



This publication replaces “Discharge Upgrading and Discharge Review: Introductory Materials & Forms for Attorneys and Counselors.” Most of the content in the first two parts is still current and was not changed, but the third and fourth parts discuss important new policies.

DISCHARGE UPGRADES

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BASICS OF DISCHARGE UPGRADING

BY TOM TURCOTTE

Advocates of active-duty military members will deal with people in situations that inevitably result in the receipt of less than fully honorable discharges. There is, and always has been, a great deal of misinformation regarding the process and standards in the military’s system for reviewing discharges.

A less than fully Honorable Discharge imposes significant limitations on veterans’ VA benefits entitlement and employment opportunities.

This article is intended only to provide a very basic overview of the discharge review system and provide some practice pointers for advocates. Nothing is intended to impart specific advice to any individual's situation nor is anything discussed regarding federal court review of Less-Than-Honorable Discharges or correction of military records.

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I. The Discharge Review and Correction Boards

There are two separate Boards for each service branch that reviews discharges -- The Discharge Review Board and the Board for Correction of Military/Naval Records.

The Discharge Review Boards consist of five officers, of the rank O-4 or higher. These Boards have jurisdiction over discharges issued within fifteen years of the date of application. The Review Boards cannot review a Bad Conduct or Dishonorable Discharge issued as part of the sentence of a General Court-Martial, but they can review all others including Bad Conduct Discharges issued as part of the sentence of a Special-Court Martial.

The Review Boards are empowered only to "upgrade" the type of discharge and change the reason for discharge. They may sometimes change a re-enlistment code, but cannot otherwise modify the contents of a vet's military records.

Applicants can elect either a personal appearance type of hearing before the Review Boards or a non-personal appearance review that is limited to consideration of available medical and administrative records as well as any materials submitted by the vet. The latter is called a records review or documentary review.

An applicant can first apply for a non-appearance type of review and, if that is not successful, then ask for a personal appearance type of hearing. Statistically, personal appearance type hearings stand a much better of success.

I often advise clients to try the non-appearance mode first, then, if that's not successful, ask for a personal appearance. This gives the vet "two bites at the apple." A personal appearance type of hearing, like a documentary review, must be made within fifteen years from discharge, so that deadline has to be considered first and foremost.

The Army Review Board holds hearings in Washington, DC, and will now conduct videotaped hearings elsewhere in the country. Sadly, and perhaps illegally, the Navy and Air Force Discharge Review Boards have not traveled regionally, though they may now hold videotaped hearings in other parts of the country.

In the personal appearance type of hearing, a Review Board allows an applicant to be represented by lawyer or non-lawyer counsel. An opening statement by counsel is generally made, as are direct questions of the applicant by counsel, then followed by questions from the Board members and a closing statement by counsel. Witnesses can also testify at hearings.

Application to the Review Boards are made on DD Form 293. The form asks the veteran to list specific issues in support of an upgrade that the Board will consider and resolve. (NOTE: Any search engine will produce the Review and Correction Boards' web sites -- just enter Discharge Review Boards. These sites include regulations, application forms that can be downloaded and FAQ's, etc. for each Board and branch of service. Citation to regs are not made here because they are available on the web.)

The Boards for Correction of Military/ Naval Records consist of high ranking civilian employees of each branch. These Boards have almost complete power to change, delete, modify or add to the contents of military records. Application to a BCMR requires completion of DD form 149.

The BCMR's can do anything to a vet's records except overturn a court-martial conviction.

They are not required to grant personal appearance hearings though they can but very rarely do. They sit only in Washington D.C.

Unlike the Review Boards, (which operate under a fifteen year limit from the date of discharge that cannot be waived), the Correction Boards operate under a three year limit for application that starts upon the date of “discovery of alleged error or injustice.” This date is generally held by the Correction Boards to start as of the date of discharge or, in the case of a denied upgrade from a Discharge Review Board, the date of the Review Board denial decision.

However, the Correction Boards can, and very often do, waive the three year limit if they determine that it “is in the interest of justice” to do so. They cannot determine whether to waive the three year limit without making a cursory review of the merits of a petition.

Vets often argue that they were never advised of the existence of the Boards, let alone their time limits. This argument cannot hurt but I have never really seen it work either, because “ignorance of the law is no excuse” and because since 1975, vets being separated Less-Than-Honorably are required to be given a fact sheet regarding the Review and Correction Boards' powers and application time limits.

It is best to simply argue that the merits of the case warrant waiver of the three-year limit. The application form (DD 149) actually requires explanation as to why the Board should find it in the interests of justice to waive the three year limit if the application is made past three years from the date of discovery of error or injustice.

If medical or legal issues are involved in a Correction Board application, the Boards will often ask for advisories from the Staff Judge Advocate, Flight Surgeon or other officials. One can always ask for an advisory, provided a request to review and rebut the advisory opinion is also made.

Though the Correction Boards cannot overturn a Court-Martial conviction as a matter of law, they can, and sometimes do order that the records be corrected to show that the Convening Authority approved only part of a sentence but not a punitive discharge.

Correction Board decisions are binding on all federal agencies including the Department of Veterans Affairs.

This is crucial in General Court-Martial cases because a discharge as part of the sentence of a General Court-Martial is an absolute statutory bar to VA benefits. If a Correction Board orders a change in the Convening Authority’s review and changes the reason for discharge from sentence of a GCM to action by the Correction Board -- the discharge no longer is the result of a General Court-Martial which eliminates the bar to VA benefits. (VA benefits are discussed in a little more detail below.)

II. Some Myths about “Bad Paper”

It is absolutely not true that a Less-Than-Honorable Discharge automatically gets upgraded six months after discharge. This myth has been around since World War II and is still being perpetuated by people marginally involved in the discharge process such as personnel specialists and NCO’s. Typically, a vet will explain that: “They told me so long as I kept my nose clean the discharge would go to Honorable in six months.”

Advocates should make it clear that this just not true!

My theory after nearly 30 years of doing this work is that the “six month myth” is grounded partly in the fact that military regs used to require that administrative records not be forwarded to the Records Center in St. Louis until six months after separation. I suspect that this is where the six-month aspect of the myth comes from.

I think the real reason this myth is still being perpetuated is that it deceives young people who are already under great stress believing that they need not use any rights they may have in the discharge process because, “after all- it’s gonna’ get upgraded anyway”.

The FAQ part of the Army Review Boards' website actually includes debunking of the “six month myth.” That is how common this mean little bit of misinformation is.

Another myth is that regardless of the reason for discharge or what is in one’s disciplinary record, a discharge upgrade will obtain long as an excellent post-discharge history can be documented.

Post service history, no matter how laudatory and well documented is not by itself a ground for upgrade, although the Boards are increasingly interested in it. I believe that documenting post- service honors, contributions to the community, career, education and character is a good idea because the Board members may use that evidence to sway them to the applicant’s advantage. Also, post-service history can be used to demonstrate that the grounds for discharge were not valid in retrospect in, for example, drug or alcohol cases where the vet can demonstrate recovery that was not offered in service.

A final myth is that only an upgrade of discharge can entitle a vet to VA benefits.

The Department of Veterans Affairs can grant basic benefit eligibility to any veteran discharged with a Less-Than-Honorable Discharge except those who received a Bad Conduct or Dishonorable Discharge as part of the sentence of a General Court-Martial. Administratively issued Other-Than-Honorable discharges and Bad Conduct Discharges issued as part of the sentence of a Special Court-Martial can be subjected to a VA “Character of Service” determination.

Any VA Regional Office can conduct a review of “the facts and circumstances” surrounding the issuance of a discharge. A vet need only apply for any benefit to “trigger” this determination which is threshold to entitlement to specific VA benefits. The standards used by the VA to make these determinations can be found at 38 C.F.R. Sec. 3.12 et seq.

VA’s regs regarding the considerations applied to a character of service determination are surprisingly straightforward and fair.

Vets with “bad paper” need to know that the discharge does not preclude basic VA entitlement, but that eligibility for specific VA benefits can require other factors such as total time served and “era” of service.

III. Tactics for Advocates

Anyone dealing with someone who may receive “bad paper” from the military is in a position to help document the “facts and circumstances” surrounding the discharge. Documentation can be crucial to both discharge review applications and VA disability claims.

Advocates should always consider their ability to “preserve the evidence.”

Service members facing discharge should always get the home of record address and phone number of people in their unit who have inside knowledge of facts relevant to the discharge but which will not be in the official records.

The ideal situation is to get statements from people prior to the actual discharge but this is not always possible. People often fear retaliation for providing a statement or simply are removed from the soon-to-be veteran.

I advise people to get the address of friends who can give statements or their parent's address. This way, a letter can be forwarded later asking for statements.

JAG officers are usually fairly easy to track down either while they are still in the military or have been discharged. Each branch has a JAG locator service.

I have had surprisingly positive results in getting statements from JAGs appointed to represent people facing discharge. Even if they can't remember the details of a given case, they will often be glad to put in writing the prejudices of a command or other important inside information about improprieties in certain types of cases at commands they were assigned to.

In that connection, advocates should know that the Review and Correction Boards have no subpoena or summons powers -- even over active duty personnel. (The exception is Board for Correction cases brought under the Military Whistleblower Protection Act.) Potential witnesses should be assured that there will be no retaliation for giving a sworn statement because the Boards have no power over them, the proceedings of the Boards are covered by the Privacy Act of 1974 and frankly, the Boards probably just don't care about them. (This is not to say they won't consider any support statement because they will and, in fact, I don't believe they see many support statements in the first place.)

Any and all documents even remotely or possibly connected to the facts leading to discharge should be kept as potential evidence. Medical bills for treatment off-base for conditions that should have been treated by the military should obviously be kept, but this is just one of many examples of preserving evidence for a future discharge review or VA character of service determination.

Not infrequently, by the time the relationship between a service member and the military has soured to the point that an other than fully Honorable Discharge is inevitable -- the service member just wants out. The last thing s/he is thinking about is preserving evidence and contacts necessary to development of a good application. An advocate can be invaluable in this respect!

Finally, advocates should understand that the discharge upgrade rates among the Boards vary from service to service but remain low. The rates always go up in personal appearance type hearings but the overall low rate isn't high due only to restrictive regulations or reactionary Board members. (Recent policy guidance for the Boards from the Department of Defense is encouraging a slightly more lenient approach to cases, and widen the types of evidence veterans may submit, but these cases are still challenging.)

I firmly believe that the Boards are not accustomed to seeing well documented, organized and persuasive applications made, with reference to their regulations and those applicable to discharges. Most of their caseload involves unrepresented applicants or those represented by traditional veterans' organizations that often employ a very rote approach based on good citizenship since discharge which is specifically not a ground for upgrade.

Simply filling the form out and showing you've been good since you got your discharge is not going to get it, and people need to know that.

Both as a military counselor and lawyer, I've been involved in more than a few bad discharges. I've also been fortunate enough to have been involved in more than a few discharge upgrades and favorable VA character of service determinations.

That experience has taught me that there is no substitute for documentation in this work and that advocates are uniquely positioned to do "damage control" by explaining how discharge review works, debunking myths, and developing evidence.

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DISCHARGE UPGRADING – AN OUTLINE FOR BEGINNERS

BY KATHY GILBERD

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1. Discharge Upgrades in a Nutshell

- Veterans can apply to upgrade less than honorable discharges and to change the reason or basis for discharges. Each service has a Discharge Review Board (DRB) which can upgrade general, other than honorable and special court-martial bad conduct discharges (BCDs), and can also change discharges to or from uncharacterized entry level separations (ELSs). DRBs can also change the reason for discharge, and will occasionally change reenlistment codes if they do so.
- Each branch also has a Board for Correction of Military (or Naval) Records (BCMR) which can consider "appeals" of bad DRB decisions, upgrade discharges given by general courts-martial, change discharges to or from medical retirement or discharge, change reenlistment codes, reinstate people in the military (this is rarely done) and make many other changes in military records.
- Vets can apply to the DRBs at any time up to 15 years from the date of discharge. They can apply to the BCMRs up to three years from the date of discharge or from the date of a bad DRB decision. BCMRs very often accept late applications.
- There are no automatic upgrades, and upgrades aren't easy to get. People who don't want to live with a less than honorable discharge should talk with a counselor or attorney before discharge if at all possible, and should normally demand all of their rights to fight against a bad discharge while they are still in the military. If the bad discharge can't be avoided, it's important to start gathering evidence in support of an upgrade even before the discharge takes place.

2. Rumors

The military is full of rumors about discharges and discharge upgrades. They are almost always wrong:

- Going AWOL or UA is not the only way to get out.
- Getting a bad discharge is not the only way to get out.
- Getting a good (fill-in-the-blank type of) discharge is not impossible, and the gunny hasn't seen 50 of them turned down just at this command!

- Fighting for a good discharge when the command recommends a bad one does not take forever.
- Waiving all the rights in a discharge proceeding does not increase the chances of a good discharge unless it is part of a signed agreement.
- Discharges do not upgrade automatically after six months.
- Discharges do not upgrade automatically.
- Upgrades are not a piece of cake. It is almost never enough just to fill out an application form and send it in.
- Upgrades are not impossible to get.
- There is no need to wait six months, two years, or any minimum amount of time before applying to a DRB or BCMR. The only important dates involve the maximum time -- 15 years for DRBs, three for BCMRs -- within which to apply.
- Staying out of trouble after discharge is not enough to get an upgrade.

3. Preventing a Bad Discharge in the First Place

- Usually the best way to avoid a less than honorable discharge is to fight it before it takes place. This is an important issue to discuss with a military counselor or attorney.
- Many GIs feel that it's worth a bad discharge to get out, and that it won't affect them much. Of course the decision is theirs. But before they act on those ideas, it's important that they have information about the effects of bad discharges on veterans benefits and employment, that they know about alternative discharges that won't have those effects, and that they know the rumors about automatic and easy upgrades are false.
- Fighting a bad discharge for reasons like misconduct usually means demanding the right to an administrative discharge board hearing, where GIs can argue for a better character of discharge and/or against the command's reason for discharge. With GOS discharges (discharges in lieu of court-martial), GIs are not entitled to a hearing. With admin discharges that can be no less than general, there is usually no right to a board. However, soldiers who've been in for over six years are entitled to a board no matter what the character of discharge may be. When people aren't entitled to a board or waive a board, they can still submit written statements on their own behalf, witness statements and other evidence, and a letter or brief from their counselor or attorney arguing for a better discharge. With a court-martial, fighting the discharge means working closely with military and/or civilian defense counsel and, if there is a conviction, with appellate counsel.
- GIs who decide not to challenge a bad discharge beforehand, or whose challenges aren't successful, should normally start gathering evidence before they get out, to be used in a later upgrade application.

4. What the Review Boards Can Do

- DRBs can upgrade general discharges to honorable; upgrade OTH discharges to honorable or general; upgrade BCDs from special courts-martial to honorable, general or OTH; and change discharges to or from ELS. They cannot overturn or pardon or eliminate a court-martial conviction.

- DRBs can change the reason or basis for discharge, as from misconduct to convenience of the government, but can't change discharges to or from medical disability discharge or retirement.
- DRBs do not often change reenlistment codes and cannot reinstate people in the service.
- BCMRs can do all the things DRBs can do, and can consider "appeals" from DRB denials or partial denials.
- BCMRs can upgrade discharges awarded by general courts-martial, and can upgrade special-court BCDs if a DRB refuses to do so. BCMRs cannot overturn or pardon or eliminate a special or general court-martial conviction.
- BCMRs can change the reason for discharge to or from medical disability retirement or discharge. In some cases, the BCMR will decide a vet should have been medically retired as of the date of his or her discharge, resulting in a disability pension retroactive to that date.
- BCMRs can reinstate people in the military, though they rarely do this. They can change military records to show that applicants served to the end of their term of service, and can change reenlistment codes to permit vets to reenlist if they meet other reenlistment criteria (age, etc.).
- BCMRs can eliminate the results of disciplinary actions, like fines or reductions in rank, can change or remove bad performance evaluations or "counseling entries," can take incorrect diagnoses out of medical records, and can make many other changes in service records. Because of these broad powers, GI's still in the military may wish to apply to the BCMRs to clean up problems in their records which might later lead to a problem discharge, affect promotion, etc.

5. Time Limits

- There is no minimum time that vets must wait before applying for an upgrade.
- But the DRBs will sometimes recommend that vets wait a few years from discharge before applying, to build up a good civilian record. *The wisdom of this depends entirely on the facts and issues in an individual case, and on the vets' needs.*
- Vets can apply to the DRBs at any time up to 15 years from the date of the discharge. In a court-martial case, the discharge becomes final after post-trial procedures and appeals are over, not at the time of sentencing. DRBs will not accept late applications.
- Vets can apply to the BCMRs at any time within three years from the date of the "error or injustice" in their record, or three years from the date of discharge. Three years after discharge is acceptable even if the error or injustice occurred some time before the discharge. Vets can also apply to the BCMRs within three years of the date they are turned down, or turned down in part, by the DRBs.
- The BCMRs will often accept late applications if the vet can show a good reason for the delay, though the Boards are not required to take late claims. The BCMR rules say that they may waive the time limit when it is "in the interest of justice," which often means the vet had not been informed of his right to apply for an upgrade, had serious medical or psychiatric problems that kept her from applying before, etc. Vets who failed to apply to the DRBs within 15 years of discharge may still find the BCMRs willing to hear their cases. BCMRs are more likely to accept late cases if there are interesting issues or arguments in them.
- If vets are eligible to ask for a second DRB review (see part 6), they must do so within 15 years of the date of discharge. There is now no specific time limit for reapplications to the BCMRs.
- GIs and vets should know that discharge review cases tend to take many months. Time varies depending on the complexity of the case, whether or not the case involves a hearing, and the particular board involved.

6. Types of Review

- DRBs hold documentary reviews and personal appearance (hearing) reviews. Vets can have both if they take them in that order and stay within the 15-year deadline.
- In documentary reviews, DRBs look at vets' personnel and medical records and any arguments and evidence submitted by the vets. The Boards usually don't look at court-martial records of trial, just at the charges and results. Vets can be represented by an attorney or counselor.
- With personal appearances, DRBs look at the same records, evidence and arguments. Vets can testify, bring witnesses, and be represented by an attorney or counselor. (When vets testify under oath, the board members can question them; some vets prefer to make unsworn statements to avoid this. It's a tactical decision best made with the help of a counselor or attorney.)
- The Navy/Marine Corps and Air Force DRBs hold hearings in Washington,DC, and may hold videoconference hearings elsewhere ; the Army holds hearings in DC or by videoconference in some major cities around the country. DRBs don't pay travel expenses for applicants or witnesses.
- Vets can request hearings before the BCMRs, but the Boards seldom grant them. Vets have no right to a hearing except in cases brought under the Military Whistleblower Protection Act.
- BCMR hearings are held in Washington.
- Veterans can ask the BCMRs at any time to reconsider their cases on the basis of new evidence not considered by the Board during the first review.

7. Arguments and Evidence

- The DRBs and BCMRs start with a legal presumption that discharges are fair and legal, and that military officials act properly. Vets have the burden of proving that their discharges should be changed.
- The proceedings are considered 'non-adversarial,' with no attorney representing the military's 'side,' but board members may be critical and sometimes suspicious. The rules of evidence don't apply, though vets and their representatives can object to offensive questions, unnecessary invasions of their privacy, and questions that simply aren't relevant to the case.
- The DRBs and BCMRs do not normally make any independent investigations. There are a few exceptions: the boards will sometimes check to see if an applicant with a BCD has a later civilian conviction, the BCMRs may ask for advisory opinions from OJAG, the service's medical or personnel experts, and on very rare occasions from the vets' old command. More investigation may be proper in Military Whistleblower Protection Act cases.
- The DRBs and BCMRs have no subpoena power and will not order military witnesses to attend. Bringing witnesses is the job of the applicants, so that in many cases they must rely on written statements or letters rather than live testimony. Again, BCMR cases involving the Whistleblower Protection Act give the Board broader authority to bring witnesses.
- With admin discharges, the Boards will consider arguments that discharges were unfair ("inequitable" to the DRBs, "unjust" to the BCMRs) or illegal ("improper" to the DRBs, "erroneous" to the BCMRs). Vets can argue that there were mitigating circumstances surrounding the problems or misconduct that led to a bad discharge (for instance, that undiagnosed medical problems kept them from performing duties properly), an "equity" or "justice" issue. They can also argue that the command or the service failed to follow its discharge regs, federal law, or constitutional requirements in discharge proceedings, a "propriety" or "error" issue.

- In these admin cases, good conduct after discharge is not generally a separate reason for an upgrade. It should be considered as it reflects on the vets' character or actions before discharge. However, the Boards are often quite impressed by good conduct, charitable activities, an impressive career, etc., after discharge, and recent policy guidance for the Boards emphasizes the importance of such evidence.
- On the other hand, bad conduct after discharge can bias the Boards against an applicant. For example, applications mailed from prison may be received with some skepticism--people in military or civilian prisons should generally be encouraged to apply after they are released unless they face a Board deadline or have unusual circumstances. Statements or evidence of bad behavior after discharge may reduce the Boards' sympathy for applicants, unless they are presented as part and parcel of the problems leading to discharge--problems overcome through rehab or good efforts and followed by outstanding conduct and character.
- With punitive discharges (BCDs and DDs, or dismissals for officers) the Boards will upgrade only on the basis of clemency. The means showing rehabilitation and excellent conduct after the offense(s) and especially after discharge. In addition, it can help to show extenuating or mitigating circumstances relating to the offense(s).

IMPORTANT: It is virtually always helpful to begin gathering documentation and evidence for discharge upgrades during the discharge process and right after discharge, even if vets don't plan to request an upgrade soon. Since evidence, records and witnesses can get lost, this task shouldn't be put off. It can include:

- Getting a complete copy of military personnel records, outpatient medical records, and any in-patient hospital records.
- Getting a complete copy of the "discharge packet" sent to the separation authority.
- Getting a complete copy of all files kept by their civilian and/or military attorneys.
- Getting copies of complete NCIS, OSI, CID or DIS records if an investigation was made.
- Getting all of the documentation on any positive urinalysis test (the order authorizing the test, the chain of custody document, message traffic between command and lab, and actual test results). GIs or vets can also request retesting of the original "sample" at a civilian lab. Samples and documents are not kept permanently, so requests should be made quickly.
- Asking for letters from fellow soldiers who are aware of good character, mitigating circumstances surrounding misconduct, innocence of alleged misconduct, command bias, etc.
- Getting permanent addresses for fellow soldiers who may not be willing to provide statements now, but could be asked again after they're out.
- Getting letters or permanent addresses from civilian friends, neighbors, etc., with similar knowledge.
- Getting records of any reports or complaints the GI made regarding sexual assault or sexual harassment, as well as follow-up paperwork.
- Getting copies of any discrimination complaints, Article 138 complaints, or other complaints showing racial or other discrimination, harassment of or bias towards the GI.
- Obtaining at least one civilian medical or psychiatric evaluation if medical or psychiatric issues exist but were not well documented in military records.

8. Representation

- It is almost always helpful to have representation in discharge upgrade cases. An attorney or counselor can help to evaluate the case, develop equity and propriety arguments, assist in gathering and evaluating evidence, write a legal brief discussing the case and issues, and represent vets during hearings.

- If this level of representation isn't possible, it is helpful for vets to read over the regs governing the Boards and literature from civilian sources. It is also very helpful to have an attorney or counselor look over the regs, records and evidence, and help vets develop arguments.
- Vets should bear in mind that anything they say or submit to the Board can be considered, and will become a part of their permanent military record, so that it would be available to the Boards in any future application. A poorly prepared application can sometimes work against vets in further "appeals" or new applications.

9. Resources

- The *Discharge Upgrade Manual* from the Connecticut Veterans Legal Center can be found at ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-20111.pdf
- The *Discharge Upgrading Manual*, while not updated since 1990, has useful information on a number of discharge upgrade issues. Regulation-based arguments and discussion should be checked against current regulations. Find it at ctveteranslegal.org/wp-content/uploads/2012/12/MilitaryDischargeUpgrading_lr.pdf

10. Forms

- Information about ordering military records, and the form used to order most records, [Standard Form 180](https://www.archives.gov/veterans/military-service-records/standard-form-180.html), can be found at <https://www.archives.gov/veterans/military-service-records/standard-form-180.html>
- The application form for the Discharge Review Boards, [DD form 293](https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0293.pdf) (NOTE: this is a fillable PDF form that you may not be able to open it in a browser, but can download to open with a PDF reader app*) is at <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0293.pdf>
- The application form for the Boards for Correction of Military/Naval Records, [DD form 149](http://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf) (NOTE: this is a fillable PDF form that you may not be able to open it in a browser, but can download to open with a PDF reader app*), at www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf
- If the links above lead to an error page, go to http://www.esd.whs.mil/Directives/forms/fmo_poc/ and click "DoD Forms", then use the links in the left side column to drill to the number form you need.
- The forms mentioned above can also be obtained from VA regional offices.

* The download button generally has a down-facing arrow and may appear in a small toolbar above the document.

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MENTAL HEALTH ISSUES IN DISCHARGE REVIEW CASES

Opportunity for Increased Discharge Review Fairness and Transparency Under Review Board Supplemental Guidance

By LIAM MCGIVERN

Over the past few years, the Department of Defense has issued three memoranda which, in combination, have the potential to remake the discharge review process for former service members of all eras from an opaque, arbitrary, and unfair ordeal to one in which mental health conditions and physical, mental, and emotional trauma are properly considered as mitigating factors to misconduct. Together, these three memos provide a relatively detailed analytical framework for the boards for correction of military records (BCMRs) and discharge review boards (DRBs) to follow in deciding applications for discharge review involving PTSD, other mental health conditions, TBI, sexual assault, and sexual harassment, while still maintaining the discretionary nature of the boards' equitable discharge review authority. However, it remains to be seen whether the BCMRs and DRBs will ultimately embrace the letter and spirit of this new guidance or resist the new review structure placed upon them.

BCMR and DRB Standards of Review

As those of us who represent former service members before the BCMRs and DRBs know, the boards hold the discretionary aspect of their equitable discharge review authority and mandate dearly. Historically, in most cases the boards exercise their discretion to deny applications for discharge review rather than to approve them.

As provided in regulation, "the primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis." 32 C.F.R. § 70.9 (b)(1)(i). DRB regulations provide factors which board members should consider in exercising discretion on equity issues raised by an applicant, such as combat service, wounds received in action, awards and decorations, overall capability to serve, among other factors. See 32 C.F.R. § 70.9 (c). However, the guidance contained in DRB regulations is a listing of factors rather than a framework for conducting a thorough and meaningful analysis. See 32 C.F.R. § 70.9 (c)(3). This lack of detailed guidance has led to inconsistent outcomes for discharge review applicants, with DRB decisional documents providing little or no explanation for the ways in which the evidence of record did, or did not, support a change to the applicant's discharge status.

Regulations afford the BCMRs even less guidance in terms of deciding discharge review applications. The BCMRs' mandate is to "review all applications that are properly before them to determine the existence of error or injustice," without any further guidance or instruction as to what constitutes an "error or injustice." 32 C.F.R. § 581.3(a)(4)(i). The BCMRs are required to grant relief "if persuaded that material error or injustice exists" and "sufficient evidence exists on the record," but "deny applications when the error or injustice is not adequately supported by the evidence." 32 C.F.R. 581.3(a)(4)(ii), (iv). The regulations do not provide the BCMRs with guidance on the meaning of "sufficient evidence" or "adequately supported by the evidence." Unlike the DRBs, the BCMRs are not provided factors to consider in determining whether to grant an application for discharge review. As with the DRBs, relevant regulations do not provide an adequate framework for the BCMRs in their review of applications for discharge review to provide consistent and thoughtful decisions, instead allowing the BCMRs an incredible degree of discretion. These problems are compounded by the boards' position that their

decisions are non-precedential in nature, leaving applicants unable to rely upon past decisions to guide them in their own applications.

With these broad mandates and lack of meaningful guidance, it's easy to see why the discharge review decisions issued by the DRBs and BCMRs of each of the respective military branches lack consistency.

Hagel Memo

A first step towards establishing a uniform framework for consideration of applications for discharge review in certain limited cases occurred with the September 3, 2014, release of a *Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder* by then Secretary of Defense Chuck Hagel. (Available at <http://www.secnav.navy.mil/mra/bcnr/Documents/HagelMemo.pdf>.) Known as the "Hagel Memo," the supplemental guidance was intended to "ensure consistency" between each military branch's BCMR in the consideration of applications for discharge review in cases in which PTSD or "related conditions" are potential mitigating factors to misconduct. The Hagel Memo provides the BCMRs guidance in in three areas – "Medical Guidance," "Consideration of Mitigating Factors," and "Procedures."

Under the Hagel Memo's "Medical Guidance" provisions, BCMRs are instructed to provide "liberal consideration" to an applicant's in-service medical records "which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions," and "liberal consideration to a finding that PTSD existed at the time of service" when such in-service records exist. Additionally, the BCMRs are to provide "special consideration" to Department of Veterans Affairs (VA) diagnoses and determinations that a former service member's diagnosed PTSD is connected to his or her service, and "liberal consideration" to the diagnoses of civilian providers when the medical records "contain narratives that support symptomology at the time of service," or when "any other evidence" "may reasonably indicate" that the condition existed at the time of discharge and may have mitigated the misconduct of record. The Hagel Memo does not explain the meaning of the terms "liberal consideration" and "special consideration," leaving it to each branch's BCMR to reach its own interpretation of those terms.

The Hagel Memo's "Consideration of Mitigating Factors" provisions instruct the BCMRs that when the evidence of record shows that a condition, such as PTSD, could "reasonably be determined to have existed at the time of discharge" then it "will be considered to have existed at the time of discharge." In cases where the evidence shows that PTSD or a "related condition" existed at the time of discharge, the Hagel Memo instructs the BCMRs to "carefully weigh" evidence of such a condition as a "potential mitigating factor" and a "causative factor" to misconduct which led to an "under other than honorable conditions characterization of service." The Hagel Memo cautions, however, that "PTSD is not likely a cause of premeditated misconduct."

Finally, the Hagel Memo's "Procedures" provisions provide for the waiver of the BCMRs' three-year time limit for filing an application for discharge review and for "timely consideration" of applications. The Hagel Memo also allows the BCMRs to obtain advisory opinions from Department of Defense mental healthcare professionals or physicians to assist the BCMRs in their consideration of applications for discharge review which include PTSD and "related conditions" as potential mitigating factors.

While the Hagel Memo represented an improvement from the BCMRs' broad discretion to correct an "error or injustice" in deciding applications for discharge review, its scope is relatively limited and it

lacks substantive depth. The Hagel Memo applied only to the BCMRs, not the DRBs, and only in the review of applications for discharge review which alleged PTSD or “related conditions.” While not explicit, some language in the Hagel Memo could be interpreted to limit its scope only to discharges “under other than honorable conditions,” potentially leaving those with an “under honorable conditions (general)” discharge unable to benefit from the guidance.

In terms of substance, the Hagel Memo provided the BCMRs with amorphous instructions to provide “liberal consideration” and “special consideration” to certain types of evidence, but failed to provide an analytical framework for deciding discharge review applications. The Hagel Memo does not explain which conditions are considered “related” to PTSD, leaving it to the BCMR’s discretion to make that determination.

Carson Memo

On February 24, 2016, Acting Principal Deputy Under Secretary of Defense Brad Carson issued a second memo, *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)* (“Carson Memo”). (Available at https://www.defense.gov/Portals/1/Documents/pubs/Consideration_on_Discharge_Upgrade_Requests.pdf.) The Carson Memo makes clear that traumatic brain injury (TBI) is a “related condition” under the Hagel Memo, thus requiring the BCMRs to provide “liberal consideration” and “special consideration” in cases where TBI is a potential mitigating factor to misconduct. The Carson Memo also requires the BCMRs to provide de novo reconsideration of any previously denied applications for discharge review by the DRBs or BCMRs.

Following the Carson Memo, the DRBs still fell outside the scope of either new guidance, and the only conditions explicitly covered by the memos were PTSD and TBI.

Kurta Memo

A more detailed framework arrived on August 25, 2017, with the release of a third memo, issued by the Office of the Under Secretary of Defense, *Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of Their Discharge Due to Mental Health Conditions, Sexual Assault, and Sexual Harassment*. (Available at <https://www.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf>.) Known as the “Kurta Memo,” this third guidance greatly expands the scope of the Hagel Memo and Carson Memo. Under the Kurta Memo, the new supplemental guidance contained in the three memos applies, for the first time, to both the DRBs and BCMRs in their consideration of discharge review applications. The Kurta Memo also expands the meaning of PTSD and “related conditions” to include “mental health conditions,” “sexual assault,” and “sexual harassment,” in addition to TBI. This expansion under the Kurta Memo is a dramatic and important addition to the types of cases subject to new discharge review guidance.

The Kurta Memo clarifies for the DRBs and BCMRs what types of documents and information outside of an applicant’s service record will be considered as evidence in applicable cases. After describing what are already standard types and sources of evidence, including Department of Defense forms, law enforcement documents, medical records, and statements from family members, friends, and clergy, the memo goes on to include “changes in behavior; requests for transfer to another military duty assignment; deterioration in performance; inability to conform their conduct to the expectations of a

military environment; substance abuse; episodes of depression; panic attacks or anxiety without an identifiable cause; unexplained economic or social behavior changes; relationship issues; or sexual dysfunction” as evidence on which applicants may rely to prove the presence of a condition or that an experience occurred. The Kurta Memo instructs the BCMRs and DRBs that an applicant’s oral or written testimony, on its own, “may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.”

The Kurta Memo goes so far as to state that evidence of misconduct itself may be considered as evidence of an underlying mental health condition, PTSD, TBI, or an experience of sexual assault or sexual harassment.

In addition, the Kurta Memo provides the BCMRs and DRBs with a detailed, step-by-step framework for the boards to rely on as they consider applications for discharge review. Rather than relying upon the incredible degree of discretion which comes from the DRB regulations’ simple listing of factors, and the BCMRs broad mandate to correct “errors or injustice,” the boards now have an analytical framework which they must follow in considering discharge upgrade applications.

The Kurta Memo provides the DRBs and BCMRs with series of questions to answer in deciding applications for discharge review, including “was there a condition or experience?”, “did the condition exist/occur during military service?”, “does the condition/experience excuse or mitigate the discharge?”, and “does the condition/experience outweigh the discharge?” The Kurta Memo provides guidance to the boards in answering each of these questions to help ensure fairness and consistency between the boards.

Additionally, the Kurta Memo provides a thorough definition of the Hagel Memo’s “liberal consideration” standard, including eleven separate and non-exhaustive factors for the boards to consider, touching on evidentiary standards, favorable presumptions, and decisional standards.

The Kurta Memo’s “liberal consideration” provisions instruct the BCMRs and DRBs to apply a relaxed burden of proof to applications involving mental health conditions, PTSD, TBI, and sexual trauma when the discharge occurred during a time when these conditions “were far less understood than they are today.” This would include misconduct related to PTSD and other combat trauma during times when these conditions were less well understood and fewer procedural protections were in place to ensure fair treatment of wounded service members. Specific to sexual trauma and harassment, the memo instructs the boards to apply a lower evidentiary burden “for injustices committed years ago when there is now restricted reporting, heightened protection for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment.” In terms of evidence required to prove an applicant’s case, the Kurta Memo instructs that the boards should not “condition relief on the existence of evidence that would be unreasonable or unlikely [to exist] under the specific circumstances of the case,” and states that those applicants with mental health conditions, PTSD, or TBI, and who experienced sexual trauma “may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran’s life.”

Apart from these lowered evidentiary standards, the Kurta Memo’s clarification of the term “liberal consideration” includes presumptions about the ways in which mental health conditions, PTSD, TBI, and sexual trauma affect service members. The memo states that “mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often

undiagnosed or diagnosed years after, and are frequently unreported,” and that these conditions “inherently affect one’s behavior and choices causing veterans to think and behave differently than one might otherwise have expected.” With this new guidance, individual applicants discharged due to misconduct which is connected to these conditions and experiences should receive the benefit of the doubt that their misconduct stems from their conditions or experiences without having to provide evidence of the same.

The Kurta Memo’s “liberal consideration” provisions also provide the BCMRs and DRBs with guidance in determining whether a change to an applicant’s discharge is warranted. The memo states plainly that “an Honorable discharge characterization does not require flawless military service.” The Kurta Memo instructs the boards to consider the misconduct associated with an applicant’s discharge under current, contemporary standards for conduct, providing that “the relative severity of misconduct can change over time,” and pointing specifically to marijuana use, which “is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe than it was decades ago.” (The “decades ago” language is problematic given that some post-9/11 combat veterans were discharged following a single incident of marijuana use.) The Kurta Memo makes clear that “liberal consideration” “does not mandate an upgrade,” but that “relief may be appropriate for minor misconduct.” However, the Kurta Memo does not clarify the meaning of “minor misconduct,” leaving the door open to a restrictive interpretation of the standards under which relief should be granted.

Conclusion - Potential for Increased Fairness and Transparency

The discharge review framework provided in the Kurta Memo offers hope that applicants to the BCMRs and DRBs who allege mental health, PTSD, TBI, and sexual trauma mitigation will enjoy a greater degree of fairness and transparency in the consideration of their applications. Pre-Kurta Memo, with the nearly unfettered discretion afforded the boards under federal regulations, decisional documents often amounted to little more than a bare recitation of the issues raised by an applicant and a statement that relief was not warranted without any further explanation or justification. With the Kurta Memo’s relatively detailed framework, the BCMRs and DRBs should engage in a more thorough and substantive analysis of the ways in which relief is, or is not, warranted under the new guidance and the evidence presented. This will not only benefit individual applicants as their cases are considered, it will also require the boards to consider cases in a more uniform and fair manner.

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POLICY GUIDANCE FOR DISCHARGE REVIEW BOARDS AND BOARDS FOR CORRECTION

BY KATHY GILBERD

Recent memoranda from the Department of Defense have provided helpful guidance to the services' review boards, raising the possibility of better outcomes for veterans with less than honorable discharges. Two of these, the *Hagel* and *Kurta* memos, are discussed above. Between them, the memos offered "liberal consideration" to applicants affected by Post Traumatic Stress Disorder (PTSD) and other mental health conditions, by traumatic brain injury (TBI) and by sexual assault or sexual harassment.

A third policy memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," was published on July 25, 2018, by then-Under Secretary of Defense Robert Wilkie (hereafter the *Wilkie* memo). It provides broader help on issues of clemency or fairness.

The *Wilkie* cover memo emphasizes clemency, mentioning the country's increasing attention to pardons for criminal convictions and "second chances" for those convicted of crimes. It notes the need for more guidance on clemency upgrades of court-martial discharges (bad conduct and dishonorable discharges as well as officer dismissals) as a matter of fundamental fairness. The attachment to the cover memo, however, extends this concept of clemency and fairness to less-than-honorable administrative discharges (general and other than honorable discharges), framing its provisions as affecting relief based on equity (for Discharge Review Boards), justice (for Boards for Correction) and clemency (for both sets of boards in court-martial cases). Taken in conjunction with the *Hagel* and *Kurta* memos, it may provide for much greater relief for "bad paper" veterans. While it seems to emphasize upgrades of discharges, paragraph 4 of the attachment notes that in addition to court-martial discharge upgrades, "it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds." This could include changes in the narrative reason for discharge, as from misconduct to secretarial plenary authority, and possibly justice changes from administrative or court-martial discharge to medical retirement. It remains to be seen how the boards will handle requests for changes other than upgrades.

The memo is framed in terms of guidance. The attachment specifically notes that each case should be examined on its own merits, and that the application of the memo's principles is within the boards' sound discretion. (Para. 5.)

Wilkie sets out twelve principles for consideration in clemency, equity or justice claims. Some of these restate or parallel existing standards or trends used by the boards. For example, evidence from outside a veteran's service record may be considered in support of relief, as has long been the case. Military policy changes which would now be reasonably expected to allow a better outcome may be considered, long used as a "current standards" basis for an upgrade. And a veteran's sworn statement or sworn testimony may be used to establish a fact; the boards have long accepted this in principle, though not often in practice.

But a number of the principles are new. "[C]haracter and rehabilitation should weigh more heavily than achievement alone," so that outstanding academic or career achievement are not necessary to prove real rehabilitation. Along with this, "[i]t is consistent with military custom to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible,

and to favor second chances in situations in which individuals have paid for their misdeeds.” (Para. 6.a.) While the boards have occasionally concluded that some veterans have paid a heavy price for less than honorable discharges, the idea of second chances is new and somewhat surprising,

The memo emphasizes that flawless service is not necessary to warrant an honorable discharge, a matter which the boards have often ignored. It notes that views of the relative severity of different acts of misconduct may change over time, thus changing the weight of misconduct when the boards consider mitigation. Marijuana use and its legality in some states is given as an example here. The memo also notes that relief is generally more appropriate for nonviolent offenses.

Para. 6.h clarifies consideration of mental health conditions, TBI and sexual assault or sexual harassment in equity/justice issues: “Requests for relief based in whole or in part on a mental health condition, including Post-Traumatic Stress Disorder (PTSD); Traumatic Brain Injury (TBI); or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety.” (Error/impropriety refers to consideration of violations of military regulations or law, or Constitutional provisions, as opposed to matters of fairness.) In this writer’s experience, boards have tended to lean towards equity/justice considerations when they are unwilling to admit that, for example, commands have violated regulations, but para. 6.h gives this real emphasis.

In a change from prior practice, *Wilkie* suggests that the boards consider “uniformity and unfair disparities in punishments” as grounds for relief. In the past, the boards have generally held that individual cases warranted disparate punishment, so that unequal treatment of similar offenses was normally rejected as an argument for upgrades.

The final principle (Para. 6.l) notes that upgrades and changes in reason for discharge based on equity, justice, or clemency “normally” should not result in benefits such as separation pay, retroactive promotions, or payment of past medical expenses that would have been available had the revised character of or reason for discharge been given. There is no mention of medical pensions in cases where medically unfit members have been discharged for misconduct.

In addition to these principles, the memo sets out a number of factors to consider in equity, justice and clemency requests. These include candor; whether punishment, including collateral effects, was too harsh; aggravating and mitigating facts “related to the record or punishment;” positive or negative post-conviction conduct; severity of misconduct; length of time since discharge; “acceptance of responsibility, remorse or atonement;” the degree to which the relief is “necessary for the applicant;” his or her character and reputation; critical illness; old age; “meritorious service in government or other endeavors;” rehabilitation; the availability of other remedies; job history; youthful indiscretion as a cause of the misconduct; character references; letters of recommendation; whether an official with appropriate oversight opines that relief is warranted; and victim support for or opposition to relief.

Although some of these factors have been considerations in the past, they were not given significant emphasis in regulations governing discharge review, and many of them are new. They open significant areas for argument, and among other things suggest that documentation and issues regarding post-service rehabilitation, conduct, and problems such as illness or age, will deserve more attention than in the past.

Although the *Wilkie* memo presents guidance rather than binding requirements, it offers a good deal of hope for veterans, including those whose cases may already have been denied. As always, development of in-service and post-service evidence can play a critical role in these cases, and use of the specific types of evidence and assertions raised in the *Wilkie* memo may be of great help.

The Task Force hopes to monitor implementation of the *Wilkie* memo, as well as the *Kurta* and *Hagel* memos, and would appreciate thoughts and observations from readers handling discharge review cases. While the memos offer the boards an opportunity to improve veterans' chances of upgrades and other changes in discharges, it may well be that encouragement or pressure from advocates will be important.

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