. SECRETARIES OF THE MILITARY DEPARTMENTS.** The Secretaries of the Military Departments:

- a. Will:
  - (1) Determine the deployability status of Service members.
  - (2) Make retention determinations consistent with this issuance for Service members who have been non-deployable for more than 12 consecutive months.
  - (3) Submit monthly reports identifying the number of non-deployable Service members for all components within their Departments to the Office of the USD(P&R) in accordance with Paragraph 3.2. of this issuance.
  - (4) Monitor compliance with requirements established in DoDI 6025.19 to ensure required evaluations, assessments, and other medically related actions are accomplished to improve individual and overall unit readiness.

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b. May:

(1) Retain in service those Service members whose period of non-deployability exceeds the 12 consecutive month limit in Paragraph 1.2. of this issuance if determined to be in the best interest of the Military Service.

(2) Delegate the authority in Paragraph 2.4.(b)(1) of this issuance to retain in service those Service members whose period of non-deployability exceeds the 12 consecutive month limit. Such a delegation must be in writing, and may only be made to Presidentially Appointed, Senate-Confirmed officials; Senior Executive Service members; or general/flag officers serving at the Military Department or Service headquarters.

(3) Initiate administrative separation processing, or referral to the DES, as appropriate, prior to a non-deployable Service member being in a non-deployable status for 12 months when the Military Service determines there is a reasonable expectation that the reason will not be resolved and the Service member will not become deployable.

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## **SECTION 3: PROCEDURES FOR TRACKING AND REPORTING SERVICE MEMBERS**

### **3.1. TRACKING.**

a. The Military Departments will monitor and track the number of Service members by Military Service that are:

(1) Non-deployable in accordance with the categories established in Paragraphs 3.5. and 3.6. of this issuance.

(2) Deployable with limitations in accordance with Paragraph 3.3. of this issuance.

(3) Deployable but have individual medical readiness (IMR) deficits in accordance with Paragraph 3.7. of this issuance.

(4) In training or in a transient status in accordance with the category defined in Paragraph 3.4. of this issuance.

b. To ensure accurate and consistent accounting across the DoD, Military Services will account for Service members in only one category. If a Service member can be accounted for in more than one category, the Service member will be counted only once and in the category with the highest priority listed in accordance with Paragraph 3.8. of this issuance.

### **3.2. REPORTING.**

a. The Secretaries of the Military Departments will report to the ASD(M&RA) the number of non-deployable personnel (and other categories as provided in this section) for all Military Services, and their respective components, on a monthly basis.

(1) The format for the Monthly Non-deployable Report can be found at <https://prhome.defense.gov/M-RA/Inside-M-RA/MPP/OEPM/>.

(2) Reports are due by the end of each month with data current as the last day of the previous month. For example, the June Non-deployable Report is due by June 30th with non-deployable data as of May 31st.

b. The number of non-deployable Service members is reported by categories, either temporary or permanent, and grouped into medical, legal, or administrative sub-categories. Each sub-category is further broken down to account for the specific reasons or conditions that make a Service member non-deployable.

c. The number of Service members who are deployable with limitations, in accordance with Paragraph 3.3. of this issuance, will be categorized separately on the monthly report. Such Service members are not to be counted in the non-deployable populations.

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d. The number of Service members who require urgent or emergent dental treatment for dental readiness (Dental Class 3), are overdue for annual dental screening (Dental Class 4), or are overdue for a Periodic Health Assessment (PHA) are reported as IMR Deficits in accordance with Paragraph 3.7. of this issuance. Such Service members are not counted in the non-deployable populations.

e. The number of Service members who are in a training or transient status are reported in one of the four categories listed in Paragraph 3.4. of this issuance.

**3.3. DEPLOYABLE WITH LIMITATIONS.** Service members with a medical condition that requires additional medical screening, or Combatant Command approval prior to deployment outside the continental United States, will be categorized as Deployable with Limitations. This includes, but is not limited to, conditions referred to in DoDI 6490.07.

**3.4. TRAINING AND TRANSIENT.** The Training and Transient category provides a means to track the human resources necessary to maintain a healthy force, within current end strength constraints. This category contains Service members who are not immediately ready for deployment and fall into one of the following four categories:

**a. Initial Entry Training.** These Service members are:

(1) Enlisted Service members at recruit training, initial skill training, and other proficiency or developmental training accomplished before moving to the member's first permanent duty assignment. This includes all in-transit time commencing upon entry into active service, through completion of the final course of initial entry training that terminates enlisted trainee status.

(2) Enlisted trainees who enter officer candidate school, officer training school, and Service academy preparatory school following enlistment on active duty. These members will be considered:

(a) Enlisted trainees from initial entry on active duty until commissioning.

(b) Upon commissioning, officer accession students and will remain in the initial entry training category for any subsequent initial entry training, or until they begin travel to their first permanent duty assignment.

(3) Officers at officer basic courses, and all initial skill and proficiency training taken before travel to the Service member's first permanent duty assignment. This includes all in-transit time from entry on active duty until completion of the last initial entry course of instruction.

(4) Reserve Component (RC) Service members (enlisted and officer) who enter the Ready Reserve and are awaiting initial entry training.

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**b. Cadets and Midshipman.** These are individuals currently attending the U.S. Military Academy, the U.S. Air Force Academy, or the U.S. Naval Academy. In accordance with Section 115 of Title 10, United States Code (U.S.C.), cadets and midshipman are counted in the active duty end strength for their respective Service, but by policy are non-deployable while attending school.

**c. All Other Training.** These are Service members who are attending training that is 20 weeks or more in length, and is conducted after their initial entry training. Examples include Command and Staff Colleges, Senior Service College, the United States Army Sergeants Major Academy, medical residencies, and all other post-graduate professional education opportunities.

**d. Transient.** These are Service members who are not available for duty while executing permanent change of station orders at the time of the report. This category does not include military personnel who are:

- (1) On temporary duty for training between permanent duty stations, or;
- (2) Moving between entry-level courses of instruction, specifically Service members who have departed from one duty station and are in transit but have not yet reported for duty at the next permanent duty station.

### **3.5. TEMPORARY NON-DEPLOYABLE CATEGORIES.**

**a. Medical.** Service members are considered temporarily non-deployable for one of three reasons:

- (1) **Patient.** In accordance with DoDI 1120.11, Service members who are hospitalized and are projected to heal, recover, and return to full duty in less than 12 months are temporarily non-deployable.
- (2) **Medical Condition That Limits Full Duty.** Service members who have temporary profiles or are in limited duty status are counted as temporarily non-deployable. Light duty will not be reported as non-deployable unless the duration exceeds 30 days, with discretion given to the medical officer to extend light duty status for up to 60 days, making light duty no longer than 90 days for conditions expected to recover or stabilize within that time.
- (3) **Pregnancy (including post-partum).** Service members who are pregnant or in the post-partum phase are temporarily non-deployable. The post-partum phase ranges from 6 to 12 months after childbirth for female Service members and is determined by individual Service policy.

**b. Legal.** Service members are considered temporarily non-deployable for one of two reasons:

- (1) **Prisoner.** Service members convicted by civilian or military authorities and sentenced to confinement of more than 30 days, but for 6 months or less, are temporarily non-

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deployable. Service members confined for more than 6 months are not included in end strength numbers and will not be included in the monthly non-deployability report.

(2) **Legal Action.** Service members who are under arrest, confined 30 days or less, pending military or civil court action, under investigation, a material witness, on commander directed hold, pending non-judicial punishment action under Section 815 of Title 10, U.S.C., also known as Article 15 of the Uniformed Code of Military Justice (UCMJ), or pending discharge based on action under the UCMJ are temporarily non-deployable.

**c. Administrative.** These Service members are considered temporarily non-deployable for one of eight reasons:

(1) **Absent Without Leave or Unauthorized Absence.** Service members who are absent without leave, as defined in Section 886 of Title 10, U.S.C., also known as Article 86 of the UCMJ, will be considered as temporarily non-deployable.

(2) **Family Care Plan.** In accordance with DoDI 1342.19, Service members required but failing to have a family care plan in place are temporarily non-deployable.

(3) **Adoption.** Service members who are single parents or one member of a dual military couple and are adopting a child are temporarily non-deployable. They are non-deployable for at least 6 months after the child is placed in the home, or longer dependent on the administrative stabilization period prescribed by the jurisdiction in which the adoption occurred.

(4) **Service Member Under 18.** Service members who are not yet 18 years of age are temporarily non-deployable. The Child Soldier Prevention Act of 2007 prohibits Service members under the age of 18 from taking part in hostilities as a member of governmental armed forces.

(5) **Humanitarian Assignment.** Service members assigned to a location to provide support to a family member are temporarily non-deployable. These Service members typically receive 12 to 24 months stabilization by Military Service policy.

(6) **Service Discretion.** Military Services may designate Service members temporarily non-deployable when the previous categories do not apply. Examples include:

(a) Simultaneous Membership Program or Officer Candidate School.

(b) Education stabilization; mobilization deferral for affiliation after release from Active Component.

(7) **Pending Administrative Separation.** Service members being processed for administrative separation are temporarily non-deployable.

(8) **Unsatisfactory Participants or Administrative Action Pending (RC Only).** Service members who are determined to be unsatisfactory participants, as defined in DoDI 1215.13, are temporarily non-deployable.

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### 3.6. PERMANENT NON-DEPLOYABLE CATEGORIES.

**a. Medical.** Service members are considered non-deployable for one of three reasons listed below.

(1) **Permanent Limited Duty.** Service members with a medical condition that permanently prevents deployment are non-deployable. This includes Service members processed through the DES who are not deployable and were retained in the Military Service. In accordance with Section 1214a of Title 10, U.S.C., Service members cannot be involuntarily administratively separated or denied reenlistment due to unsuitability based solely on the medical condition considered in the evaluation unless the request to separate the Service member is approved by the Secretary of Defense. The Military Service may direct the Service member to reenter the DES process to be reconsidered for retirement or separation for disability.

(2) **Enrolled in DES.** In accordance with DoDI 1332.18, Service members currently enrolled in the DES process are non-deployable. That includes those pending separation or retirement after receiving a “not fit for duty” determination through the DES.

(3) **Permanent Profile Non-duty Related Action Needed (RC).** Those RC Service members who have a permanent profile and are pending a decision on a line of duty determination are non-deployable.

**b. Administrative.** These Service members are considered non-deployable for one of three reasons:

(1) **Sole Survivor, Surviving Family Member, or Deferred from Hostile Fire Zone.** Service members who acquired the status in accordance with DoDI 1315.15 are non-deployable.

(2) **Unable to Carry a Firearm.** Service members who are subject to the provisions of Section 922 of Title 18, U.S.C. are non-deployable.

(3) **Conscientious Objector.** Service members who are granted restriction of military duties in accordance with DoDI 1300.06 are non-deployable.

**c. Approved for Retention.** This category accounts for Service members who are retained by the Military Department despite being in a non-deployable status for 12 months or longer. Service members who the Military Departments retained in Service and are considered non-deployable for one of two reasons:

(1) **Combat Wounded.** These are Service members whose injuries were the result of hostile action, meet the criteria for awarding of the Purple Heart, and whose injuries were not the result of their own misconduct.

(2) **Other.** These are Service members who are not designated as combat wounded but are non-deployable and retained in the Military Service by the Secretary of the Military Department in accordance with Paragraph 2.4. of this issuance.

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**3.7. IMR DEFICITS.** These IMR categories are not considered non-deployable conditions. Components are expected to immediately correct all IMR deficits to ensure Service members are medically ready to deploy.

**a. Overdue PHA.** These Service members are not compliant with the requirement to complete a PHA in accordance with DoDI 6025.19.

**b. Dental Readiness (Dental Class 3).** Service members who require urgent or emergent dental treatment.

**c. Overdue Dental Screening (Dental Class 4).** Service members who are not compliant with the requirement to complete a dental screening in accordance with DoDI 6025.19.

**d. Additional IMR Categories.** In addition to dental categories (Dental Classes 3 and 4) and PHAs, the Military Departments track three additional areas of IMR: immunization status, medical readiness and laboratory studies, and individual medical equipment. In accordance with DoDI 6025.19, Service members who are not current in these areas are considered partially medically ready.

**3.8. PRIORITIZATION OF SERVICE MEMBERS BY CATEGORY.** This paragraph sets the prioritization for the grouping of Service members into categories to provide consistent reporting among the Military Departments, in accordance with Paragraph 3.1.(b) of this issuance. Service members will be counted only once, in a single category; Service members who may fall into more than one category will be reported in the priorities established in this paragraph. These categories are listed below in descending order of priority.

**a. Deployed.** This category includes Service members who are currently deployed. These Service members will not be counted in any other category (including deployable with limitations or approved for retention).

**b. Deployable with Limitations.**

**c. Approved for Retention.**

(1) Combat wounded – Non-deployable but retained.

(2) Other – Non-deployable but retained.

**d. Permanent Non-Deployable.**

(1) Medical permanent limited duty.

(2) Administrative.

(a) Sole survivor, surviving family member, or deferred from hostile fire zone.

(b) Unable to carry a firearm (e.g., Lautenberg Amendment).

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- (c) Conscientious objector.
- (d) Ex-prisoner of war.
- (3) Medical Enrolled in DES.
- (4) Permanent profile non-duty related action needed (RC).

**e. Training and Transient.**

- (1) Initial entry training.
- (2) Cadets or Midshipmen.
- (3) All other training.
- (4) Transient (permanent change of station).

**f. Temporary Non-Deployable.**

- (1) Medical.
  - (a) Patient (assigned to “Individuals Account”).
  - (b) Medical condition that limits full duty.
  - (c) Pregnancy (including post-partum).
- (2) Legal.
  - (a) Prisoner.
  - (b) Legal Action.
- (3) Administrative.
  - (a) Absence without leave.
  - (b) Family Care Plan.
  - (c) Adoption.
  - (d) Service member under 18.
  - (e) Humanitarian assignment.
  - (f) Service Discretion.
  - (g) Pending Administrative Separation.

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(h) Unsatisfactory participants or admin action pending (RC).

**g. IMR Deficits.**

- (1) Overdue PHA.
- (2) Dental readiness (Dental Class 3).
- (3) Overdue dental screening (Dental Class 4).

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## **SECTION 4: RETENTION DETERMINATION**

**4.1. RETENTION AUTHORITY FOR NON-DEPLOYABLE SERVICE MEMBERS.** In accordance with Paragraph 2.4. of this issuance, the Secretaries of the Military Departments have retention authority.

### **4.2. RETENTION DETERMINATION.**

a. The Secretaries of the Military Departments may retain Service members who are non-deployable in excess of 12 consecutive months, on a case-by-case basis, if determined to be in the best interest of the Service, based on:

(1) The Service member's ability to perform appropriate military duties commensurate with his or her office, grade, rank, or skill.

(2) The likelihood that the Service member will resolve the condition or reason that is the underlying cause of his or her non-deployable status.

b. The Secretaries of the Military Departments may approve retention for Service members who are non-deployable in excess of 12 consecutive months for up to:

(1) The length of time remaining on a Service member's enlistment contract; or

(2) Three years for officers, including warrant officers, and those enlisted members serving on indefinite contracts.

(3) Upon expiration of the retention period, the Secretary of the Military Department concerned may renew retention for a Service member on a case-by-case basis for periods stated in this paragraph.

c. The Secretaries of the Military Departments may establish procedures for Service members who are or will be non-deployable for 12 months or longer due to an administrative reason to request retention consideration.

d. Approval of the retention for Service members who are non-deployable for 12 months or longer will only be made for individual Service members, not an entire cohort or skill set of Service members.

e. Except as required by DoDI 1332.18, the Secretaries of the Military Departments may request from the Secretary of Defense the authority to automatically exempt Service members serving in specified positions from the requirement for a retention determinations pursuant to Paragraph 2.4.b.

f. When appropriate, Service members not recommended for further retention will be considered for processing for administrative separation in accordance with DoDI 1332.14 or DoDI 1332.30, or referral for disability separation in accordance with DoDI 1332.18.

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#### **4.3. SPECIAL CATEGORIES.**

a. Pregnant and post-partum Service members, as a group, are exempt from Paragraph 2.4.a., for pregnancy-related health conditions during pregnancy through the post-partum period.

b. The Secretaries of the Military Departments have the authority to retain combat wounded Service members who have been evaluated through the DES and whose reason for non-deployability is a direct result of their combat wounds, if requested by the Service member.

(1) Disapproval of retention for non-deployable combat wounded Service members, who wish to be retained and whose reason for non-deployability is a direct result of their combat wounds, may not be delegated.

(2) Retention will be authorized in accordance with Paragraph 4.2.b.

c. Unless found unfit for duty through the DES, Service members serving in specified positions approved by the Secretary of Defense pursuant to Paragraph 4.2.e. are exempt from requiring a retention determination based solely on being in a non-deployable status for 12 months or longer. Upon reassignment, these Service members will again require a retention determination in accordance with Paragraph 4.2.a.

d. Unless sooner discharged or retired under another provision of law, or discharged due to misconduct or sub-standard performance, the Secretaries of the Military Departments may retain those Service members who are, or will be, non-deployable for 12 months or longer due to administrative reasons and who have attained such years of creditable service so as to be within 3 years of qualifying for:

(1) Regular retirement (or in the case of enlisted members of the Navy or Marine Corps, transfer to the Fleet Reserve or Fleet Marine Corps Reserve, as the case may be) pursuant to Sections 3911, 3914, 6323, 6330, 8911, or 8914 of Title 10, U.S.C.; or

(2) Non-regular retirement (but for age) pursuant to Sections 12731 and 12735 of Title 10, U.S.C., if, in the case of RC members other than RC members within 3 years of qualifying for regular retirement, they have attained at least 17 years of qualifying creditable service as computed in accordance with Section 12732 of Title 10, U.S.C., and continue to attain qualifying creditable service as computed under attains Section 12732 of Title 10, U.S.C. to become eligible for non-regular retirement within the 3-year period.

*DoDI 1332.45, July 30, 2018*

## **SECTION 5: AUTHORITIES FOR SEPARATIONS AND RETIREMENTS**

5.1. In accordance with Paragraph 1.2. of this issuance, a Service member who has been non-deployable for an administrative reason (not medical or legal) for more than 12 consecutive months, will be processed for administrative separation in accordance with DoDI 1332.14 or DoDI 1332.30. Military Services should ensure expeditious administrative separation proceedings in accordance with Military Department and Military Service policies.

5.2. A Service member who has been non-deployable due to a physical disability that makes him or her potentially unfit for the duties of his or her office, grade, rank, or rating for more than 12 consecutive months will be referred into the DES in accordance with DoDI 1332.18.

## GLOSSARY

### G.1. ACRONYMS.

ASD(M&RA)	Assistant Secretary of Defense for Manpower and Reserve Affairs
DES	Disability Evaluation System
DoDI	DoD instruction
IMR	individual medical readiness
PHA	periodic health assessment
RC	Reserve Component
UCMJ	Uniformed Code of Military Justice
U.S.C.	United States Code
USD(P&R)	Under Secretary of Defense for Personnel and Readiness.

**G.2. DEFINITIONS.** Unless otherwise noted, these terms and their definitions are for the purpose of this issuance.

**active duty.** Defined in the DoD Dictionary of Military and Associated Terms.

**active service.** Defined in Section 101(d)(3) of Title 10, U.S.C.

**active status.** Defined in Section 101(d)(4) of Title 10, U.S.C.

**combat wounded.** Service members whose injuries were the result of hostile action, who meet the criteria for awarding of the Purple Heart, and whose injuries were not the result of their own misconduct.

**deployable.** A Service member who does not have a Service-determined reason that precludes him or her from deployment.

**deployment.** The movement of personnel into and out of an operational area or in support of operations. Deployment encompasses all activities from origin or home station through destination, specifically including inter-theater, and intra-theater movement legs, staging, and holding areas.

**Military Departments.** The Departments of the Army, Navy, and Air Force.

**Military Service Headquarters.** Headquarters, United States Army; Headquarters, United States Navy; Headquarters, United States Air Force; and Headquarters, United States Marine

*DoDI 1332.45, July 30, 2018*

Corps.

**Military Services.** The United States Army, the United States Navy, the United States Air Force, and the United States Marine Corps.

**military specialty.** A military occupational specialty in the Army and the Marine Corps; an Air Force specialty code in the Air Force; or a rating or Navy enlisted classification in the Navy.

**non-deployable.** A Service member who has a Service-determined reason that precludes him or her from deployment.

**permanently non-deployable.** A Service member who has a reason that precludes them from deployment, and there is a Service expectation that the reason will not be resolved and the Service member will never be deployable.

**profile.** A document used to communicate to commanders the individual medical restrictions for Soldiers and Airmen.

**Ready Reserve.** Defined in the DoD Dictionary of Military and Associated Terms.

**reason code.** The term used to define non-deployable categories.

**separation.** A general term that includes discharge, release from active duty, release from custody and control of the Military Services, transfer to the Individual Ready Reserve, and similar changes in Active and Reserve status.

**temporarily non-deployable.** A Service member who has a reason or reasons that precludes him or her from deployment, and there is a Service expectation that the reason or reasons will be resolved and the Service member will be deployable.

*DoDI 1332.45, July 30, 2018*

## REFERENCES

- DoD Directive 5124.02, “Under Secretary of Defense for Personnel and Readiness (USD(P&R)),” June 23, 2008
- DoD Instruction 1120.11, “Programming and Accounting for Active Component (AC) Military Manpower,” March 17, 2015
- DoD Instruction 1215.13, “Ready Reserve Member Participation Policy” May 5, 2015
- DoD Instruction 1300.06, “Conscientious Objectors,” July 12, 2017
- DoD Instruction 1315.15, “Special Separation Policies for Survivorship,” May 19, 2017
- DoD Instruction 1332.14, “Enlisted Administrative Separations,” January 27, 2014, as amended
- DoD Instruction 1332.18, “Disability Evaluation System (DES),” August 5, 2014, as amended
- DoD Instruction 1332.30, “Commissioned Officer Administrative Separations,” May 11, 2018
- DoD Instruction 1342.19, “Family Care Plans,” May 7, 2010, as amended
- DoD Instruction 6025.19, “Individual Medical Readiness (IMR),” June 9, 2014
- DoD Instruction 6490.07. “Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees” February 5, 2010
- DoD Manual 8910.01, Volume 1, “DoD Information Collections Manual: Procedures for DoD Internal Information Collections,” June 30, 2014, as amended
- Office of the Chairman of the Joint Chiefs of Staff, “DoD Dictionary of Military and Associated Terms,” current edition
- The Child Soldier Prevention Act of 2007, 110<sup>th</sup> Congress, S.1175
- United States Code, Title 10
- United States Code, Title 18



## Department of Defense INSTRUCTION

NUMBER 6485.01  
June 7, 2013

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USD(P&R)

SUBJECT: Human Immunodeficiency Virus (HIV) in Military Service Members

References: See Enclosure 1

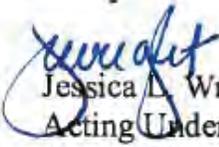
1. PURPOSE. In accordance with the authority in DoD Directive (DoDD) 5124.02 (Reference (a)), this instruction reissues DoD Instruction (DoDI) 6485.01 (Reference (b)) to establish policy, assign responsibilities, and prescribe procedures for the identification, surveillance, and management of members of the Military Services infected with HIV and for prevention activities to control transmission of HIV.
2. APPLICABILITY. This instruction applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.
3. POLICY. It is DoD policy to:
  - a. Deny eligibility for military service to persons with laboratory evidence of HIV infection for appointment, enlistment, pre-appointment, or initial entry training for military service pursuant to DoDI 6130.03 (Reference (c)).
  - b. Periodically screen Service members for HIV infection.
4. RESPONSIBILITIES. See Enclosure 2.
5. PROCEDURES. See Enclosure 3.
6. RELEASABILITY. **Unlimited**. This instruction is approved for public release and is available on the Internet from the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

*DoDI 6485.01, June 7, 2013*

7. EFFECTIVE DATE. This instruction:

a. Is effective June 7, 2013.

b. Must be reissued, cancelled, or certified current within 5 years of its publication in accordance with DoDI 5025.01 (Reference (d)). If not, it will expire effective June 7, 2023 and be removed from the DoD Issuances Website.



Jessica D. Wright  
Acting Under Secretary of Defense for  
Personnel and Readiness

Enclosures

1. References
2. Responsibilities
3. Procedures

Glossary

DoDI 6485.01, June 7, 2013

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*DoDI 6485.01, June 7, 2013*

ENCLOSURE 1

REFERENCES

- (a) DoD Directive 5124.02, "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," June 23, 2008
- (b) DoD Instruction 6485.01, "Human Immunodeficiency Virus," October 17, 2006 (hereby cancelled)
- (c) DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," April 28, 2010, as amended
- (d) DoD Instruction 5025.01, "DoD Directives Program," September 26, 2012
- (e) DoD Directive 6490.02E, "Comprehensive Health Surveillance," February 8, 2012
- (f) DoD Instruction 6025.19, "Individual Medical Readiness (IMR)," January 3, 2006
- (g) DoD Instruction 6490.03, "Deployment Health," August 11, 2006
- (h) DoD Instruction 6025.13, "Medical Quality Assurance (MQA) and Clinical Quality Management in the Military Health System (MHS)," February 17, 2011
- (i) DoD 6025.13-R, "Military Health System (MHS) Clinical Quality Assurance Program (CQA) Regulation," June 11, 2004
- (j) DoD Instruction 6490.07, "Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees," February 5, 2010
- (k) DoD Instruction 1332.38, "Physical Disability Evaluation," November 14, 1996, as amended
- (l) Section 705(c) of Public Law 99-661, "National Defense Authorization Act for Fiscal Year 1987," November 14, 1986
- (m) DoD 5400.11-R, "Department of Defense Privacy Program," May 14, 2007
- (n) DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 24, 2003

DoDI 6485.01, June 7, 2013

ENCLOSURE 2

RESPONSIBILITIES

1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)). The USD(P&R) provides overall policy implementation guidance for:

- a. The personnel management of Service members with laboratory evidence of HIV infection.
- b. Compliance with host-nation requirements for screening and related matters for Service members.

2. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS (ASD(HA)). Under the authority, direction, and control of the USD(P&R), the ASD(HA) provides overall policy implementation guidance for the medical management of Service members with laboratory evidence of HIV infection and for health education programs to prevent the transmission of HIV.

3. UNDER SECRETARY OF DEFENSE FOR POLICY (USD(P)). The USD(P):

- a. Identifies or confirms host-nation HIV screening and other related requirements and transmits this information to the USD(P&R).
- b. Coordinates matters involving host-nation screening and other related requirements with the Department of State.

4. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments:

- a. Implement this instruction and any guidance issued under the authority of this instruction.
- b. Report HIV test results to the Defense Medical Surveillance System pursuant to DoDD 6490.02E (Reference (e)).
- c. Direct health care personnel providing medical care to follow the recommendations of the Centers for Disease Control and Prevention for preventing HIV transmission in health-care settings.

*DoDI 6485.01, June 7, 2013*

ENCLOSURE 3

PROCEDURES

1. TESTING AND SCREENING

a. Applicants for appointment, enlistment, or individuals being inducted into the Military Services will be screened for laboratory evidence of HIV infection in accordance with Reference (c).

b. Applicants to the U.S. Service Academies, the Uniformed Services University of the Health Sciences, and other officer candidate programs will be tested for laboratory evidence of HIV within 72 hours of arrival to the program and denied entry to the program if such test is positive. Reserve Officer Training Corps program cadets and midshipmen must be tested for laboratory evidence of HIV not later than during their commissioning physical examination, and denied a commission if they test positive.

c. All Service members will be screened periodically for laboratory evidence of HIV infection.

(1) Active duty (AD) and Reserve Component (RC) Selected Reserve (SELRES) personnel will be routinely screened every 2 years unless more frequent screenings are clinically indicated.

(2) Members of the SELRES will be screened at least once every 2 years. RC personnel will be screened when called to a period of AD greater than 30 days if they have not received an HIV test within the last 2 years.

(3) Testing for laboratory evidence of HIV for pre- and post-deployment must be conducted in accordance with DoDI 6025.19 (Reference (f)) and DoDI 6490.03 (Reference (g)).

d. A serum sample from all HIV force screenings will be forwarded to the DoD Serum Repository as directed by Reference (e).

2. MANAGEMENT

a. Clinical management of an AD Service member and an RC Service member on AD for a period of more than 30 days with laboratory evidence of HIV infection will be conducted consistent with standard of care, evidence-based HIV clinical practice standards, and medical management guidelines, as described in DoDI 6025.13 and DoD 6025.13-R (References (h) and (i)).

*DoDI 6485.01, June 7, 2013*

b. In accordance with DoDI 6490.07 (Reference (j)), the cognizant Combatant Command surgeon will be consulted in all instances of HIV seropositivity before medical clearance for deployment.

c. An AD Service member with laboratory evidence of HIV infection will be referred for appropriate treatment and a medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses in accordance with DoDI 1332.38 (Reference (k)). An AD Service member with laboratory evidence of HIV infection determined to be fit for duty will be allowed to serve in a manner that ensures access to appropriate medical care.

d. An RC Service member with laboratory evidence of HIV infection will be referred for a medical evaluation of fitness for continued service in accordance with Service regulations, and in the same manner as an RC Service member with other chronic or progressive illnesses. Eligibility for active duty for a period of more than 30 days will be denied to those RC Service members with laboratory evidence of HIV infection (except under conditions of mobilization and on the decision of the Secretary of the Military Department concerned). RC Service members who are not on active duty for a period of more than 30 days or who are not on full-time National Guard duty, and who show laboratory evidence of HIV infection, will be transferred involuntarily to the Standby Reserve only if they cannot be used in the SELRES.

e. AD and RC Service members with laboratory evidence of HIV infection who are determined to be unfit for further duty will be separated or retired pursuant to Reference (k).

3. TRANSMISSION CONTROL. Transmission of HIV will be controlled through aggressive disease surveillance and health education programs for Service members. A Service member with laboratory evidence of HIV infection will receive training on the prevention of further transmission of HIV infection to others and the legal consequences of exposing others to HIV infection.

4. ADVERSE PERSONNEL ACTION. Information obtained during or primarily as a result of an epidemiologic assessment interview will not be used to support any adverse personnel action against the Service member in accordance with section 705(c) of Public Law 99-661 (Reference (l)). This prohibition does not apply to the use of such information for otherwise authorized rebuttal or impeachment purposes.

5. PRIVACY. The privacy of a Service member with laboratory evidence of HIV infection will be protected consistent with DoD 5400.11-R and DoD 6025.18-R (References (m) and (n)).

DoDI 6485.01, June 7, 2013

## GLOSSARY

### PART I. ABBREVIATIONS AND ACRONYMS

AD	active duty
ASD(HA)	Assistant Secretary of Defense for Health Affairs
DoDD	DoD Directive
DoDI	DoD Instruction
HIV	human immunodeficiency virus
RC	Reserve Component
SELRES	Selected Reserves
USD(P&R)	Under Secretary of Defense for Personnel and Readiness
USD(P)	Under Secretary of Defense for Policy

### PART II. DEFINITIONS

These terms and their definitions are for the purposes of this instruction.

adverse personnel action. A court-martial, non-judicial punishment, involuntary separation for other than medical reasons, administrative or punitive reduction in grade, denial of promotion, an unfavorable entry in a personnel record (other than an accurate entry concerning an action that is not an adverse personnel action), or a bar to reenlistment other than for medical reasons.

epidemiologic assessment interview. Questioning of a Service member who has been confirmed by DoD to have laboratory evidence of HIV infection for purposes of medical treatment or counseling or for epidemiologic or statistical purposes.

HIV. The virus(es) associated with the acquired immune deficiency syndrome (commonly referred to as “AIDS”).

laboratory evidence of HIV infection. A reactive and confirmed serologic result, and/or, reactive or quantitative nucleic acid result for HIV infection according to a Food and Drug Administration-approved test.



## Department of Defense INSTRUCTION

NUMBER 6490.07

February 5, 2010

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USD(P&R)

SUBJECT: Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees

References: See Enclosure 1

1. PURPOSE. In accordance with the authority in DoD Directive (DoDD) 5124.02 (Reference (a)) and the guidance in DoDDs 6200.04 and 1400.31 (References (b) and (c)), this Instruction establishes policy, assigns responsibilities, and provides procedures for ensuring that Service members and DoD civilian employees, including Coast Guard Service members and civilian employees at all times, including when the Coast Guard is a Service in the Department of Homeland Security by agreement with that Department, (hereafter referred to collectively as “DoD personnel”) deployed and deploying on contingency deployments are medically able to accomplish their duties in deployed environments.

2. APPLICABILITY. This Instruction:

a. Applies to:

(1) OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the “DoD Components”).

(2) DoD personnel deployed and deploying on contingency deployments consistent with DoD and Service-specific guidance, including Reference (c) and DoD Instruction (DoDI) 1400.32 (Reference (d)).

b. Does not apply to contingency contractor personnel, who shall comply with the guidance in DoDI 3020.41 (Reference (e)), or to shipboard operations that are not anticipated to involve operations ashore, which shall follow Service-specific guidance.

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c. Shall be used as a minimum medical standard for all deploying and deployed DoD personnel, BUT does not alter or replace:

(1) With respect to military personnel, the accession, retention, and general fitness for duty standards previously established by the Department of Defense, including those described in DoDI 6130.4, DoDD 6130.3, Under Secretary of Defense for Personnel and Readiness (USD(P&R)) Memorandum, Assistant Secretary of Defense for Health Affairs (ASD(HA)) Memorandum, and DoDI 6485.01 (References (f) through (j), respectively).

(2) With respect to civilian employees covered by sections 791 and 794a of title 29, United States Code (also known and hereafter referred to as “The Rehabilitation Act of 1973, as amended” (Reference (k))), the legal obligations of a DoD Component as an employer pursuant to that Act.

(3) More stringent individual Military Department policy guidance or Service-specific readiness requirements.

3. DEFINITIONS. These terms and their definitions are for the purpose of this Instruction.

a. contingency. A situation requiring military operations in response to natural disasters, terrorists, subversives, or as otherwise directed by appropriate authority to protect US interests.

b. contingency deployment. A deployment that is limited to outside the continental United States, over 30 days in duration, and in a location with medical support from only non-fixed (temporary) military medical treatment facilities. It is a deployment in which the relocation of forces and materiel is to an operational area in which a contingency is or may be occurring.

c. deployment. The relocation of forces and materiel to desired operational areas. Deployment encompasses all activities from origin or home station through destination, specifically including intra-continental United States, inter-theater, and intra-theater movement legs, staging, and holding areas.

d. medical assessment. The total of the pre-deployment activities described in section 1 of Enclosure 2 of this Instruction and those listed in paragraph E4.A1.1 of DoDI 6490.03 (Reference (l)).

e. trained DoD health-care provider. A physician, physician assistant, nurse practitioner, advanced practice nurse, independent duty corpsman, independent duty medical technician, or special forces medical sergeant.

4. POLICY. It is DoD policy that:

a. The medical standards in this Instruction are mandatory for contingency deployments, and permissible for any other deployment, based on the commander’s decision.

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b. DoD personnel with existing medical conditions may deploy based upon a medical assessment as described in Enclosure 2 and subparagraph E4.A1.1.1. of Reference (l), which for civilian employees shall be consistent with subparagraph 4.g.(3)(c) of DoDD 1404.10 (Reference (m)), and the requirements of The Rehabilitation Act of 1973, as amended, when such civilian employees are covered by that Act, if all of these conditions are met:

(1) The condition is not of such a nature or duration that an unexpected worsening or physical trauma is likely to have a grave medical outcome or negative impact on mission execution.

(2) The condition is stable and reasonably anticipated by the pre-deployment medical evaluator not to worsen during the deployment in light of physical, physiological, psychological, and nutritional effects of the duties and location.

(3) Any required, ongoing health care or medications anticipated to be needed for the duration of the deployment are available in theater within the Military Health System. Medication must have no special handling, storage, or other requirements (e.g., refrigeration, cold chain, or electrical power requirements). Medication must be well tolerated within harsh environmental conditions (e.g. heat or cold stress, sunlight) and should not cause significant side effects in the setting of moderate dehydration.

(4) There is no need for routine evacuation out of theater for continuing diagnostics or other evaluations. (All such evaluations should be accomplished before deployment.)

(5) In the case of civilian employees covered by The Rehabilitation Act of 1973, as amended, it is determined, based upon an individualized assessment, that the employee can perform the essential functions of the position in the deployed environment, with or without a reasonable accommodation, without causing undue hardship. In evaluating undue hardship, the nature of the accommodation and the location of the deployment must be considered. Further, the employee's medical condition must not pose a significant risk of substantial harm to the employee or others taking into account the condition of the relevant deployed environment.

c. Individuals with the conditions in Enclosure 3, based on medical assessments in accordance with Enclosure 2 and Reference (l), shall not deploy unless a waiver can be granted according to the procedures in section 3 of Enclosure 2.

d. If a Service member is found qualified for retention with no limitations on assignments or deployments following evaluation of a medical condition by competent medical and personnel authority of his or her respective Service, and if the condition remains stable, a deployment waiver of that same condition is not required by this Instruction.

e. Deploying commanders may add additional medical requirements to the standards in this Instruction based upon the demands of a specific deployment. Commanders may apply these medical standards to other deployments based on the health risk, physical demands, and medical

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capabilities of the deployment. These additional standards must be consistent with The Rehabilitation Act of 1973, as amended, when applied to civilian employees covered by that Act.

f. Protected health information collected, used, and released in the execution of this Instruction shall be protected as required by DoD 6025.18-R (Reference (n)) and DoD 8580.02-R (Reference (o)).

5. RESPONSIBILITIES. See Enclosure 4.

6. PROCEDURES. See Enclosure 2.

7. RELEASABILITY. UNLIMITED. This Instruction is approved for public release and is available on the Internet from the DoD Issuances Web Site at <http://www.dtic.mil/whs/directives>.

8. EFFECTIVE DATE. This Instruction is effective immediately.



Gail H. McGinn  
Deputy Under Secretary of Defense (Plans)  
Performing the Duties of the  
Under Secretary of Defense for  
Personnel and Readiness

Enclosures:

1. References
2. Procedures
3. Medical Conditions Usually Precluding Contingency Deployment
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ENCLOSURE 1

REFERENCES

- (a) DoD Directive 5124.02, "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," June 23, 2008
- (b) DoD Directive 6200.04, "Force Health Protection (FHP)," October 9, 2004
- (c) DoD Directive 1400.31, "DoD Civilian Work Force Contingency and Emergency Planning and Execution," April 28, 1995
- (d) DoD Instruction 1400.32, "DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures," April 24, 1995
- (e) DoD Instruction 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces," October 3, 2005
- (f) DoD Instruction 6130.4, "Medical Standards for Appointment, Enlistment, or Induction in the Armed Forces," January 18, 2005
- (g) DoD Directive 6130.3, "Physical Standards for Appointment, Enlistment, and Induction," December 15, 2000
- (h) Under Secretary of Defense for Personnel and Readiness Memorandum, "Policy Guidance for Medical Deferral," February 9, 2006
- (i) Assistant Secretary of Defense for Health Affairs Memorandum, "Policy Guidance for Deployment-Limiting Psychiatric Conditions and Medications," November 7, 2006
- (j) DoD Instruction 6485.01, "Human Immunodeficiency Virus," October 17, 2006
- (k) Sections 791 and 794a of title 29, United States Code (also known as "The Rehabilitation Act of 1973, as amended")
- (l) DoD Instruction 6490.03, "Deployment Health," August 11, 2006
- (m) DoD Directive 1404.10, "DoD Civilian Expeditionary Workforce," January 23, 2009
- (n) DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 24, 2003
- (o) DoD 8580.02-R, "DoD Health Information Security Regulation," July 12, 2007

DoDI 6490.07, February 5, 2010

ENCLOSURE 2

PROCEDURES

1. PERFORMANCE OF MEDICAL ASSESSMENTS. All DoD personnel serving in a contingency deployment as defined in section 3 of the front matter of this Instruction must undergo a medical assessment prior to deployment in accordance with subparagraph E4.A1.1.1. of Reference (I). The mandatory portions of the assessment are:

a. Completion of DD Forms 2795, "Pre-Deployment Health Assessment," and 2766, "Adult Preventive and Chronic Care Flowsheet" (available on the Internet at <http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm>). Except for Coast Guard personnel, completed copies of both of these forms must be submitted to the Defense Medical Surveillance System and included in DoD personnel deployment paperwork, and shall serve as the deployment medical record. For Coast Guard personnel, the DD Form 2766 shall be placed in the member's health record, but all other procedures for Coast Guard personnel shall be as described in this Instruction for DoD personnel.

b. Medical record review.

c. Current periodic health assessment (Service members only).

d. Physical exam within 1 year of deployment (DoD civilian employees only).

2. DETERMINATIONS OF DEPLOYABILITY. A trained DoD health-care provider must make a provisional determination on DD Form 2795 as to the deployability of DoD personnel. This decision should be based on all of the information obtained in the medical assessment described in section 1 of this enclosure.

a. In general, DoD personnel with any of the medical conditions in Enclosure 3, and based on a medical assessment, shall not deploy unless a waiver is granted. Consideration should be made for the nature of the disability and if it would put the individual at increased risk of injury or illness, or if the condition is likely to significantly worsen in the deployed environment.

(1) For civilian employees covered by The Rehabilitation Act of 1973, as amended, it must be determined, before deployment and based upon an individualized assessment, that the employee can perform the essential functions of the position in the deployed environment, with or without a reasonable accommodation, without causing undue hardship. In evaluating undue hardship, the nature of the accommodation and the location of the deployment must be considered. Further, the employee's medical condition must not pose a significant risk of substantial harm to the employee or others taking into account the condition of the relevant deployed environment.

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(2) The requirement to provide reasonable accommodations for disabilities does not apply to deployment of military members, nor to civilian employees not covered by The Rehabilitation Act of 1973, as amended.

b. All individuals deemed not deployable at the deployment processing center shall be returned to their originating unit with a DD Form 2795 and a summary of their non-deployable medical condition to provide to the unit medical personnel. The civilian supervisor shall also be notified if the individual is deemed not deployable.

3. WAIVERS. If a commander or supervisor of DoD personnel (except for SOF personnel) wishes to deploy an individual with a medical condition that could be disqualifying (see Enclosure 3, the commander or supervisor must request a waiver. The waiver request shall be submitted to the applicable Combatant Commander through the individual's servicing military medical unit in the case of a Service member, or through the individual's personnel office in the case of a civilian employee, with medical input provided by the individual's medical provider.

a. Requests for a waiver shall include a summary of a detailed medical evaluation or consultation concerning the medical condition(s). Maximization of mission accomplishment and the protection of the health of personnel are the ultimate goals. Justification shall include statements indicating service experience, position to be placed in, any known specific hazards of the position, anticipated availability and need for care while deployed, the benefit expected to accrue from the waiver, the recommendation of the commander or supervisor, and the reasonable accommodations that can be provided for civilian employees covered by The Rehabilitation Act of 1973, as amended. For all DoD personnel, the factors listed in subparagraphs 4.b.(1) through 4.b.(4), (and subparagraph 4.b.(5) for civilian employees only) of the front matter shall be discussed.

b. For SOF personnel with any of the conditions listed in Enclosure 3, medical clearance may be granted by the CDRUSSOCOM, subject to the approval of the Combatant Commander under which the Service member is deployed or will deploy.

c. In the case of civilian employees covered by The Rehabilitation Act of 1973, as amended, a waiver must be granted if it is determined, based upon an individualized assessment, that the employee can perform the essential functions of the position in the deployed environment, with or without a reasonable accommodation, without causing undue hardship. In evaluating undue hardship, the nature of the accommodation and the location of the deployment must be considered. Further, the employee's medical condition must not pose a significant risk of substantial harm to the employee or others taking into account the condition of the relevant deployed environment.

#### 4. ROLES AND RESPONSIBILITIES

a. Commanders and Supervisors. Commanders and supervisors shall:

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(1) Ensure deploying DoD personnel are appropriately assessed by competent medical authority before deployment, in accordance with Reference (1).

(2) Request waivers for DoD personnel they wish to deploy who have the medical conditions described in Enclosure 3.

(3) Ensure that DoD personnel under their command meet the medical standards of the gaining commander when individuals and their leaders deploy in support of other DoD Components. As these standards may differ by assignment, they must be coordinated separately for each deployment.

b. Supervisors. Supervisors shall additionally:

(1) Identify medical and physical requirements for deployable positions designated for fill by DoD civilian employees.

(2) Ensure that such requirements are documented in position descriptions, vacancy announcements, and other appropriate sources.

(3) Ensure that DoD civilian employees meet such requirements; take appropriate action when employees no longer meet identified requirements.

c. DoD Personnel

(1) DoD personnel in deployable positions shall be responsible for meeting the medical and physical requirements of their deployment-specific tasks.

(2) DoD personnel who are civilian employees selected for deployment opportunities outside their chain of supervision shall be responsible for meeting and maintaining the medical standards identified for the deployment by the responsible commanding officer.

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ENCLOSURE 3

MEDICAL CONDITIONS USUALLY PRECLUDING CONTINGENCY DEPLOYMENT

This list of conditions is not intended to be all-inclusive. A list of all possible diagnoses and their severity that may cause an individual to be potentially non-deployable, pending further evaluation, would be too extensive. Medical evaluators must consider climate, altitude, rations, housing, duty assignment, and medical services available in theater when deciding whether an individual with a specific medical condition is deployable. In general, individuals with the conditions in paragraphs a. through h. of this enclosure, based upon a medical assessment as described in Enclosure 2 and Reference (1), shall not deploy unless a waiver is granted.

a. Conditions Affecting Force Health Protection

(1) Physical or psychological conditions resulting in the inability to effectively wear personal protective equipment, including protective mask, ballistic helmet, body armor, and chemical and/or biological protective garments, regardless of the nature of the condition that causes the inability to wear the equipment if wearing such equipment may be reasonably anticipated or required in the deployed location.

(2) Conditions that prohibit immunizations or the use of force health protection prescription products (FHPPPs) required for the specific deployment. Depending on the applicable threat assessment, required FHPPPs may include atropine, epinephrine, and/or pralidoxime chloride (2-PAM chloride) auto-injectors; certain antimicrobials and antimalarials; and pyridostigmine bromide.

b. Unresolved Health Conditions Requiring Care or Affecting Performance

(1) Any chronic medical condition that requires frequent clinical visits, fails to respond to adequate conservative treatment, or necessitates significant limitation of physical activity.

(2) Absence of a dental exam within the last 12 months or presence of the likelihood that dental treatment or reevaluation for oral conditions will result in dental emergencies within 12 months. Individuals being evaluated by a non-DoD civilian dentist should use DD Form 2813, "DoD Active Duty/Reserve Forces Dental Examination," as proof of dental examination (available on the Internet at <http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm>).

(3) Pregnancy.

(4) Any medical condition that requires either durable medical equipment or appliances, or periodic evaluation or treatment by medical specialists that is not readily available in theater.

(5) Any unresolved acute or chronic illness or injury that would impair duty performance in a deployed environment during the duration of the deployment.

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(6) Cancer that requires continuing treatment or specialty medical evaluations during the anticipated duration of the deployment.

(7) Precancerous lesions that have not been treated and/or evaluated and that require treatment and/or evaluation during the anticipated duration of the deployment.

(8) Any medical condition that requires surgery or for which surgery has been performed that requires rehabilitation or additional surgery to remove devices.

(9) Any musculoskeletal condition that significantly impairs performance of duties in a deployed environment.

(10) An acute exacerbation of a physical or mental health condition that could significantly affect duty performance.

c. Conditions That Could Cause Sudden Incapacitation

(1) Recurrent loss of consciousness for any reason.

(2) Any medical condition that could result in sudden incapacitation including a history of stroke within the last 24 months, seizure disorders, and diabetes mellitus type I or II treated with insulin or oral hypoglycemic agents.

d. Pulmonary Disorders. Asthma that has a forced expiratory volume-1 (FEV-1) of less than or equal to 60 percent of predicted FEV-1 despite appropriate therapy and that has required hospitalization at least 2 times in the last 12 months, or that requires daily systemic (not inhalational) steroids.

e. Infectious Disease

(1) Active tuberculosis or known blood-borne diseases that may be transmitted to others in a deployed environment.

(2) A diagnosis of human immunodeficiency (HIV) antibody positive with the presence of progressive clinical illness or immunological deficiency. The cognizant Combatant Command surgeon shall be consulted in all instances of HIV seropositivity before medical clearance for deployment.

f. Sensory Disorders

(1) Hearing Loss. The requirement for use of a hearing aid does not necessarily preclude deployment. However, the individual must have sufficient unaided hearing to perform duties safely.

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(2) Vision Loss. Best corrected visual acuity must meet job requirements to perform duties safely.

g. Cardiac and Vascular Disorders

- (1) Hypertension not controlled with medication or that requires frequent monitoring.
- (2) Symptomatic coronary artery disease.
- (3) History of myocardial infarction within 1 year of deployment.
- (4) History of coronary artery bypass graft, coronary artery angioplasty, carotid endarterectomy, other arterial stenting, or aneurysm repair within 1 year of deployment.
- (5) Cardiac dysrhythmias or arrhythmias, either symptomatic or requiring medical or electrophysiologic control (presence of an implanted defibrillator and/or pacemaker).
- (6) Heart failure.

h. Mental Health Disorders

- (1) Psychotic and/or bipolar disorders. (See Reference (i) for detailed guidance on deployment-limiting psychiatric conditions or psychotropic medications.)
- (2) Psychiatric disorders under treatment with fewer than 3 months of demonstrated stability.
- (3) Clinical psychiatric disorders with residual symptoms that impair duty performance.
- (4) Mental health conditions that pose a substantial risk for deterioration and/or recurrence of impairing symptoms in the deployed environment.
- (5) Chronic medical conditions that require ongoing treatment with antipsychotics, lithium, or anticonvulsants.

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ENCLOSURE 4

RESPONSIBILITIES

1. ASD(HA). The ASD(HA), under the authority, direction, and control of the USD(P&R), shall review and issue to the Secretaries of the Military Departments and the Directors of the Defense Agencies and the DoD Field Activities technical adjustments to the deployment standards in Enclosure 3 as needed, based on changing conditions or additional unanticipated difficulties encountered in the in-theater management of medical conditions.

2. SECRETARIES OF THE MILITARY DEPARTMENTS, COMMANDANT OF THE COAST GUARD, AND DIRECTORS OF THE DEFENSE AGENCIES AND THE DoD FIELD ACTIVITIES. The Secretaries of the Military Departments, the Commandant of the Coast Guard, and the Directors of the Defense Agencies and the DoD Field Activities shall:

a. Direct their respective Components to apply and uniformly implement the standards in this Instruction.

b. Ensure that:

(1) All deploying DoD personnel assigned to their respective Service, Defense Agency, or DoD Field Activity have a medical assessment in accordance with Reference (1), including a medical record review, to evaluate their medical status before contingency deployments and other deployments pursuant to paragraph 4.a. of the front matter of this Instruction.

(2) Pre-deployment processes are in place to identify individuals with deployment-limiting medical conditions.

(3) DoD personnel who occupy deployable positions maintain a high state of pre-deployment health and medical readiness.

3. CHAIRMAN OF THE JOINT CHIEFS OF STAFF. The Chairman of the Joint Chiefs of Staff shall ensure that the Combatant Commanders:

a. Establish a minimum standard when developing medical requirements for entering the theater of operations that factors in the medical conditions described in Enclosure 3 of this Instruction.

b. Implement a medical requirements waiver process that includes waiver computerization and archival storage.

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4. COMBATANT COMMANDERS. For all DoD personnel deployed or deploying to a theater within their respective Combatant Commands, the Combatant Commanders shall:

a. Establish a process for reviewing recommendations from the Services regarding the granting of exceptions to medical standards (waivers) for the conditions in Enclosure 3, including a mechanism to track and archive all approved or denied waivers and the medical conditions requiring the waivers.

b. Serve as the final approval authority for exceptions to the medical standards (waivers) made pursuant to the procedures in this Instruction.

5. COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (CDRUSSOCOM). The CDRUSSOCOM shall perform the responsibilities in section 2 of this enclosure for SOF personnel.

**BY ORDER OF THE  
SECRETARY OF THE AIR FORCE**

**AIR FORCE INSTRUCTION 36-2603**

**18 SEPTEMBER 2017**

**Personnel**

**AIR FORCE BOARD FOR  
CORRECTION OF MILITARY  
RECORDS (AFBCMR)**



**COMPLIANCE WITH THIS PUBLICATION IS MANDATORY**

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**ACCESSIBILITY:** Publications and forms are available for downloading or ordering on the e-Publishing website at [www.e-Publishing.af.mil](http://www.e-Publishing.af.mil).

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This instruction implements DoDD 1332.41, *Boards for Correction of Military Records and Discharge Review Boards*, and AFD 36-26, *Total Force Development*. It relates to procedures for correction of military records to remedy error or injustice and not to the Air Force Discharge Review Board (AFDRB). It tells how to apply for correction of military records and how the AFBCMR (the Board) considers applications. It implements the Board's statutory authority to act on applications. In collaboration with the Chief of Air Force Reserve (HQ USAF/RE), the Director of the Air National Guard (NGB/CF), and the Deputy Chief of Staff for Manpower, Personnel, and Services (HQ USAF/A1), the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) (SAF/MR) develops Air Force Board For Correction of Military Records guidance. Ensure that all records created as a result of processes prescribed in this publication are maintained IAW Air Force Manual (AFMAN) 33-363, Management of Records, and disposed of IAW the Air Force Records Disposition Schedule (RDS) in the Air Force Records Information Management System (AFRIMS). This publication applies to the Air National Guard (ANG) and the Air Force Reserve (USAFR). The authorities to waive FOA level requirements in this publication are identified with a Tier ("T-0, T-1, T-2, T-3") number following the compliance statement. Refer recommended changes and questions about this publication to the Office of Primary Responsibility (OPR) using the AF Form 847, *Recommendation for Change of*

*Publication*; route AF Forms 847 from the field through the appropriate functional chain of command. This instruction may not be supplemented.

This instruction directs collecting and maintaining information subject to the Privacy Act of 1974 authorized by Title 10, United States Code (U.S.C) § 1034 and 1552. System of Records notice F036 SAFCB A, Air Force Correction Board Records, applies.

### ***SUMMARY OF CHANGES***

This document has been substantially revised and must be completely reviewed. Major changes include defining the authority of the Director, AFRBA to appoint AFBCMR panel members; expanding the authority of the Executive Director of the AFBCMR to return applications without action when all available avenues of administrative relief have not been exhausted, he or she determines the application is clearly frivolous, or the remedy that is requested is beyond the authority of the Board; defines a proper applicant; describes the Director's authority to reject a request for reconsideration of an application when an applicant fails to provide new and/or relevant evidence that was not reasonably discoverable when the original application was submitted; stipulates a three-year period from the date of an original AFBCMR decision in which to request a one-time reconsideration and incorporates authority of the Board to reconsider an application upon its own motion; incorporates modification of the definition of persons eligible to apply for relief to the Board in accordance with guidance issued by the Secretary of the Air Force (SAF) pursuant to 10 U.S.C. § 1552(g); incorporates guidance on the liberal consideration of post-traumatic stress disorder (or similar diagnosis) on requests to upgrade other than honorable characterizations of service (e.g., undesirable, under other than honorable conditions (UOTHC), bad conduct discharge (BCD), dishonorable discharge (DD), dismissal, etc.); incorporates statutory requirements in accordance 10 U.S.C. § 1552(g), as modified by the Fiscal Year (FY) 2015 National Defense Authorization Act (NDAA) § 521, that mandate that any medical opinion issued to the Board with respect to a member or former member of the armed forces who was diagnosed while serving in the armed forces as experiencing a mental health disorder shall include the opinion of a clinical psychologist or psychiatrist if the request relates to a mental health disorder; incorporates the statutory requirements in accordance with the FY 2015 NDAA § 547 that mandate a confidential review process for applicants who claim to be the victim of sexual assault; prescribes procedures under which a request for correction of a military record may be made if the request is made on behalf of a group of members or former members of the armed forces who were similarly harmed by the same error or injustice in accordance with the provisions of the 10 U.S.C. § 1552(b), as modified by the FY 2016 NDAA § 521; incorporates SAF/MR policy directing that senior leader (general officer and senior executive service) contact with the Air Force Review Boards Agency (AFRBA) be routed through the Director, AFRBA, or Principal Deputy Assistant Secretary of the Air Force, Manpower and Reserve Affairs; incorporates policy requiring advisory opinions pertaining to high-level decorations (Silver Star or higher), promotion issues, return to flying status, or containing allegations of reprisal to be signed by at least a colonel or GS-15 within the organization providing the advisory opinion.

## 1. Roles and Responsibilities.

1.1. **Secretary of the Air Force (SAF).** In accordance with 10 U.S.C. § 1552, *Correction of military records: claims incident thereto*, the SAF is authorized to correct any military record of the Department when the SAF considers it necessary to correct an error or remove an injustice. Such corrections shall be made by the Secretary acting through boards of civilians in the executive part of the Department.

1.2. **Assistant Secretary of the Air Force for Manpower and Reserve Affairs (SAF/MR).** SAF/MR exercises the authority under 10 U.S.C. § 1552 on behalf of the SAF. SAF/MR has further delegated this authority to the Director of the Air Force Review Boards Agency (AFRBA).

1.3. **Director, AFRBA:** The Director, AFRBA appoints all members of the Board. Board members must be members of the Senior Executive Service (SES) or hold the grade of GS-15. No one may be appointed a member of the Board within five years after relief from active duty as a commissioned officer of a regular component of an armed force, except by individual waiver approved by SAF/MR. This five-year waiting period will also apply to a reserve component commissioned officer, who after twenty years of active service, retired under 10 U.S.C. § 8911, 10 U.S.C. § 3911, or 10 U.S.C. § 6323.

1.4. **Executive Director, Air Force Board for Correction of Military Records (AFBCMR).** Administer and oversee the operation of the AFBCMR and develop and publish policy, procedures, and evaluation standards related to the correction of records process.

1.5. The AFBCMR operates within the Office of the Secretary of the Air Force according to 10 U.S.C. § 1552 and DoDD 1332.41, *Boards for Correction of Military Records (BCMR) and Discharge Review Boards (DRBs)*. The Board consists of civilians in the executive part of the Department of the Air Force who serve at the pleasure of the SAF. Three members constitute a quorum of the Board.

## 2. Board Responsibilities.

2.1. **Considering Applications.** The Board considers all applications properly brought before it. In appropriate cases, it recommends correction of military records to remove an error or injustice.

2.2. **Recommending Action.** When the Board determines an applicant has been the victim of reprisal in violation of 10 U.S.C. § 1034, or AFD 90-3, *Inspector General, the Complaints Resolution Program*, it may recommend to the SAF that disciplinary or administrative action be taken against those responsible for the reprisal.

2.3. **Deciding Cases.** The Board normally decides cases on the written evidence contained in the record. It is not an investigative body; therefore, the applicant bears the burden of providing evidence of an error or injustice. However, the Board may, in its discretion, hold a hearing or call for additional evidence or opinions in any case. Applicants may request a hearing; however the decision to grant a hearing is at the sole discretion of the Board.

### 3. Application Procedures.

3.1. **Who May Apply.** The following persons/entities are eligible to apply to the Board for corrections of Air Force records (“Applicants”):

3.1.1. Current or former members of the United States Air Force, the Air National Guard (ANG), the Air Force Reserve (USAFR), or their predecessor organizations;

3.1.2. Current or former members of other armed services for whom the United States Air Force maintains a record;

3.1.3. The heirs or legal representatives of persons identified in 3.1.1 and 3.1.2 above;

3.1.4. Dependents, spouses, or former spouses of persons identified in 3.1.1 and 3.1.2 above; and

3.1.5. Employees or former employees of the Department of the Air Force, except in regard to civilian employment matters.

3.1.6. Apart from applicants qualified under 3.1.3, no applicant is eligible to obtain a correction of another person's record, unless the application pertains to a group of current or former members submitted under the provisions of 10 U.S.C. § 1552(b), as implemented by paragraph 3.10 below, that authorize the SAF to make such an application. However, this restriction in no way limits the authority of Air Force offices to make administrative corrections in cases of manifest error.

3.2. **Obtaining Forms.** Applicants may obtain a DD Form 149, *Application for Correction of Military Record Under the Provisions of 10 U.S.C. § 1552*, and Air Force Pamphlet 36-2607, *Applicants’ Guide to the Air Force Board for Correction of Military Records (AFBCMR)*, from any of the following sources:

3.2.1. From the internet at the Department of Defense Publishing website, <http://www.dtic.mil/whs/directives/forms/eforms/dd0149.pdf> (DD Form 149), or Air Force e-publishing website, <http://www.e-publishing.af.mil/> (AFPAM 36-2607).

3.2.2. Any Air Force personnel or publications distribution office.

3.2.3. Most veterans’ service organizations.

3.2.4. The Air Force Review Boards Office, SAF/CMO, 550 C Street West, Suite 40, Joint Base San Antonio-Randolph, TX 78150-4742.

3.2.5. The AFBCMR, 1500 West Perimeter Road, Joint Base Andrews Naval Air Facility Washington, MD 20762.

3.3. **Preparation.** Before applying, applicants should:

3.3.1. Review Air Force Pamphlet 36-2607, *Applicants’ Guide to the AFBCMR*.

3.3.2. Discuss their concerns with a Total Force Service Center representative, finance office, or other appropriate officials who can refer applicants to available avenues of administrative relief (e.g., performance reports – Evaluation Reports Appeals Board (ERAB), fitness test results – Fitness Assessment Appeals Board (FAAB), debts incurred while on active duty – Remissions Board, etc.) that do not require referral to the Board.

3.3.3. Exhaust all other available administrative remedies; otherwise, the Executive Director of the AFBCMR should administratively close the case, without prejudice, and return it without action.

**3.4. Submitting the Application.** Applicants should complete all applicable sections of the DD Form 149, including at least:

3.4.1. The name of the applicant or, when the applicant is an heir or legal representative, the name of the person whose record the applicant wishes the Board to correct. For group applications, see paragraph 3.10.

3.4.2. That person's social security number or military service number.

3.4.3. The applicant's current mailing address, e-mail address, and contact number(s). E-mail, when available, will be the primary means of communication between the AFBCMR staff and the applicant.

3.4.4. The error or injustice and specific correction to the military records required to remedy the alleged error or injustice. The applicant has the burden of providing evidence in support of their claim they are the victim of an error or injustice.

3.4.5. Legal proof of the applicant's status as heir or legal representative if requesting correction of another person's records.

3.4.6. The applicant's ink signature accompanying any paper or facsimile submission. A scanned or facsimile copy of the DD Form 149 is considered a legitimate application and may be transmitted via electronic means. The completion of an electronic fillable DD Form 149, found online, will require the use of a legitimate Department of Defense Common Access Card (CAC) or identity verified electronic or digital signature. If the applicant signs the form electronically without a verified signature, then he/she must also submit a scan of a notarized letter for the record stating the time and date the application was signed along with the submission. The person who is requesting a correction of his or her record must sign the application. If the individual whose record is at issue is deceased or cannot sign due to incompetency, the application may be signed by an heir or legal representative. Proof of death, incompetency, or power of attorney must accompany the application.

3.4.7. Applicants should mail the signed DD Form 149 and any supporting documents to the Air Force address on the back of the form if submitting in paper. To expedite processing, applicants may elect to file electronically. Electronic filing options include (1) email of submission to include the scanned or fillable DD Form 149 and supporting documents to [saf.mrbr.tier1@us.af.mil](mailto:saf.mrbr.tier1@us.af.mil), or (2) upload the scanned or fillable submissions through a secure web-based intake portal, similar to what is available via MyPers, if/when made available.

**3.5. Meeting Time Limits.** Applicants must file an application within 3 years after the error or injustice was discovered, or, with due diligence, should have been discovered. Timeliness is not measured strictly from the date of the action/event the applicant alleges makes them the victim of an error or injustice, but is measured from the date of when the error or injustice was discovered or should have been discovered by the applicant with reasonable diligence.

In accordance with federal law, time on active duty is not included in the 3-year period. An application filed later is untimely and may be denied by the Board on that basis.

3.5.1. The Board may excuse untimely filing in the interest of justice.

3.5.2. If the application is untimely filed, the applicant should explain why the application was untimely filed and why it would be in the interest of justice for the Board to waive the statute of limitations.

**3.6. Stay of Other Proceedings.** Applying to the AFBCMR does not stay other proceedings.

**3.7. Representation by Counsel.** Applicants may be represented by counsel, at their own expense.

3.7.1. The term “counsel” includes members in good standing of the bar of any state; accredited representatives of veteran or service organizations recognized under 38 U.S.C. § 5902; and other persons determined by the Executive Director of the Board to be competent to represent the interests of the applicant.

3.7.2. See DoDD 7050.06, *Military Whistleblower Protection* and AFI 90-301, *Inspector General Complaints Resolution*, for special provisions in cases processed under 10 U.S.C. § 1034.

**3.8. Application format.** Applicants must use the DD Form 149. Along with the DD Form 149, applicants or counsel may submit briefs in support of applications.

3.8.1. Briefs may not exceed 25 double-spaced pages; must be typed or computer-printed on one side of each page, with the left margin justified, with not more than 12 characters per inch and no less than one-inch margins on all sides; and must be assembled without staples or bindings to permit easy reproduction and digital scanning. Electronic submissions are encouraged.

3.8.2. The Board staff will return an illegible application or brief and administratively close the case without action. Although administrative closure in no way precludes an applicant from re-applying at a later date, it does not suspend the three-year statute of limitations to file an application.

3.8.3. The Board staff will return electronic applications or briefs that cannot be opened on receipt and will close the case without prejudice, as above.

3.8.4. Rebuttals to advisory opinions must not exceed 10 pages and must meet the other requirements for briefs.

3.8.5. Supporting documentary evidence may exceed the 25-page limit, but must meet certain other requirements for briefs, to include legibility, the requirement to be assembled without staples or bindings to permit easy reproduction and digital scanning, and be printed on one side of each page.

3.8.6. In rare, complex cases, the Executive Director of the Board may waive the limitations on the length of briefs.

3.9. **Withdrawing Applications.** Applicants may withdraw an application at any time before the Board's decision. Withdrawal does not stay the 3-year time limit.

3.10. **Group Applications.** In accordance with 10 U.S.C. § 1552(b), the SAF may file a request for correction of a military record if the request is made on behalf of a group of members or former members of the Regular Air Force, Air National Guard, Air Force Reserve (or predecessor organizations) who were similarly harmed by the same error or injustice. Such a request must be staffed to the SAF for approval by the applicable MAJCOM, FOA, or HAF functional 2-letter office prior to submission to the AFBCMR. The staff package must be staffed in accordance with HAF staffing procedures. No specified form is required. At a minimum, coordination with SAF/GC and SAF/MR is required before staffing the request to SAF/OS, which must include the following:

3.10.1. A list indicating each individual's name and social security number.

3.10.2. A comprehensive summary of the facts and circumstance surrounding the purported error or injustice perpetrated against the group of named individuals supporting a determination that the group of named individuals are substantially similarly situated and have an identical basis for relief.

3.10.3. A description of the administrative remedies exhausted prior to seeking relief through the AFBCMR. All administrative avenues of relief must have been exhausted prior to submitting the application.

3.10.4. A specific recommendation as to the exact manner in which the records of the named individuals should be corrected, as well as identification of the agency responsible to carry out the correction of records, should the Board recommend that relief be granted.

3.10.5. SAF/MR will return any application not meeting the requirements above to the proponent without action. The proponent bears the same burden of proof as any individual applicant and the three-year statute of limitations also applies, although the Board could excuse the failure to timely file if it is in the interest of justice to do so. The Air Staff proponent of the application will be notified of the outcome of the case before the Board and is responsible for notification of each member represented in the application.

3.11. **Authority to Return Applications.** The Executive Director of the Board, or person delegated authority to act on his/her behalf, may return an application without action if he or she determines the applicant is not eligible to apply; the application is clearly frivolous; the applicant has not exhausted all available and effective administrative remedies; the requested remedy is unclear or is beyond the authority of the Board.

#### 4. Board Actions.

4.1. **Board Information Sources.** The applicant has the burden of providing sufficient evidence of material error or injustice. The Board will recommend relief only when a preponderance (more likely than not) of evidence substantiates that the applicant was a victim of an error or injustice. The Board may request the applicant furnish additional information regarding matters before the Board.

4.2. Although not an investigative body, the Board may obtain the following from any organization/official within the Air Force or Department of Defense:

4.2.1. Any and/or all available military records (personnel, medical, financial etc.).

4.2.2. Advisory opinions. Advisory opinions represent the one and only opportunity the Air Force will have to affirm its position on a case and set forth its rationale. Advisory opinions will be staffed to agencies with a suspense of no more than 30 days **(T-1)** and must contain the following:

4.2.2.1. A statement of whether or not the requested relief can be accomplished administratively, whether or not the applicant has exhausted such administrative means before pursuing relief to the Board, and whether or not the application was timely filed.

4.2.2.2. A clear and concise summary of the relevant facts of the case, the applicant's contentions, an analysis addressing the crux issues of the case, and a recommendation based on the applicable Air Force policy, regulatory requirements, or applicable law in effect at the time of the alleged error or injustice.

4.2.2.3. Regardless of the recommendation provided (e.g., grant or deny), the advisory opinion shall include instructions on specific corrective action to be taken if the Board recommends relief be granted.

4.2.2.4. If the matter before the Board pertains to a high-level decoration (Silver Star or higher), promotion issues, return to flying status, or contains allegations of reprisal, the opinion must be signed by at least a colonel (O-6) or GS-15 within the organization providing the advisory. **(T-1)**

4.2.2.5. In the case of an applicant who was diagnosed while serving in the armed forces as experiencing a mental health disorder and the requested correction to the military records relates to a mental health disorder, any medical advisory will contain the opinion of clinical psychologist or psychiatrist in accordance with the provisions of 10 U.S.C. § 1552(g).

4.2.2.6. Certain cases may require multiple advisory opinions from a command or field operating agency (FOA) (e.g. AFPC, ARPC, NGB, AFRC, etc.). In such cases, the perspectives of multiple offices may be consolidated into a single opinion, or take the form of individual advisory opinions from the various offices. If multiple advisories are rendered, the opinions must represent the position of the command/FOA, not the individual office, and any differences on a specific issue must be reconciled within the command/FOA prior to submission to the BCMR **(T-1)**.

4.2.2.7. Commands/FOAs will appoint a single point of contact who will manage the command/FOA's internal advisory opinion development, staffing, coordination, and accountability processes. **(T-1)**

4.2.3. Relevant investigative reports (e.g. Inspector General (IG), Office of Special Investigation (OSI), Accident Investigation Reports, etc.).

4.3. **Applicant Notification.** Applicants shall be given an opportunity to review and comment on all correspondence and communications (including advisory opinions) to or from the AFRBA and with an entity or person outside the AFRBA that pertain directly to the applicant's case or may have a material effect thereon. This rule applies to spoken or telephonic communications, which must be summarized. This rule does not apply to

classified information; release of information which is otherwise prohibited or privileged by law or regulation (e.g., privacy act); any record previously provided to the applicant or known to be possessed by the applicant (such as records of adverse administrative actions showing acknowledgement by the applicant); purely administrative correspondence; and any military record that is or may be provided to the applicant by the Secretary of the military department or other source.

4.3.1. The applicant will be given no more than 30 days to review and respond to the material described in paragraph 4.3. The application will be processed for the Board's consideration at the end of the 30-day period with the available evidence of record, or upon receipt of the applicant's rebuttal, whichever occurs first. Applicants will not contact offices of primary responsibility (OPR) to respond to advisory opinions. Any response to the advisory opinion(s) will be submitted to the Board in writing before the end of the 30-day period described above.

4.3.2. Requests for an extension of the 30-day period will not be granted. Title 10, U.S.C., Section 1557 requires the Board to adjudicate 90 percent of its cases within ten months, with no single case exceeding 18 months in processing. Therefore, given this strict processing timeline, extensions to the 30-day period cannot be granted without compromising the Board's ability to comply with the provisions of 10 U.S.C. § 1557. However, an applicant may request their case be administratively closed, without prejudice, until such time as they are ready to proceed. Once ready to proceed, the applicant must notify the Board staff in writing (e-mail or regular mail) so processing of the case to the Board may be resumed.

4.3.3. If, in response to the advisory opinion, or at any other time, the applicant amends an active application for correction of records, the application may be closed at the discretion of the Executive Director and the applicant will be instructed to file a new DD Form 149 so the requests can be aggregated and adjudicated simultaneously.

4.3.4. Any requests for the status of an application before the Board (applicant initiated or otherwise) will be referred to the Air Force Review Boards Agency. Applicants may not make contact with OPRs to ascertain the status of their application before the Board, nor will OPRs divulge information to an applicant on the adjudication of their case before the Board, but will refer the inquiry to the Board staff for a response to the applicant. OPR access to the BCMR system of record is for official use only based on a strict need-to-know.

**4.4. Consideration by the Board.** A panel consisting of at least three board members considers each application. One panel member serves as chair. The panel's actions constitute the actions of the Board.

**4.5. Board Deliberations.** Normally, only members of the Board and Board staff will be present during deliberations. The panel chair may permit observers for training purposes or otherwise in furtherance of the functions of the Board.

**4.6. Board Hearings.** Applicants may request a hearing before the Board. Whether or not the Board authorizes a formal hearing is predicated on its finding that the applicant's presence, with or without counsel, would materially add to its understanding of the issues involved. The Board has the sole discretion to determine whether to grant a hearing. See

DoDD 7050.06, *Military Whistleblower Protection* and AFI 90-301, *Inspector General Complaints Resolution*, for special provisions in cases processed under 10 U.S.C. § 1034.

4.6.1. The Executive Director, AFBCMR, will notify the applicant and counsel, if any, of the time and place of the hearing. Written notice will be mailed or electronically transmitted not less than 30 days in advance of the hearing unless the notice period is waived by the applicant. Any response by the applicant must be received not later than 15 days before the hearing date, accepting or declining the offer of a hearing and, if accepting, provide information pertaining to counsel and witnesses. The Board will decide the case based on the evidence of record if the applicant declines the hearing, fails to respond, or fails to appear.

4.6.2. When granted a hearing, the applicant may appear before the Board, with or without counsel, and may present witnesses. It is the applicant's responsibility to notify witnesses, arrange for their attendance at the hearing, and pay any associated costs.

4.6.3. The panel chair conducts the hearing, maintains order, and ensures the applicant receives a full and fair opportunity to be heard. Formal rules of evidence do not apply, but the panel will generally consider relevancy and materiality when weighing evidence. Witnesses other than the applicant will not be present except when testifying. Witnesses will testify under oath or affirmation. A recorder will record the proceedings verbatim. The chair will normally limit hearings to two hours but may allow more time if necessary.

4.7. The Board will not recommend denial of an application on the sole ground the issue already has been decided by the SAF, Secretary of Defense (SECDEF), or the President of the United States in another proceeding.

**4.8. Liberal Consideration for Post-traumatic Stress Disorder (PTSD) and Related Conditions.** Liberal consideration will be given in cases where an applicant has presented evidence of a diagnosis of PTSD, or symptoms resembling PTSD, in requests to upgrade their other than honorable discharge (e.g., undesirable, under other than honorable conditions (UOTHC), bad conduct discharge (BCD), dishonorable discharge (DD), dismissal, etc.), where the applicant claims there is a causal nexus between the PTSD or PTSD symptoms and the misconduct which precipitated the discharge. If applicable, the three-year statute of limitations prescribed in paragraph 3.5 will be waived by the Board.

**4.9. Review of Sexual Assault Cases.** The Board will utilize a confidential process by which an individual who was the victim of a sex-related offense during service in the Armed Forces may challenge the terms or characterization of the discharge or separation of the individual from the Armed Forces on the grounds the terms or characterization were adversely affected by the individual being the victim of such an offense. The Board will give due consideration to the psychological and physical aspects of the individual's experience in connection with the sex-related offense and determine what bearing such experience may have had on the circumstances surrounding the individual's discharge or separation from the Armed Forces. To ensure confidentiality, the Board staff will ensure the application pertaining to such a person is processed in such a way as to preclude the access of the application, advisory opinions, and the Board's ultimate decision, to those without a need to know. Final Records of Proceeding (ROP) in such cases will not be posted to the reading room without the consent of the applicant.

4.10. **Board Recommendations.** The panel's majority vote constitutes the action of the Board. The Board shall make a final written recommendation to the SAF, or SAF's delegee, based on determination on the following issues:

4.10.1. Whether the application was filed within 3 years after the error or injustice was reasonably discoverable and, if not, whether the applicant has demonstrated that it would be in the interest of justice to excuse the untimely filing. When the Board determines that an application is not timely, and does not excuse its untimeliness, the application will be denied on that basis.

4.10.2. Whether the applicant has demonstrated the existence of a material error or injustice that can be remedied effectively through correction of the applicant's military record and, if so, what corrections are needed to provide full and effective relief.

4.10.3. Whether the provisions of the 10 U.S.C. § 1034 apply to the application. This determination is needed only when the applicant invokes this protection, or when the question of its applicability is otherwise raised by the evidence.

4.10.4. In cases identified under paragraph 4.10.3, the Board may recommend to the SAF that disciplinary or administrative action be taken against any Air Force official whom the Board finds to have committed an act of reprisal against the applicant. Any determination on this issue will not be made a part of the Board's ROP in the case at hand and will not be given to the applicant, but will be provided directly to the SAF under separate cover (paragraph 2.2).

4.11. **Record of Proceedings.** The Board staff will prepare a ROP following deliberations which will include:

4.11.1. The name and vote of each Board member.

4.11.2. The application.

4.11.3. Briefs and written arguments.

4.11.4. Documentary evidence.

4.11.5. A hearing transcript if a hearing was held.

4.11.6. Advisory opinions (if obtained) and the applicant's related comments.

4.11.7. The findings, conclusions, and recommendations of the Board.

4.11.8. Minority reports, if any.

4.11.9. Other information necessary to show a true and complete history of the proceedings.

4.12. **Minority Reports.** There will be situations where, after deliberations, a voting panel member will disagree with the recommendation of the majority. In those instances, the dissenting panel member(s) may prepare a minority report, which may address any aspect of the case, explaining the rationale for their position.

4.13. **Separate Communications.** The Board may send comments or recommendations to the SAF as to administrative or disciplinary action against individuals found to have committed acts of reprisal prohibited by the Military Whistleblowers Protection Act and on

other matters arising from an application not directly related to the requested correction of military records. Such comments and recommendations will be separately communicated and will not be included in the record of proceedings or given to the applicant or counsel.

4.14. **Final Action by the Board.** The Board sends the record of proceedings describing its recommendations on each application to the SAF or to the SAF's delegee for final decision. For Military Whistleblower cases (10 U.S.C. § 1034), if the applicant is not satisfied with the final decision, it may be appealed to the SECDEF.

4.15. The Board may identify DoD or Air Force policies, instructions, guidance or practices that are leading to, or likely to lead to unsound organizational decisions, unfair results, waste of government funds or public criticism. The Board will forward such observations directly to the appropriate offices of the Secretariat, the Air Staff, or both, for review and evaluation. Such observations will not be included in the ROP.

**5. Decision of the SAF.** In accordance with Secretarial delegations of authority, the SAF, or the SAF's delegee, will direct such action as the SAF or delegee deems appropriate on each case, including returning the case to the Board for further consideration. Cases returned to the Board for further reconsideration will be accompanied by a brief statement of the reasons for such action. If the SAF or delegee does not accept the Board's recommendation, the decision will be in writing and will include a brief statement of the grounds for his or her final decision.

5.1. **Decisions in Cases Under the Military Whistleblowers Protection Act.** In resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by the Military Whistleblowers Protection Act, the Board may review the matter. The SAF will issue decisions on such cases within 180 days after the application is filed. If the SAF fails to issue a final decision within that time, the applicant shall be deemed to have exhausted administrative remedies and may appeal to the SECDEF or Federal Court as applicable. Additionally, unless the full relief requested is granted, the Board will inform the applicant of their right to request review of the decision by the SECDEF. Applicants will also be informed of the following:

5.1.1. The name and address of the official to whom the request for review must be submitted;

5.1.2. The request for review must be submitted within 90 days after receipt of the decision by the SAF;

5.1.3. The request for review must be in writing and include the applicant's name, address, email address, and telephone number; a copy of the application to the AFBCMR, the final decision of the SAF, and a statement of the specific reasons the applicant is not satisfied with the decision;

5.1.4. The request must be based on the Board record; requests for review based on factual allegations or evidence not previously presented to the Board will not be considered under this paragraph, but may be the basis for reconsideration by the Board under paragraph 6.

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5.2. In cases under paragraph 5.1 which involve additional issues not cognizable under that paragraph, the additional issues may be considered separately by the Board under paragraphs 3 and 4. The special time limit in paragraph 5.1 does not apply to the decision concerning these additional issues.

5.3. In resolving an application for the correction of records made by a member or former member of the armed forces in which the request is based on an alleged incorrect Inspector General finding of reprisal by the applicant, if the Board considers the applicant to have raised potentially new matters, it will refer the applicant's new matters to the Air Force Inspector General (SAF/IG).

5.3.1. SAF/IG will determine if the applicant's matters are, in fact, new, relevant, and material; and if so, whether the new matters warrant that SAF/IG reopen their investigation.

5.3.2. If SAF/IG finds no new matters in the application, or determines that the new matters are not relevant or material to the original reprisal determination, it shall return the case to the Board within 30 days, informing the Board of their determination. SAF/IG may also submit their analysis of the applicant's new matters to DoD IG for oversight and approval.

5.3.3. If SAF/IG revises in any way their original findings of reprisal by the applicant, SAF/IG will refer the case to DoD IG for statutorily required oversight and approval. Upon receipt of DoD IG's final approval, the case will be returned to the Board within 15 days.

5.3.4. Regardless of SAF/IG's determinations in paragraphs 5.3.1, 5.3.2, and 5.3.3, SAF/IG shall provide an advisory to the Board regarding its determination(s). At a minimum, the advisory shall address the applicant's contentions and provide a recommendation for granting or denying the requested relief.

5.4. In all cases, all relevant Inspector General records will be made available to the Board for their use in cases under paragraph 5.3 which involve additional issues not cognizable under that paragraph, the additional issues may be considered separately by the Board under paragraphs 3 and 4. The special time limit in paragraph 5.1 does not apply to the decision concerning these additional issues.

**6. Reconsideration of Applications.** The Board may reconsider an application if the applicant, within 3 years of the original decision, submits newly discovered relevant evidence that was not reasonably available when the application was previously considered. The request for reconsideration must be accompanied by a new DD Form 149, bearing the applicant's signature and describing the specific correction requested, as well as the reasons the applicant believes he or she is the victim of an error or injustice. Each request for reconsideration will be screened to determine whether or not it contains new and relevant evidence that was not available or reasonably discoverable when the original application was filed. New arguments about, or analysis of evidence already considered and additional statements that are cumulative to those already in the record of proceedings will not be considered new evidence. The Board may also reconsider an application upon its own motion.

6.1. If the request does not contain new evidence, the Executive Director or the Executive Director's designee will return it to the applicant without referral to the Board.

6.2. If the request contains new evidence, the Executive Director or his or her designee will refer it to a panel of the Board for a decision. The Board will decide the relevance and weight of any new evidence and whether it was reasonably available to the applicant when the application was previously considered. The Board may deny reconsideration if the new evidence is not relevant to the original matter or if it was reasonably available to the applicant when the original application was submitted. Otherwise, if the Board deems the evidence new and relevant, it will reconsider the case on the merits. In any case, an ROP will be prepared by the AFBCMR staff in accordance with paragraph 4.11.

6.3. If the AFBCMR receives a request for reconsideration more than 3 years after the Board's original decision, the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction.

## 7. Action After Final Decision.

7.1. **Action by the Executive Director.** The Executive Director or his or her designee will inform the applicant or counsel, if any, of the final decision on the application. If any requested relief was denied, the Executive Director will advise the applicant of reconsideration procedures and, for cases processed under 10 U.S.C. § 1034, procedures for review by SECDEF. The Executive Director will send decisions requiring corrective action (directives) to the Chief of Staff of the Air Force (or appropriate designee) for necessary action. These directives are final and conclusive on all officers of the government. Directives will be staffed to command/FOA/Air Force/DoD agency responsible for promulgating the corrective action. Corrective action should be taken within 30 days **(T-1)** of the date of the instrument and copies of corrected documents should be provided to the Air Force Review Boards Agency Case Management Office. Commands/FOAs (e.g. AFPC, AFRC, NGB, AFRC, etc.) will appoint a single point of contact to manage the directive promulgation process. **(T-1)**

7.2. **Settlement of Claims.** The Air Force is authorized, under 10 U.S.C. § 1552, to pay claims for amounts due to applicants as a result of correction of military records.

7.2.1. The Executive Director will furnish the Defense Finance and Accounting Service (DFAS) with AFBCMR decisions potentially affecting monetary entitlement or benefits. DFAS will treat such decisions as claims for payment by or on behalf of the applicant.

7.2.2. DFAS settles claims on the basis of the corrected military record. Computation of the amount due, if any, is a function of DFAS. Applicants may be required to furnish additional information to DFAS to establish their status as proper parties to the claim and to aid in deciding amounts due.

7.2.3. Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted from the settlement. Amounts found due will be offset by the amount of any existing indebtedness to the government.

7.2.4. Payment of Expenses. The Air Force has no authority to pay expenses of any kind incurred by or on behalf of an applicant in connection with a correction of military records under 10 U.S.C. § 1034 or § 1552.

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7.3. **Public Access to Decisions.** After deletion of personal information, AFBCMR decisions will be made available for review and copying via an electronic public reading room at [http://boards.law.af.mil/AF\\_BCMR.htm](http://boards.law.af.mil/AF_BCMR.htm).

**8. Miscellaneous Provisions.**

8.1. **Access to Records.** Applicants will have access to all records considered by the Board, except those exempted by law. Inasmuch as the AFBCMR is not the custodian for master personnel records, any applicant requesting these records will be referred to the National Personnel Records Center (NPRC), 1 Archive Drive, St. Louis, MO 63138, (314) 801-0800, <http://www.archives.gov/st-louis>, or, if still serving, the appropriate servicing personnel agency.

8.2. **Senior Leaders Communications with Air Force Review Boards Agency.** Any inquiry about a specific pending case before the AFBCMR by a senior official (general officer or Senior Executive Service (SES)) should be routed through the Director, AFRBA or the Principal Deputy Assistant Secretary of the Air Force (Manpower and Reserve Affairs).

DANIEL R. SITTERLY  
Acting Assistant Secretary of the Air Force  
Manpower and Reserve Affairs

**Attachment 1**

**GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION**

***References***

Fiscal Year 2015 National Defense Authorization Act (NDAA), Sections 521 and 547

Title 10, United States Code (U.S.C.), Section 1552

Title 10, U.S.C., Section 1556

Title 10, U.S.C., Section 1557

Title 10, U.S.C., Section 1034

DoDD 1332.41, *Boards for Correction of Military Records and Discharge Review Boards*,  
8 March 2004

DoDD 7050.06, *Military Whistleblower Protection*, 15 April 2015

AFPD 90-3, *Inspector General, the Complaints Resolution Program*, 9 June 2016

AFI 90-301, *Inspector General Complaints Resolution*, 27 August 2015

AFMAN 33-363, *Management of Records*, 1 March 2008

AFPAM 36-2607, *Applicants' Guide to the Air Force Board for Correction of Military Records (AFBCMR)*, 3 November 1994

Secretary of Defense Memorandum, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder, 3 September 2014, and Acting Principal Deputy Secretary of Defense for Personnel and Readiness (OUSD-P&R) memorandum, Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI), 24 February 2016.

SAF/MR Memorandum, Senior Leader Communications with Air Force Review Boards Agency, dated 5 October 2011

SAF/MR Memorandum, Preparation of Advisory Opinions before the Air Force Board for Correction of Military Records (AFBCMR), dated 20 June 2012

***Adopted Forms***

DD Form 149, *Application for Correction of Military Records*, December 2014

AF Form 847, *Recommendation for Change of Publication*, 22 September 2009

***Abbreviations and Acronyms***

**AFBCMR**—Air Force Board for Correction of Military Records

**AFDRB**—Air Force Discharge Review Board

**AFI**—Air Force Instruction

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**AFMAN**—Air Force Manual

**AFPC**—Air Force Personnel Center

**AFRBA**—Air Force Review Boards Agency

**AFRC**—Air Force Reserve Command

**AFRIMS**—Air Force Records Information Management System

**ARPC**—Air Reserve Personnel Center

**BCD**—Bad Conduct Discharge

**CAC**—Common Access Card

**DD**—Dishonorable Discharge

**DFAS**—Defense Finance and Accounting Service

**FOA**—Field Operating Agency

**NDAA**—National Defense Authorization Act

**NGB**—National Guard Bureau

**OPR**—Office of Primary Responsibility

**PTSD**—Post-traumatic Stress Disorder

**RDS**—Records Disposition Schedule

**SECDEF**—Secretary of Defense

**U.S.C**—United States Code

**UOTHC**—Under Other Than Honorable Conditions

**BY ORDER OF THE  
SECRETARY OF THE AIR FORCE**

**AIR FORCE INSTRUCTION 36-3212**

**2 FEBRUARY 2006**

*Incorporating Through Change 2, 27 November 2009*

**Personnel**

**PHYSICAL EVALUATION FOR RETENTION,  
RETIREMENT, AND SEPARATION**



**COMPLIANCE WITH THIS PUBLICATION IS MANDATORY**

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OPR: HQ AFPC/DPSD

Certified by: HQ AFPC/DPP  
(Col Steven M. Maurmann)

Supersedes: AFI 36-3212, 30 September 1999

Pages: 98

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This instruction describes how to retire or discharge Air Force (AF) members who are unfit to do their military duties because of physical disability. It outlines procedures for examining, and discharging or retiring members from the temporary disability retired list (TDRL). It also provides disposition instructions for unfit members who remain on active duty in a limited assignment status (LAS). **Chapter 8** applies to certain Air National Guard (ANG) and United States Air Force Reserve (USAFR) members not on extended active duty (EAD). This instruction carries out the requirements of Title 10, United States Code (U.S.C.), chapter 61, and Department of Defense Directive (DoDD) 1332.18, *Separation or Retirement for Physical Disability*, November 4, 1996, DoD Instructions (DoDI) 1332.38, *Physical Disability Evaluation*, and 1332.39, *Application of the Veterans Administration Schedule for Rating Disabilities*, November 14, 1996, and implements Air Force Policy Directive (AFPD) 36-32, *Military Retirements and Separations*.

This instruction requires collecting and maintaining information protected by the Privacy Act of 1974, under 10 U.S.C., chapter 61, and Executive Order (EO) 9397. The Privacy Act statement required by Air Force Instruction (AFI) 37-132, *Air Force Privacy Act Program*, is in AF Forms 1185, **Statement of Record Data**, and 1186, **Retention Limited Assignment Status**. System of Records Notice F035 AF PC, *Military Personnel Records System*, applies. Submit proposed supplements and operating instructions to AF Personnel Center, Directorate of Personnel Program Management, USAF Physical Disability Division (HQ AFPC/DPPD), for review and approval before publication. Process supplements that affect any military personnel function as shown in AFI 37-160, volume 1, table 3.2, *The Air Force Publications and Forms Management Programs--*

*Developing and Processing.* Refer to **Attachment 1** for Glossary of References, Abbreviations, Acronyms, Terms and Addresses.

**SUMMARY OF CHANGES**

This change revises paragraph 2.6 for recalling MEB cases; updates paragraph 2.7 with new procedures for the “Expedited DES Process”; revises paragraph 3.34 to include both fit and unfit findings; updates date of separation computation in paragraph 5.19.3.1; and eliminates the option for airmen over 20 years to remain in a Limited Assignment Status in paragraph 6.3.2. A margin bar (/) indicates newly revised material.

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## Chapter 1

### GENERAL PROVISIONS

#### 1.1. Purpose of the Disability Evaluation System (DES).

1.1.1. To maintain a fit and vital force, disability law allows the Secretary of the Air Force (SAF) to remove from active duty those who can no longer perform the duties of their office, grade, rank or rating and ensure fair compensation to members whose military careers are cut short due to a service-incurred or service-aggravated physical disability.

#### 1.2. Responsibilities.

1.2.1. The SAF prescribes directives to carry out provisions of Title 10, U.S.C. These are used to decide fitness for continued military duty; percentage of disability in unfit cases; suitability for reappointment, enlistment or reentry on active duty; and entitlement to disability retirement or severance pay.

1.2.2. The Secretary of the Air Force Personnel Council (SAFPC) acts on behalf of the SAF.

1.2.3. HQ AFPC/DPPD processes disability cases, establishes Informal and Formal Physical Evaluation Boards and controls the TDRL program.

1.2.4. SAFPC or HQ AFPC/DPPD may make exceptions to this instruction unless specifically prohibited by law or DoD policy.

**1.3. Eligibility for Disability Evaluation.** HQ AFPC/DPPD determines eligibility for disability processing. The mere presence of a physical defect or condition does not qualify a member for disability retirement or discharge. The physical defect or conditions must render the member unfit for duty. Disability evaluation begins only when examination, treatment, hospitalization, or substandard performance result in referral to a Medical Evaluation Board (MEB). Members not eligible for disability processing are:

1.3.1. Members Under Court-Martial (CM) Charges. Those charged with one or more offenses that could result in dismissal or punitive discharge, and those convicted and sentenced to dismissal or punitive discharge, may not undergo disability evaluation, unless the case fits one of the following exceptions:

1.3.1.1. Question of Mental Capacity or Responsibility. When a medical board questions a member's mental capacity or responsibility, the commander exercising CM jurisdiction decides whether to proceed with CM or dismiss, withdraw, or hold the charges in abeyance until completion of the disability evaluation. The commander sends a copy of the decision to withdraw or dismiss CM to HQ AFPC/DPPD, along with the mental inquiry report and other required records listed in AFI 48-123, *Medical Examination and Medical Standards*.

1.3.1.2. Member Whose Sentence to Dismissal or Punitive Discharge is Suspended. Action to vacate the suspension stops disability evaluation.

1.3.2. Eligibility for Disability Evaluation. USAF Academy (USAFA) Cadets (10 U.S.C. 1217) who incurred a disability on or after 27 October 2004.

1.3.3. Members on Excess Leave. According to the Comptroller General of the United States (decision B-205953, 18 Jun 82), a member in this status is not entitled to basic pay and, therefore, is not entitled to disability benefits under the provisions of 10 U.S.C., chapter 61.

**(EXCEPTION:** Member is eligible for disability processing if in this status in order to participate in educational program or for an emergency purpose.)

#### 1.4. Processing Special Cases.

1.4.1. CM Sentence Not Involving Dismissal or Punitive Discharge. Members who are in military confinement are not eligible for processing until sentence is completed and they are placed in a returned to duty status.

1.4.2. Unauthorized Absence. HQ AFPC/DPPD and the PEBLO stop processing a case when a member is absent without leave (AWOL), in deserter status, or in the hands of civil authorities and do not resume processing until the member returns to military control and HQ AFPC/DPPD determines the member is eligible for disability processing.

1.4.3. Civil Court Action. When civil criminal court action is pending and the member is present for duty, the PEBLO will continue processing after the member's commander clears the member for appearance at the PEB.

1.4.4. Dual Action. Process as dual action, disability cases on members with an unfit finding who are also pending administrative separation (including Second Lieutenants being processed for "not qualified for promotion"), or who apply for nondisability retirement or discharge in lieu of CM action according to AFIs 36-3203, *Service Retirements*, 36-3206, *Administrative Discharge Procedures*, 36-3207, *Separating Commissioned Officers*, 36-3208, *Administrative Separation of Airmen* or 36-3209, *Separation Procedures for Air National Guard and Air Force Reserve Members*. SAFPC makes the final disposition. If SAFPC does not accept the retirement or discharge in lieu of CM action, the CM will proceed. If the sentence does not result in punitive discharge, then the disability case can be processed. **NOTE:** Administrative action continues in any disability case that results in a fit determination.

**1.5. Delay of Processing.** Medical Treatment Facilities (MTFs) will not delay disability processing for nondisabling conditions such as elective surgery. If a member needs emergency surgery, treatment, or hospital care, consider a delay in retirement or discharge only when it could cause a change in the disability disposition or rating.

**1.6. Benefits.** The Air Force disability system will not retain, retire, or discharge a member for disability solely to increase Air Force retirement or discharge benefits.

**1.7. Disability Ratings.** The PEB assigns a percentage rating to a medical defect or condition when the member is physically unfit for duty. By law, (10 U.S.C., chapter 61), the Air Force assigns ratings from the Department of Veterans' Affairs (VAs') *Schedule for Rating Disabilities* (VASRD) and implementation guidance contained in DoDI 1332.39. **(EXCEPTION:** Reserve and ANG fitness/unfitness determinations as described in **Chapter 8**.)

**1.8. VASRD Distribution.** The VA sends the VASRD to HQ AFPC/DPPD. HQ AFPC/DPPD assigns a control number to each copy and sends a copy to the PEBLOs and to evaluating boards and staff members in the disability system. PEBLOs maintain control of the publication within their respective MTF.

**1.9. Air Force and VA Ratings.** The VA administers its program under Title 38, U.S.C.; the Air Force under Title 10. Although both use the VASRD in assessing disability ratings, a prime difference between the two systems is that the VA may rate any service-connected condition without regard to fitness, whereas the Air Force may rate only those conditions which make a member unfit for continued military service (see paragraph **A2.21**).

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**1.10. Medical Hold.** The Medical Standards Branch (HQ AFPC/DPAMM) may place a member on medical hold when he or she is within 60 days of the scheduled non-disability separation or retirement date and undergoing disability processing. HQ AFPC Service Retirements, AF/DPOB (for Colonels and Colonel-selects), or the MPF must revoke the non-disability retirement or discharge order before its effective date.

**1.11. The Next of Kin (NOK) or Guardian.** The NOK (in accordance with 10 U.S.C. 1513 [4] and [5] and 10 U.S.C. 1482[C]) or guardian acts for a member when the member is mentally incompetent or the physician determines that divulging information to the member would be harmful to the member's well being. The NOK or guardian has the same rights, privileges, and counseling benefits and, unless specifically prohibited, follows the same procedures as for the members being evaluated. *NOTE:* For the sake of brevity, this instruction refers to the member except when the text applies specifically to the NOK or guardian.

**1.12. National Emergency, Contingencies of War, Times of War.** HQ AFPC/DPPD will establish Physical Evaluation Boards (PEBs) at designated locations in the Continental United States (CONUS) and will announce this action by message (includes minimize).

1.12.1. Medical facilities send their MEBs to the nearest PEB-selected location. The PEB sends its findings and recommended disposition to the evaluatee. If the evaluatee nonconcur, he or she may appear before the Formal Physical Evaluation Board (FPEB) represented by counsel or, if the evaluatee denies this option, he or she may appeal in writing to the PEB that issued the original findings. The member may appeal the final findings of the PEB by writing to the central review authority of the SAFPC at AFPC. *EXCEPTION:* If the Informal Physical Evaluation Board (IPEB) finds a member fit and recommends return to duty, no appeal process is available.

1.12.2. The central review authority is made up of members of the current PEBs and makes the final determination.

**1.13. Unlawful Influence.** No one may attempt to coerce or, by any unauthorized means, influence a PEB or the outcome of any disability case.

**1.14. Approval by Defense Finance and Accounting Service (DFAS).** DFAS approved the entitlements portions of this instruction under procedures prescribed by the Secretary of Defense (SecDef) according to Title 37 U.S.C., Section 1001.

**1.15. Special Orders.** HQ AFPC/DPPD issues special orders effecting temporary and permanent disability retirement (ACD series), travel orders for TDRL members (TDD), and appointment of PEB members (ABD). The Chief, USAF Physical Disability Division, is the authenticating official.

## Chapter 2

### MEDICAL TREATMENT FACILITY (MTF) PROCESSING RELATED TO DISABILITY EVALUATIONS

**2.1. Medical Evaluation Boards (MEB).** AFI 48-123, *Medical Examination and Standards*, gives the rules for competency boards and MEBs, their documentation, appropriate recommended actions, and the disposition of evaluatees and their records. In addition, the PEB requires specialty evaluations, such as cardiology consultations for heart conditions or psychiatric consultation for mental conditions. Documentation sent to the PEB for adjudication must not be over 90 days old when received at AFPC. When there is a question about the member's ability to act in his or her own behalf, or if there is a change from a prior competency determination, a competency board must be conducted. **EXCEPTION:** This 90-day time limit does not apply in cases of members of the Ready Reserve whose non-duty related impairments are being evaluation by the PEB for a determination of fitness only under **Chapter 8, Section 8E**.

#### **2.2. Role of the Medical Officers in the MEB Process.**

2.2.1. The attending physician at the medical treatment facility (MTF) will:

2.2.1.1. Conduct the examination.

2.2.1.2. Prepare the documents required to identify medical defects or conditions that may disqualify the member for continued active duty (AD).

2.2.1.3. Refer the case to a MEB.

2.2.2. Medical officers on the MEB will:

2.2.2.1. Evaluate the documentation. Recommend the disposition of the MEB case and refer it to the approving authority as outlined in AFI 48-123.

#### **2.3. Role of the Physical Evaluation Board Liaison Officer (PEBLO).** The PEBLO will:

2.3.1. Ensure disability cases referred to the PEB are complete, accurate, and fully documented.

2.3.2. Counsel evaluatees concerning their rights in the disability process (see **Attachment 2**).

2.3.3. Maintain coordination with the member, medical facility, MPF, and HQ AFPC/DPPD.

**2.4. Role of Commander and Supervisor.** Except in situations of critical illness or injury in which return to duty is not expected, a written statement from the member's immediate commanding officer or supervisor describing the impact of the member's medical condition on normal military duties and ability to deploy or mobilize, as applicable, will be submitted with the documentation required by AFI 48-123.

**2.5. Hospitalization During or After Disability Evaluation.** If disability processing is not completed, the MTF must obtain authorization from HQ AFPC/DPPD before moving the member to a VA hospital for long-term inpatient care. When the evaluatee's medical condition requires continued inpatient care after completion of disability processing, hospitalization will be at the referring hospital, another military facility, or a VA or civilian medical facility.

**2.6. Recall of Case.** If a major change in the diagnosis or in member's condition is discovered, the referring MTF commander may recall the case for further medical evaluation and new

medical board or addendum, as appropriate. The commander sends a report of circumstances and request for recall to AFPC/DPSD.

2.6.1. **DELETED.**

2.6.2. **DELETED.**

**2.7. Expedited DES Process for Members with Catastrophic Conditions and Combat-Related Causes.** Military medical authorities, the Federal Recovery Care Coordinator, PEBLOs, treating physicians, medical and non-medical case managers collaborate in identifying members who are qualified for referral to the expedited DES process. The PEBLOs work to obtain a medical declaration of catastrophically ill or injured through the DES.

2.7.1. The PEBLO transmits the following minimum documentation to AFPC/DPSD: a narrative summary of care describing, at minimum, the member's course of medical treatment since injury, current condition, description of the treatment plan and prognosis. Narrative summary must be signed by the senior attending physician. Once the PEB has made the catastrophic determination, processing will continue as outlined in DoDI 1332.38, Enclosure 9, paragraph E9.4.

2.7.2. **DELETED.**

**2.8. DELETED.**

**2.9. Referral for Pre-Separation Counseling.** As soon as it is evident that a member will meet an MEB, the PEBLO refers the member to the MPF for pre-separation counseling in accordance with AFI 36-2102, *Base-Level Relocation Procedures*. Although final disposition is unknown at this point, early counseling is necessary to satisfy requirements of 10 U.S.C. 1142.

### Chapter 3

#### THE PHYSICAL EVALUATION BOARD (PEB)

##### *Section 3A—How PEBs are Established*

**3.1. Purpose of PEBs.** A PEB is a fact-finding body that investigates the nature, origin, degree of impairment, and probable permanence of the physical or mental defect or condition of any member whose case it evaluates. The disability system provides for two PEBs: an Informal PEB and a Formal PEB. If either board finds a member unfit, it recommends appropriate disposition based on the degree of impairment caused by the disabling condition, the date incurred, and the member's line of duty status. A PEB is not a statutory board, and there is no statute of limitations in considering evidence.

**3.2. Legal Basis for Formal Hearings.** The FPEB provides the full and fair hearing required by 10 U.S.C. 1214 for members recommended for a disability discharge or retirement.

**3.3. Voting Board.** The PEB is a voting board and each member has an equal vote. If disagreement occurs, the majority vote determines the issue. The dissenting member may write a report to assist later reviewers in understanding the issues.

**3.4. Training of PEB Members.** HQ AFPC/DPPD trains all members before they act and vote on disability cases. Training includes all elements of the disability system, criteria for fitness determinations, and use of the VASRD.

**3.5. The Appointing Authority for PEB Members.** Permanent and alternate members are appointed on Department of the Air Force (DAF) Special Orders by direction of the SAF.

**3.6. Permanent Members of the PEB.** The Commander, Air Force Personnel Center (AFPC/CC), or a designee, assigns and appoints PEB permanent members. Appointment orders designate the senior nonmedical voting member as PEB president, other nonmedical voting members as personnel members, and identify Medical Corps and Reserve component members.

**3.7. Alternate Members of the PEB.** Alternate members serve when permanent members are absent. The PEB president instructs alternate members on their duties and responsibilities. HQ AFPC/DPPD and the FPEB, HQ AFPC/DPPDF, appoint and designate alternate members on orders. AFPC/CC furnishes alternate members to the IPEB. The Commander, Air Force Military Training Center (AFMTC, Lackland), furnishes alternate presidents and personnel members for the FPEB. The Commander, 59th Medical Wing, Wilford Hall Medical Center (59 Med Wg (WHMC), Lackland), furnishes alternate medical members for the FPEB. The Lackland Staff Judge Advocate (SJA) furnishes the alternate legal counsel for the FPEB. In acting on a PEB request for an alternate member, the commander's decision on the availability of the member is final. Alternate presidents should be lieutenant colonels or above; alternate medical and non-medical members, majors or above; and alternate military legal counsels, captains or above.

**3.8. PEB Composition.** The PEB must have at least three voting members. When appropriate, the permanent personnel member (if serving in the grade of lieutenant colonel or above) or the senior alternate non-medical member may serve as president. HQ AFPC/DPPD appoints an alternate president if neither is available. (*Exception:* If SAFPC approves, the informal PEB may consist of two members--a medical and a personnel officer. If the two disagree on the findings, HQ

AFPC/DPPD appoints a third member to get a majority vote.). The president of the PEB assembles the board and ensures:

- 3.8.1. One of the voting members is a physician.
- 3.8.2. One of the voting members is in the Regular Air Force, if the evaluatee is in the Regular Air Force.
- 3.8.3. One of the voting members is a Reserve officer (Title 10 U.S.C. 266), if the evaluatee is in a Reserve component.

**3.9. Restrictions on Membership.** Voting members cannot serve on a PEB that evaluates a case they have acted on before except:

- 3.9.1. When a PEB voting member acting on a TDRL reevaluation case acted on the same case at the initial evaluation or an earlier reevaluation.
- 3.9.2. When additional documentation has been added to the case.
- 3.9.3. When a new MEB has recommended that a case again be referred to a PEB.
- 3.9.4. When a higher review authority has directed further investigation and reconsideration of a case or when authorized by the Chief, USAF Physical Disability Division.

**3.10. Self Disqualification.** PEB voting members must disqualify themselves if for any reason they believe they would be unable to render a fair and impartial decision.

**3.11. PEB Locations.** The IPEB is at AFPC, 550 C Street West Ste 6, Randolph AFB TX 78150-4708. The FPEB is at 2320 Carswell Ave Ste 3, Lackland AFB TX 78236-5607.

**3.12. PEB Support and Administration.** HQ AFPC/DPPD exercises operational, procedural and administrative supervision of the PEBs. However, the PEBs are attached to the base where they are located for logistics and administrative support, and court martial jurisdiction. In addition to providing administrative control of disability case processing, HQ AFPC/DPPD gives administrative and statistical support to the PEB as required.

- 3.12.1. The Disability Operations Branch (HQ AFPC/DPPDS) processes all disability cases on AD members, ARC members, and TDRL members.
- 3.12.2. HQ AFPC/JA provides legal support.
- 3.12.3. To ensure fairness and independent decisions in the disability evaluation system, primary members of the PEBs will not be rated (for officer performance report purposes) by the board president or another member of the board.

### ***Section 3B—PEB Findings and Recommendations***

**3.13. Cases Unable to be Adjudicated.** When the PEB needs more or corrected information to evaluate a case, HQ AFPC/DPPD returns the medical board proceedings and related documents to the referring MTF with a cover memorandum explaining why the case is being returned and what actions to take. When returning the case to HQ AFPC/DPPD, the MTF must include a cover memorandum telling what they did and whether they added or changed any documents. HQ AFPC/DPPD refers a case to a different facility for more medical workup or new MEB if the PEB considers it necessary to ensure a fair and impartial evaluation. HQ AFPC/DPPD returns cases for any of the following reasons:

- 3.13.1. More detailed or additional documents;
- 3.13.2. Further information and description of defects;
- 3.13.3. Further hospitalization, another physical exam, or reconsideration by an MEB;
- 3.13.4. Correction or explanation of apparent errors, omissions or inconsistencies in the records or supporting documents; or
- 3.13.5. Noncompliance with governing directives, such as AFIs 48-123 and 36-2910, *Line of Duty and Misconduct Determination*, and this instruction.

**3.14. Documenting Findings and Recommendations.** The PEBs will document their findings and recommendations on an AF Form 356, **Findings and Recommended Disposition of the USAF Physical Evaluation Board**. *EXCEPTION:* See paragraph **3.36** for documentation procedures when the IPEB issues a fit finding on an ARC member for a non-duty related condition.

**3.15. Documenting Member's Election.** Use AF Form 1180, **Action on Physical Evaluation Board Findings and Recommended Disposition**, on the PEB's findings and recommended disposition. The PEB president or board member, HQ AFPC/DPPD staff representative, or the PEBLO may sign in block 2. For TDRL evaluations, HQ AFPC/DPPDS informs the TDRL member of the PEB action by memorandum, and the member documents his or her election by indorsement to the notification memorandum.

**3.16. Fitness Determinations.** These are the most important findings made by the PEB. The standards and criteria for making this determination are in DoDD 1332.18, paragraph C.

**3.17. Presumption of Fitness.** The PEBs will presume a member fit if he or she has been able to do his or her duty satisfactorily in the 12 months before a scheduled retirement. Presumption of fitness applies to non-EAD ARC members only when there is a mandatory retirement date. This presumption applies whether the member was referred to a PEB as a result of nondisability retirement or separation processing. The presumption of fitness does not apply to a member on Limited Assignment Status (LAS) under the provisions of **Chapter 6**. The presumption of fitness may be overcome in the following circumstances:

- 3.17.1. Within the presumptive period an acute, grave illness or injury occurs that would prevent the member from performing further duty if he or she were not retiring; or
- 3.17.2. Within the presumptive period a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the member were not retiring; or
- 3.17.3. The condition for which the member is referred is a chronic condition and a preponderance of the evidence establishes that the member was not performing duties befitting either his or her experience in the office, grade, rank, or rating before entering the presumptive period. When there has been no serious deterioration within the presumptive period, the ability to perform duty in the future shall not be a consideration.

**3.18. Ratable Physical Defects and Conditions.** Disability evaluation boards assign a disability percentage rating of zero or more to each ratable defect or condition using the VASRD and DoD Instruction 1332.39 as guides. The boards will rate only those conditions which make a member unfit for continued active duty.

**3.19. Known Existed Prior to Service (EPTS) Defects or Conditions.** See DoD Instruction 1332.38, part 2, paragraph E, for standards, limitations, and presumptions concerning EPTS defects or conditions.

**3.20. Line of Duty (LOD) Determinations.** Chapter 61, 10 U.S.C., requires a line of duty determination for each unfitting defect or condition. Specifically, for compensability purposes the PEB must know whether or not the member incurred the disability as the result of his or her intentional misconduct or during a period of unauthorized absence.

3.20.1. Evidence in Support of LODs. This evidence may include, but is not limited to, medical documentation, documents verifying a period of unauthorized absence, or an LOD determination made under AFI 36-2910.

3.20.2. PEB Action on LOD Determinations. LOD determinations made under provisions of AFI 36-2910 are material evidence considered by the PEB. The PEB cannot properly adjudicate a case until the completed LOD determination, if required, is in the case file. (**NOTE:** Entries on AF Form 618 constitute administrative LOD determinations.) The PEB will direct the referring medical facility to begin an LOD determination under AFI 36-2910 before continuing with the evaluation process when:

3.20.3. There is reasonable doubt as to the accuracy of the administrative LOD determination as shown on the AF Form 618; and

3.20.4. There is no existing informal or formal LOD determination in the member's case file; and

3.20.5. There is insufficient evidence from which the PEB may make its own independent LOD determination.

3.20.6. Changes in LOD Determinations. Only SAF or SAF's designated representative has the authority to reverse LOD determinations made under AFI 36-2910. The PEB may not recommend a change to a line of duty determination made under AFI 36-2910 unless there is new and compelling evidence not considered during that process.

**3.21. Absence Without Leave (AWOL).** A member who incurs an unfitting defect or condition during a period of unauthorized absence or AWOL is not entitled to disability benefits for that defect or condition under 10 U.S.C., chapter 61. In cases involving a member who was AWOL, the record must contain enough evidence to support a finding that the member incurred the disability during a period of unauthorized absence. In addition to pertinent medical records, supporting evidence may include court martial orders, duty status reports, line of duty reports, or other documents that verify the exact period of unauthorized absence.

**3.22. Identifying When Ratable Defects or Conditions Were Incurred.** In most cases, for each ratable defect or condition, the PEB must find if the member incurred the defect or condition while entitled to basic pay. The date incurred is the date when, according to documented evidence or accepted medical principles, the member incurred the disease, defect, condition, or injury--not the date the member underwent medical evaluation. The following guidelines apply:

3.22.1. Service-Incurred Defects. The PEB presumes members to have been in sound physical and mental condition on entering military service except for defects or conditions noted and recorded at time of entry. They presume any disease or injury discovered after active duty (AD) entry, with the exception of congenital and hereditary conditions, as having been incurred while entitled to receive basic pay. The defect or condition is service incurred unless a preponderance

of evidence shows it existed prior to service, or developed while the member was in an excess leave or TDRL status.

3.22.2. Acute Conditions. The PEB regards as service incurred or service aggravated acute conditions occurring during active service, unless the preponderance of evidence shows there was no new or increased disability resulting from these conditions during active service.

3.22.3. Conditions That Existed Prior to Service (EPTS). Certain abnormalities and residual physical defects or conditions, when found, require the conclusion that they must have existed before entry into military service or during a break in service or during a period of inactive service. For example:

3.22.3.1. Congenital and hereditary conditions.

3.22.3.2. Medical authorities are in consistent and universal agreement to the cause and time of origin.

3.22.3.3. The case involves manifestation of lesions or symptoms of chronic disease existing from the date of entry or so close to the date that the disease could not have originated in so short a period of time.

3.22.3.4. The condition is of infectious origin and is found within less than minimum incubation period.

3.22.3.5. Competent civilian medical or dental sources document physical defects of conditions before entry into service, and the records are available to military medical authorities. The physical defect or condition must be such that, by a preponderance of evidence, it must have existed before entry into the service, or the service entrance examination noted objective evidence of the defect or condition.

3.22.4. Service Aggravation of EPTS Defects or Conditions. When the PEB finds that a physical defect or condition is "EPTS," it then must find whether military service further aggravated the defect or condition. Additionally, PEBs will:

3.22.4.1. Presume service aggravation if there is any permanent increase in severity of the preexisting condition occurring after the member entered into military service. Only specific findings of "natural progression" of the preexisting defect or condition, based on well established medical principles as distinguished from medical opinion alone, will overcome the presumption of service aggravation.

3.22.4.2. Not consider as service aggravation the residual conditions resulting from medical or surgical treatment of EPTS defects or conditions. **EXAMPLE:** Post operative scars or absent or poorly functioning parts or organs.

3.22.4.3. Consider the residuals as service aggravation if the residuals are unusual or unanticipated, or if the purpose of the treatment was to relieve a service-aggravated defect or condition.

3.22.5. Conditions Incurred During a Period of Excess Leave. According to the Comptroller General of the United States (decision B-205953, 18 June 1982), a member in this status is not entitled to basic pay and, thus, is not entitled to disability benefits under the provisions of 10 U.S.C., chapter 61. (**exception:** If member is in this status in order to participate in an educational program or for an emergency purpose.)

**3.23. Proximate Result.** For cases involving ARC members who incurred a disability on or before September 23, 1996, the PEB determines whether the disability was the proximate result of performing military duties in cases involving ARC members called to active duty for 30 days or less or performing active or inactive duty training. The PEB bases these findings on the facts and circumstances in each case. There must be some definite causal relationship between the disability and the required military duty. Resolve findings in favor of the member unless the preponderance of the evidence dictates otherwise. This determination is not required for Regular members or ARC members serving on active duty for a period of more than 30 days, or for ARC members called to active duty for 30 days or less or performing active or inactive duty for training after September 23, 1996 if injury was caused in the line of duty.

**3.24. Permanence of Impairment.** The PEB determines the permanence of the impairment and classifies it as either "Permanent" or "May Be Permanent." (See [Attachment 1](#))

3.24.1. Use of the TDRL. When the PEB finds a disability may be permanent in character, but not stable in degree, and the member otherwise qualifies for disability retirement, the Air Force places the member on the TDRL. The TDRL is a way to further observe unfit members whose disability has not stabilized and for whom the PEB cannot accurately assess the degree of severity, percent of disability, or ultimate disposition. The TDRL also serves as a safeguard for both the member and the Air Force by delaying permanent disposition for those members whose conditions could improve or get worse, or where the ultimate disposition could change within a reasonable period of time.

**3.25. Percent of Disability and VA Diagnostic Codes.** The PEB, on finding a member unfit, assigns a disability percentage to each ratable defect or condition and the VA code that describes the defect or condition. The PEB enters the percent of disability without regard to LAS or the final disposition and uses hyphenated VA codes only when authorized by the VASRD. This provision does not apply to ARC and Air National Guard (ANG) fitness/unfitness determinations for non-duty related conditions.

**3.26. Armed Conflict and Instrumentality of War.** This determination may entitle the retired member to certain tax and VA benefits, special considerations if later employed by the US government and, if a Regular officer, the exemption from the requirement to forfeit a part of military retired pay. The PEB uses the following criteria in making this determination:

3.26.1. Armed Conflict. The PEB makes this determination only when the member incurred the physical defect or condition in the line of duty as a direct result of armed conflict and that defect or condition, standing alone, makes the member unfit. Mere presence in an area of armed conflict is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability. (See [Attachment 1](#))

3.26.2. Instrumentality of War. The PEB makes this determination only when the member incurred the physical defect or condition in line of duty as the result of an instrumentality of war during a period of war, and that defect or condition, standing alone, makes the member unfit. Title 38 U.S.C. 101 defines the periods of war.

**3.27. Determinations for Tax Benefits.** Prior to 25 Sep 75, military disability pay was excluded from gross income for Federal tax purposes. The Tax Reform Act of 1976 (26 USC, 104) provides that, effective 25 Sep 75, disability payments are taxable unless one of the following conditions is met:

3.27.1. Service Affiliation. If the evaluatee was a member of the Armed Forces (or Reserve component thereof), or under a binding written agreement to become such a member on 24 Sep 75. HQ AFPC/ DPPD determines this from information in the personnel data system or other available personnel records, and documents it in the disposition message and retirement order form.

3.27.2. Direct Result. One of the member's defects or conditions was the direct result of a combat-related injury. The defect or condition, standing alone, must make the member unfit. In all cases, the member must have incurred the disability in the line of duty, under orders (verbal or written) to perform duty, and there must be a definite causal relationship between the required duty and the disability.

3.27.2.1. Combat-related Disabilities. The PEB will make a combat-related disability determination for:

3.27.2.1.1. Armed Conflict. See paragraph 3.26 and Attachment 1.

3.27.2.1.2. Extra Hazardous Service. An assignment to a military occupation entitling the member to hazardous duty pay, such as parachute, flight deck, demolition, experimental stress, or leprosarium duty. It includes flight duty only if it involves other than routine training flights, and there is enough evidence of record to show that an extremely hazardous duty factor was present.

3.27.2.1.3. Conditions Simulating War. Includes any disability resulting from military training, such as war games, practice alerts, or riot control training. It does not include activities like calisthenics and supervised sports not essentially military in nature.

3.27.2.1.4. Instrumentality of War. See paragraph 3.26 and Attachment 1. In these cases, the law does not require that the disability be incurred during a period of war. Consequently, the PEB may make a favorable determination if the member incurred the disability during any period of service of such diverse causes as wounds caused by a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material.

3.27.2.2. TDRL Reexamination Cases. The initial combat-related determination is valid until final disposition. When removing a member from the TDRL for permanent disposition, the PEB makes a new determination to ensure that the combat-related defect or condition, standing alone, still makes the member unfit.

**3.28. Categorizing Ratable Defects or Conditions.** The PEB categorizes each ratable defect or condition as compensable or noncompensable. Eligibility for disability benefits is based only on compensable defects or conditions. (See glossary for definition.) After recording the compensable defects and conditions, the PEB combines the percentage rating of each defect or condition as outlined in table 1 of the VASRD. The PEB reflects any additions to or deductions from this combined rating, such as a bilateral factor or EPTS factor, and converts the final combined compensable rating to the nearest whole number divisible by 10. Any condition or defect that does not affect the member's ability to perform military duty is considered not unfitting, but is noted.

**3.29. Recommended Disposition.** The PEB recommends one of the following dispositions:

3.29.1. Return to Duty. Applies to all members found physically fit, except TDRL members or previously retired members on active duty.

3.29.2. Permanent Retirement.

3.29.3. Temporary Retirement.

3.29.4. Discharge With Severance Pay.

3.29.5. Discharge Under Other Than 10 U.S.C. Chapter 61. Add "(EPTS)," "(Excess Leave)," or "(Not Proximate Result)," to more fully explain this disposition action.

3.29.6. Discharge Under 10 U.S.C. 1207. Use only when the member is unfit and the disability is due to intentional misconduct, willful neglect, or was incurred during a period of unauthorized absence.

3.29.7. Removal From TDRL (Fit). Use only for TDRL members found fit and being removed from the TDRL.

3.29.8. Retain on TDRL. Use only for unfit TDRL members retained on that list.

3.29.9. Revert With Disability Benefits: Except as shown below, use this recommended disposition for an unfit retired member serving on AD who is reverting to the retired list with disability benefits. Under this category, add "Temporary Retirement" or "Permanent Retirement," as applicable, in item 12 of AF Form 356. Example: "Revert with Disability Benefits (Temporary Retirement)." **EXCEPTION:** To receive disability benefits, unfit members previously retired for years of service or age must have a disability of 30 percent or more (10 U.S.C. 1402 (b) and 1402(a)). Otherwise, the member reverts to the retired list without disability benefits.

3.29.10. Revert Without Disability Benefits. Use only for a retired member serving on AD who is reverting to the retired list without disability benefits.

**3.30. PEB Summary Statement.** The PEB recommends action based on objective findings of record, and uses the "Remarks" section of AF Form 356 to briefly summarize the rationale for its decision. The PEB may express matters of opinion, so long as they clearly identify them as such. Generally, the PEB will make statements concerning the following:

3.30.1. Personal impressions created by the appearance of the member if such impressions are at variance with documentary evidence in the case file.

3.30.2. The percentage rating or recommended disposition varies from that which would appear appropriate.

3.30.3. The member is unfit (excluding EPTS) and scheduled for nondisability retirement within the 12-month period immediately after the MEB evaluation.

3.30.4. The member is unfit because of defects or conditions known before the evaluation or identified during the last periodic physical examination but not previously found disqualifying or unfitting for continued active duty.

3.30.5. One of the member's defects or conditions was the direct result of a combat-related injury, as defined in 26 U.S.C. 104, and that defect, standing alone, makes the member unfit.

3.30.6. Determination that one of the member's defects or conditions was the direct result of armed conflict or caused by an instrumentality of war during a period of war, and that defect or condition, standing alone, makes the member unfit.

3.30.7. Disagreement with a LOD finding under AFI 36-2910.

3.30.8. **(If condition was incurred on or before 23 September 1996)** - Determination that the disability of an ARC member on AD 30 days or less is not the proximate result of performing AD or inactive duty training (excluding EPTS).

3.30.9. **(If condition was incurred after 23 September 1996)** - Determination that the disability of an ARC member on AD 30 days or less is not in line of duty (excluding EPTS).

**3.31. Dissenting Report.** Any voting member of a PEB may prepare a signed report for any case in which he or she disagrees with the majority decision. Include in the report the reasons for the disagreement; and identify those matters that are personal opinions. Show in the report the type of hearing, the date, and location of the PEB. Attach a copy to each set of the PEB findings and give to the member before asking him or her to agree or disagree with the PEB action.

**3.32. PEB Case File Assembly and Disposition.** See **Table 3.3** for instructions on assembling the case, marking exhibits, and disposing of the case file. The completed case file is "For Official Use Only," and AFIs 37-131, *Air Force Freedom of Information Act Program*, and 37-132 apply.

### *Section 3C—IPEB Procedures*

**3.33. IPEB Review.** The IPEB reviews appropriate medical and personnel records, and related documentation to determine fitness for duty. Neither the member nor counsel may be present at the informal hearing.

**3.34. IPEB Findings.** AFPC/DPSD sends AF Form 356, along with an AF Form 1180, by electronic means whenever possible to the PEBLO at the referring medical facility.

3.34.1. Action by the PEBLO and the member. Within 1 duty day of receiving the IPEB's findings, the PEBLO locates and counsels the member on the recommended disposition and on his or her rights, available options, and required actions. The member has 10 calendar days to agree or disagree with the IPEB's findings. AFPC/DPSD may approve limited extensions up to 5 calendar days. The PEBLO and others in the disability system may answer questions, but the member alone makes the final decision and documents that decision by marking the appropriate block on AF Form 1180. Prior to acting on a member's request for a FPEB, the PEBLO will review with the member the applicable standard detailed in the VASRD in order for member to understand what his symptoms would have to be to warrant an increase in the percentage of disability. If member disagrees with the recommendation of the IPEB and requests a FPEB hearing, member may submit a brief rebuttal stating reason for disagreement.

3.34.1.1. Signs the counseling portion of AF Form 1180;

3.34.1.2. Informs HQ AFPC/DPPD of the member's decision by electronic means, telephone, or by message if overseas (includes *MINIMIZE*);

3.34.1.3. Gives the member a copy of AF Forms 1180 and 356;

3.34.1.4. Retains a copy of each form in suspense until case completion;

3.34.1.5. Mails or sends by electronic means the signed original AF Form 1180 and the rebuttal, if applicable, to HQ AFPC/DPPD.

3.34.2. Action by HQ AFPC/DPPD. Upon notification of member's decision, HQ AFPC/DPPD will:

3.34.2.1. Continue processing the case as appropriate if the member agrees with the IPEB findings.

3.34.2.2. Request a formal hearing for any member who disagrees with an unfit finding and forward the case file to the FPEB.

3.34.2.3. If member disagrees with a fit finding, a rebuttal statement must accompany the AF Form 1180 and the Chief, USAF Physical Disability Division, will determine whether there is sufficient justification for a Formal Board hearing.

3.34.2.3.1. If insufficient justification, member's request for an FPEB will be denied and the PEBLO will be notified. The PEBLO will notify the member and the Military Personnel Section (MPS) that the member has been returned to duty. The MPS will be required to accomplish appropriate personnel actions as outlined in this instruction (Chapter 4)

3.34.2.3.2. If sufficient justification exists, member will be scheduled for a Formal Board hearing.

**3.35. NEXT OF KIN (NOK) Counseling.** If the member is unable to act on his own behalf because of mental incompetence, is comatose, or it would be dangerous to his or her health, the PEBLO personally counsels the NOK. The NOK signs AF Form 1180 for the member.

3.35.1. When the NOK is not near the referring facility, HQ AFPC/DPPD sends AF Forms 1180 and 356 and other information to another Physical Evaluation Board Referral Hospital (PEBRH) near the NOK, where the PEBLO will counsel the NOK and complete the required actions. If the NOK is not near a PEBRH, HQ AFPC/DPPD sends the necessary forms to the NOK, with a letter of explanation, and requests a reply within a specified time (normally 2 weeks).

3.35.2. If the PEBLO cannot identify or locate the NOK, the PEBLO informs HQ AFPC/DPPD, who then refers the case to the FPEB.

3.35.3. When the IPEB recommends permanent or temporary retirement with maximum benefits (100 percent compensable rating), and time and circumstances do not permit a formal hearing, HQ AFPC/ DPPD processes the case for Secretarial determination without the member's or NOK's agreement. HQ AFPC/DPPD includes a statement of the circumstances in the case file.

**3.36. IPEB Fit Findings.** The IPEB will stamp the AF Form 618 "Fit - Return to Duty." The stamp will be signed and dated by the IPEB president or board member. (The IPEB will not initially issue an AF Form 356.)

3.36.1. A designated assistant to the Director, SAFPC will review the case. If approved, the assistant will sign and date in the space provided on the stamped AF Form 618, which is then filed in the member's out-patient health record.

3.36.2. Approval by the SAFPC designated assistant completes the disability evaluation process. However, before the records are returned to the PEBLO, HQ AFPC/DPAMM will review them and, if applicable, include a memorandum advising that the member will require an assignment limitation code (ALC) "C." For ARC members not on extended active duty, the records will be returned to the appropriate ARC headquarters for review and action.

3.36.3. Upon receiving the records, the PEBLO will take the following actions:

3.36.3.1. Notify the member of actions taken in the case.

3.36.3.2. Notify the Military Personnel Flight (MPF) that the member has been returned to duty, and ask them to accomplish the required personnel actions in this instruction (**Chapter 4**).

3.36.3.3. Gives the MPF a copy of HQ AFPC/DPAMM's memorandum containing Code "C" instructions, if applicable.

### **3.37. Special Review by the IPEB.**

3.37.1. When a hospital commander discovers any of the circumstances listed below, he or she sends a report of circumstances (with supporting evidence) and requests special review by the IPEB. If the request meets the criteria for special review, HQ AFPC/DPPD refers the case to the IPEB. The special review may be conducted by the same members who previously considered the case, or different members if one or more of the original board members are unavailable. If, after review, the IPEB revises its findings, it prepares a new AF Form 356 and reprocesses the case. If there is no change, HQ AFPC/DPPD notifies the hospital commander to continue processing the original case and adjusts the time limit for response. The following circumstances may merit a special review:

3.37.1.1. Pertinent medical records or evidence were not sent to the informal PEB.

3.37.1.2. A change in diagnosis that does not require another medical workup or new medical board. (If the change is major, see recall guidelines, paragraph **2.6**)

3.37.1.3. Changes in medical status that may change the IPEB's findings and recommended disposition.

3.37.2. If after the IPEB has found a member fit, the hospital commander discovers additional facts or evidence which might meet the criteria for special review by the IPEB, and HQ AFPC/DPPD agrees, HQ AFPC/DPPD will reopen the case. In addition to the report of circumstances and supporting evidence, the PEBLO returns the member's records to HQ AFPC/DPPD.

3.37.2.1. If, upon special review, the IPEB issues an unfit finding and recommends disability separation or retirement, an AF Form 356 will be referred to the evaluatee, and the case will proceed in the same manner as other unfit cases.

3.37.2.2. If the IPEB does not change its initial fit finding, they will issue an AF Form 356 and forward it, with the rest of the case file, directly to SAFPC for review.

3.37.2.3. If the SAFPC agrees with the IPEB's fit finding, they will issue a memorandum directing the member's return to duty and return the case file to HQ AFPC/DPPD. The MEB, AF Form 356, and SAFPC memorandum will be placed in the member's out-patient health record.

3.37.2.4. If the SAFPC finds the member unfit, they will issue "revised recommended findings" (RRF) and the case proceeds in the same manner as other unfit cases.

3.37.3. When appropriate, the PEBLO keeps the MPF apprised of the status of any case undergoing special review.

*Section 3D—FPEB Procedures*

**3.38. Purpose of the Formal Hearing.** Gives members recommended for discharge or retirement the opportunity to appear in person before the FPEB, to be represented by an appointed military counsel or counsel of their choice, and to present evidence and call witnesses. Hearings are not adversarial; they are administrative in nature.

**3.39. Situations That Require a Formal Hearing.**

- 3.39.1. When it is requested by the member after the IPEB has issued an unfit finding.
- 3.39.2. When the IPEB issues an unfit finding and the member neither agrees nor disagrees with the findings, or submits a conditional concurrence.
- 3.39.3. When the member is unable to act in his or her own behalf and the NOK is unknown, unavailable, or is unwilling to accept the responsibility.
- 3.39.4. When the Chief, HQ AFPC/DPPD, or other final reviewing authority decides that a formal hearing is in the best interest of the member and the Air Force. In these cases, the official concerned directs the hearing in writing. The hearing may be held in absentia if the evaluatee is a TDRL member (see paragraph 7.19).

**3.40. PEBLO Actions.** Prior to the formal hearing the PEBLO:

- 3.40.1. Issues orders placing member on temporary duty (TDY) to 59 Med Wg (WHMC), Lackland AFB TX 78236-5300, when the member needs military or commercial transportation to the formal board. Shows on the order that the TDY is for the specific purpose of appearing before the FPEB and includes the reporting date and time. Ensures the member arrives at Lackland no more than 24 hours before the scheduled reporting time. The reporting time is when the member is to consult with the appointed military legal counsel and review the case records. The actual hearing takes place after the consultation. If traveling by aeromedical evacuation, shows on the orders that member will travel "Class 4," unless that class is not appropriate due to medical reasons. The referring medical facility funds TDY to the FPEB (For ARC members, refer to paragraph 8.12). Members normally may not take leave in conjunction with TDY to the FPEB (**Chapter 4**).
- 3.40.2. Gives the member up-to-date information on Lackland AFB housing, transportation, meals, location of buildings, where to report, how to contact appointed military counsel, and how to get orders indorsed for reimbursement.
- 3.40.3. Tells the member that active duty and ARC members must wear the service uniform unless they can not wear it for medical reasons. Wear of the military uniform must conform with all requirements of AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*.

**3.41. HQ AFPC/DPPDF Actions.** Prior to the hearing HQ AFPC/DPPDF:

- 3.41.1. Allows the member up to 3 duty days after arrival at the FPEB to review the available records and prepare the case. If the member needs more time, he or she submits a written request to the FPEB president. The member should state the reasons for the requested delay and how much extra time he or she needs. If disapproved, a written notice explains the reason for the disapproval, or if approved, gives a new date and time for the formal hearing.
- 3.41.2. Informs the member, counsel, and witnesses of the rules outlined in this section.

3.41.3. Ensures that member and counsel have access to this instruction, AFD 36-32, DoDD 1332.18, DoDI's 1332.38 and 13332.39, AFI 48-123, the VASRD, and any other directives or publications referred to in this instruction that may apply.

**3.42. Failure of Member To Appear for a Formal Hearing.** With the exception of members who are mentally incompetent, absentia cases, TDRL cases, or when appearance would be harmful to the member's medical condition, if a member fails to appear for a scheduled formal hearing, the FPEB delays the hearing and investigates the absence. The FPEB President decides whether to reschedule the hearing or proceed with it. Include a statement of circumstances in the record. The appointed military counsel must be present at the hearing if neither the member nor another counsel representing the member is present. **EXCEPTION:** Return to DPPDS cases on TDRL members found fit and recommended for removal from TDRL (see paragraph 7.25.2).

**3.43. Excusal from Hearing.** A member may request to be excused from personally appearing at a hearing. This request is not to be confused with the waiver of formal hearing (paragraph 3.44). The request to be excused may be made either before or after the member travels to the hearing. The FPEB president at his discretion may approve a member's request for excusal. The record of the hearing must clearly show that this was a voluntary act by the member. In such cases, the designated legal counsel represents the member during all open sessions. The member remains in the area until the FPEB completes its action. Excusal does not keep the FPEB from referring the member to 59 Med Wg (WHMC) for medical consultation is needed.

**3.44. Waiver of Formal Hearing.** Formal hearings are either requested by a member or directed by competent authority. After a hearing has been scheduled as the result of a member's request or direction by competent authority, a member must appear unless a waiver has been requested and approved. A member may request a waiver either before or after arrival at the FPEB. The waiver must include the reasons for the request and indicate concurrence with the IPEB's findings. The FPEB president is the approval authority for waivers, except for directed formal hearings, in which case the directing official is the approval authority. The member also signs a statement of understanding acknowledging no further right to demand a formal hearing without substantial new evidence or unless a subsequent review level changes the findings and recommended disposition of the IPEB. The request for waiver becomes a permanent part of the record.

3.44.1. If the member has arrived at Lackland AFB, the FPEB president may approve such waivers if in the best interest of all concerned. This authority applies only to formal hearings scheduled at the request of the member. Only the directing official may waive directed formal hearings.

**3.45. Representation by Counsel.** Members have legal representation at the formal hearing, unless they decline in writing. The representative is a PEB-appointed military counsel (a judge advocate), another military counsel of the member's choice, if reasonably available to perform such duties, or civilian counsel of the member's choice, at member's expense. When the member designates other military or civilian counsel, they assume the responsibilities and duties outlined in this chapter for the FPEB military counsel. The designated counsel or member may ask the regularly appointed military counsel to assist in pre-hearing preparation. The FPEB president or the regularly appointed military counsel explains formal hearing procedures to the designated counsel before the PEB convenes.

**3.46. Appointed Counsel.** The FPEB appoints military counsel to safeguard the legal rights of the member and present his or her case to the board. Appointed counsel attends all open hearing sessions, unless excused in writing by the member. Duties and responsibilities include:

- 3.46.1. Advising member of rights, options, and formal hearing rules.
- 3.46.2. Preparing or assisting member in case presentation.
- 3.46.3. Obtaining sworn statements or other evidence in support of the member's position. If presenting additional medical evidence, label it as "additional medical evidence" rather than as an "addendum" to prior medical records.
- 3.46.4. Examining and cross-examining witnesses, as appropriate.
- 3.46.5. Submitting oral or written arguments, as appropriate.
- 3.46.6. Counseling the member on the PEB's findings and recommended disposition.
- 3.46.7. Preparing or assisting the member in preparing the rebuttal, when requested.

**3.47. Special Cases.** When a member is mentally incompetent or the physician determines that knowledge of the condition would harm the member, the appointed legal counsel represents the member if the NOK (or guardian) fails to reply or designate alternate counsel. Include a statement of the circumstances in the record. The appointed military counsel must be present at the hearing if neither the NOK, guardian, nor another designated counsel is present.

**3.48. Formal Hearing Instructions.** HQ AFPC/DPPD will establish and provide to HQ AFPC/DPPDF the formal hearing format and procedures.

**3.49. Actions Following Formal Hearing.** HQ AFPC/DPPDF prepares AF Forms 356 and 1180, files the originals in the member's master case file, and gives copies to the referring MTF, HQ AFPC/DPPD, the member, and the counsel.

3.49.1. Time Limits. After receiving AF Form 356, **Findings and Recommended Disposition of USAF Physical Evaluation Board**, and AF IMT 1180, **Action on Physical Evaluation Board Findings and Recommended Disposition**, the evaluatee has 1 duty day to either agree or disagree with the FPEB findings. If the evaluatee disagrees, he or she may submit a written rebuttal within 10 calendar days. The FPEB president may approve written requests for additional time to allow the member to obtain additional medical documentation or consult with legal counsel.

3.49.2. Contents of Rebuttal:

- 3.49.2.1. Specific items with which the evaluatee disagrees.
- 3.49.2.2. The reasons for the disagreement.
- 3.49.2.3. The desired outcome, including disposition and percentage of disability if applicable.
- 3.49.2.4. Supporting statements or documents. Do not resubmit as part of the rebuttal documents entered as evidence during the formal hearing.

3.49.3. Counseling the Evaluatee After the Formal Hearing. The appointed military counsel, PEBLO, or other counsel will counsel the evaluatee in person using counseling guidance at **Attachment 2**. If the member is not at Lackland AFB, but is at or near another PEBRH, HQ AFPC/DPPDF asks the PEBLO there to counsel the member. After the counseling, the PEB counsel or PEBLO signs the AF Form 1180 and helps the member complete his or her part.

- 3.49.3.1. If the member disagrees with the findings, the counsel or PEBLO may help the member prepare the rebuttal or, at the member's request, the counsel submits the rebuttal

for the member. The PEBLO keeps one copy of AF Form 1180, gives the member a copy, and sends the original to HQ AFPC/DPPDF with the rebuttal.

3.49.3.2. If a member is represented by other counsel, HQ AFPC/DPPDF gives AF Forms 356 and 1180 to the counsel and requests that person to:

3.49.3.2.1. Counsel the member on the results of the PEB.

3.49.3.2.2. Give the member a copy of AF Forms 356 and 1180 and the audio cassette (if requested), and advise the member of the available options.

3.49.3.2.3. Return the completed forms with rebuttal, if any, on time.

3.49.3.3. HQ AFPC/DPPDF mails AF Forms 356 and 1180 with a memorandum of instructions to members not near Lackland AFB or a PEBRH. Forms must be completed and returned by a specified date, with the rebuttal (if any). If HQ AFPC/DPPDF does not receive a reply by the specified date, case processing continues without a response. HQ AFPC/DPPDF monitors the case to ensure completion of actions on time.

3.49.3.4. Counseling of NOK or Guardian. The designated counsel counsels the NOK (or guardian) in the same manner prescribed for the member. If the NOK is unknown or unavailable, the FPEB counsel submits a statement of circumstances and points out any information from the case file that is important to the final review and evaluation of the case.

3.49.4. Failure or Refusal to Reply or Make an Election. When the member fails or refuses to make an election, fails to submit a rebuttal within the specified time limit, or submits a conditional concurrence, HQ AFPC/DPPDF sends a written explanation of the circumstances with the case file to HQ AFPC/DPPD for final review and processing.

3.49.5. Record of Formal Hearing. AFPC/DPSDF makes an audio recording of the formal hearing testimony and attaches it to the case file for the benefit of subsequent review levels.

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**Table 3.1. AF Form 356 Recommended Dispositions for Unfit RegAF Members or ARC Members on EAD or on AD Orders for More Than 30 Days (See note 1).**

<b>R U L E</b>	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	<b>G</b>
	<b>If disability was result of intentional mis-conduct willful neglect, or was incurred while AWOL (item 9C)</b>	<b>If member was entitled to basic pay and disability was incurred while entitled to basic pay (item 9B)</b>	<b>and disability was incurred in time of war or national emergency (or after 14 Sep 78) (item 10B)</b>	<b>and member has at least 20 Years of Service (YOS) (computed under 10 USC 1208) (item 7)</b>	<b>and compensable percentage of disability (item 11)</b>	<b>and disability (item 10E)</b>	<b>then PEB recommended disposition is (item 12)</b>
<b>1</b>	Yes						discharge under 10 U.S.C. 1207.
<b>2</b>	No	No					discharge under other than 10 U.S.C. chapter 61 (see note 2).
<b>3</b>	No	Yes		Yes	0-100	is permanent	permanent retirement. (10 U.S.C. 1201).
<b>4</b>	No	Yes		No	30-100		
<b>5</b>	No	Yes		No	30-100		
<b>6</b>	No	Yes	Yes	No	30-100		
<b>7</b>	No	Yes		Yes	0-100	may be permanent	temporary retirement (TDRL). (10 U.S.C. 1202).
<b>8</b>	No	Yes		No	30-100		
<b>9</b>	No	Yes		No	30-100		
<b>10</b>	No	Yes	Yes	No	30-100		

<b>R U L E</b>	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	<b>G</b>
	<b>If disability was result of intentional mis-conduct willful neglect, or was incurred while AWOL (item 9C)</b>	<b>If member was entitled to basic pay and disability was incurred while entitled to basic pay (item 9B)</b>	<b>and disability was incurred in time of war or national emergency (or after 14 Sep 78) (item 10B)</b>	<b>and member has at least 20 Years of Service (YOS) (computed under 10 USC 1208) (item 7)</b>	<b>and compensable percentage of disability (item 11)</b>	<b>and disability (item 10E)</b>	<b>then PEB recommended disposition is (item 12)</b>
<b>11</b>	No	Yes		No	0-20	is or may be permanent	discharge with severance pay (10
<b>12</b>	No	Yes	Yes	No	0-20		U.S.C
<b>13</b>	No	Yes		No	0-20		1203).

**NOTES:**

1. When the rule and column are blank, the item on the AF Form 356 may be "Yes," "No," or "NA." However, where the rule and column are filled in, all items in the rule must match with the items on the AF Form 356.
2. Where the recommended disposition is discharge under other than 10 U.S.C. chapter 61 (without severance pay), the statutory authority for discharge is as follows: 10 U.S.C. 1169 for enlisted personnel; 10 U.S.C. 12681, 12683 for ARC commissioned officers and 10 U.S.C. 630 for probationary RegAF commissioned officers.

**Table 3.2. AF Form 356 Recommended Dispositions for Unfit ARC Members Evaluated for Disease or Injury (Chapter 8) (See note 1).**

R U L E	A	B	C	D	E	F
1	Yes					discharge under 10 U.S.C. 1207.
2	No	No				discharge under other than 10 U.S.C., chapter 61 (see note 2).
3	No	Yes	Yes	0-100	is permanent	permanent retirement (10
4	No	Yes	No	30-100		U.S.C. 1204).
5	No	Yes	Yes	0-100	may be permanent	temporary retirement (TDRL) (10 .
6	No	Yes	No	30-100		U.S.C. 1205).

7	No	Yes	No	0-20	is or may be permanent	discharge with severance pay (10 U.S.C. 1206).
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**NOTES:**

1. Applies only to ARC members performing Inactive Duty Training or on active duty orders for 30 days or less. Where the rule and column are blank, the item on AF Form 356 may be "Yes," "No," or "NA." However, where the rule and column are filled in, all items in the rule must match with the items on the AF Form 356.
2. Where the recommended disposition is discharge under other than 10 U.S.C., chapter 61 (without severance pay), the statutory authority for discharge is as follows: 10 U.S.C. 1169 for enlisted personnel; and 10 U.S.C. 12681, 12683 for ARC commissioned officers.

**Table 3.3. Assembly of PEB Case Record (See Note 3).**

**Note: Exhibits apply only to FPEB**

**IF IPEB: Top of package**

Step	Action
1	- IPEB AF Form 1180 <b>or</b> - statement of concurrence/nonconcurrence - documents that pertain to this area such as rebuttals, mail receipts, etc. - pay estimate
2	- IPEB AF Form 356 ( <b>and/or</b> RRF - with latest date first), <b>and, if applicable,</b> - summary statement - dissenting report <b>(Exhibit B)</b>
3	- orders appointing board
4	- AF Form 618 w/attachments (including commander's letter) or report of TDRL reexamination <b>(Exhibit C)</b>
5	- approved AF Form 348, Line of Duty Determinations, <b>or</b> DD Form 261, Report of Investigation Line of Duty and Misconduct Status <b>(not on TDRL cases)</b> <b>(Exhibit D)</b>
6	- memo for Record of a call <b>or</b> orders covering non-EAD service, if applicable <b>(Exhibit E)</b>

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<b>7</b>	<ul style="list-style-type: none"> <li>- <b>If applicable,</b></li> <li>- AF Form 1172, Certificate of Medical Officer, <b>or</b></li> <li>- prior medical board report relating to mental competency (AFI 48-123)</li> </ul> <p style="text-align: right;"><b>(Exhibit F)</b></p>
<b>8</b>	<b>Additional exhibits - start with Exhibit G</b>
<b>9</b>	<p><b>As attachments and not part of proceedings, if applicable:</b></p> <ul style="list-style-type: none"> <li>- historical documents of case</li> <li>- clinical records</li> <li>- AF Form 125, Application for Extended Active Duty With the USAF</li> <li>- statement Relative to Appointment or Enlistment After Removal From TDRL</li> <li>- retention in Limited Assignment Status</li> </ul> <p><b>Bottom of package</b></p>

**Continue with assembly and insert additional exhibits at Step 8**

**IF FPEB: Top of Package**

<b>Step</b>	<b>Action</b>
<b>1</b>	<ul style="list-style-type: none"> <li>- FPEB AF Form 1180 <b>or</b></li> <li>- statement of concurrence/nonconcurrence</li> <li>- documents that pertain to this area, such as rebuttals, mail receipts, etc.</li> <li>- new pay estimate (if different from IPEB pay estimate)</li> </ul>
<b>2</b>	<ul style="list-style-type: none"> <li>- FPEB AF Form 356, <b>with, if applicable,</b> summary statement and/or dissenting report attached</li> <li>- audiocassette (see note 1)</li> </ul>
<b>3</b>	<ul style="list-style-type: none"> <li>- orders appointing board (see note 2)</li> </ul> <p style="text-align: right;"><b>(Exhibit A)</b></p>

**NOTES:**

1. Upon written request, you may furnish the member a copy of audiocassette.
2. Upon written request, furnish member with sanitized copy of appointing order, omitting board members' SSNs.
3. In general, the order of assembly is to place the most current action on top of package.

## Chapter 4

### PERSONNEL PROCESSING ACTIONS

#### *Section 4A—Administrative Controls*

**4.1. PEBLO Responsibilities.** The PEBLO coordinates processing actions at base and Reserve component levels, and is essential to the prompt, effective processing of disability evaluation cases. The PEBLO contacts the member's commander or servicing MPF for any needed data or documentation. The commander or servicing MPF provides the requested information as quickly as possible so as not to delay processing.

**4.2. Ordering the Member to a Medical Facility or to the FPEB.** The member's commander promptly moves the member to the proper facility to complete medical examination, treatment, and processing.

**4.3. Personnel Data.** The PEBLO sends to HQ AFPC/DPPD documents required by AFI 48-123. The MPF provides the PEBLO information required to complete AF Form 1185, **Statement of Record Data**, and supplies other data and documents needed ( **Table 4.1**). The PEBLO or MPF advises HQ AFPC/DPPD of any change in the member's status or in the data shown on the AF Form 1185.

**4.4. Control of Member During PEB Processing.** Disability processing begins when the PEBRH or HQ AFPC/DPAMM refers a medical board case to the PEB. Once in disability channels, the following restrictions apply to ensure the member is available for necessary disability processing actions:

4.4.1. The member may not take leave outside the local area.

4.4.2. The member may not go on TDY.

4.4.3. The MPF will not reassign the member, except for emergency reasons, until receiving notification of the final determination.

4.4.4. The PEBLO notifies the member's commander and servicing MPF, in writing, when the MTF or HQ AFPC/DPAMM refers a case to the PEB, and informs them of the preceding restrictions.

4.4.5. Exceptions to the restrictions on TDY and reassignment are those actions necessary for completion of disability processing, i.e., TDY to the FPEB and TDY or permanent change of station (PCS) in a patient status for required medical evaluation or treatment. HQ AFPC/DPPD authorizes exceptions to the leave restriction outside the local area when warranted by circumstances and when approval of leave will not adversely affect case processing.

4.4.6. Essential administrative controls during disability processing are:

4.4.6.1. Member Evaluated as Outpatient. The PEBLO asks the member's commander or servicing MPF to ensure the member stays available for possible additional disability evaluation processing.

4.4.6.2. Member Evaluated as Inpatient - Not Assigned to Referring Medical Facility. The member remains at the referring facility unless HQ AFPC/DPPD authorizes return to home unit. If there is an unusual delay in completing the processing and the PEBLO, the member's commander, or the servicing MPF believes it to be in the best interest of all, contact HQ AFPC/DPPD and request authority to return the member to the unit of assignment. HQ AFPC/DPPD will normally approve such requests if there is no medical reason for the member to remain at the facility and if adequate disability counseling support is available at the home station.

4.4.6.3. Member Evaluated While Assigned to Referring Medical Facility. The member remains at the facility. HQ AFPC/DPPD makes exceptions when appropriate or when the member requires transfer to a VA medical facility for further hospitalization.

**4.5. Control of Member After PEB Action.** The MPF must not retire, discharge, nor release a member from active duty before receiving the final decision in the form of retirement orders or instructions from HQ AFPC/DPPD directing disposition. Unless otherwise directed, use the following interim administrative control measures after the PEB completes its action and the member has agreed or submitted a rebuttal, but before the final decision:

4.5.1. Physically Fit. When the PEB finds the member fit, the medical facility commander returns the member to his or her unit of assignment in a duty status. The local MTF takes action to confirm or revise the physical profile series according to AFI 48-123. If the case is under special review (paragraph 3.37), the medical facility commander advises the member's immediate commander or servicing MPF, in writing, that the PEB findings and recommended disposition are subject to revision, and restrictions in paragraph 4.4 remain in effect.

4.5.2. Physically Unfit. When the PEB determines the member is unfit, he or she will remain under the control of the appropriate commander until final disposition of the case. As in fit cases, restrictions in paragraph 4.4 remain in effect. When assigned to a medical facility in a patient status, the member remains at the facility, unless transferred to another military or VA medical facility for further hospitalization. A member evaluated in an outpatient status or attached to the referring medical facility may return to his or her unit of assignment to await final disposition unless release from the facility is not possible because of the member's medical condition. The following restrictions or instructions apply:

4.5.2.1. A member returned to the unit of assignment may perform military duties within the limitations of his or her physical condition.

4.5.2.2. The referring MTF commander must give the member's immediate commander written notice of the member's medical condition and duty limitations, and the commander will consider these factors in assigning duties.

4.5.2.3. The immediate commander contacts the referring medical facility or the nearest medical facility if any question arises as to the member's ability to perform a specific duty.

4.5.2.4. If the member is rehospitalized, the referring medical facility or PEBLO immediately contacts HQ AFPC/DPPD giving details, and indicating whether reprocessing through the disability evaluation system is needed.

*Section 4B—PCS in Awaiting Orders Status*

**4.6. General PCS "Home" Rules.** HQ AFPC/DPPD (or AFGOMO in the case of general officer or general officer selectees) may authorize a member to go "PCS in awaiting orders status" to await final disposition of his or her disability case. Basic trainees are not eligible for this program.

**4.7. Application Procedures.** Members wishing to go PCS in awaiting orders status apply in writing to HQ AFPC/DPPD through their MPF. General officers and general officer selectees may apply to AFGOMO through their commander. Applicants provide the reasons for the request and verify they meet all requirements reflected in **Section 4B** of this chapter. When a member is a patient at the referring medical facility, the application is first sent through the PEBLO at the facility. Criteria for applying:

4.7.1. Request is for PCS from, and to, locations within continental United States (CONUS). Do not consider Alaska and Hawaii as part of the CONUS.

4.7.2. Member is on extended active duty.

4.7.3. The PEB evaluated the case, with a finding that the member is unfit and recommended disposition is disability retirement, discharge with or without severance pay, or discharge under other than chapter 61, Title 10 U.S.C.

4.7.4. Member has either agreed with the informal PEB findings or has submitted a rebuttal to the formal PEB hearing.

4.7.5. Member did not request retention in limited assignment status and did not submit a rebuttal requesting retention on active duty.

4.7.6. Member is competent or incompetent and the NOK or guardian accepts responsibility.

4.7.7. Member does not need further hospital care at a military, VA, or civilian medical facility.

4.7.8. Member does not have a nondisability retirement or separation action pending.

4.7.9. Local TMO counseled the member on movement of dependents and household goods and member received a copy of **Attachment 3**.

4.7.10. Member knows that, while in a PCS-awaiting-orders status, he or she must return to unit of assignment, referring medical facility, or the PEB if directed to do so by HQ AFPC/DPPD, through the MPF or HQ AFGOMO, as applicable. If SAF approves the PEB's recommendation, the member will not have to return.

4.7.11. Member gives the MPF a nonmilitary address and phone number to write or call, if needed, and advises the MPF of any changes to that address or phone number.

4.7.12. Member acknowledges understanding that the Defense Joint Military Pay System (DJMS) deducts the number of days in PCS-awaiting-orders from the number of days leave accrued as of the date of retirement or discharge.

4.7.13. PEBLO Actions. When attached or assigned to the referring medical facility, the PEBLO endorses the member's application to the MPF and indicates the member was counseled on the findings and recommended disposition of the PEB - 4.7.14. MPF Actions.

The MPF endorses the application to HQ AFPC/DPPD and verifies that the member does not have a nondisability retirement or discharge pending. If AFPC approves the application, the MPF completes the following actions:

4.7.13.1. Verifies whether member has an injured or ill travel or transportation entitlement pending. If so, does not publish special orders until the member exercises those entitlements.

4.7.13.2. Publishes and distributes orders according to AFI 36-2102, *Base Level Relocation Procedures*. Ensures the member has a copy of "PCS In Awaiting Orders Status Instructions" ( **Attachment 3**). **NOTE:** AFGOMO will publish and distribute orders for general officers and general officer selectees.

4.7.13.3. Completes all required retirement or discharge processing and counseling so the member won't have to return to the unit of assignment at the time of actual retirement or discharge.

4.7.13.4. Refers the member to the local TMO for counseling on movement of dependents and household goods.

4.7.13.5. Obtains an address and phone number where the member can be reached while on awaiting orders status and determines whether address is member's home of record or the place where ordered to AD.

4.7.13.6. Notifies HQ AFPC/DPPD if the member does not go PCS in awaiting orders status or if there is any change in the nonmilitary address or phone number.

**4.8. Action by Reviewing Officials.** HQ AFPC/DPPD reviews each request for PCS in awaiting orders status and advises the member, through the MPF, when approved or disapproved. The approval notification will include the member's service and entitlements to travel to any designated place in the CONUS, or specify restriction as outlined in paragraph **4.9** AFGOMO will review requests from general officers or general officer selectees and advise them when approved or disapproved. AFGOMO also notifies HQ AFPC/DPPD of the decision.

**4.9. Travel.** A member may PCS to any designated place in the CONUS if he or she has completed 8 years continuous active duty with no single break of more than 90 days just before PEB evaluation. If the member does not have 8 years continuous active service, he or she may go PCS only to the home of record or the place where ordered to active duty. Travel to the nonmilitary address must meet the rules set forth in the Joint Federal Travel Regulation (JFTR), Volume 1.

#### ***Section 4C—Disability Retirement or Discharge Processing by the Servicing MPF***

**4.10. MPF Counseling and Processing.** The MPF counsels and processes the member after receiving final disposition. Contact other MPFs or PEBLOs to complete the required actions if the member is not available for face-to-face counseling or processing. Counsel the member by mail if there are no other means of contact. The MPF must advise HQ AFPC/DPPD when there is an unusual delay or problem in completing the required counseling or processing.

4.10.1. Member Unable To Act in Own Behalf. When the member is incompetent, or unable to act in his or her own behalf, contact and counsel the NOK, preferably in person. The MPF gets the NOK's signature on applicable forms and documents or includes a

statement indicating the reason why member (or NOK) could not sign. If necessary, contact another MPF near the NOK and request help in counseling and processing.

4.10.2. Other Action Pending. When actions, such as nondisability retirement or discharge and medical hold are pending, the MPF advises the appropriate AFPC office of the retirement or discharge by reason of physical disability and ensures conflicting orders, such as nondisability separation or retirement orders, are revoked.

**4.11. Retirement or Discharge Date.** HQ AFPC/DPPD sets the scheduled retirement or discharge date. If the MPF can not complete the necessary processing, they must notify HQ AFPC/DPPD before the effective date, explain why they can not complete the processing, and provide compelling justification to support an extension. Extensions for the convenience of the MPF or the member cannot be approved.

**4.12. Discharge Orders.** After receiving disposition instructions, the MPF publishes orders to discharge the member on the scheduled date. Prepare orders on AF Form 100, **Request and Authorization for Separation**, according to provisions in AFI 36-2102. When necessary, include a statement in the orders concerning termination of appointments. The MPF sends a copy of the orders to HQ AFPC/DPPD (**Table 4.2.**).

**4.13. Ceremonies and Presentations of Appropriate Certificates.** Commanders will conduct a suitable ceremony before members retire or separate for disability. For an oversea member returning to the CONUS, hold the ceremony at the oversea base. If the oversea separation base does not do this, the MPF at the CONUS separation base arranges an appropriate ceremony before the member leaves that base. Present the retirement or discharge certificate, along with any awards and letters of appreciation at the ceremony. Follow these guidelines:

4.13.1. Retirement. Commanders use AFI 36-3203, *Service Retirement*, as used for members who retire for age or service. When possible, the MPF gets a written statement from members who decline a ceremony.

4.13.2. Discharge. As outlined in AFI 36-3202, *Separation Documents*, the member's immediate commander will make suitable expression of appreciation on behalf of the Air Force for the member's service.

4.13.3. Exceptions. When members can not act for themselves and are in a patient status, or are in a VA hospital, present or mail (with suitable cover letter) the certificate and other documents to the NOK.

**4.14. Retirement or Discharge Documents. Order-Physically Unfit.** The MPF prepares necessary documents according to **Attachment 4** and enters required data into the PDS and the DJMS to complete the retirement or discharge (**Table 4.2.**). The MPF gives the member the documents, other than the retirement or discharge certificate, before completing final retirement or discharge processing, except when the member:

4.14.1. Is not present on the last day of AD for any reason, such as PCS in awaiting orders status, on leave, or transfer to a VA hospital. Prepare and mail all required documents to the member on the effective date of retirement or discharge.

4.14.2. Is incompetent or unable to act in own behalf for other reasons. Present or mail the required documents to the NOK (or guardian) on the effective date of retirement or discharge.

4.14.3. Is returning to CONUS from overseas. CONUS MPF presents the required documents to the member during final out processing.

4.14.4. Is being placed on the TDRL. MPF prepares and delivers retirement documents the same as for members being permanently retired. Special provisions for DD Form 363 and AF Form 1344JA97 are in **Attachment 4**. When removing the member from the TDRL, HQ AFPC/DPPD prepares and mails the required orders, forms, and other documents.

#### **4.15. Permissive Temporary Duty (PTDY).**

4.15.1. Commanders may grant PTDY to members retiring for disability and members separating for disability who are eligible for benefits under the Transition Assistance Management Program (TAMP) for the purpose of aiding job and house search in connection with transition to civilian life (20 days PTDY to members assigned to CONUS; 30 days to members assigned overseas).

4.15.2. AFI 36-3003, *Military Leave Program* and 36-3203, *Service Retirement*, contain specific guidance; however, not all PTDY procedures will apply to disability retirements and separations. For example, members can not take PTDY in increments because they won't know the disposition of their case until approved by SAF. HQ AFPC/DPPD will resolve any questions on PTDY for members separating or retiring for disability.

4.15.3. Once approved, DoD imposes strict time limits in establishing separation or retirement dates (see **Chapter 5**). Generally, members must take PTDY in conjunction with the 20 and 30-day processing times and, when applicable, unused leave days they can not sell back to the government.

4.15.4. Hospitalized or incompetent members are not eligible for PTDY since they are unable to perform the mission of PTDY (job and house search).

**4.16. Place of Retirement or Discharge.** Members being retired or discharged for disability may, under certain circumstances, choose the place where final retirement or discharge action takes place. This choice may limit future entitlement to movement of the member as well as dependents and household goods. In order to prevent the possible loss of entitlements, the MPF makes members aware of the requirements outlined in AFIs 36-3202, 36-3203, 36-2102, AFR 76-8, *Revenue Traffic Transported On Dept Of Defense Aircraft Other Than Airlift Service, Industrial Fund, Operational Policies*, as well as JFTR and this instruction before they retire, separate, or make any moves. Provide copies of applicable entitlement information sheet found in AFIs 36-3202 or 36-3203 to members separating or retiring from an oversea duty location. The place of retirement or discharge is as follows:

4.16.1. Member Serving in CONUS. Retire or discharge member at the unit of assignment. (Alaska and Hawaii are outside the CONUS.)

4.16.1.1. If the member is in a military or VA medical facility or is in PCS in awaiting orders status, show the member's actual location at the time of retirement or separation on the orders.

4.16.1.2. If the duty base can not process the retirement or discharge, send the member TDY to the nearest Air Force base that has the processing capability.

4.16.2. Member Serving Outside CONUS. The member may select retirement or separation at the oversea duty location or a separation processing base of choice in the CONUS.

4.16.2.1. Additional options may be available for members taking at least 5 days leave or PTDY in conjunction with separation or retirement. Specific guidance concerning the various options is in AFIs 36-3203 and 36-3202.

4.16.2.2. The PEBLO advises HQ AFPC/DPPD of the member's desires.

4.16.2.3. If the member is not retiring or separating overseas, the MPF publishes PCS without Permanent Change of Assignment (PCA) orders. If applicable, include authorization for movement of dependents and household goods in the orders.

4.16.3. US Territorial Residents. A member whose home of record or place from which ordered to AD is a US territory may qualify as a resident of that area. If member is not serving in that US territorial location, he or she may return to the home of record or place from which ordered to AD for retirement or discharge at the discretion of HQ AFPC/DPPD.

4.16.3.1. HQ AFPC/DPPD will approve such movement only if authorized retirement or discharge facilities are available in the overseas area (AFIs 36-3202 and 36-2110, *Assignments*) and there is available transportation to ensure the member arrives at the home location before the scheduled date of retirement or discharge.

4.16.3.2. The MPF tells the member that travel to his or her home location will use home of selection entitlements.

4.16.3.3. If HQ AFPC/DPPD disapproves movement to the oversea home location, retire or discharge the member at the base of assignment, or another suitable location as directed by HQ AFPC/DPPD.

4.16.3.4. If needed, move the member to a VA medical facility in the CONUS pending movement overseas. When bed space becomes available, the VA will move the member to the oversea medical facility.

4.16.4. General Officers. Unless otherwise directed by the AFGOMO, this section also applies to general officers retiring by reason of physical disability.

**4.17. Movement and Orders for Members Assigned Overseas.** When directing disability retirement for members overseas, HQ AFPC/DPPD will show the oversea MPF on the retirement order. The oversea MPF publishes PCS without PCA orders if the member desires to return to the CONUS, gives the member 25 copies of the retirement order, and distributes other copies as follows:

4.17.1. Retiring at Non-CONUS Base. Send 5 copies to the local accounting and finance office. The MPF retains sufficient copies for such things as the unit personnel records group and relocation folder.

4.17.2. Retiring in CONUS. When the member will return for retirement, the oversea MPF sends copies of the orders to the designated CONUS MPF with an advance notice of the member's arrival date and a copy of the PCS without PCA orders. These orders will direct the member to report to the designated CONUS MPF early enough to

complete retirement processing, but not more than 5 days before the scheduled date of retirement or date terminal leave is to start. If applicable, include authorization for movement of dependents and household goods in the orders.

**Table 4.1. Instructions for Preparing AF Form 1185, Statement Of Record Data.**

L I N E	A	B	C
	To Complete		Enter
	Sec	Item	
1	1	1	Names as shown in official records, including Jr, Sr, 2d, 3d, and so on.
2		2	Grade in which serving on active duty.
3		3	Social Security Number (SSN).
4		4	Component in which serving on active duty (RegAF, USAFR, ANG).
5	II	A	Show any grade held on AD (in service) that is higher than current grade. Also show any ARC component grade that is equal or higher than current AD grade. For enlisted persons only: If an enlisted person has served on AD in a grade higher than current grade, forward a copy of the promotion order, a copy of the document authorizing demotion, and a copy of all performance evaluations rendered while serving in a grade higher than current grade. (Show grade and equivalent pay grade. <b>EXAMPLE:</b> e.g. Maj 0-4, MSgt E-7, and so on.) (See notes 1 and 2).
6		B	Show beginning date for any grade listed in item IIA.
7		C	Show ending date for any grade listed in item IIA.
8		D	Show branch of service and component. <b>EXAMPLE:</b> AF-Reg and Army-Reg.
9		E	Show reason for termination.

L I N E	A	B	C
	To Complete		Enter
Sec	Item		
10	III	5	For enlisted persons only: "Yes" or "No". If answer is "Yes," attach supporting documents to show from and to dates and reason for lost time. Enter "NA" for officers.
11		6	If member is non-CONUS resident (that is, his or her "home of record" is outside the CONUS), show "home" location (territory, oversea state, or country) in "Remarks" section and state whether member wants to go back to that place for retirement or discharge. Tell member that travel to non-CONUS "home" area will usually use up "home of selection" rights. If member is now in his or her non-CONUS "home" area, check "NA."
12		7	If any type of nondisability separation or retirement action is pending or contemplated (except ETS), including such actions as resignations, civil criminal court action, OSI investigation, international hold, court-martial, and so on; show type of action in "Remarks" section and attach a copy of pending action, if available; otherwise, attach a detailed statement describing the nature of the pending action, current status, anticipated completion date, and so on. Do not delay disability processing if MEB is complete, sufficient documentation is available to clearly indicate status of other action, there are no restrictions to processing (paragraph 1.3.), member is present for duty, and responsible military authorities clear member's movement.
13		8	If answer is "Yes," indicate in "Remarks" section whether member desires retirement or discharge at CONUS port of entry, or at a selected CONUS Air Force station.
14		9	Mailing address after discharge or retirement (when found unfit).
15		10	List current unit of assignment, if different from information in PDS. Show "NA" if information is the same as PDS.
16		11	Servicing MPF.
17		Rmks	List additional pertinent information, such as leave accrued and leave sold since 10 February 1976. Include statement when member has any additional comments or information for the board to consider.

<b>L I N E</b>	<b>A</b>	<b>B</b>	<b>C</b>
	<b>To Complete</b>		
	<b>Sec</b>	<b>Item</b>	<b>Enter</b>
<b>18</b>	IV		Show completion date of AF Form 1185; signature, grade, and title of PEBLO; and signature of member (when physically or mentally unable to sign, so indicate).

**NOTES:**

1. If a RegAF enlisted person holds a higher ARC appointment but has completed less than 10 years of active service, indicate the highest grade in item IIA. Also include the following statement in "remarks" and have member initial it: "Item IIA. I understand that my discharge by reason of physical disability will result in termination of any ARC appointment that I hold (except retired Reserve). The orders directing my discharge will show the termination of any such appointment."
2. Ensure that member reads the Privacy Act Statement on the AF Form 1185 and acknowledges understanding that furnishing requested information, including signature, is voluntary; however, failure to furnish pertinent information may delay processing of the case.

**Table 4.2. MPF Action Upon Receipt Of Disposition Notice.**

<b>If disposition is</b>		<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>
<b>A</b>	return to duty	Yes							
<b>B</b>	discharge with severance pay, 6 months or more service		Yes						
<b>C</b>	discharge with severance pay, less than 6 months active service			Yes					
<b>D</b>	discharge w/o severance pay under other than chapter 61, 10 U.S.C.				Yes				
<b>E</b>	discharge w/o severance pay, 10 U.S.C. 1207					Yes			
<b>F</b>	temporary or permanent retirement						Yes		

If disposition is		1	2	3	4	5	6	7	8
<b>G</b>	revert with disability benefits (retired members serving on AD)							Yes	
<b>H</b>	revert w/o disability benefits (retired members serving on AD)								Yes
<b>then</b>									
<b>I</b>	advise member and furnish a copy of the disposition notice.	X	X	X	X	X	X	X	X
<b>J</b>	return member to duty status and effect necessary PDS change. <b>EXAMPLE:</b> Remove AAC 37. Remove member from any medical hold status.	X							
<b>K</b>	request the medical facility profiling officer review member's profile and, if necessary, revise it as prescribed in AFI 48-123 (see note 1).	X							
<b>L</b>	when member serving outside CONUS elects discharge or retirement in CONUS, oversea MPF will assign member PCS without PCA to report in sufficient time to allow 2 days processing before discharge or retirement data.		X	X	X	X	X	X	X
<b>M</b>	process member for discharge or retirement by this instruction and other separation directives (see note 2).		X	X	X	X	X	X	X
<b>N</b>	issue discharge order (see notes 2 and 3)		X	X	X	X			
<b>O</b>	notify HQ AFPC/DPPD by most expeditious means if you can not retire or discharge the member on the effective date specified in the disposition message.		X	X	X	X	X	X	X
<b>P</b>	include HQ AFPC/DPPD, on AF Form 100, item 32, for distribution of one copy of the disability separation order (see note 2).		X	X	X	X			

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<b>If disposition is</b>		<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>
<b>Q</b>	when member has a projected promotion with an effective date after date of OSAF approval cited in the disposition message, take action as follows: Enlisted - Update PES code L effective date of SAF decision according to AFI 36-2502; Officers - Take action according to AFI 36-2501.		X	X	X	X		X	X

**NOTES:**

1. If member had a temporary "4" profile when the case was referred for disability processing, the profiling officer must revise that profile according to AFI 48-123.
2. These instructions also apply to MPFs servicing members assigned PCS without PCA from non-CONUS areas.
3. As authority in AF Form 100, item 28, enter AFI 36-3212.

## Chapter 5

### FINAL REVIEW AND DISPOSITION

#### *Section 5A—Secretary of the Air Force Personnel Council (SAFPC)*

##### **5.1. SAFPC Review.**

5.1.1. DELETED.

5.1.2. DELETED.

5.1.2.1. DELETED

5.1.2.2. DELETED

5.1.2.3. DELETED

**5.2. Special Assistants to the Director, SAFPC.** The Director, SAFPC, may appoint one or more officers, comparable grade civilians, or senior noncommissioned officers to serve in an additional duty capacity as special assistants to the Director, SAF Personnel Council. SAFPC selects special assistants from among members permanently assigned to HQ AFPC/DPPD. Under strict guidelines, SAFPC authorizes the special assistants to sign for the Director, SAFPC, in certain routine cases, announce the SAF decision, and direct final disposition on behalf of the Secretary.

**5.3. When Special Assistants May Act.** The Director, SAFPC, authorizes officers designated as special assistants to sign for the Director in the following circumstances:

5.3.1. The member concurs with the PEB findings, and the case does not otherwise require referral to SAFPC.

5.3.2. The Air Force Personnel Board (AFPB) directs a formal PEB (if one hasn't been held previously) and member concurs with the FPEB and case does not meet the criteria of paragraph 5.4

5.3.3. Member is removed from TDRL for failing to report for examination after 5 years.

5.3.4. The informal PEB recommends removal from TDRL (Fit). Member either fails to reply to correspondence advising of the recommendation, or does not concur and requests a formal PEB but fails to report for the formal hearing.

5.3.5. The member has received the findings of the formal PEB and either fails to acknowledge or respond to them, or the member nonconcur but fails to submit a rebuttal.

**5.4. Cases Which Must Be Forwarded to SAFPC.** Forward cases to SAFPC for action:

5.4.1. When the member does not concur and submits a rebuttal to the recommended findings of the PEB.

5.4.2. When the member has more than 8 years of active service and the recommended disposition is separation from active service for physical disability under Title 10 U.S.C., Section 1207 (intentional misconduct, willful neglect, or unauthorized absence), without entitlement to disability benefits.

- 5.4.3. On general officers (includes fit and unfit recommendations).
- 5.4.4. When the member has met a PEB, and the Special Assistant, SAFPC, believes the member is not eligible for processing under provisions of this instruction.
- 5.4.5. When the special assistant, SAFPC, believes the case warrants a decision from SAFPC.
- 5.4.6. Cases that the PEB questions the appropriateness of a Formal LOD determination made under AFI 36-2910 because of new and compelling evidence not considered during the LOD process.
- 5.4.7. When processed as dual action with a final recommendation of unfitness and administrative action is pending. This includes involuntary administrative separation, resignation for the good of the service, discharge in lieu of court-martial, drop from the rolls action, or retirement in lieu of such adverse action.
- 5.4.8. When the PEB determines they can not apply the VA rating, or the rating ordinarily applicable is excessive or inadequate.
- 5.4.9. Involving members assigned to HQ AFPC/DPPD, the PEBs, and SAFPC. This requirement continues for 2 years after member's reassignment from any of the above-named organizations.
- 5.4.10. Requiring grade determination under the provisions of 10 U.S.C. 1372 or 10 U.S.C. 1212.
- 5.4.11. On Medical Corps officers with a final recommendation of unfitness incidental to voluntary or mandatory length of service retirement (not on TDRL members).
- 5.4.12. When the member was a Prisoner of War (POW) or Missing in Action (MIA)(includes fit and unfit recommendations).
- 5.4.13. When HQ AFPC/DPPD does not receive a reexamination report on TDRL members imprisoned or confined by civil authorities, or when the report received is inadequate.
- 5.4.14. Involving airmen in entry level status when the separation authority believes an entry level separation is inappropriate and recommends a characterization of "honorable" based on unusual circumstances of personal conduct and performance of military duty.
- 5.4.15. With a return to duty recommendation when the PEB held a special review and did not change its findings and recommended disposition.

**5.5. When Cases Are Forwarded to SAFPC.** The board within SAFPC, the Air Force Personnel Board (AFPB), reviews all disability cases forwarded by HQ AFPC/DPPD under paragraph [5.4](#)

**5.6. Composition of AFPB.** There are 5 voting members and normally two will be Medical Corps officers. At least one voting member must be a Medical Corps officer.

- 5.6.1. DELETED.
  - 5.6.1.1. DELETED.
  - 5.6.1.2. DELETED.
  - 5.6.1.3. DELETED.

5.6.1.4. DELETED.

5.6.1.5. DELETED.

5.6.1.6. DELETED.

5.6.1.7. DELETED.

5.6.1.8. DELETED.

5.6.1.9. DELETED.

5.6.2. DELETED.

5.6.2.1. DELETED.

5.6.2.2. DELETED.

5.6.2.3. DELETED.

5.6.2.4. DELETED.

5.6.2.5. DELETED.

5.6.3. DELETED.

**5.7. Changes to PEB Findings.** The AFPB may change the findings and recommended disposition of the PEB. When this happens, the AFPB documents and describes the basis for the change. Based on the application of accepted medical principles, the AFPB identifies the principles at issue, and relates the issue to the facts and circumstances established in the record of the proceedings of the PEB. The AFPB recommends the final disposition to SAFPC under the criteria in paragraph **5.9**

5.7.1. DELETED.

5.7.2. DELETED.

5.7.2.1. DELETED.

5.7.3. DELETED.

5.7.3.1. DELETED.

5.7.3.2. DELETED.

5.7.3.3. DELETED.

**5.8. Personal Appearance.** Neither the member, NOK, nor counsel may appear before the AFPB, except at the specific invitation of AFPC. The board reviews all the records evaluated by the PEB(s), records of the PEB(s) hearings, plus any rebuttal or additional documents submitted by the member or requested by SAFPC.

**5.9. SAFPC Action.** SAFPC may take one of the following actions in each disability case:

5.9.1. Defer final determination until receipt of additional records or reports deemed essential to final evaluation and disposition of the case.

5.9.2. Return the case with specific directions on what actions they require before HQ AFPC/DPPD resubmits the case to SAFPC. (For example, further medical evaluation to secure additional information concerning fitness for duty or duty status.)

5.9.3. Direct administrative discharge under some other applicable directive or provision of law when SAFPC determines such action is more appropriate than disability retirement or discharge under this instruction.

5.9.4. Direct some other disposition of the case, if not specifically prohibited by law.

5.9.5. Assign one of the following dispositions according to Title 10 U.S.C., chapter 61:

5.9.5.1. Return to Duty. Member is physically fit for continued military service.

5.9.5.2. Permanent Retirement. Member is physically unfit, meets criteria for retirement, and condition is of a permanent nature and stable (10 U.S.C. 1201 or 1204).

5.9.5.3. Temporary Retirement. Member is physically unfit, meets criteria for retirement, and condition may be of a permanent nature but is not stable (10 U.S.C. 1202 or 1205).

5.9.5.4. Discharge With Severance Pay. Member is physically unfit but does not meet the requirements for disability retirement (10 U.S.C. 1203 or 1206).

5.9.5.5. Discharge Under Other Than 10 U.S.C., chapter 61. Member is physically unfit, but is not entitled to disability benefits provided under 10 U.S.C., chapter 61. Discharge members under this provision whose unfitting conditions existed prior to service, or who incurred unfitting conditions while in excess leave status, or while on TDRL (and the condition for which originally placed on the TDRL is no longer unfitting).

5.9.5.6. Discharge Under 10 U.S.C. 1207. Member is physically unfit but is not entitled to disability benefits because disability resulted from the member's own intentional misconduct or willful neglect, or the member incurred the disability during a period of unauthorized absence.

5.9.5.7. Removal From TDRL (Fit). TDRL member is physically fit; remove from the TDRL under 10 U.S.C. 1210(f)(1). If otherwise eligible, member has option to return to duty under 10 U.S.C. 1211.

5.9.5.8. Retain on TDRL. Member is physically unfit and remains qualified for retirement but condition has not stabilized; retain on the TDRL.

5.9.5.9. Revert With Disability Benefits (Temporary Retirement) or (Permanent Retirement). Use this disposition for an unfit retired member serving on active duty who is reverting to the retired list with disability benefits.

5.9.5.10. Revert Without Disability Benefits. Use only for a retired member serving on AD who is reverting to the retired list without disability benefits.

### ***Section 5B—DoD Review and Approval***

**5.10. Legal Basis.** Public law and DoD policy require DoD review and (or) approval in certain disability cases.

5.10.1. Approval. In cases where the general officer or medical corps officer was processing for retirement by reason of age or length of service before an MEB referred his or her case for disability processing, the Secretary of Defense must approve the unfitness determination before the Service Secretary may retire or discharge the officer for disability. This requirement is in 10 U.S.C. 1216(d) and pertains to all military services. In all other cases, SAF retains final approval authority.

**5.11. Routing Cases To and From DoD.** HQ AFPC/DPPD sends cases to SAFPC that may require DoD approval. If SAFPC finds the officer "unfit" and recommends retirement or discharge by reason of physical disability, SAFPC will refer the case to DoD for review and, if applicable, approval. After DoD action, SAFPC returns the case to HQ AFPC/DPPD for necessary administrative action to carry out the directed disposition.

### ***Section 5C—Final Disposition Processing***

**5.12. Options.** Members whose final disposition of their disability case is separation (active duty or TDRL) or TDRL from active duty, and they have 15 to 20 years active service, will be referred to HQ AFPC/DPPD. Members who meet basic eligibility requirements for Temporary Early Retirement Authority (TERA) may apply and, if approved, be retired under TERA. ARC members found unfit for nonduty related medical conditions, if otherwise eligible, may apply for early retirement pursuant to 10 U.S.C. 12732.

**5.13. Service Computation.** 10 U.S.C. 1208 outlines creditable service for disability retirement or discharge. HQ AFPC/DPPD verifies and includes the amount of creditable service in the disability retirement order or discharge disposition instructions. For ARC members, HQ AFPC/DPPD obtains a statement of service credit from HQ ARPC.

**5.14. Pay Computation.** DFAS-CL is responsible for final retired pay computation and for establishing retired pay accounts. They base computations on information in the special orders and data entered into the DJMS by the servicing MPF at time of retirement or discharge. (See **Attachment 2** and AFMAN 36-2622, Volume 5, *Personnel Concept III (Civilian), End Users Manual for additional information.*) The local finance office computes disability severance pay for active duty members, and DFAS-Denver Center for ARC members. See **Attachment 2** and **Table 5.1** and **Table 5.2**

5.14.1. Disability Retired Pay. DFAS-CL/FR may use two different formulas for computing retired pay (**Table 5.1**). They may base computation on years of creditable service or on percentage of disability, whichever is more advantageous to the member. In addition, if entitled to pay computation under some other provision of law that would result in greater retired pay, DFAS-CL/FR makes that computation. DFAS-CL/FR selects the one more favorable, unless the member specifically requests that retired pay be computed at some lower rate authorized by law. According to 10 U.S.C. 1401 and 8991, retired pay may not exceed 75 percent of the retired pay base (current base pay or "high three," as applicable).

5.14.2. Increased Retired Pay for Extraordinary Heroism. Enlisted members retiring for disability who are otherwise eligible to retire for years of service and entitled to a 10 percent increase in pay for certified acts of extraordinary heroism are entitled to an additional computation under the service retirement if they meet the requirements set forth in AFI 36-3203. For a member to be considered, the PEBLO or the member must make a notation on the AF Form 1185 "Remarks" section and attach copies of supporting documents to the AF Form 1185 when sending it to HQ AFPC/DPPD. HQ AFPC/DPPD accepts late submissions, provided the member qualifies under AFI 36-3203. SAFPC approves these actions but retired pay, including the heroism additive, cannot exceed the 75 percent statutory limit.

5.14.3. Recomputation of Retired Pay for Later AD. DFAS-CL/FR recomputes disability retired pay to reflect active duty performed after retirement, if the member meets all the requirements outlined in 10 U.S.C. 1402.

**5.15. Grade on Retirement.** Unless entitled to a higher retired grade under some other provision of law, members permanently retired for disability or placed on the TDRL retire in the highest of the following grades (10 U.S.C. 1372):

5.15.1. Grade in Which Serving. The grade in which the member is serving on the date placed on the TDRL or on the date permanently retired for disability.

5.15.2. Higher Reserve Grade. The Reserve grade the member held at time of retirement if it is higher than the grade in which serving on active duty. The Reserve grade must be a valid USAFR or ANG grade that is still in effect at the time of retirement.

5.15.3. Higher Grade. A higher grade in which the member served satisfactorily on active duty, as determined by the SAF (see **Table 4.1**, line 5). Service in a higher grade is usually satisfactory unless the higher grade was terminated for cause (except in cases where the member received an honorable discharge in that higher grade during a previous period of service and had held the grade for a period of 6 months or more); information in the member's service record clearly supports the conclusion that the member would have been discharged or demoted for cause at the time he or she held the higher grade; or member served on active duty in higher commissioned grade for less than 6 months.

5.15.4. Members who are retired on or after 23 Sep 96, may be retired in the regular or reserve grade to which they had been selected and would have been promoted, had it not been for the physical disability for which they were retired. (10 U.S.C. 1372 was amended effective 23 Sep 96.)

**5.16. Grade on Discharge.** The discharge grade will be the higher of the following:

5.16.1. Grade in Which Serving. The grade in which the member is serving at the time of discharge.

5.16.2. Higher Grade Determined by SAF. A grade in which the member served satisfactorily on active duty, as determined by the SAF, pursuant to 10 U.S.C. 1212 (see **Table 4.1**, line 5).

**5.17. Disposition of Officer Appointments Upon Disability Retirement or Discharge.**

5.17.1. Discharge of Officers. A discharge terminates all appointments held by the officer.

5.17.2. Retirement of Regular Officers. Retirement does not terminate the appointment of a Regular officer when permanently retired or placed on the TDRL.

5.17.3. Retirement does not terminate the appointment of an ARC officer when permanently retired for disability or when placed in the Retired Reserve.

**5.18. Enlisted Status at Time of Retirement or Discharge.** A retirement or discharge terminates an enlisted member's status, as well as any appointment held at the time of discharge for disability. ARC enlisted members being retired for disability are transferred to the Retired Reserve (see AFI 36-3203 for rules on transfer or assignment). HQ AFPC/DPPD reflects the transfer action in the retirement order.

**5.19. Date of Disability Retirement or Discharge.**

5.19.1. HQ AFPC/DPPD determines the retirement or discharge date no later than 10 days from the date of the Secretarial determination of unfitness. Appropriate processing and permissive TDY time will be considered before the effective retirement date is established.

5.19.2. If members have not previously sold 60 days of accrued leave after 10 February 1976, they must sell the leave at separation or retirement. Members retiring or separating for disability may use accrued leave that they can not sell back. If they have sold the maximum leave permitted by law, HQ AFPC/DPPD will add their accrued leave to the 20-day processing time (30 days if overseas) to arrive at the final discharge or retirement date (see AFI 36-3003, paragraph 3.13.1).

5.19.3. HQ AFPC/DPPD will establish disability separation and retirement dates as follows:

5.19.3.1. Date of separation or retirement will be established not to exceed 90 days from date of Secretary of the Air Force (SAF) Memorandum approving the separation or retirement. For the purposes of Benefits Delivery at Discharge, the date will be established as a day during the last week of the month which does not extend the DOS beyond 90 days from SAF Memo. For example: If 90 days would place the DOS at 15 May, the DOS will be 29 April. Any unsellable leave must be taken prior to member's separation or retirement date.

5.19.3.2. Basic Trainees will be separated within 3 duty days of SAF memorandum.

5.19.3.3. **DELETED.**

5.19.4. HQ AFPC/DPPD has authority to make the following exceptions:

5.19.4.1. Early Discharge or Retirement. HQ AFPC/DPPD approves retirement or discharge dates of less than 20 days, at the request of the member or the member's commander, and in the best interest of all concerned--if the MPF can complete final processing by the designated date. The member requests early discharge or retirement in writing; the MPF personnel relocations element endorses the request and forwards it to HQ AFPC/DPPD before HQ AFPC/DPPD issues the disposition instructions or retirement order.

5.19.4.2. Overseas. For members located outside the CONUS who elect to return to the CONUS for final processing, HQ AFPC/DPPD authorizes 30 calendar days processing time.

5.19.4.3. Hardship. HQ AFPC/DPPD may approve limited extensions, normally not to exceed 30 days, in cases where the member is facing an unusual personal hardship over and above that encountered by other members being retired or discharged for disability. Submit requests for extension through MPF personnel relocation channels.

5.19.4.4. Special Cases. Unless HQ AFPC/DPPD approves a later date, the date of discharge for basic trainees at the AFMTC is 3 duty days after the date of the Secretarial determination of unfitness. HQ AFPC/DPPD may designate other disability cases for retirement or discharge to become effective in less than 20 calendar days and will notify all concerned.

**5.20. Appeal Procedures.** After HQ AFPC/DPPD announces SAF's final action, if the member believes the disposition of his or her case constitutes an error or injustice, he or she may appeal through application to the Air Force Board for Correction of Military Records (AFBCMR) under AFI 36-2603.

**Table 5.1. Computation of Disability Retired Pay.**

R	A	B	C
U L E	If the member is	then take the monthly pay rate (see note 1) of the grade to which member	and multiply by 2.5 percent times the years and months of service under 10 U.S.C. 1208 or, the % disability, whichever is higher
1	permanently retired	is entitled under paragraph	on date retired.
2	placed on TDRL (see note 2)	<b>5.14.</b>	
3	removed from the TDRL and permanently retired	was entitled on the date member's name was placed on TDRL	at time of removal from the TDRL.

**NOTES:**

1. Use the pay rate that applies to the member on date of retirement. It may be the current monthly basic pay rate, average monthly retired pay base, or, if eligible and applicable, some other (more favorable) rate, such as the Tower amendment provision outlined in **Attachment 2**, with maximum pay being 75 percent of the base amount of which computed (10 U.S.C. 1401, 1401a, 8991).
2. When placed on TDRL, retired pay will not be less than 50 percent of the monthly pay rate on which computing retired pay. For members who entered military service prior to 8 September 1980, compute according to the current monthly basic pay rate. For members who entered military service on or after 8 September 1980, compute from a monthly retired pay base (RPB). RPB is an average of the member's highest 36 months of active duty pay. Changes that may occur as a result of reexamination will not affect retired pay for members still carried on TDRL.

**Table 5.2. Computation of Disability Severance Pay.**

R	A	B
U L E	If the member is being	then take member's years of service, but not more than 12, computed under 10 U.S.C. 1208 (see note 1) and multiply by
1	initially discharged with disability severance pay	twice the amount of monthly basic pay of the grade to which entitled under paragraph 5.15.
2	removed from the TDRL and discharged with disability severance pay	the higher of the following: twice the amount of monthly basic pay to which entitled on the date he or she is discharged with severance pay and in the highest AD or Reserve component grade as provided in paragraph 5.15.; or, twice the amount of monthly basic pay in effect on the date placed on the TDRL and in the highest grade as determined by the Secretary of the Air Force (paragraph 5.15.) (see note 2).

**NOTES:**

1. Count as a whole year a part of a year that is 6 months or more, and disregard a part of a year that is less than 6 months (10 U.S.C. 1212 and 37 Comptroller General 832). A member with less than 6 months' creditable service will not receive severance pay since the member has no years of service to use as a multiplier. The law limits maximum disability severance pay to 24 months' pay of the grade in which discharged (10 U.S.C. 1212, paragraph 5.15., and Attachment 2).
2. Compute the member's pay based on the base pay scale in effect when placed on the TDRL.

## Chapter 6

### LIMITED ASSIGNMENT STATUS (LAS)

#### *Section 6A—Purpose and Eligibility*

**6.1. Basic Eligibility.** Some members found physically unfit by a PEB can serve on AD in LAS with limitations and controls over their assignments. This option is open to members on EAD who meet the eligibility criteria and apply for LAS. Members who have some type of nondisability retirement or separation pending are not eligible for LAS.

**6.2. Procedures and Objective.** The SAF may defer the final disposition of members found physically unfit by a PEB and who request LAS.

6.2.1. Retention in LAS depends upon the type and extent of the member's physical defect or condition, the amount of medical management and support needed to sustain the member on AD, the physical and assignment limitations required, the years of service completed, and the Air Force need for the particular grade and specialty.

6.2.2. The LAS program conserves manpower by keeping needed experience and skills that the Air Force can economically use. It is not the intent of the LAS program to retain a member just to increase benefits or allow the member to complete a period of service.

6.2.3. Members not physically fit for AD without restriction do not have a legal or vested right to retention in LAS, and the Air Force does not guarantee retention for any specified period of AD. The Air Force may retire or discharge members on LAS at any time as the result of medical reevaluation. A member continued on active duty in LAS is not presumed physically fit. The DES will determine fitness or unfitness on the evidence of record at the time of final retirement or discharge.

6.2.4. Action Offices. Designated representatives within the offices of the Directorate of Assignments (HQ AFPC/DPA), Medical Service Office Management Division (HQ AFPC/DPAM), Colonel's Group (AFDPO) for cases on colonels, General Officer Matters (AFGOMO) for cases on general officers, and Directorate of Personnel Program Management (HQ AFPC/DPP) have authority to act in processing and approving requests for retention in LAS.

**6.3. LAS Retention Criteria.** The number of members retained in LAS will be held to an absolute minimum. Action offices will use the following guidelines:

6.3.1. From 15 to 19 Years AD. Consider members:

6.3.1.1. If there is a need for the member's skill, experience, grade or specialty, and

6.3.1.2. If their physical defect or condition has essentially stabilized or, based on accepted principles, shows either gradual improvement or slow progression. Members must be able to function in a normal military environment without adverse effect on their own health, or the health of others, and without need for an excessive amount of medical care.

6.3.2. Airmen with over 20 years active duty service will not be considered for LAS.

**6.4. Rules for Members Retained in LAS.**

6.4.1. Periodic Medical Examinations. The MTF examines LAS members at least once a year. The report of examination shows the current status of the unfitting physical defects or conditions for which retained in LAS and the status of any additional physical defects or conditions that may affect duty performance.

6.4.2. Service Commitments. Members in LAS must complete any active service commitments they incur unless their overall physical condition deteriorates to a point where they are no longer acceptable for retention in LAS.

6.4.3. Assignment Limitation Identification. The action offices identify members in LAS in the PDS with an assignment limitation code (ALC).

6.4.4. PEB Evaluation. LAS members will be evaluated by a PEB before discharge or retirement.

6.4.5. Inquiries. Address inquiries concerning the disposition status of LAS cases to HQ AFPC/DPPD.

### ***Section 6B—LAS Processing***

**6.5. Application Procedures.** Eligible members request retention in LAS by submitting AF Form 1186, **Retention in Limited Assignment Status**. Before doing so, members must have agreed with the PEB's recommendation. If approved for LAS, file PEB proceedings without further action. If disapproved for LAS, the disability case will be processed. Application procedures are as follows:

6.5.1. Preparing AF Form 1186. The PEBLO or PEB counsel prepares four copies of AF Form 1186 and complete the "Personnel Data" portion of the form. The PEBLO or PEB counsel informs the member of the purpose, policy, and objective of the LAS program before the member signs the forms. Send copies of AF Form 1186 and AF Form 1180 to HQ AFPC/DPPD and give one copy to the member.

6.5.2. Personal Statement. Members who wish to stay on AD in LAS may attach a personal statement to AF Form 1186 giving any information they believe important to their case. This statement may cite matters of record that the member wants to emphasize for review, but the member should not attach other documents to AF Form 1186. Members may request a delay, not to exceed 3 duty days, to prepare the personal statement. If not received within the 3-duty-day period, HQ AFPC/DPPD will process the disability case to completion.

6.5.3. Counseling the Member. The counselor ensures the member understands the approval procedures, the reevaluation requirements, and the possibility of an unscheduled termination of LAS.

**6.6. AFPC Processing.** HQ AFPC/DPPD reviews the application to ensure the member meets the general eligibility criteria in this section. If the member is not eligible, HQ AFPC/DPPD returns AF Form 1186 to the member, through the MPF or referring medical facility, as applicable, with a cover memorandum advising the member that the application does not meet basic eligibility requirements. When the request meets the basic eligibility standard, process it as follows:

6.6.1. Medical Review. HQ AFPC/DPPD sends AF Form 1186 and allied papers, including the PEB findings and recommended disposition and all available medical records, to HQ AFPC/DPAMM for review. HQ AFPC/DPAMM determines member's medical acceptability for LAS retention and annotates the applicable assignment limitations, if approved, or indicates

disapproval and the reason for the disapproval in the medical review portion of AF Form 1186. After its review, HQ AFPC/DPAMM returns the case to HQ AFPC/DPPD for further action.

6.6.2. Assignment Determinations. When HQ AFPC/ DPAMM determines that the member is medically acceptable for LAS retention, HQ AFPC/DPPD sends the case to HQ AFPC/DPA for all enlisted persons and officers below the grade of colonel, AF/DPO for all colonels, and to AFGOMO for all general officers. The functional area resource manager must determine if the Air Force can productively use the member's services within the limitations specified by HQ AFPC/DPAMM. The resource manager enters the decision in the personnel review portion of AF Form 1186 and returns the case to HQ AFPC/DPPD for further action.

6.6.2.1. LAS Assignment Approved. The resource manager must indicate approval and note the correct assignment limitation code on AF Form 1186. If the member has over 19 years of active duty, add a statement on AF Form 1186 documenting the unique and overriding need for the member's services and specifying a recommended period of retention. HQ AFPC/DPPD is the final approval authority for members with more than 19 years of AD.

6.6.2.2. LAS Assignment Not Approved. The resource manager indicates disapproval on AF Form 1186.

6.6.3. Final Disposition of LAS Approvals. After action by HQ AFPC/DPAMM and the resource manager, HQ AFPC/DPPD completes administrative processing, notifies the member of approval, through the MPF or referring medical facility, and advises appropriate officials of the LAS code and assignment limitations. Retention period for LAS approvals follow these general rules:

6.6.3.1. Over 19 Years of AD. HQ AFPC/DPPD determines the period of retention.

6.6.3.2. Less than 19 years of AD. Retention is not for a specified period of time, but does not normally exceed 20 years of AD.

6.6.4. LAS Disapprovals. When the member is not medically acceptable for retention in LAS or when the resource manager cannot justify retention, HQ AFPC/DPPD advises the member of the disapproval, through the MPF or referring medical facility, and resumes case processing.

### ***Section 6C—LAS Reevaluation***

**6.7. LAS Reevaluation Rules.** Members retained in LAS undergo periodic or annual medical examinations as directed by HQ AFPC/DPPD.

6.7.1. Reevaluations will consider the current status of medical limitation and the need for the particular grade and specialty.

6.7.2. HQ AFPC/DPPD may direct reevaluation at any time to assist in the management of LAS members or to meet current personnel manning requirements.

6.7.3. A reevaluation may consist of a general medical examination or may include an MEB and PEB.

6.7.4. The commander of a member in LAS may, at any time, refer the member to a local medical facility for reevaluation if the member cannot satisfactorily perform duties in his or her grade and specialty. In such cases, proceed according to AFI 48-123 and this instruction.

**6.8. Reevaluation Procedures.** HQ AFPC/DPPD advises the MPF personnel employment element by memorandum when an LAS reevaluation is due, and directs them to schedule the LAS member for a medical examination.

6.8.1. MPF Action. The personnel employment element schedules the examination at the closest medical facility; tells the member and the member's commander of the date, place, and reason for the examination; and ensures the medical facility has a copy of the memorandum stating the reason for the examination.

6.8.2. MTF Action. Medical facilities conduct examinations and send the completed reports to HQ AFPC/DPPD within 30 days of the date of the request for re-evaluation. Unless HQ AFPC/DPPD requires or requests an MEB, the physical examination does not have to be extensive. However, it must be in enough detail to allow evaluation of the member's overall condition--with special emphasis on the condition for which the member was first placed on LAS. In most cases SF 502, **Medical Record - Narrative Summary**, or SF 513, **Medical Record - Consultation Sheet**, is adequate.

6.8.2.1. If the MTF can not complete the examination within the time limit, they must advise HQ AFPC/DPPD of the reason for the delay and give a date when they will complete and forward the examination report.

6.8.2.2. When processing by MEB is directed or required, the medical facility must follow guidance in AFI 48-123 and this instruction.

6.8.2.3. The medical report must include sufficient information to document the following items:

6.8.2.3.1. Interim Medical History. New developments or changes since last LAS evaluation.

6.8.2.3.2. That may contribute to the member's overall physical disability.

6.8.2.3.3. Present Medical Support. Current therapy and treatment requirements.

6.8.2.3.4. Present Duty Performance. Member's functional impairment as it relates to ability to perform duties.

6.8.2.3.5. Statement of Opinion. The examining physician may include an opinion as to whether he or she still considers the member medically acceptable for retention in LAS. If considered acceptable, the physician also specifies if the present assignment limitations remain valid and whether he or she still considers the member physically unfit for return to full military duty.

6.8.3. AFPC Action. Upon receipt, HQ AFPC/DPPD sends the current physical examination and the entire LAS case file to HQ AFPC/DPAMM for review.

6.8.3.1. HQ AFPC/DPAMM Action. Review the case and determine if the member is still acceptable for retention in LAS and, if acceptable, whether a change in assignment limitations is appropriate. Advise HQ AFPC/DPPD of any change in limitations. If the member is no longer acceptable for LAS retention, direct MEB action as outlined in AFI 48-123 and this instruction.

6.8.3.2. Assignment Resource Manager Action. When HQ AFPC/DPAMM recommends retention in LAS, the resource manager, as identified in paragraph **6.6.2**, reviews the case to

determine if they can still justify LAS assignment. After review, the resource manager returns the case to HQ AFPC/DPPD indicating whether continued LAS is, or is not, justified.

6.8.3.3. HQ AFPC/DPPD Action. Advise the member by memorandum, through the MPF, of the final decision concerning retention in LAS. When the member is no longer medically acceptable for LAS, or when the LAS assignment is no longer justifiable, initiate MEB action. If approving retention in LAS, include any change in assignment limitation in the approval notice.

**6.9. Exceptions to Normal LAS Reevaluations.** Upon receiving information indicating further LAS retention may not be appropriate, HQ AFPC/DPPD may send the case file to HQ AFPC/DPAMM or the proper functional resource manager for review, direct an MEB and PEB, or take any other action necessary to determine if the member's continued retention on LAS is appropriate.

## Chapter 7

### PERIODIC EXAMINATION OF MEMBERS ON THE TDRL

#### *Section 7A—TDRL Examination Rules*

**7.1. Requirement for Periodic Examination.** The law, 10 U.S.C. 1210, requires reexamination of all members on the TDRL at least once every 18 months to determine if there has been a change in the disability that resulted in their placement on the TDRL. These periodic examinations continue until final disposition or until the statutory period expires (currently 5 years) whichever is earlier.

7.1.1. HQ AFPC/DPPD usually schedules the initial examination 16 months after placing the member on the TDRL so the medical facility can complete it before the end of the 18th month. They schedule the examination at the Air Force medical facility closest to the member's home that has the required capability, or the closest DoD medical facility if indicated by the member's medical condition.

**7.2. Importance of Processing TDRL Examinations Rapidly.** Many TDRL members must leave school or their jobs to report for examination, and any undue delay may cause hardship. HQ AFPC/DPPD notifies everyone concerned approximately 20-30 days in advance of the scheduled reporting date and time for the examination. The members must report on time, and the medical facility must complete the examination without delay.

**7.3. Failure to Report for Periodic Examinations.** In accordance with the law (10 U.S.C. 1210) TDRL members who fail to report for periodic examinations, after having been properly notified, will have their retired pay terminated. All members on the TDRL shall advise HQ AFPC/DPPD of their current mailing address. In this way, members will receive important notices on periodic examinations, as well as other correspondence of interest.

#### **7.4. Procedures for Periodic Examinations.**

7.4.1. About 60 days before the reporting date, HQ AFPC/DPPD sends the previous TDRL medical records and any special instructions to the examining facility and requests a TDRL medical examination appointment.

7.4.2. Within 10 days of receiving the request, the examining facility will call or send a message to HQ AFPC/DPPDS giving the date and time of the appointment, and indicating whether they will evaluate the member on inpatient or outpatient status.

7.4.3. If the medical facility can not conduct the examination, they must return the records within 15 days to HQ AFPC/DPPDS -If appropriate, HQ AFPC/DPPDS then schedules the examination at another facility as quickly as possible, or returns the package for necessary processing.

7.4.4. The member shall provide to the examining physician, for submission to the PEB, copies of all his or her medical records (civilian, VA, and all military medical records) documenting treatment since the last examination.

7.4.5. If the member is being treated by a civilian physician or the VA and member provides them directly to HQ AFPC/DPPDS, HQ AFPC/DPPDS will provide the information to the PEB for review. If the PEB determines that the report is sufficient to evaluate the member, the scheduled appointment at the MTF will be canceled.

7.4.6. If the member fails to report for the examination on the scheduled reporting date, the medical facility must advise HQ AFPC/DPPDS immediately and await further instructions.

7.4.7. Telephone Counseling. TDRL members may call HQ AFPC/DPPDS toll-free at 1-800-531-5806 for information or counseling regarding their periodic examination or the findings and recommended disposition of the IPEB.

**7.5. Travel and Per Diem Allowance.** Members traveling to a medical facility for examination, or to Lackland AFB TX for the formal PEB, receive travel and per diem allowance based on their retired grade (10 U.S.C. 1210 and JFTR volume 1, chapter 7, part I). The Air Force reimburses them for the cost of travel to and from the examining facility or the formal PEB as well as certain other costs, such as meals and lodging, at about the same rates as AD members of the same grade in TDY status. Members are not authorized use of rental vehicles.

**7.6. Travel Orders.** About 20-30 days before the reporting date, HQ AFPC/DPPD sends travel orders to the member. The order shows the exact date, time, and place to report and includes the authority for payment of travel costs. The orders and the accompanying information sheets contain instructions for the members on what they need to do and their entitlements.

**7.7. Orders Processing by the Examining Facility.** The medical facility endorses the order to show whether they examined the member as an inpatient or outpatient, the dates and times the member reported and was released after completing the examination. If the examination was in outpatient status, tell whether or not the member occupied government quarters. The examining facility must ensure the member has an indorsed order to submit with the claim for reimbursement. The member submits a travel voucher to 12 CPTS/FMFL for reimbursement. FMFL must also approve all advances.

**7.8. Authorized Escort.** An escort may accompany a member to the place of examination or to the formal PEB when the member is not physically or mentally able to travel without help. Submit the request and supporting documents for review by HQ AFPC/DPPD before beginning travel. If approved, HQ AFPC/DPPD includes the authority for an escort's travel in the member's travel order. The attendant may file a claim for expenses according to JFTR, volume 1, chapter 7, part I. However, if traveling by private conveyance, the Air Force will reimburse only the retired member for transportation costs.

**7.9. Purpose and Scope of TDRL Reevaluation.** The purpose of the periodic examination is to determine if the condition for which the member was retired has changed since retirement or since the previous TDRL evaluation. The medical facility conducts the examination according to AFI 48-123.

7.9.1. The report of examination centers on the unfitting defects and conditions and includes anything the examining physician discovers or observes as to what the member is actually able to do or not do.

7.9.2. The examination also includes information on any other defect or condition incurred or discovered after the member's retirement. For any newly identified defect or condition, the report indicates whether the member incurred the condition while on active duty or while on TDRL. For any change to an old defect or condition, the narrative summary indicates whether the condition is better or worse than at the time of retirement.

7.9.3. The examining facility performs the necessary diagnostic, laboratory, and radiological procedures which clearly and accurately establish the member's current status. Include the following in the final report: test results, a statement as to the normal test value for the

procedures done, copies of consultations, and a statement identifying all medications the member is currently taking.

7.9.4. The examining physician includes medical statements and opinions in the report of examination when such information may help the PEB evaluate the member's current condition. However, since prior TDRL medical records are available to the PEB and higher levels of review, do not repeat information in previous records except to make a point. The physician will include a detailed statement of interim history describing social, industrial, or educational activity, as well as the medical prognosis. References to the administrative disposition of the member, such as return to active duty, retention on TDRL, permanent retirement, discharge for disability, or probable percentage of disability are not appropriate and frequently lead to unnecessary questions or disappointment for the member.

7.9.5. Insurance Claims. The examining DoD medical facility may bill the reasonable costs of the TDRL examination to a third-party payer such as an insurance company or a medical service or health plan under which the member is a covered beneficiary (10 U.S.C. 1095). Additionally, please note the following:

7.9.5.1. Do not bill the member for costs not paid (such as required deductibles or co-payments).

7.9.5.2. If the third-party payer asks the member to clarify the charges, resource management personnel at the DoD medical facility will help in completing any additional claim forms.

7.9.5.3. Do not release confidential drug and alcohol treatment records without a patient consent executed according to federal law and Public Health Service regulations. A general consent form to release "medical records" or an assignment of third-party payer benefits will not satisfy Public Health Service requirements.

**7.10. Processing at the Examining Facility.** The commander of the examining facility or designated representative makes sure the medical facility completes the examination as quickly as possible so the member may return home without delay.

7.10.1. Time Limits. Follow these general rules:

7.10.1.1. When possible, complete the examination within 1 to 3 duty days after the member arrives at the examining facility.

7.10.1.2. Only extend the examination period if the examining physician believes a short period of observation or medical testing is absolutely essential for a complete report. Hold such examinations to a minimum.

7.10.1.3. The DoD requirement is to provide medical reports to HQ AFPC/DPPD within 30 days of examination.

7.10.1.4. Do not send the case to HQ AFPC/DPPD until all laboratory studies and consultations have been completed and included in the report. If the MTF can not complete the report of examination within the required period, advise HQ AFPC/DPPD in writing of the reason for delay and give an estimated date of report completion. Never keep the member at the examining facility pending review of laboratory test results or to await typing of the report.

7.10.2. Report of Examination. The examining medical facility must send the completed report and all previously loaned medical records to HQ AFPC/DPPDS. The completed report consists of SF 502 and the results of all laboratory procedures and consultations. Further, the service member shall provide copies of all civilian, VA, and military medical records documenting treatment since the last TDRL reevaluation. Submit the narrative summary in original plus two legible copies.

7.10.3. Competency Rules. If the member was mentally incompetent when last examined and there has been a change in competency since then, or if there is a question as to mental competency, the examining military facility must convene a competency board according to DFAS-DE 177-373, volume 1, chapter 24, Joint Uniform Pay System - DJMS AFO Procedures and AFI 48-123. A competency ruling will not be required for members evaluated at VA or civilian medical facilities. In these cases, the member or an NOK must contact DFAS-CL to arrange for a change in competency. Take the following action:

7.10.3.1. Include a copy of the board's competency determination with the report of examination when sending it to HQ AFPC/DPPD.

7.10.3.2. Send a copy of the competency board to DFAS-CL/FRAA.

7.10.3.3. If it would be harmful or against the member's best interest to know his or her medical condition, the examining physician will point that out in the narrative summary. HQ AFPC/DPPD will then process the case accordingly.

**7.11. TDRL Members Imprisoned or Confined by Civil Authorities.** The law requires periodic examination, regardless of the member's status or circumstances. For members imprisoned or confined by civil authorities, HQ AFPC/DPPD requests a report of examination and a copy of the commitment order, when appropriate, from the confinement institution.

7.11.1. If the report received contains sufficient information, the PEB uses it to evaluate the member. If the report is inadequate, or if the institution does not send a report, HQ AFPC/DPPD sends the case to SAFPC for review and disposition.

### ***Section 7B—Review by IPEB and FPEB***

**7.12. IPEB Review of the TDRL Examination.** HQ AFPC/DPPD refers reports of examination with prior medical records and allied papers to the IPEB for evaluation as outlined in **Chapter 3**.

**7.13. Additional Medical Workup.** If the report of examination is inadequate, HQ AFPC/DPPD returns it to the examining facility for more data, or takes other action as necessary to get a complete and adequate report. HQ AFPC/DPPD may direct the member to report to another facility for additional medical workup, or to 59 Med Wg (WHMC), Lackland AFB TX, for complete examination followed by a PEB. HQ AFPC/DPPD issues another set of travel orders when applicable.

**7.14. Changes in Prior Determinations.** Do not change prior findings such as LOD, proximate result, EPTS factor, and so on, unless there is new and compelling evidence not available to the original board that establishes that the initial determination was in error. Determinations of armed conflict and instrumentality of war are binding so long as the defect remains unfitting.

7.14.1. Conditions found not unfitting when placed on the TDRL are not compensable if they become unfitting while on the TDRL. However, if reevaluation reveals the condition was unfitting when the member was placed on the TDRL, the evaluating board lists the condition as

compensable when making permanent disposition of the case, and documents the reasons for making the change in item 15, AF Form 356. Since the board cannot retroactively change the member's records as of the date placed on the TDRL, HQ AFPC/DPPD will tell the member that he or she may apply for records correction through the AFBCMR process.

**7.15. Action by AFPC and Member After IPEB.** HQ AFPC/DPPD sends to the member the AF Form 356, a copy of the TDRL report of exam, and a memorandum outlining actions required. When the IPEB recommends removal from the TDRL, the member may agree with the board's recommendation, disagree and request a formal PEB, or waive the formal PEB and submit a written rebuttal. When the board recommends retention on the TDRL, HQ AFPC/DPPD advises the member of the action but does not give the member the option to agree or disagree (see paragraph [7.25](#)).

7.15.1. Time Limits. The member is provided 30 calendar days to reply when the IPEB recommends final disposition in the case. Upon request, HQ AFPC/DPPD may grant additional time if needed. If there is no response within the time limit, HQ AFPC/DPPD will presume the member concurs and the case will be finalized.

7.15.2. Member Agrees or Submits a Rebuttal to the IPEB Findings. HQ AFPC/DPPD processes the case as outlined in [Chapter 3](#) and [Chapter 5](#).

7.15.3. When Physically Fit. When the recommended disposition of the IPEB is "Removal from the TDRL (Fit)," HQ AFPC/DPPD sends a memorandum to the member with a 30 day suspense outlining action required. HQ AFPC/DPPD will notify the appropriate offices; i.e., promotions, enlisted retention, officer appointments and officer procurement.

7.15.3.1. If eligible for return to active duty, HQ AFPC/DPPD sends the member one copy of **Statement Relative to Appointment or Enlistment After Removal from TDRL** along with the informal board's findings and recommendation. The member must make a decision and return the form within 30 calendar days. Except as stated in paragraph [7.15.4](#), if the member does not respond within the 30-day time limit, HQ AFPC/DPPD will process the case as if the member did not desire appointment or enlistment.

7.15.3.2. If a member was serving on AD as a non-EAD ARC officer when placed on the TDRL, HQ AFPC/DPPD will refer him or her to the nearest ARC facility for further processing.

7.15.3.3. In addition to permitting return to duty under 10 U.S.C. 1211, the law (10 U.S.C. 1210) provides that members removed from the TDRL as fit will be discharged, retired, or transferred to the inactive Reserve under any other law if, under that law, the members applies for and qualifies for that retirement or transfer, or is required to be discharged, retired, or eliminated from an active status. The member's grade is determined under the provisions of law for which retired, transferred, discharged, or eliminated from an active status. Retired, retainer, severance, readjustment, or separation pay is computed as if the member had been reappointed or reenlisted upon removal from the TDRL and before the retirement, transfer, discharge, or elimination. (See paragraph [7.27](#) for service retirement procedures involving members removed from the TDRL.)

7.15.3.4. Members found fit who do not elect enlistment or reappointment, and who are not discharged, retired, or transferred to the inactive Reserve as indicated in paragraph [7.15.3.3](#), will be discharged without benefits, subject to restriction in paragraph [7.15.4](#)

7.15.4. Obligated Service. By law, members who entered military service after 1 June 1984 must serve 8 years in the armed services, unless sooner discharged. Do not discharge TDRL

members found fit who entered military service after 1 June 1984, served less than 8 years, and do not want to be reappointed nor to enlist. Instead, when removing them from the TDRL, transfer them to the USAFR (Obligated Reserve Section), and assign them to the Air Reserve Personnel Center (ARPC) to complete their military service obligation. Time spent on the TDRL counts toward the required obligated service.

**7.16. Documentation Provided To the FPEB.** When a formal hearing is to be held, HQ AFPC/DPPD sends the TDRL examination, medical records, and related documents to the FPEB. If the FPEB decides it needs more medical data, they may refer the member to 59 Med Wg (WHMC) for specific tests, consultations, or medical workups. The FPEB must specify the conditions that require evaluation and identify any other information needed. The FPEB president recesses the hearing pending receipt of the additional data.

**7.17. Directed Examination Followed by FPEB Hearing.** HQ AFPC/DPPD can direct a complete medical workup and formal hearing when they determine that it is in the best interests of the member or the Air Force. HQ AFPC/DPPD schedules the examination at 59 Med Wg (WHMC), and prepares and sends orders directing the member to report to 59 Med Wg (WHMC) for the required examination. The examination follows the general guidelines in this chapter.

7.17.1. Time Limits. 59 Med Wg (WHMC) must complete the medical workup and examination as quickly as possible--10 to 14 days maximum. If medical personnel at 59 Med Wg (WHMC) need more time, they must advise HQ AFPC/DPPD and the FPEB of reasons for the delay and the expected completion date. As soon as 59 Med Wg (WHMC) completes the medical examination, the member will appear before the FPEB.

**7.18. Special Considerations for TDRL Members.** The FPEB hearing for a member on the TDRL proceeds as outlined in **Chapter 3, Section 3C**. The following special considerations apply:

7.18.1. FPEB In Absentia. When the retired member does not or cannot appear in person, HQ AFPC/ DPPD approves and HQ AFPC/DPPDF convenes a formal hearing in absentia. In such cases, legal counsel must be present during all open sessions. The NOK (or guardian) may also be present and act for the member. Examples of when hearings will be held in absentia, include, member:

7.18.1.1. Is hospitalized, confined, incarcerated, or otherwise unable to travel freely.

7.18.1.2. Is unable to travel because of his or her physical or mental condition.

7.18.1.3. Is unable to act in his or her own behalf because he or she is incompetent or because knowledge of the condition or disability would be harmful to the member.

7.18.2. Excusal from Hearing. A retired member may request to be excused from personally appearing at a hearing. This request is not be confused with the formal hearing that is held in absentia (paragraph **7.18.1**). The FPEB president at his discretion may approve a retired member's request for excusal. The record of the hearing must clearly show that this was a voluntary act by the member. In such cases, the designated legal counsel represents the member during all open sessions. The member remains in the area until the FPEB completes its action. Excusal does not keep the FPEB from referring the member to 59 Med Wg (WHMC) for medical consultations if needed.

**7.19. Personal Appearance.** The TDRL member must appear before the FPEB, unless the FPEB conducts the hearing in absentia, or the board president excused the member from the hearing.

**7.20. Disposition Options of the Formal Hearing.** Same as for IPEB (see paragraph **3.29**).

**7.21. Special Actions When Member Is Found Fit.** When the FPEB recommends "Removal from TDRL (Fit)," the FPEB counsel or other designated counsel:

7.21.1. Provides member a memorandum outlining action required, election statement of intent to seek reenlistment, reappointment or service retirement, if appropriate, and a fact sheet to aid member in making election. Fact sheet includes points of contact for any questions they may have. Member is allowed two weeks to reply to HQ AFPC/DPPDS.

7.21.2. Advises members who were serving on active duty as USAFR or ANG officers when placed on the TDRL to contact their appropriate Reserve component for further processing.

7.21.3. Advises members who entered the military service on or after 1 June 1984 and served less than 8 years of the obligated service provision of 10 U.S.C. 651 as outlined in paragraph **7.15.4**

7.21.4. Counsels enlisted members that HQ AFPC/DPPA will review their records to determine if they are eligible to reenlist. If ineligible, they do not have the option to reenlist, and will be discharged without disability benefits.

***Section 7C—AFPC Disposition Actions***

**7.22. Final Review and Disposition Actions.** HQ AFPC/DPPD announces the final disposition on a computer format, **Retirement Special Order - Physically Unfit**, or **Retirement Special Order Removal From TDRL**. These orders are the official notice to TDRL members of final disposition action. Retaining a member on TDRL is not a final disposition (see paragraph **7.24**).

**7.23. Stopping Retired Pay.** Retired pay stops when TDRL members are removed from the TDRL or when the statutory period of retention on TDRL according to 10 U.S.C. 1210h expires.

7.23.1. HQ AFPC/DPPD may also stop a member's eligibility to receive Air Force retired pay if the member is scheduled to report for periodic examination and refuses or fails to report after having been given proper notice or fails to provide all his or her medical records (civilian, VA, and all military medical records) documenting treatment since the last examination. Rules for reinstatement are:

7.23.1.1. If the member later reports, reinstate eligibility to receive retired pay effective on the date the member reports and completes the examination.

7.23.1.2. If the member can show "just cause" for not reporting, reinstate eligibility to receive retired pay retroactively for a period of not more than 1 year (10 U.S.C. 1210a).

7.23.1.3. If the member does not undergo periodic examinations after disability retired pay has been terminated, they will be administratively removed from the TDRL on the fifth anniversary of placement on the list and separated without entitlement to any disability benefits.

7.23.2. For TDRL members found fit and reappointed or enlisted, disability retired pay stops on the date removed from TDRL.

**7.24. Removal From TDRL for Failure To Report or Reply.** HQ AFPC/DPPD will process as follows:

7.24.1. Failure To Report for Periodic Examination. Under provisions of this chapter, HQ AFPC/ DPPD schedules members nearing the 5th anniversary of the date placed on the TDRL for

periodic examination. If these members refuse or fail to report after having been properly notified, or if HQ AFPC/DPPDS cannot locate the TDRL member, HQ AFPC/DPPDS refers the case to the IPEB, with a detailed account of all relevant circumstances. Possible follow-on actions:

7.24.1.1. The IPEB may recommend permanent disability retirement, discharge with entitlement to disability severance pay, or removal from the TDRL and discharge without benefits.

7.24.1.2. The designated special assistant to SAFPC may confirm and approve the IPEB's recommended disposition, refer the case to the FPEB for a formal hearing in absentia, or to SAFPC for final disposition.

7.24.2. Members Found Fit Who Fail To Respond as Required. HQ AFPC/DPPD will remove from the TDRL and discharge without benefits TDRL members who have been found fit and fail to reply within the time limit to the notification of the fit finding. HQ AFPC/DPPD will also remove from the TDRL and discharge without benefits a TDRL member who is found fit, requests a FPEB hearing, and fails to report to the FPEB.

**7.25. Retention on TDRL.** When the IPEB recommends retention on TDRL, HQ AFPC/DPPD furnishes the member a copy of AF Form 356, copy of TDRL report of exam, and a memorandum advising there is no change in member's status or Air Force retired pay as long as the member's name remains on the TDRL regardless of whether or not there is a change in percentage rating. HQ AFPC/DPPD's memorandum of notification includes an approximate date for the next examination and tells the member that instructions, and a firm date, and designated place of examination will be sent approximately 20-30 days before the examination date.

**7.26. Enlistment, Reappointment, or Retirement (TERA) After Removal from TDRL as Fit.** Upon recommendation of the IPEB be removed from the TDRL as fit:

7.26.1. Enlistment or Reappointment Grade. The appropriate promotions office determines the grade of enlistment or reappointment and advises HQ AFPC/DPPD.

7.26.2. Enlistment. HQ AFPC/DPPDS tells members what date they will remove them from the TDRL and that members will have 60 calendar days from the date removed during which they may enlist without a physical examination. HQ AFPC/DPPDS provides instructions for the member to present to the MPF when reporting for enlistment. After the 60-day period, former TDRL members follow the same enlistment rules that apply to any other civilian.

7.26.3. Retirement (TERA). Members who meet basic eligibility requirements for the TERA will be referred to HQ AFPC/DPPR to apply.

7.26.4. Reappointment of Certain ARC Officers. HQ ARPC/DPRB, reappoints ARC officers being assigned to a Reserve component (not retiring and not returning to AD).

**7.27. Service Retirement of Members Being Removed from TDRL.** Members who are fit, or who are unfit because of a condition incurred or aggravated while on TDRL after having recovered from the condition for which placed on the TDRL, may apply for service retirement if eligible under AFI 36-3203. HQ AFPC/DPPDS provides the appropriate application forms, and HQ AFPC/DPPR issues orders effecting removal from TDRL on the last day of the month and service retirement on the first day of the following month so there is no loss of pay.

## Chapter 8

### EVALUATION OF AIR RESERVE COMPONENT (ARC) MEMBERS

#### *Section 8A—General Guidelines*

**8.1. Purpose.** This chapter provides the guidelines for processing through the disability system certain ARC members who meet eligibility requirements in paragraph 8.2 Paragraph 8.3 gives an ineligibility guideline. The Air Force disability system will evaluate ARC members who meet the basic requirements for disability benefits under 10 U.S.C., chapter 61. Further, Ready Reserve members who are pending separation for a non-duty related impairment and Reserve members who are not on a call to active duty of more than 30 days and who are medically disqualified for impairments unrelated to the member's military status and performance of duty shall be afforded the opportunity to enter the disability system for a determination of fitness only but shall not be afforded disability benefits (see section E).

**8.2. Eligibility for Disability Processing.** The following ARC members who have impairments which were incurred or aggravated in the line of duty are eligible for disability processing:

- 8.2.1. On active duty for 31 days or more while the member was entitled to basic pay.
- 8.2.2. After 23 Sep 96, on active duty for 31 days or more but not entitled to basic pay under 37 U.S.C. 502(B) due to authorized absence to participate in an educational program, or for an emergency purpose, as determined by the SAF or designated representative.
- 8.2.3. On active duty for 30 days or less or on call to Inactive Duty Training (IDT).
  - 8.2.3.1. While traveling directly to or from the place at which such duty is performed; and/or
  - 8.2.3.2. After September 23, 1996, any injury, illness, or disease incurred or aggravated while remaining overnight, between successive periods of IDT, at or in the vicinity of the site of the inactive duty training, if the site is outside reasonable commuting distance of the member's residence.
  - 8.2.3.3. Additionally, members of the Ready Reserve with nonduty-related impairments pending separation for failure to meet physical standards. (See eligibility criteria in **Section 8E**).

**8.3. Ineligibility for Disability Processing.** ARC members are ineligible for disability processing if the member is pending an approved, unsuspended, punitive discharge or dismissal.

**8.4. Misconduct.** In order for ARC members to be *compensated* for disabilities incurred while in active duty or inactive duty status, the PEB must find that the unfitting condition was not the result of intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence.

**8.5. Entitlement to Medical Care and Evaluation.** AFI 41-115, *Authorized Health Care and Health Care Benefits in the Military Health Services Systems (MHSS)* outlines an ARC member's possible entitlement to medical care when not on active duty, including hospitalization for evaluation of physical defects or conditions incurred as a result of performing authorized military duty. If there is any question as to a member's entitlement to medical care and evaluation, the medical facility takes action to verify such entitlement.

## 8.6. Duty and Pay Status:

8.6.1. An ARC member who incurs a disability while performing AD on orders for 30 days or less is not ordered or continued on AD past the date specified solely for processing under this instruction. However, the member is eligible to receive medical care and evaluation. Members with disabilities incurred or aggravated after 29 September 1988 may also be entitled to pay and allowances; however, the amount received is reduced by the full amount of civilian income received during the disability period. Limit payment to a maximum of 6 months unless SAF extends the period after determining it is in the interest of fairness and equity to do so (37 U.S.C. 204(g) and [h]).

8.6.2. ARC members who incur or aggravate an injury, illness or disease in the line of duty while on orders for more than 30 days are not involuntarily released from those orders until final disposition of their disability case. These members' entitlement to full pay and allowances and benefits continue to the same extent provided by law or regulation to regular component members.

**8.7. Movement of Member.** The PEBLO or medical facility commander advises the member's unit commander or MPF of the disposition or movement to another medical facility or to travel to meet a FPEB. When such movement is necessary, the medical facility issues appropriate orders to authorize the movement.

### *Section 8B—Administrative Processing*

**8.8. Records for PEB.** When referring an ARC/Ready Reserve member's case to the PEB, the PEBLO at the referring facility obtains all prior medical and related records for use by the PEB following these procedures:

8.8.1. Modify the text of the request for prior medical records as follows: "PEB pending for (grade, name, SSN). Request all medical and clinical records (include places and date of hospitalization and register number, if known). Member claims prior service in (Branch of Service or (state)) National Guard from \_\_\_\_\_ to \_\_\_\_\_ under service numbers \_\_\_\_\_."

8.8.2. Send the request to the custodian of the MPerGp as specified in AFI 36-2608, *Military Personnel Records Systems*.

8.8.3. Send an information copy of the request to the Records Management Division (HQ AFPC/ DPSR), for IMA's send a copy to HQ AFPC/DRSP.

8.8.4. If the member had military service other than Air Force, send a copy to the National Personnel Records Center, Air Force Reference Branch (NPRC/NRPMF-C).

**8.9. Case Records for the PEB.** Assemble as outlined in AFI 48-123. If the PEBLO can not locate all the needed documents, the PEBLO includes a statement to that effect for the case file. Send cases to the PEB through the SG and DP offices of the appropriate headquarters—ANG (ANG members), HQ AFRC (unit members), or HQ ARPC (individual mobilization augmentees). Cases on Reserve component personnel on EAD or undergoing initial active duty for training do not require headquarters review.

**8.10. Case Processing.** Upon determining a member to be eligible for disability evaluation, process the case according to **Chapter 3**, **Chapter 4**, and **Chapter 5. Section 8C** of this chapter

outlines special processing rules. HQ AFPC/DPPD may grant other exceptions to normal processing when such action is in the best interest of the member and the Air Force.

**8.11. Other Administrative Actions.** Do not retire or discharge a member whose case is undergoing disability evaluation until completion of the disability case. Do not administratively discharge under AFI 36-3209, *Separation Procedures for Air National Guard and Air Force Reserve Member*, members retired or discharged for disability under this instruction.

**8.12. Movement of Member to FPEB.** If HQ AFPC/DPPD schedules an ARC member to meet a FPEB, the PEBLO or medical facility commander arranges for movement of the member and prepares orders placing member on TDY to 59 Med Wg (WHMC) to meet the formal PEB (See **Section 3C, Chapter 3**). **EXCEPTION:** Members of the ARC with a non-duty related medical condition are responsible for their personal travel and other expenses.

### *Section 8C—Special Case Processing*

**8.13. Waiver of PEB Action in EPTS Cases.** A member whose physical qualification for military duty is questionable because of an EPTS condition, and whose case is being considered for PEB action under this chapter, may waive evaluation by a PEB subject to conditions outlined below. If the case does not meet all the criteria for waiver or if the member requests evaluation by a PEB, the appropriate headquarters or medical facility will refer the case to the PEB. Also refer a case to the PEB when the member fails or refuses to sign a waiver. Cases must meet the following conditions:

- 8.13.1. Member's qualification to perform duties of his or her office, grade, or rank is questionable, as determined by medical board action.
- 8.13.2. The disqualifying defect or condition existed before entry on current period of duty and such duty has not aggravated the defect or condition.
- 8.13.3. Knowing about his or her medical condition would not be harmful to the member's well being.
- 8.13.4. The member does not require further hospitalization or institutional care.
- 8.13.5. After being advised of the right to a full and fair hearing, member still desires to waive PEB action.
- 8.13.6. Member knows he or she must undergo PEB evaluation to receive Air Force disability benefits, if applicable, but waiving PEB evaluation will not prevent applying for VA benefits.
- 8.13.7. Member knows that he or she will go home under applicable USAFR or ANG directives to await the final outcome of the case.
- 8.13.8. Member knows final action on the case may result in discharge, and that he or she may not withdraw PEB waiver action under this chapter.

**8.14. Waiver Processing.** Prepare the waiver statement in three copies using the format at **Attachment 5**. The commander of the medical facility processing the case, or a designated representative, distributes the original and two copies of the waiver statement as follows:

- 8.14.1. Original. Send with the original AF Form 618, narrative summary, and memorandum of notification to the appropriate addressee as follows:

8.14.1.1. USAFR Members: HQ ARPC/DPA for Individual Mobilization Augmentees (IMA); or HQ AFRC/DPM for unit members.

8.14.1.2. ANG Members: ANG/MPPSS.

8.14.2. First Copy. Send with a legible copy of AF Form 618 and narrative summary to the member's unit commander or MPF for file with the health records in the Field Records Group. For IMAs, send to HQ ARPC/DRSP.

8.14.3. Second Copy. Give to member.

8.14.4. Completing the Memorandum of Notification to ARC Headquarters.

8.14.4.1. Wording: "(Grade, name) is not considered to be physically qualified for military duty and has waived further evaluation by a Physical Evaluation Board (PEB). Attached are the Medical Board Report and medical summary, with the member's statement waiving PEB action, for disposition of the member under applicable directives. The member will go home to await your final action."

8.14.4.2. If the member is on AD undergoing training, the medical facility commander may send the Medical Board Report and waiver statement to the servicing MPF where the member is training. The MPF completes the discharge processing and advises the USAFR or ANG of final action.

**8.15. Disposition of Ineligible Member.** An ineligible member is one not physically qualified for military service but who does not qualify for PEB evaluation under this instruction. The medical facility commander or designated representative must advise member that he or she is not eligible for processing under this instruction; cannot stay in a duty status; and will be returned home to await discharge under applicable USAFR or ANG directives.

8.15.1. After completing inpatient or outpatient medical treatment or medical processing, the medical facility commander sends the member home to await discharge. The MTF commander sends a memorandum of notification to the ARC headquarters with a copy to the member and to the unit commander (or MPF) that includes a detailed medical summary describing the member's disqualifying defects. Send notifications to the following offices: For USAFR Category A unit members, HQ AFRC/SGP; for IMAs, HQ ARPC/DPA; for ANG members, ANG/MPPSS.

8.15.2. The medical facility commander prepares the notification memorandum in three copies with the following wording: "(Grade, name) is not considered to be physically qualified for military duty, and is not eligible for processing by a PEB. The attached medical summary reflects the member's current physical status. Please take immediate action to ensure proper disposition of the member under applicable directives. The member is being returned home to await final disposition."

### ***Section 8D—Final Disposition***

#### **8.16. Disposition of Eligible Member.**

8.16.1. Return to Duty by a Medical Board. If an MEB finds an ARC member physically qualified for military service and returns the member to duty, the medical facility commander returns the member to the unit of assignment or, if the period of duty has expired, sends the member home. Send a copy of AF Form 618 to the unit commander or MPF for file with the health records in the member's Field Records Group. **NOTE:** For unit-assigned Reservists, HQ

AFRC/SGP and ANG/SGP will provide disposition instructions to the member's medical unit and distribute the final board report to the appropriate Reserve agencies.

8.16.2. Disposition After PEB Evaluation. After the member has either agreed with the PEB or submitted a rebuttal, the referring medical facility commander takes one of the following actions:

8.16.2.1. Physically Fit. Returns the member to the unit of assignment or, if the period of service has expired, sends the member home.

8.16.2.2. Physically Unfit. If the member does not require further hospitalization, return the member home to await final disposition action. If the member requires hospitalization after retirement or discharge, the referring medical facility commander takes action as outlined in AFIs 48-123 and 41-115.

**8.17. Final AFPC Processing After PEB Evaluation.** After final disposition, HQ AFPC/DPPD advises the ARC headquarters, prepares retirement orders or discharge information, and mails the case file to the ARC headquarters, as applicable. The ARC addressee completes retirement or discharge processing, including removal from status, if applicable, and issues appropriate instructions to the MPF.

8.17.1. HQ AFPC/DPPD may contact the member's MPF directly if necessary to ensure timely action on any retirement or discharge. When the final disposition is discharge without severance pay, HQ AFPC/DPPD may direct the MPF to discharge the member and notify the USAFR or ANG of the completed action. Offices are:

8.17.1.1. HQ ARPC/DPA for USAFR member not assigned to a specific Reserve unit.

8.17.1.2. AFRC/DPM for USAFR member assigned to a Reserve unit.

8.17.1.3. ANG/MPPSS for ANG member.

**8.18. Inactive Status List (ISL) Transfers.** Per 10 USC 1209, ARC members approved for disability discharge under 10 U.S.C. 1203 or 1206 and who have 20 or more years of satisfactory federal service computed under 10 U.S.C. 12732 may elect either disability discharge with severance pay, or transfer to ISL with retirement at age 60 under 10 U.S.C. 12732. Per 10 USC 12731D, Selected Reserve members who have 15, but less than 20 years satisfactory service, the last 6 years of which was Reserve duty, may apply for early qualification for retired pay at age 60.

### ***Section 8E—ARC Non-Duty Related Impairments***

#### **8.19. Eligibility.**

8.19.1. Any member of the Ready Reserve who is pending separation for a non-duty related impairment shall be afforded the opportunity to enter the DES for a determination of fitness. If determined fit, the member is deemed medically qualified for retention in the Ready Reserve in the same specialty for which he or she was found fit.

8.19.2. Members of the Reserve components who are not on a call to active duty for more than 30 days and who are medically disqualified for impairments unrelated to the member's military status and performance of duty shall be referred into the DES solely for a fitness determination upon the request of the member or when directed by the Secretary concerned.

**8.20. Standard.** The sole standard to be used in making determination of unfitness due to physical disability shall be unfitness to perform the duties of the member's office, grade, rank or rating because of disease or injury.

**8.21. Case Processing.**

8.21.1. Requests for fitness only determinations will be forwarded to HQ AFPC/DPPD by the appropriate ARC headquarters (ANG, AFRC, or ARPC) and will contain the following documentation:

8.21.1.1. Administrative separation package or medical documentation used by the ARC headquarters to arrive at an unfitness determination.

8.21.1.2. Statement from member requesting referral into the DES for a fitness determination.

8.21.1.3. Statement from member's commander (refer to paragraph 2.4).

8.21.1.4. ARC headquarters SG's and DP's recommendations.

8.21.1.5. A statement from the member, if he or she so desires.

8.21.2. Cases unable to be adjudicated. When the PEB needs additional information to make a fitness determination, HQ AFPC/DPPD will notify the ARC headquarters of the requirement.

8.21.3. Documenting Findings.

8.21.3.1. Unfit determinations will be documented on a memorandum signed by the PEB President.

8.21.3.2. Fit determinations will be documented on a memorandum signed by the PEB President and approved by the Director, Secretary of the Air Force Personnel Council, or his designated representative.

8.21.4. Fit determination

8.21.4.1. Case will be returned to the appropriate ARC headquarters.

8.21.4.2. Member will be counseled and returned to duty.

8.21.5. Unfitness recommendation

8.21.5.1. Finding will be sent to the appropriate ARC headquarters; they will provide HQ AFPC/ DPPD with member's concurrence or nonconcurrence within 30 days from member's receipt of recommendation.

8.21.5.2. Member will be counseled, and advised that if a FPEB is demanded, personal travel and other expenses will be their own responsibility.

8.21.6. If member agrees with IPEB unfitness determination:

8.21.6.1. ARC headquarters will finalize separation case through appropriate administrative channels and notify HQ AFPC/DPPD.

8.21.7. If member disagrees with IPEB unfitness determination and requests a formal board hearing.

8.21.7.1. ARC headquarters will advise HQ AFPC/DPPD and HQ AFPC/DPPD will schedule a FPEB hearing in approximately 30 days.

8.21.8. Member appears before the FPEB

8.21.9. If member agrees with the FPEB

8.21.9.1. Case will be finalized.

8.21.10. If member disagrees with the FPEB recommendation

8.21.10.1. HQ AFPC/DPPD will notify ARC Headquarters.

8.21.10.2. Member will be allowed 14 calendar days from date of receipt of FPEB recommendation to submit a rebuttal.

8.21.10.3. Rebuttal along with unfitness case will be forwarded to SAFPC for a final determination.

8.21.11. HQ AFPC/DPPD will advise ARC headquarters of the final determination.

8.21.12. Case will be returned to ARC headquarters for disposition and counseling.

**8.22. Information Collections, Records, and Forms/Information Management Tools (IMTs).**

8.22.1. Information Collections. Information collections are not created by this publication.

8.22.2. Records. Retain and dispose of records according to the AF Records Disposition Schedule.

8.22.3. Forms/IMTs Prescribed.

8.22.3.1. Forms/IMTs Adopted. No forms/IMTs are adopted by this publication.

8.22.3.2. Forms/IMTs Prescribed. AF Form 356, **Findings and Recommended Disposition of the USAF Physical Evaluation Board**, AF IMT 1180, **Action on Physical Evaluation Board Findings and Recommended Disposition**, and AF IMT 1185, **Statement of Record Data**.

RICHARD Y. NEWTON III, Lt General, USAF  
Deputy, Chief of Staff, Manpower, Personnel and Services

**Attachment 1**

**GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION**

***References***

Title 10, United States Code, *Armed Forces*

DoD Directive 1332.18, *Separation or Retirement for Physical Disability, November 4, 1966*

DoD Instruction 1332.38, *Physical Disability Evaluation, November 14, 1996*

DoD Instruction 1332.39, *Application of the Veterans Administration Schedule for Rating Disabilities November 14 1996*

F035 AF PC, *Military Personnel Records System*

Executive Order (EO) 9397

Title 37, United States Code, *Pay and Allowances of the Uniformed Services*

CG Decision B-205953, 18 Jun 82

Title 38, U.S.C., *Veterans Benefits Administration*

Joint Federal Travel Regulation (JFTR)

Title 26, United States Code, *Internal Revenue Service*

Title 32, United States Code, *National Guard*

Uniform Code of Military Justice (UCMJ)

***Abbreviations and Acronyms***

**AD**—Active Duty

**AFBCMR**—Air Force Board for Correction of Military Records

**AFMTC**—Air Force Military Training Center

**AFPB**—Air Force Personnel Board

**AGR**—Active Guard and Reserve Member on Full Time Military Duty Under Title 10, 32 U.S.C.

**ALC**—Assignment Limitation Code

**ANG**—Air National Guard

**ANG**—Air National Guard Readiness Center

**ARC**—Air Reserve Components

**ASD/HA**—Assistant Secretary of Defense (Health Affairs)

**AWOL**—Absent Without Leave

**CAR**—Casualty Assistance Representative

**CHAMPUS**—Civilian Health and Medical Program for Uniformed Services

**CM**—Court-Martial  
**CONUS**—Continental United States  
**DAFSO**—Department of the Air Force Special Order  
**DES**—Disability Evaluation System  
**DFAS CL**—Defense Finance and Accounting Service - Cleveland Center  
**DJMS**—Defense Joint Military Pay System  
**DoD**—Department of Defense  
**EAD**—Extended Active Duty  
**EO**—Executive Order  
**EPTS**—Existed Prior to Service  
**FPEB**—Formal Physical Evaluation Board  
**HIV**—Human Immuno-deficiency Virus  
**HQ ARPC**—Headquarters Air Reserve Personnel Center  
**HQ USAF**—Headquarters US Air Force  
**IDT**—Inactive Duty for Training  
**IMA**—Individual Mobilization Augmentee  
**IPEB**—Informal Physical Evaluation Board  
**ISL**—Inactive Status List  
**JFTR**—Joint Federal Travel Regulations  
**LAS**—Limited Assignment Status  
**LOD**—Line of Duty  
**MCM**—Manual of Courts Martial  
**MEB**—Medical Evaluation Board  
**MIA**—Missing In Action  
**MPAC**—Military Pay and Allowance Committee  
**MPF**—Military Personnel Flight  
**MPerGp**—Master Personnel Records Group  
**MTF**—Medical Treatment Facility  
**NOK**—Next of Kin  
**NPRC**—National Personnel Records Center  
**OASD**—Office of the Assistant Secretary of Defense  
**OSAF**—Office of the Secretary of the Air Force

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**OSI**—Office of Special Investigation  
**PCA**—Permanent Change of Assignment  
**PCS**—Permanent Change of Station  
**PDAB**—Physical Disability Appeals Board  
**PDS**—Personnel Data System  
**PEB**—Physical Evaluation Board  
**PEBLO**—Physical Evaluation Board Liaison Officer  
**PEBRH**—Physical Evaluation Board Referral Hospital  
**POW**—Prisoner of War  
**RegAF**—Regular Air Force  
**RPB**—Retired Pay Base  
**RPDS**—Retired Personnel Data System  
**RRF**—Revised Recommended  
**SAFPC**—Secretary of the Air Force Personnel Council  
**SBP**—Survivor Benefit Plan  
**SGLI**—Servicemen's Group Life Insurance  
**SJA**—Staff Judge Advocate  
**SSN**—Social Security Number  
**TAFMS**—Total Active Federal Military Service  
**TDRL**—Temporary Disability Retired List  
**TDD**—Special Orders Series for TDRL travel orders  
**TDY**—Temporary Duty  
**TERA**—Temporary Early Retirement Authority  
**TFMSD**—Total Federal Military Service Date  
**TMO**—Traffic Management Office  
**UCMJ**—Uniform Code of Military Justice  
**USAF**—United States Air Force  
**USAFR**—United States Air Force Reserve  
**U.S.C.**—United States Code  
**VA**—Veterans Administration  
**VASRD**—Veterans Administration Schedule for Rating Disabilities  
**VGLI**—Veterans Group Life Insurance

**YOS**—Years of Service

*Terms*

**Accepted Medical Principles**— Fundamental deductions, consistent with medical facts, that are so reasonable and logical as to create a virtual certainty that they are correct.

**Active Duty**— Full-time duty in the active military service of the United States. It includes:

- Full-time National Guard Duty (on orders).
- Annual training.
- Attendance while in active Military Service at a school designated as a Service school by law or by the Secretary of the Military Department concerned.
- Service by a member of a Reserve component ordered to active duty (with or without his or her consent), or active duty for training (with his or her consent), with or without pay under competent orders.

**Active Duty for a Period of More than 30 days**— Active duty or full-time National Guard Duty under a call or order that does not specify a period of 30 days or less.

**Active Reserve Status**— Status of all Reserves who are not on an active-duty list maintained under Section 574 or 620 of 10 U.S.C., except those in the inactive National Guard, on an inactive status list or in the Retired Reserve. Reservists in an active status may train with or without pay, earn retirement points, and may earn credit for and be considered for promotion. In accordance with the Reserve Officer Personnel Management Act (ROPMA), a member in an Active Reserve status must be on the Reserve Active-Status List (RASL)(10 U.S.C. 14002).

**Air National Guard of the United States**—A reserve component of the USAF consisting of all federally recognized units, organizations, and members of the ANG of the several states, the District of Columbia, and Commonwealth of Puerto Rico, who, in addition to their status as ANGUS members, are Reserves of the Air Force in the same grades in which enlisted or appointed and federally recognized. Membership in the ANGUS is acquired by the enlistment or appointment in the federally recognized ANG of a state and concurrent enlistment or appointment as a Reserve of the Air Force in the same grade.

**Air Reserve Components**—Includes all categories of the Air Force Reserve and ANG.

**Appointed Military Counsel**—The legal officer or judge advocate appointed to represent a member before the FPEB.

**Armed Conflict**—Conflict between nations or other contestants entailing the physical destruction of, or injury to, one another's armed forces. Armed conflict exists if the direct use of physical force endangers the lives or safety of members of the armed services of a nation, belligerent power, coalition, or faction. Armed conflict includes war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerrilla action, riot, or any other action in which Air Force military personnel engage a hostile or belligerent nation, faction, or force. It also includes incidents involving a member while interned as a POW or while detained against his or her will in custody of a hostile or belligerent force or while escaping or attempting to escape from such confinement, POW or detained status.

**Compensable Disability**—A medical condition determined to be unfitting by reason of physical disability and which meets the statutory criteria under 10 U.S.C, chapter 61, for entitlement to disability retired or severance pay.

**Competent, Competency**—The member's mental ability to act in his or her own behalf during disability evaluation processing.

**Competency Board**—A board consisting of at least three medical officers or physicians (including one psychiatrist) convened to determine whether a member is competent (capable of making a rational decision regarding his or her personal or financial affairs).

**Component**—As used in this instruction, refers to whether the member is a member of the Regular Air Force (Reg Air Force) or a Reserve component member. The Reserve components are the Air National Guard of the US (ANGUS) and AF Reserve (USAFR).

**Counsel**—The person designated to give advice to a member. Includes the appointed military counsel, other military counsel, or civilian counsel. Also pertains to advice or information given by legal counsel, PEB Liaison Officer, and others in the disability evaluation system, MPF, TMO, accounting and finance office, etc.

**Creditable Service**—Military service that can be used in determining the disposition of a case, entitlement to benefits, etc.

**Death**—A determination of death must be made in accordance with accepted medical standards and the laws of the State where the member is located or the military medical standards in effect at an overseas location.

**Defect, Defects**—Missing or damaged (injured or diseased) parts of a member's body.

**Deployability**—A determination that the member is free of a medical condition(s) that prevents positioning the member individually or as part of a unit, with or without prior notification to a location outside the Continental United States for an unspecified period of time.

**Disability**—Any impairment due to disease or injury, regardless of degree, which reduces or precludes an individual's actual or presumed ability to engage in gainful or normal activity. The term "physical disability" includes mental disease, but not such inherent defects as behavioral disorders, personality disorders, and primary mental deficiency. A physical disability is not necessarily unfitting and may be referred to as a physical defect or condition.

**Disposition**—The end result of board action or the final action taken in a case.

**Dual Action**—The case of a member who, in addition to the disability evaluation, also has some other nondisability separation action pending resolution along with the disability action.

**Duty Related Impairments**—Impairments which, in the case of a member on active duty for 30 days or less, are the proximate result of, or were incurred in line of duty after September 23, 1996, as a result of:

- Performing active duty or inactive duty training;
- Traveling directly to or from the place at which such duty is performed; or
- An injury, illness, or disease incurred or aggravated while remaining overnight, between successive periods for purpose of IDT, at or in the vicinity of the site of the IDT, if the site is outside reasonable commuting distance of the member's residence.

**Excess Leave**—Leave during which the member does not receive pay and allowances. The member does not accrue leave while on excess leave status.

**Exhibit, Exhibits**—Documents presented to a PEB as evidence in a disability evaluation case.

**Existed Prior to Service (EPTS)**—A term used to signify there is clear and unmistakable evidence that the disease or injury, or the underlying condition producing the disease or injury, existed prior to the individual's entry into military service, during a break in service, or during a period of inactive service.

**Extended Active Duty (EAD)**—Active duty under orders specifying a period of more than 30 days.

**Fit**—The ability of a member to perform the duties at his or her office, grade, or rank. It is the same as physically fit.

**Formal, Formal Hearing**—Refers to the type of proceedings before the FPEB at Lackland AFB TX. The member has a legal counsel and may present evidence and appear in person

**Full and Fair Hearing**—A hearing held by a board, before which the Service member has the right to make a personal appearance with the assistance of counsel and to present evidence in his or her behalf.

**Impairment of function**—Any disease or residual of an injury that results in a lessening or weakening of the capacity of the body or its parts to perform normally, according to accepted medical principles.

**Inactive Duty Training (IDT)**—Duty prescribed for Reservists, other than active duty or full-time National Guard Duty, under 37 U.S.C. 206, or other provisions of law. It does not include work or study in connection with a correspondence course of a Uniformed Service.

**Incompetent**—The state of a member who is mentally unable to act in his or her own behalf in matters pertaining to pay, records, and disability processing.

**Inpatient**—An individual, other than a transient patient, admitted (placed under treatment or observation) to a bed in a MTF that has authorized or designated beds for inpatient medical or dental care.

**Instrumentality of War**—A vehicle, vessel, or device designed primarily for Military Service and intended for use in such Service at the time of the occurrence of the injury. It may also be a vehicle, vessel, or device not designed primarily for Military Service if use of or occurrence involving such a vehicle, vessel, or device subjects the individual to a hazard peculiar to Military Service. This use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits. There must be a direct causal relationship between the use of the instrumentality of war and the disability, and the disability must be incurred incident to a hazard or risk of the service.

**Limited Assignment Status (LAS)**—Permits an unfit member to be voluntarily retained on AD and ARC to perform specific duty with certain limits on his or her assignability.

**Line of Duty (LOD) Investigation**—An inquiry used to determine whether an injury or disease of a member performing military duty was incurred in a duty status; if not in a duty status, whether it was aggravated by military duty; and whether incurrence or aggravation was due to the member's intentional misconduct or willful negligence.

**May Be Permanent**—Refers to a disability that has not stabilized and is such that the PEB cannot accurately assess the ultimate extent of impairment.

**Medical Treatment Facility (MTF)**—A facility established for the purpose of furnishing medical or dental care to eligible individuals.

**Natural Progression**—The worsening of a pre-Service impairment that would have occurred within the same timeframe regardless of Military Service.

**Next of Kin (NOK)**—The nearest relative to the member who may act for the member who is physically or mentally unable to act for himself or herself.

**Noncompensable Defects or Conditions**—Those that resulted from a member's intentional misconduct or willful neglect and those incurred during a period of AWOL are noncompensable. Also included are EPTS conditions not aggravated by service, non-duty related conditions of an ARC member, and conditions incurred while in excess leave status.

**Nonratable, Unratable, Not Ratable.**—A physical defect or condition that does not qualify for a percentage rating under the VASRD because it does not, in itself, cause the member to be unfit for military service or because the condition is one that renders a member as unsuitable, rather than unfit, for military service.

**Office, Grade, or Rank or Rating**—*Office* - A position of duty, trust, authority to which an individual is appointed; *Grade* - A step or degree in a graduated scale of office or military rank that is established and designated as a grade by law or regulation; *Rank* - The order of precedence among members of the Armed Forces; *Rating* - The name (such as Boatswain's Mate") prescribed for members of an Armed Force in an occupational field.

**Performing Military Duty of 30 Days or Less**—A term used to inclusively cover the categories of duty pertaining to 10 U.S.C. 1204 - 1206 (active duty, IDT, and travel directly to and from active duty or IDT).

**Permanent Disability**—A disability that has stabilized, and the compensable rating is not likely to change for a reasonable period of time (usually the statutory TDRL period or the remainder of that period, for those already on TDRL), or the disability rating is 80 percent or more and is not likely to fall below that rating within a reasonable period of time.

**Personnel Data System**—A collective term encompassing the total vertical computerized personnel data system. It is used when not referencing a specific subsystem. The system provide the capability for equitable, responsive, uniformly administered and cost effective management and administration of AD military, ANG, AFRC, retired, and civilian personnel.

**Physical Disability**—Any impairment due to disease or injury, regardless of degree, that reduces or prevents an individual's actual or presumed ability to engage in gainful employment or normal activity. The term "physical disability" includes mental disease, but not such inherent defects as behavioral disorders, adjustment disorders, personality disorders, and primary mental deficiencies. A medical impairment or physical defect standing alone does not constitute a physical disability. To constitute a physical disability, the medical impairment or physical defect must be of such a nature and degree of severity as to interfere with the member's ability to adequately perform his or her duties.

**Pre—existing**—Refers to the fact that some physical defect or condition (including disease) had its source, or start, before the member entered the military service (see EPTS).

**Preponderance of Evidence**—That evidence which tends to prove one side of a disputed fact by outweighing the evidence on the other side (that is, more than 50 percent). Preponderance does not necessarily mean a greater number of witnesses or a greater mass of evidence; rather, preponderance means a superiority of evidence on one side or the other of a disputed fact. It is a term that refers to the quality, rather than the quantity of the evidence.

**Presumption**—An inference of the truth of a proposition or fact, reached through a process of reasoning and based on the existence of other facts. Matters presumed need no proof to support them, but may be rebutted by evidence to the contrary.

**Presumption of Fitness**—The presumption that a service member was in sound physical and mental condition upon entering active service, except for medical impairments and physical disabilities noted and recorded at the time of entrance.

**Proximate Result**—A permanent disability the result of arising from, or connected with active duty, annual training, active duty for training, or inactive duty training (IDT), (etc.) to include travel to and from such duty or remaining overnight between successive periods of inactive duty training. (Only applicable to disabilities incurred on or before 23 September 1996.)

**Rating, Ratable, Ratings**—The disability percentage classification applied to a physical defect or condition that renders a member unfit for military service.

**Ready Reserve**—Units and individual reservists liable for active duty as outlined in Sections 12301 (Full Mobilization) and 12302 (Partial Mobilization) of 10 U.S.C. This includes members of units, members of the Active Guard Reserve Program, Individual Mobilization Augmentees, Individual Ready Reserve, and the Inactive National Guard.

**Recoup, Recoupment**—Usually used in reference to the legal requirement of a member to pay back disability severance pay if he or she later qualifies for disability compensation from the VA.

**Residual, Residuals**—Usually used in reference to the remaining physical or mental defect or impairment that remains after a disease or injury has stabilized.

**Service Aggravation**—The permanent worsening of a pre-service medical condition over and above the natural progression of the condition caused by trauma or the nature of Military Service.

**Service Connected**—A VA term applied to physical or mental defect or condition incurred or aggravated in the line of duty while performing active military service.

**Severance Pay**—A one-time lump sum payment to members whose military service ends prematurely due to a physical or mental disability incurred in line of duty.

**Stable, Stabilized**—Fixed, not likely to change; usually used in reference to a physical or mental defect or condition that is not likely to change significantly in degree of severity over a specified period of time.

**Unfit**—The inability of the member to perform duties of his or her office, grade or rank as a result of physical or mental disability.

**United States AF Reserve (USAFR)**—All reserves of the Air Force except those units, organizations, and members assigned to the ANGUS.

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**Veterans Administrations Schedule for Rating Disabilities, VA Schedule, or VASRD**—The schedule that the Air Force uses as a guide in determining the disability percentage for each condition.

**Workup**—Used in reference to the completion of medical tests, examination, or consultation required in the disability evaluation process.

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## Attachment 2

### COUNSELING THE EVALUEE

**A2.1. Purpose for Counseling.** To ensure all members undergoing disability evaluation fully understand the process, the PEBLO counsels them on at least two occasions: when the case enters the disability evaluation system at the referring facility, and again when the PEB completes its action. PEBLOs will not speculate about the possible case disposition or percentage of disability in counseling evaluatees. When members request a formal hearing, the PEBLO counsels them at the referring facility, then the appointed military counsel counsels them before and after the hearing. Counseling varies, depending on the circumstances in each case. Information in this attachment, as well as other parts of this instruction, will answer most questions. In addition, HQ AFPC/DPPD prepares and distributes a "Disability Counseling Guide for PEB Liaison Officers" to assist in counseling. However, the PEBLO or PEB counsel should contact HQ AFPC/DPPD if they need help.

**A2.2. Counseling Materials.** The PEBLO and the PEB counsel must have ready access to copies of this instruction, AFD 36-32, DoD Directive 1332.18, DoDI 1332.39 (Application of the Veterans Administration for Rating Disabilities), as well as copies of AFI 48-123, and the VASRD. Make these directives available to the member while the case is being processed. Prior to acting on a Service member's request for a formal PEB, review with the member the applicable standard detailed in the VASRD or DoD Instruction 1332.39. If member requests a FPEB hearing, encourage them to submit a rebuttal to the PEB. The PEBLO and the PEB counsel have access to other Air Force directives, the Joint Federal Travel Regulation (JFTR), the Manual for Courts Martial (MCM) and any other materials that would be helpful in counseling the member.

**A2.3. Information on Percentage Ratings.** Refer to specific parts of the VASRD and DoD Directive 1332.39 for an explanation of the percentage rating for each defect or condition listed on the AF Form 356.

**A2.4. Effect of Disposition.** Explain the effect the recommended disposition may have on the member's military status. If the recommended disposition is permanent disability retirement or placement on the TDRL, outline the benefits and privileges that go with retired status. If TDRL, explain the legal requirement for periodic examinations as well as the possibility of final disposition any time within the mandatory retention period on the TDRL. If the recommended disposition is discharge, explain to the member that he or she will lose entitlement to Air Force benefits upon termination of military status.

**A2.5. Grade Determination.** Generally, members retiring or separating for disability do so in the grade in which they are serving on active duty. Members may be eligible to retire or separate in a higher grade if they served satisfactorily in a higher grade, or are Regular Air Force enlisted members or Reserve component officers holding a valid appointment in a higher ARC (USAF Reserve) commissioned grade. The OSAF makes the grade determination, and HQ AFPC/DPPD announces the decision in retirement orders or discharge notification message. length of creditable service according to 10 U.S.C. 1208. AF Form 356, item 7, shows the length of

service at the time the PEB considers the case. To be eligible for retirement for physical disability, the member must have at least 20 years of service creditable for retirement or a disability rating of 30 percent or more. A member whose compensable disability rating is less than 30 percent and who has less than 20 years of creditable service will be entitled to discharge with severance pay.

**A2.6. Length of Service.** One factor in determining entitlement to disability benefits is the member's length of creditable service according to 10 U.S.C. 1208. AF Form 356, item 7, shows the length of service at the time the PEB considers the case. To be eligible for retirement for physical disability, the member must have at least 20 years of service creditable for retirement or a disability rating of 30 percent or more. A member whose compensable disability rating is less than 30 percent and who has less than 20 years of creditable service will be entitled to discharge with severance pay.

**A2.7. SAFPC Review.** Advise members that, after completion of PEB action, HQ AFPC/DPPD will refer the case to SAFPC for final review unless the Director, SAFPC, has authorized an AFPC official to finalize the case under special assistant authority. The counselor also explains that the Air Force Personnel Board within SAFPC may direct the final disposition in the case or may change the PEB's findings and recommended disposition. If the change is major, HQ AFPC/DPPD refers AFPB's revised recommended findings to the member for review and comment (**Section 5A, Chapter 5**). The PEBLO or PEB counsel advises the member of his or her legal rights, available options, and actions required.

**A2.8. VA Benefits.** Advise member of the right to apply to the VA for benefits. The counselor will stress that the Air Force and the VA operate under different laws, and the decision of one agency is not binding on the other. The PEBLO or PEB counsel advises members of the following pertinent items:

A2.8.1. VA Disability Compensation. Give the member an estimate of VA compensation if the VA were to rate the disability at the same percentage as the Air Force, but stress that this is only an estimate and not binding. Explain how the VA includes compensation for dependents when rating the disability at 30 percent or more and that the Air Force has no such legal authority (10 U.S.C., chapter 61, and 38 U.S.C. 314 and 315 (wartime) and 38 U.S.C. 331, 334, and 335 (peacetime)). Advise each member that the MPF will give him or her the opportunity to file a claim for VA benefits during final out-processing. If the member elects not to apply for VA benefits, he or she must sign a statement acknowledging the opportunity to apply. The member may exclude from gross income either the amount of retired pay attributed to combat-related injuries or the amount of disability compensation the member could receive from the VA, whichever is greater. This is regardless of whether the member applies to the VA for such disability compensation. The tax laws do not require the Air Force to make a determination as to the probable VA disability compensation. The PEBLO tells members about this provision of law and gives them a rough estimate of the probable VA compensation.

A2.8.2. Waiving Retired Pay for VA Compensation. Advise members they may waive all or part of retired pay to receive VA disability compensation. The part of the Air Force retired pay waived is equal to VA compensation received. If VA compensation equals or

exceeds Air Force retired pay, the member must waive all Air Force retired pay. The member may revoke the waiver at any time to reestablish Air Force retired pay. This action has no effect on the right to waive Air Force retired pay again at a later date, if such action is a financial benefit.

A2.8.3. Recouping Disability Severance Pay. The VA deducts the entire amount of Air Force disability severance pay from any VA compensation paid. At the discretion of the VA, the member may repay the entire amount in one lump sum, or the VA may withhold the monthly compensation until the total amount withheld equals the amount of the Air Force disability severance pay received.

A2.8.4. Other VA Benefits. Counsel member on other VA benefits, such as post service life insurance, educational benefits, medical care, or hospitalization, but emphasize that approval of such benefits is at the discretion of the VA.

**A2.9. Travel and Transportation.** Advise members being retired or discharged for disability of the travel and transportation entitlements in the JFTR, volume 1. Counseling should include the following pertinent facts.

A2.9.1. Home of Selection Move:

A2.9.1.1. Injured or Ill Provision of the JFTR. The travel and transportation entitlements provided under this provision provide some different entitlements (for example, overland shipment of a privately owned vehicle, 18,000 pounds weight allowance regardless of grade, etc.) than those provided for members retired for disability or discharged with severance pay. The provision applies only in cases of prolonged hospitalization or treatment as verified by a statement of the commanding officer at the receiving hospital. The member must exercise these entitlements before retiring or separating. Failure to do so will not serve as a basis for requesting an extension of the disability retirement or separation date.

A2.9.1.2. Retired. Members being retired for disability, regardless of years of service, may move dependents and household goods to a home of selection. Volume 1 of the JFTR shows the authorized weight allowances. Refer members to the local TMO for information and counseling on these entitlements. Advise them that failure to follow the instructions provided may result in liability for all or part of the cost of movements to a home of selection.

A2.9.1.3. Discharged With Disability Severance Pay. Members discharged from active duty with disability severance pay who have completed at least 8 years of continuous active duty with no single break of more than 90 days have the same entitlement as members retired for disability.

A2.9.2. Home of Record. Members being discharged from active duty, with or without disability severance pay, who do not qualify under paragraph **A2.9.1.3.** may move to home of record or place from which ordered to active duty.

**A2.10. Legal Rights.** The PEBLO advises member that he or she has the legal right to a full and fair hearing before being discharged or retired for physical disability. The counsel also advises the member that appearance before a formal PEB constitutes a full and fair hearing as envisioned by the law. Advise member that this legal right does not extend to members found fit and recommended for return to duty. **EXCEPTION:** TDRL members found fit and recommended for removal from TDRL.

**A2.11. Pay Counseling.** Upon receipt of findings and recommended disposition of the IPEB, the PEBLO advises the member concerning entitlement to disability retired pay or disability severance pay and gives the member the pay estimate provided by HQ AFPC/DPPDS. If the FPEB changes the recommended disposition or compensable rating, the FPEB counsel revises the pay estimate accordingly. The PEBLO also advises the NOK that DFAS-CL will not release an incompetent member's retired pay to the NOK without trustee or legal guardianship designation. The NOK obtains legal guardianship papers through the civilian courts at his or her own expense. Obtain trusteeship designation through DFAS-CL.

**A2.12. Estimated Pay.** Advise all members that the discharge or retired pay estimate serves only as information to consider in making the decision to agree or disagree with the PEB action. The MPF furnishes additional information at the time of actual retirement or discharge; however, the final authority for pay computations rests with DFAS-CL for retirements, or DFAS-DE or the local finance office for disability severance pay (see paragraph 5.13.).

**A2.13. Disability Retired Pay Computation.** Retired pay computations are based either on a percent of disability or percent for creditable service, whichever will result in a greater dollar amount for the member.

A2.13.1. Members in Service Before 8 September 1980.

A2.13.1.1. To compute retired pay based on percent of disability, multiply the percent of disability (not to exceed 75 percent) by the current monthly basic pay rate of the retirement grade.

A2.13.1.2. To calculate retired pay based on years of service, multiply the current monthly basic pay rate of the retirement grade by the retired pay multiplier. Calculate the retired pay multiplier by multiplying the computed value for years and months of creditable service times 2.5 percent. Derive computed value for months of creditable service by dividing the number of full months of completed service by 12. **EXAMPLE:** To compute the retired pay for a member with 15 years and 7 months of creditable service take the following steps:

Step 1 - 7 mos divided by 12 = .583 of a year. (Round off to two decimal places.)

Step 2 - Add .58 to 15 to get the computed value for years and months of creditable service = 15.58 years.

Step 3 - Multiply 15.58 years by 2.5 percent (.025) = 38.95 percent. (Retired pay multiplier).

Step 4 - Monthly basic pay rate for grade in which retired multiplied by 38.95 percent = retired pay based on years of service.

A2.13.2. Members in Service After 7 September 1980. For members who entered a uniformed service after this date, apply the retired pay multiplier based on the percent of disability to the retired pay base (RPB) instead of the monthly basic pay rate. The RPB is an average of a member's highest 36 months of active duty pay. If the member served less than 36 months, the RPB is an average of pay for the months served. The formula for computing disability retired pay using years of service also applies. However, years of service is not a factor in retired pay computation for members retiring for disability until they acquire at least 12 years, 1 month of service. (A member with less than 20 years active service must have a disability rating of at least 30 percent to qualify for retirement. Twelve years of service equates to 30 percent.)

**A2.14. Disability Severance Pay.** Compute 2 months' basic pay for every year of active service not to exceed 12 years or a maximum of 24 months' pay (**Table 5.2.**).

A2.14.1. Rounding Out Service. Count as a whole year service of six months or more; disregard service of less than 6 months.

A2.14.2. Less Than 6 Months Service. Advise members who have less than 6 months of active service that they will not receive any disability severance pay from the Air Force, as they have no active service to use as a multiplier.

**A2.15. Tax Counseling.** After advising member of the estimate of gross retired pay, the PEBLO counsels members on how much of that pay may be subject to income tax and how much may be exempt. The PEBLO should point out that, even though DFAS-CL determines the gross amount of retired pay, the final authority on the amount of taxes owed is the Internal Revenue Service (IRS). The Air Force has no control over IRS laws or rules. However, in counseling include the following items so the member will have an idea of the amount of tax he or may have to pay.

A2.15.1. Withholding Tax. Estimate the approximate amount of monthly withholding tax (see table in the "PEBLO Guide").

A2.15.2. Survivor Benefit Plan (SBP). Explain that the member must decide whether to participate in the SBP, the desired level of participation, and that DFAS will exclude monthly SBP payments from gross retired pay subject to income tax. More information on the SBP is in AFI 36-3006, *Survivor Benefit Plan (SBP) and Supplemental Survivor Benefit Plan (SSBP)(Active, Guard, Reserve, and Retired)*.

A2.15.3. Tax Exemption. Explain that the amount of retired pay based on percent of disability is tax free for those members who meet the tax exemption criteria in paragraph **3.27**. For those individuals, only the portion of retired pay based on years of service that

exceeds the amount based on disability is subject to income tax. If disability retired pay equals or is more than the amount based on service, retired pay is tax-free.

**A2.16. Retired Pay While On TDRL.** The retired pay of a TDRL member is the same as that of a member permanently retired for disability. *EXCEPTION:* While on the TDRL, the member will not receive less than 50 percent of the amount of monthly basic pay or RPB to which entitled at time of retirement. Except for cost of living increases, a TDRL member's retired pay will not change until removed from the list for permanent disposition. This is true even if the percentage rating changes following periodic examination.

**A2.17. The Tower Amendment.** A save pay provision known as the Tower Amendment (10 U.S.C 1401a(f)) permits a member to use earlier active duty pay rates (cost of living adjusted), if advantageous. The member must have been eligible to retire under nondisability provisions of law when those earlier rates were in effect except that such computation may not be based on a rate of basic pay for a grade higher than the grade in which the member is retired. Another condition requires computation of pay using the grade held and years of service accrued at the time those rates were in effect. When using the Tower Amendment, compute the portion of disability retired pay based on percent of disability using the current basic pay rate only. This portion may be tax free.

**A2.18. Allotments From Retired Pay.** The PEBLO advises member being retired for disability that he or she must take action to continue, discontinue, change, or add allotments from retired pay before the effective retirement date. Otherwise, the same allotments will continue provided retired pay will cover them. All allotments from retired pay are subject to the rules, limitations, and restrictions in DFAS-DE 177-373, volume 1.

**A2.19. Creditable Service.** HQ AFPC/DPPD provides the PEBLO with the length of service used in computing disability retired pay at the same time that they send the PEB findings and recommended disposition. However, the PEBLO must stress the following general items when counseling the member:

A2.19.1. Basic Pay. The length of service for basic pay sets the rate of basic pay. This service is not rounded off and the member must have at least 1 day over the required amount to use that particular rate of basic pay (37 U.S.C. 203, 204, 1009).

A2.19.2. Multiplier. The service that determines the multiplier may include both active and inactive service. Computation for the multiplier generally falls into the following categories:

A2.19.2.1. Enlisted Members. Service may include active, inactive, and certain "point" credit.

A2.19.2.2. Officers. May include active, inactive, and certain constructive service with only "point" credit for inactive service after 1 June 1958.

A2.19.2.3. ARC Members. Service may include active, inactive, and certain "point" credit.

**A2.20. Retirement or Discharge Counseling:**

A2.20.1. The counseling outlined in this attachment does not take the place of the final retirement or separation counseling conducted by the member's MPF. This attachment is to aid the PEBLO in informing the member of all aspects of the disability evaluation system. The PEBLO must keep in close contact with the nearest servicing MPF for assistance in resolving related personnel actions. A2.20.2. In cases of sudden illness or imminent death, family members often need additional time to understand the effect of their decisions upon family well-being. The PEBLO refers the member (or NOK) to the MPF for counseling as soon as the member becomes terminally ill (see **Chapter 2**). This earlier personal affairs counseling by the MPF provides the family extra time to discuss and prepare for vital decisions they must make should the member be retired for physical disability. Counseling will include the following subjects: The difference in benefits payable when a terminally ill member dies on active duty versus in retirement; explanations of SBP options, Servicemen's Group Life Insurance (SGLI) and Veterans Group Life Insurance (VGLI) programs; private life insurance affected by retirement; and Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) cost sharing if the member is in a civilian hospital. Also explain to the member or NOK that a request for immediate retirement or separation could result in forfeiture of unused accrued leave days that they can not sell back to the government (see **Chapter 5**).

**A2.21. How the Air Force Applies the VASRD.** The Air Force uses the VASRD and appropriate DoD guidance to determine the percentage of disability for each ratable defect or condition shown on AF Form 356. The VASRD does not provide a specific rating for all physical defects or conditions. Many of the general policies in the VASRD do not apply to the military services, since they are primarily for the guidance of VA rating boards and often cover laws and policies that apply only to the VA. Consequently, DoD has developed specific guidance on general policy and certain ratable defects and conditions listed by VA diagnostic code numbers (DoD Instruction 1332.39).

**Attachment 3**  
**PCS IN AWAITING ORDERS STATUS INSTRUCTIONS**

I understand that if AFPC approves my request for "PCS in awaiting orders status":

- a. I will be entitled to pay and allowances during the period of PCS in awaiting orders status.
- b. The period spent on PCS in awaiting orders status is charged against any accrued leave, and any remaining time is an authorized absence.
- c. Transportation or travel allowances will be furnished if authorized for me, my dependents, and household goods, if I so desire (JFTR, volume 1).
- d. If I choose to receive transportation or travel allowances as indicated in paragraph c , I understand that:
  1. My entitlement to further transportation or travel allowances (to a home of selection) will be exhausted if I am discharged without severance pay. They will also be exhausted if I am discharged with severance pay before 8 years continuous duty (with no single break of more than 90 days).
  2. If I am discharged for physical disability with entitlement to severance pay and have completed at least 8 years of continuous active duty (with no single break of more than 90 days) immediately before discharge, or, am retired by reasons of physical disability (permanent or temporary), I will be authorized additional transportation or travel allowances for my dependents and household goods, to a home of my selection. However, entitlement to additional transportation or travel allowances for my dependents and household goods may not exceed the entitlement from my last permanent duty station to home of selection, minus any transportation or travel allowances furnished or paid while PCS in awaiting orders status.
- e. If ordered to return to duty, I will be entitled to travel and transportation allowances for myself, my dependents, and household goods based on permanent change of station entitlements from the location of my awaiting orders to my new permanent duty station (including return to present duty station).
- f. If retirement or discharge is delayed or stopped for any reason, I remain subject to military control and subject to orders to a duty station, for duty, further medical treatment, and so on, as determined by the Air Force.

**NOTE.** Give a copy of this statement to each member who requests "PCS in awaiting orders status." Counsel the member on the provisions of the JFTR that pertain to the transportation of dependents and household goods.

**Attachment 4**  
**RETIREMENT OR DISCHARGE DOCUMENTS AND REPORTS**

**A4.1.** Immediately after receiving retirement orders or disposition instructions, the MPF prepares the following required forms and documents to complete the disability processing.

**A4.1.1. DD Form 214, Certification of Release or Discharge from Active Duty.**

Prepare and distribute according to AFI 36-3203.

**A4.1.2. Retired Pay Documents. DD Form 2656, Data for Payment of Retired Personnel** and other related documents. Send prepared documents to DFAS-CL/FR, as outlined in AFMAN 36-2622 and AFI 36-3006.

**A4.1.3. Character of Discharge.** Except where otherwise shown below, members discharged for disability are honorably discharged and receive DD Form 256AF, **Honorable Discharge.**

A4.1.3.1. Officer. An officer's service may be characterized as General (under honorable conditions) only when approved and directed within OSAF. In these cases, HQ AFPC/DPPD will specifically notify the servicing MPF of the approval.

A4.1.3.2. Enlisted. Describe as "entry level," the separation of enlisted members in entry level status as defined in AFI 36-3208, unless OSAF specifically approves an honorable discharge. For the purpose of determining entry level character of service, consider the effective date of member's disability discharge as the date separation proceedings began. Characterize the service of enlisted members as General (under honorable conditions) when, based on the member's military record, a recommendation for such a discharge has been processed according to AFI 36-3208; or when directed by officials within OSAF. HQ AFPC/DPPD will notify the servicing MPF of OSAF approval.

**A4.1.4. DD Form 363AF, Certificate of Retirement.** Give to all members retiring for disability (permanently, or placed on the TDRL) with enough creditable service to qualify for nondisability retirement. Prepare the certificate as outlined in AFI 36-3203 and present in a Retirement Binder (National Stock Number 7510-00-134-8179) at a suitable ceremony. If the certificate or binder is not available, the MPF keeps the data needed to fill out the form and mails the item to the member's non-military address as soon as they are available.

**A4.1.5. DD Form 256AF.** HQ AFPC/DPPD will prepare and mail a discharge certificate to members removed from the TDRL and discharged.

**A4.1.6. Certificate of Appreciation.** AF Form 1344JA97 (for husbands and wives) Prepare and present as outlined in AFI 36-3203 to the spouse of a member retiring for

disability (permanently or placed on TDRL) with enough creditable service to be eligible for non-disability retirement.

**A4.1.7. DD Form 2542, Certificate of Appreciation for Service in the Armed Forces of the United States.** Prepare and present according to AFI 36-3203 to each member of the active and Reserve forces retiring for disability (permanently or placed on the TDRL) with enough creditable service to qualify for nondisability retirement.

A4.1.8. Retirement Options or Entitlements Fact Sheet. Give this fact sheet (AFI 36-3203) to members retiring for disability at the same time you give them their retirement orders, or when they are undergoing retirement processing and counseling, whichever is earlier. The MPF advises members not to begin moving dependents or storing household goods before receiving their retirement orders, or until they know the order number and the fund citation. Before moving, members will contact the nearest military transportation officer for counseling on transportation entitlements.

A4.1.9. Identification Cards. Issue or dispose of identification cards as shown in AFI 36-3001, *Issuing and Controlling Identification (ID) Cards*.

**A4.1.10. Special Information Report.** Where deemed proper, the MPF reports special information required by AFI 71-101, Vol II, *Criminal Investigations, Counterintelligence, and Protective Service Matters*, at the time of final retirement or discharge processing.

**Attachment 5  
WAIVER STATEMENT**

"I have been told that, based on findings of a Medical Board, I am not physically qualified for retention in the military service. This disqualification is based on the finding of a physical defect or condition considered to have existed before entry on my current duty status, and does not appear to be incident to, or aggravated by, such duty. I have been told that I have a right to the same processing as any other member of the Air Force being discharged by reason of physical disability, including the consideration of my case by a Physical Evaluation Board. However, I hereby waive this right. I understand that, as a result of signing this waiver statement, I will be released from duty and returned to my home to await disposition under applicable USAFR or ANG directives. I also understand that I will not be eligible to receive disability benefits from the Air Force, but this waiver action does not stop me from applying for disability benefits administered by the Department of Veterans' Affairs."

(Signature) \_\_\_\_\_ (Date)

**NOTE.** If the member is a USAFR non-prior service enlisted person, add the following sentence to the last paragraph of the waiver statement: "I also waive further processing under AFI 36-3209."

**Attachment 6  
IC 99-1 TO AFI 36-3212, PHYSICAL EVALUATION  
FOR RETENTION, RETIREMENT, AND SEPARATION  
30 SEPTEMBER 1999**

*SUMMARY OF REVISIONS*

This change incorporates interim change (IC) 99-1 which enables the Secretary of the Air Force Personnel Council's (SAFPC) decision on disability cases, when it changes the findings and recommendation of the PEB, to be a final decision. See the last attachment of publication, IC 99-1, for the complete IC. A bar (/) indicates revision from the previous edition.

**5.1. SAFPC Review.** Under authority of Title 10 U.S.C. 1216, chapter 61, the SAF retires or separates individuals found unfit to perform the duties of their office or grade due to physical disability. As the action agency within the Office of the Secretary of the Air Force (OSAF), the SAFPC reviews disability cases and announces the final decision of the Secretary.

- 5.1.1. Deleted.
- 5.1.2. Deleted.
- 5.1.2.1. Deleted.
- 5.1.2.2. Deleted.
- 5.1.2.3. Deleted.

5.3.2. The Air Force Personnel Board (AFPB) directs a formal PEB (if one hasn't been held previously) and member concurs with the FPEB and case does not meet the criteria of paragraph 5.4.

**5.5. When Cases Are Forwarded to SAFPC.** The board within SAFPC, the Air Force Personnel Board (AFPB), reviews all disability cases forwarded by HQ AFPC/DPPD under paragraph 5.4.

**5.6. Composition of AFPB.** There are 5 voting members and normally two will be Medical Corps officers. At least one voting member must be a Medical Corps officer.

5.6.1. Deleted.

5.6.1.1. Deleted.

5.6.1.2. Deleted.

5.6.1.3. Deleted.

5.6.1.4. Deleted.

5.6.1.5. Deleted.

5.6.1.6. Deleted.

5.6.1.7. Deleted.

5.6.1.8. Deleted.

5.6.1.9. Deleted.

5.6.2. Deleted.

5.6.2.1. Deleted.

5.6.2.2. Deleted.

5.6.2.3. Deleted.

5.6.2.4. Deleted.

5.6.2.5. Deleted.

5.6.3. Deleted.

**5.7. Changes to PEB Findings.** The AFPB may change the findings and recommended disposition of the PEB. When this happens, the AFPB documents and describes the basis for the change. Based on the application of accepted medical principles, the AFPB identifies the principles at issue, and relates the issue to the facts and circumstances established in the record of the proceedings of the PEB. The AFPB recommends the final disposition to SAFPC under the criteria in paragraph 5.9.

5.7.1. Deleted.

5.7.2. Deleted.

5.7.2.1. Deleted.

5.7.3. Deleted.

5.7.3.1. Deleted.

5.7.3.2. Deleted.

5.7.3.3. Deleted.

**5.8. Personal Appearance.** Neither the member, NOK, nor counsel may appear before the AFPB, except at the specific invitation of AFPC. The board reviews all the records evaluated by the PEB(s), records of the PEB(s) hearings, plus any rebuttal or additional documents submitted by the member or requested by SAFPC.

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**Attachment 6**  
**IC 2006-1 TO AFI 36-3212,**  
**PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, AND SEPARATION**

**2 FEBRUARY 2006**

***SUMMARY OF REVISIONS***

This change incorporates interim change (IC) 2006-1 (**Attachment 6**) alters the allowable time limits to concur or non-concur with the recommended findings and to submit a written rebuttal to the Formal Physical Evaluation Board (FPEB) recommendation for retention, retirement or separation and establishes across-the-board computations for disability separation and retirement dates. See the last attachment of the publication, IC 2006-1, for the complete IC. A bar (|) indicates revision from the previous edition.

OPR: HQ AFPC/DPPDS (Brenda L. Kurth)

Supersedes: AFI 36-3212, 30 September 1999

Certified by: HQ AFPC/DPP (Col Steven M. Maurmann)

1.3.2. Eligibility for Disability Evaluation. USAF Academy (USAFA) Cadets (10 U.S.C. 1217) who incurred a disability on or after 27 October 2004.

3.49.1. Time Limits. After receiving AF Form 356, **Findings and Recommended Disposition of USAF Physical Evaluation Board**, and AF IMT 1180, **Action on Physical Evaluation Board Findings and Recommended Disposition**, the evaluatee has 1 duty day to either agree or disagree with the FPEB findings. If the evaluatee disagrees, he or she may submit a written rebuttal within 10 calendar days. The FPEB president may approve written requests for additional time to allow the member to obtain additional medical documentation or consult with legal counsel.

5.19.3. HQ AFPC/DPPD will establish disability separation and retirement dates as follows:

5.19.3.1. For members serving at CONUS locations, date of separation or retirement will be established as 40 days from date of Secretary of the Air Force (SAF) Memorandum (SAF) approving the separation or retirement;

5.19.3.2. For members serving overseas, date of separation or retirement will be established as 60 days from date of SAF Memo;

5.19.3.3. For ARC members, date of separation or retirement will be established as 27 days from date of SAF Memo.

**8.22. Information Collections, Records, and Forms/Information Management Tools (IMTs).**

8.22.1. Information Collections. Information collections are not created by this publication.

8.22.2. Records. Retain and dispose of records according to the AF Records Disposition Schedule.

8.22.3. Forms/IMTs Prescribed.

8.22.3.1. Forms/IMTs Adopted. No forms/IMTs are adopted by this publication.

8.22.3.2. Forms/IMTs Prescribed. AF Form 356, **Findings and Recommended Disposition of the USAF Physical Evaluation Board**, AF IMT 1180, **Action on Physical Evaluation Board Findings and Recommended Disposition**, and AF IMT 1185, **Statement of Record Data**.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 28, 2019, I electronically filed this joint appendix with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, except for the following, who will be served (as agreed upon) via email:

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