

NLWJC - Kagan

DPC - Box 027 - Folder 014

Gay/Lesbian - Ineptitude Rule

Meeting Concerning the proposed DOL regulation for the payment of unemployment benefits to discharged members of the military declared "inept" to serve.

Department of Labor

Kitty Higgins 219-6151	Deputy Secretary
Marvin Krislov 219-6151	Deputy Solicitor of Labor

Department of Defense

Bob Tyrer 703-695-5261	COS to Secretary Cone
Pamela Berkowski 703-693-4272	Tyrer's Assistant

Veteran's Affairs

Janice Joyner 273-4800	Executive Assistant & Deputy COS to the Secretary
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National Security Council

Rod Van Lipsey 456-9191	Director for Defense Policy & Arms Control
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White House

Robert Weiner 395-6618	Counsel
Tracie Thorton 456-6493	Legislative Affairs
Chris Balderston 456-2572	Cabinet Affairs
Anne McGuire 456-2572	Cabinet Affairs

Richard
456-1611

Karen
6-1906

U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210



For 2:00 DOL mtg

Cleared
4/28/98

MEMORANDUM FOR: LARRY MATLACK
Branch Chief
Labor Branch
Office of Management and Budget

FROM: GRACE A. KILBANE
Director
Unemployment Insurance Service

SUBJECT: Notification of a Department of Labor (DOL)
Decision Affecting Unemployment Compensation
for Ex-Servicemembers (UCX) Program
Qualifying Requirements

This is to inform you of a recent DOL decision that affects the UCX program eligibility of ex-servicemembers discharged under honorable conditions before completing their first full term of service for reasons constituting "inaptitude" (5 U.S.C. 8521(a)(1)(B)(ii)(IV)). DOL defines "inaptitude" as being "unsuitable for military service for reasons largely related to personal characteristics not reflected by acts of serious misbehavior." We plan to issue new instructions to State Employment Security Agencies via an Unemployment Insurance Program Letter (UIPL) by July 14, 1998.

As you know, the UCX program provides unemployment compensation coverage to ex-servicemembers who perform "Federal service" as defined in Federal law. Federal law defines "Federal service" to include discharge or release from the armed forces under honorable conditions for "inaptitude" before completing the first full term of service (if the service was continuous for 365 days or more). In defining the term "inaptitude" for UCX program qualifying purposes, DOL has provided equity between the military and civilian sectors, insofar as Federal law permits, for reasons for separation that would be qualifying under State UC laws.

The character of discharge and the narrative reason for separation assigned by the Department of Defense (DOD) are conclusive on the issue of the basis for the discharge. However, DOL determines which narrative reasons for separation issued by DOD to ex-servicemembers meet the statutory criteria for "Federal service" for UCX program eligibility purposes, and informs the States via a directive that all States apply uniformly. Since October 1, 1993, the DOD had ceased using the sole narrative

reason for separation that DOL considered to constitute inaptitude: "Unsuitability - Inaptitude."

Since "inaptitude" is a qualifying reason for separation under Federal law, DOL must be able to determine from DOD's narrative reason when a discharge occurs for this reason. DOL consulted with the Departments of Defense (DOD), Justice (DOJ), and Veterans Affairs (VA), on this matter and has now finalized the list of "acceptable" narrative reasons for separation dealing with "inaptitude" for UCX program qualifying purposes. The most common narrative reason for separation meeting DOL's definition of inaptitude is a discharge for "weight control failure." Some narrative reasons are considered "controversial," e.g., discharges for homosexuality and alcohol or drug rehabilitation failure.

The armed forces retain considerable authority in determining an ex-servicemember's eligibility for UCX benefits since they determine the character of discharge and the narrative reason for separation. If the armed forces choose to portray an ex-servicemember's behavior that led to discharge as volitional and akin to misconduct, there are several bad conduct related narrative reasons for separation to use that would not meet DOL's definition of "inaptitude." Further, in egregious cases, the armed forces could characterize the ex-servicemember's behavior leading to discharge as "under other than honorable conditions" or worse. In either case, the ex-servicemember would not meet the definition of "Federal service" for UCX program qualifying purposes.

The status of current litigation demands this action at this time. DOD, DOL, and VA are defendants in a case in U.S. District Court that impacts on this matter. The case, in part, involves the denial of UCX benefits to plaintiffs discharged for reasons related to homosexuality. This case, Cadiz, et al. v. United States Department of Defense, United States Department of Labor and United States Department of Veterans Affairs, C.A. No. 94-12040, has been stayed at the request of the defendants to permit DOL to implement its "inaptitude" policy. This stay was initially ordered on April 11, 1997, and has been extended since that time.

The court was advised by DOJ on April 15, 1998, that DOL expects to have a new definition of "inaptitude" in effect within 60-90 days, if not sooner. The plaintiffs opposed the last request for an extension of the stay and are likely to do so again. However, DOJ has advised that the judge will probably defer to DOL on this

matter if DOL has its definition of "inaptitude" in place by July 14. DOJ further advises that the judge will not look kindly on further delay, and DOJ cautions that the judge may impose his own definition of "inaptitude" contrary to, or at least without the benefit of, DOL's interpretation, if we do delay.

DOL estimates that, under a worst case scenario, up to an additional \$10 million per year in UCX benefits outlays may occur as the result of this new policy. Attached is the draft UIPL announcing DOL's definition of "inaptitude" for UCX program qualifying purposes and providing procedures for the State's implementation of this definition. As noted above, DOL must implement this UIPL by July 14, although the sooner we do so, the more favorably positioned we will be in our defense of the Cadiz case.

If you have questions, please contact Betty Castillo or Robert Gillham at 202-219-5616.

ATTACHMENT

DRAFT

U. S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION UI
	CORRESPONDENCE SYMBOL TEUPDI
	DATE

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER
NO. 3-95, CHANGE 2

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : GRACE A. KILBANE
Director
Unemployment Insurance Service

SUBJECT : UCX Narrative Reasons for Separation from
Military Service

1. Purpose. To amend the consolidated list of "acceptable" narrative reasons for separation transmitted in Unemployment Insurance Program Letter (UIPL) No. 3-95 and UIPL No. 3-95, Change 1 to include those dealing with "inaptitude."

2. References. UIPL No. 3-95; UIPL No. 3-95, Change 1; 5 U.S.C. 8521(a)(1); and 20 CFR Part 614.

3. Background. On December 6, 1994, UIPL No. 3-95 was issued to all State Employment Security Agencies (SESAs) formally transmitting a new consolidated list of acceptable narrative reasons for separation, except those for "inaptitude," and instructions for their use in determining individual eligibility for UCX benefits. The military services began to use exclusively the consolidated list of "acceptable" narrative reasons for separation after October 1, 1993.

After the issuance of UIPL No. 3-95, the Department of Labor (DOL) received several inquiries from SESAs regarding the effective date of the new instructions for using the consolidated list of acceptable narrative reasons for separation that was contained in UIPL No. 3-95. UIPL No. 3-95 stated

RESCISSIONS NONE	EXPIRATION DATE
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that the new consolidated list of acceptable narrative reasons for separation was effective for all separations from military service on or after December 6, 1994, the date of the directive. Since the DOL did not provide for a retroactive application of the consolidated list in UIPL No. 3-95, some SESAs assumed that UIPL No. 25-83 and Changes 1-12 were controlling for the period October 1, 1993, to December 5, 1994.

Consequently, UIPL No. 3-95, Change 1 was issued revising the effective date of UIPL No. 3-95 and provided clarifying instructions concerning the effective dates of lists of "acceptable" narrative reasons for separation.

Further, UIPL No. 3-95 informed the SESAs that we would amend the list of "acceptable" narrative reasons for separation when we had determined which narrative reasons for separation were for "inaptitude." DOL has consulted with the Department of Defense (DOD), and has now finalized the list of "acceptable" narrative reasons for separation dealing with "inaptitude."

The contents of this directive will also be issued as a Change 14 to ET Handbook No. 384, Second Edition.

4. DOL Definition of "Inaptitude." DOL defines "inaptitude" as being "unsuitable for military service for reasons largely related to personal characteristics not reflected by acts of serious misbehavior."

5. Narrative Reasons for Separation Meeting DOL's Definition of Inaptitude. DOL determined that 20 narrative reasons, listed in the attachment to this directive, constitute "inaptitude" under the above definition for UCX qualifying purposes. DOL estimates that this broader definition will allow approximately 2,500 to 3,000 additional claimants per year to qualify for UCX.

6. Effective Date. The narrative reasons for separation that DOL has determined constitute "inaptitude" within the meaning of 5 U.S.C. 8521(a)(1)(B)(ii)(IV) shall be effective for all separations from military services on and after the date of this directive.

The new list of "acceptable" narrative reasons for separation constituting "inaptitude" represents a substantial expansion from October 1, 1993, of both the types and the numbers, of separations designated as "inaptitude." Prior to October 1, 1993, there was only one DOD narrative reason used to denote discharges for "inaptitude." This reason was designated as "Unsuitability -- Inaptitude." However, since October 1, 1993, the DOD had ceased using this sole narrative reason.

Although it is a sound rule of administrative law to apply new statutory interpretations prospectively, UIPL No. 3-95 announced an intent to make retroactive the amended list of "acceptable" narrative reasons for separation constituting "inaptitude." DOL initially believed that a substantial number of ex-servicemembers might have been prejudiced by having no discharges designated as "inaptitude" from late 1993 until the new "inaptitude" list was released and thus examined whether to apply this expanded list retroactively to October 1, 1993. However, DOL has now determined that very few servicemembers would be prejudiced by an application that was only prospective and, therefore, the public interest would not be served by a retroactive application.

DOD has informed us that there were only seven discharges with a narrative reason related to "inaptitude" (designated as "Unsuitability -- Inaptitude") during the three fiscal years prior to October 1, 1993. This information suggests that very few servicemembers would have been discharged after 1993 for the "inaptitude" narrative reason for separation had the pre-October 1, 1993 narrative reason continued in use. Thus, very few individuals discharged after October 1, 1993, but prior to the date of this issuance, would have had any expectation of qualifying for benefits under the prior inaptitude list. Further, it is impossible to identify these few individuals, since DOD stopped using the sole "inaptitude" narrative reason in late 1993. Thus, the public interest is not served by applying the new list retroactively to October 1, 1993.

7. Action Required. The above information and the attachment to this directive should be provided to appropriate staff members, including appeals staff.

8. Inquiries. Direct inquiries to the appropriate Regional Office.

9. Attachment. Revised List of "Acceptable" Narrative Reasons for Separation Meeting the Requirements of 5 U.S.C. 8521(a)(1)(B)(ii)(I)-(IV).

ATTACHMENT

"ACCEPTABLE" Narrative Reasons for Separation Meeting the Requirements of 5 U.S.C. 8521(a)(1)(B)(ii)(I)-(IV)

For the convenience of the government under an early release program (5 U.S.C. 8521(a)(1)(B)(ii)(I))

Medal of Honor Recipient
Completion of Required Active Service
Insufficient Retainability (Economic Reasons)
Reduction in Force
To Attend School
Holiday Early Release Program
Defective Enlistment Agreement
Erroneous Entry (Other)
Intradepartmental Transfer*
Miscellaneous/General Reasons**

Because of medical disqualification, pregnancy, parenthood, or Service-incurred injury or disability (5 U.S.C. 8521(a)(1)(B)(ii)(II))

Pregnancy or Childbirth
Parenthood or Custody of Minor Children
Conditions, not Disability
Disability, Severance Pay
Disability, Permanent
Disability, Temporary
Disability, Existed Prior to Service, PEB
Disability, Existed Prior to Service, Med BD
Disability, Aggravated
Disability, Other

Because of hardship (5 U.S.C. 8521(a)(1)(B)(ii)(III))

Surviving Member
Hardship

* Effective for separations on or after September 1, 1994.

** Pertaining only to Army Officers' separations occurring from October 1, 1994 through August 31, 1995 and November 14, 1995 through July 1, 1996.

Because of personality disorders or inaptitude, but only if the service was continuous for 365 days or more (5 U.S.C. 8521(a)(1)(B)(ii)(IV))

Personality Disorder

The following are narrative reasons for separation that DOL has determined constitute "inaptitude" within the meaning of 5 U.S.C. 8521(a)(1)(B)(ii)(IV) and which are effective for all separations from military services on and after the date of this directive:

Conscientious Objector
Weight Control Failure
Ecclesiastical Endorsement
Secretarial Authority
Physical Standards
Erroneous Entry, Alcohol Abuse
Erroneous Entry, Drug Abuse
Non-selection, Permanent Promotion
Non-selection, Temporary Promotion
Failure to Complete a Commission or Warrant Program
Failure to Complete a Course of Instruction
Unsatisfactory Performance
Substandard Performance
Personal Alcohol Abuse
Alcohol Rehabilitation Failure
Drug Rehabilitation Failure
Military Personnel Security Program
Homosexual Admission
Homosexual Act
Non-retention on Active Duty

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MAR 2 1998

**QUESTIONS AND ANSWERS REGARDING "INAPTITUDE" FOR
UNEMPLOYMENT COMPENSATION FOR EX-SERVICEMEMBERS (UCX)
QUALIFYING PURPOSES**

QUESTION: What is the Department of Labor's (DOL) definition of the term "Inaptitude" for UCX eligibility purposes?

ANSWER: DOL defines "inaptitude" as being "unsuitable for military service for reasons largely related to personal characteristics not reflected by acts of serious misbehavior. Therefore, acts of misconduct or unacceptable conduct are not included in DOL's definition of "inaptitude."

QUESTION: How will DOL implement this definition?

ANSWER: DOL has determined which narrative reasons for separation used by the armed forces constitute "inaptitude" for UCX program eligibility purposes. The list of narrative reasons for separation constituting "inaptitude" is being transmitted by Unemployment Insurance Program Letter (UIPL) No. 3-95, Change 2 to the State Employment Security Agencies (SESAs) which administer the UCX program. The attachment to UIPL No. 3-95, Change 2 will include the list of narrative reasons for separation that DOL has determined meet the UCX eligibility requirements in Federal law for the various categories, including those for "inaptitude." Narrative reasons for separation not in the attachment to UIPL No. 3-95, Change 2 do not meet the statutory requirements for UCX program eligibility.

QUESTION: How many narrative reasons for separation has DOL determined constitute "inaptitude" for UCX qualifying purposes?

ANSWER: DOL determined that 20 narrative reasons for separation constitute "inaptitude" for UCX qualifying purposes. They are included in the list of narrative reasons for separation in the attachment to UIPL No. 3-95, Change 2.

QUESTION: What will be the effective date of the new consolidated list of "acceptable" narrative reasons for separation that will include those dealing with "inaptitude?"

ANSWER: DOL has determined that the narrative reasons for separation that constitute "inaptitude" for UCX program eligibility purposes shall be effective for all separations from armed forces on and after the date of UIPL No. 3-95, Change 2.

QUESTION: Why did DOL decide to make the amended list of "acceptable" narrative reasons for separation constituting "inaptitude" prospective and not retroactive?

ANSWER: Sound administrative practice favors the prospective application of new statutory interpretations. Further, after October 1, 1993, the armed forces ceased using the sole narrative reason for separation constituting "inaptitude." DOD has informed us that, according to its records, only seven servicemembers were discharged from the various branches of the military services during the three year period immediately prior to October 1, 1993, for reasons considered "inaptitude." This fact suggests that only approximately eleven servicemembers would have been discharged since October 1, 1993 with the inaptitude narrative reason, had the pre-October 1, 1993, definition been in use. Because DOD has not been able to identify a precise definition for its earlier "inaptitude" narrative, DOL is unable to identify just those few ex-servicemembers falling within this definition since October 1, 1993. Additionally, even if that definition were available, it would be inefficient and very costly to reopen all UCX claims decided since late 1993 simply to identify fewer than a dozen claimants who might then have been eligible for UCX.

QUESTION: How much will total UCX benefit outlays increase as the result of DOL's "inaptitude" policy?

ANSWER: UCX benefits are likely to increase less than \$10 million annually with the inclusion of the 20 narrative reasons for separation constituting "inaptitude." This is about a 5 percent increase in total UCX payments for which the armed forces are billed. This estimate assumes the armed forces utilize these narrative reasons for separation at the same frequency as in the past.

QUESTION: Of the 20 narrative reasons constituting "inaptitude," which ones are the most commonly used by the armed forces?

ANSWER: Based on the results of a random survey, 3 of these narrative reasons comprise 80 percent of the occurrences. They are: "Unsatisfactory Performance," "Weight Control Failure," and "Non-retention on Active Duty."

[For DOL Background Purposes Only: The two narrative reasons dealing with homosexuality ("Homosexual Admission" and "Homosexual Acts") each comprise 2.6 percent of the occurrences.]

DRAFT-----February 25, 1998

Veterans' Employment and Training Service

CONTACT: Gordon Berg
OFFICE: (202) 219-5573

USDL:
FOR RELEASE:

**MORE DISCHARGED VETERANS TO QUALIFY FOR UNEMPLOYMENT BENEFITS
UNDER NEW LABOR DEPARTMENT PROGRAM LETTER**

More veterans discharged before completing their first full term of service will now receive credit for their time served, provided it was at least 365 days, for purposes of receiving unemployment compensation. The increase will result from an expanded definition of the reason for discharge known as "inaptitude," developed by the U.S. Department of Labor (DOL), in consultation with the Department of Defense (DOD).

Generally, in order to have military service count toward eligibility for unemployment benefits, an ex-servicemember must complete the first full term of service and be discharged or released under honorable conditions. Fulfilling these requirements is necessary under Federal law to establish "Federal service." Otherwise, the period of active duty and the wages paid cannot be used to qualify for benefits under any unemployment compensation program.

The law also makes special provision for honorable discharges, under four general categories, prior to completing the first full term of service. The categories are: (1) For the convenience of the government; (2) For medical disqualification, pregnancy, parenthood, or service-connected disability; (3) For hardship; and (4) For personality disorders or "inaptitude," but only if the service was continuous for 365 days or more. If an ex-servicemember was honorably discharged for any of these reasons (and served sufficient time with regard to the fourth category), the time served would be considered "Federal service" and counted toward eligibility for unemployment benefits. But, since 1993, when DOD created a new list of narrative reasons for discharge, there has been no narrative reason for discharge falling under "inaptitude."

Following extensive consultations with DOD, DOL has now compiled a list of 20 reasons for discharge it considers "inaptitude." The new interpretation will be published in the Federal Register and transmitted to the States by a program letter from the department's Employment and Training Administration (ETA), the agency that administers the unemployment compensation program.

The new interpretation will not be retroactive and will cover only those discharges that occur after the program letter is issued. In the three years prior to 1993, only seven

servicemembers were discharged for reasons then considered to be inaptitude. DOL and DOD expect that as many as a few thousand additional servicemembers may qualify each year for unemployment compensation under the expanded definition of "inaptitude."

Unemployment compensation for ex-servicemembers, known as UCX, is paid with funds reimbursed to DOL from DOD.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1800

GENERAL COUNSEL

12 MAY 1998

Charles D. Raymond, Esq.
Associate Solicitor for Employment
and Training Legal Services, Office of the Solicitor
U.S. Department of Labor
Washington, DC 20210

Dear Mr. Raymond:

I am writing with regard to the Department of Labor's proposed unemployment insurance program letter concerning unemployment compensation for ex-service members (UCX), which is governed by 5 U.S.C. § 8521. We understand that the proposed program letter includes a new definition of the term "inaptitude" for purposes of determining eligibility for UCX benefits, and that it lists twenty narrative reasons for separation of service members from the military that fall within that definition. The Department of Defense recognizes that the Department of Labor has the authority and responsibility to interpret terms in the UCX statute as necessary, and therefore defers to the Department of Labor's proposed approach on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas A. Dworkin".

Douglas A. Dworkin
Principal Deputy General Counsel