



# Homeland Security

TO: Members and staff of the Board for Correction of Military Records (BCMR) of the Coast Guard

SUBJECT: Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment

In light of a new requirement for “liberal consideration” of certain BCMR cases in 10 U.S.C. § 1552(h) and DoD guidance authorizing its correction boards to grant “liberal consideration” to a considerably broader category of cases, I am issuing this guidance (Attachment A) to assist you in your deliberations. The guidance interprets “liberal consideration” for the purpose of deliberating a BCMR case and explains the types of cases to which it applies.

The need for “liberal consideration” arises because some veterans may have had a mental health condition or experience of sexual assault or sexual harassment that caused or contributed to conduct that led to an adverse discharge. These veterans may have avoided seeking mental health care or reporting the sexual assault or sexual harassment while serving in the military, and their reticence may have resulted in whole or in part from past military policies. If so, their records may contain no diagnosis of their condition or report of sexual assault or sexual harassment. BCMR cases involving allegations of such undocumented, invisible wounds are among the most difficult to assess.

The attached guidance addresses this need by emphasizing the Board’s discretion in weighing all types of evidence submitted by these veterans when they request an upgraded discharge. The guidance does not alter the burden of proof, which remains the preponderance of the evidence as required by 33 C.F.R. § 52.24(b). The guidance encourages the Board to carefully consider evidence that otherwise might receive scant attention or be accorded little evidentiary weight.

This guidance is not intended to interfere with or impede the Board’s independence and is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor does it require the Board to grant or deny relief in any case. Moreover, it may be rescinded or modified at any time.

The Chair shall ensure that all active Board members review this guidance and remind them of it when they deliberate a case to which it applies.

Date

6/20/18

Joseph B. Maher

Principal Deputy General Counsel

## Attachment A

### **Guidance to the Board for Correction of Military Records of the Coast Guard Regarding Requests by Veterans for Modification of their Discharges Based on Claims of Post-Traumatic Stress Disorder, Traumatic Brain Injury, Other Mental Health Conditions, Sexual Assault, or Sexual Harassment**

#### *Generally*

1. This document provides guidance to the Board for Correction of Military Records of the Coast Guard for providing “liberal consideration” pursuant to 10 U.S.C. § 1552(h) and “due consideration” pursuant to 10 U.S.C. § 1554b(b) when deliberating and deciding a veteran’s request for modification of his or her discharge based in whole or in part on a claim that a mental health condition, sexual assault, or sexual harassment, either excuses the conduct or poor performance that adversely affected the discharge or otherwise warrants modifying the discharge.
2. Although 10 U.S.C. § 1554b(b) requires the Board to give “due consideration” to the claim of a victim of a sex-related offense that his or her character of discharge was adversely affected by the experience of that offense, 10 U.S.C. § 1552(h) requires the Board to give “liberal consideration” to a claim that either post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) contributed to the circumstances resulting in the member’s separation if the PTSD or TBI is related to combat or military sexual trauma. This guidance uses the term “liberal consideration” but applies to cases meeting the criteria of § 1554b(b) as well as § 1552(h).
3. The term “sexual assault,” as used in this guidance, includes the sex-related offenses listed in 10 U.S.C. § 1554b(d): rape, sexual assault, forcible sodomy, and attempts to commit these offenses. Both “sexual assault” and “sexual harassment,” as used in this guidance, constitute potential causes of “sexual trauma,” but not necessarily “military sexual trauma,” pursuant to 10 U.S.C. § 1552(h).
4. The term “discharge,” as used in this guidance, means a veteran’s character of service, narrative reason for separation, separation code, and reenlistment code.
5. Unless otherwise specified, the term “mental health condition” in this guidance refers to both diagnosed and undiagnosed mental health conditions, including PTSD and TBI, and the terms “sexual assault” and “sexual harassment” refer to both reported and unreported incidents.
6. The term “conduct” in this guidance includes misconduct and inappropriate conduct.
7. The terms “liberal consideration” and “liberally consider” as used in this guidance include the following considerations:
  - a. Mental health conditions, sexual assault, and sexual harassment may affect veterans’ thinking, behavior, performance, and choices in unexpected ways and have often gone

undiagnosed or unreported for years because of stigmas and policies that deterred many veterans from seeking help.

- b. Requests for discharge modifications should not be denied based solely on the absence of a pre-separation diagnosis of the asserted mental health condition or the lack of a pre-separation report of sexual assault or sexual harassment.
  - c. A veteran who has a mental health condition or who has experienced sexual assault or sexual harassment may have difficulty presenting a thorough application for relief because of how the asserted condition or experience has affected the veteran's life.
  - d. An honorable discharge does not require flawless military service. Many veterans who have committed some minor misconduct are separated with an honorable discharge.
  - e. Military and civilian mores and standards may change over time. The Board may modify a veteran's discharge if it is deemed unduly severe in light of contemporary mores or standards regarding the conduct or poor performance that adversely affected the discharge.
  - f. Service members who are diagnosed with mental health conditions or who report sexual assault or sexual harassment before separation now receive heightened screening to ensure that the possible causal relationship between their symptoms and their conduct or poor performance is fully considered and that the characterization of service is appropriate. Veterans separated under prior procedures and medical standards may have suffered an error or injustice because the separation authority was unaware of their condition or experience or the possible effects of their condition or experience at the time of separation.
  - g. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, in cases of minor misconduct or other conduct or performance problems commonly associated with mental health conditions, sexual assault, or sexual harassment, and even in some cases of significant misconduct if it is sufficiently justified or outweighed by the facts and circumstances.
8. The Board shall waive the statute of limitations (if applicable) and liberally consider and reconsider veterans' requests for discharge modifications based in whole or in part on claims that a mental health condition, sexual assault, or sexual harassment either excuses the conduct or poor performance that adversely affected the discharge or otherwise warrants modifying the discharge.
  9. The Board shall consider all evidence presented by the veteran or the Coast Guard, including evidence from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, physicians, pregnancy tests, tests for sexually transmitted diseases, and statements from others, including family members, friends, roommates, co-workers, fellow members, and clergy. The federal rules of evidence do not apply, and the Board shall exercise its discretion in weighing the evidence while following this guidance.

10. The Board shall carefully consider the veteran's own testimony, oral or written, and may find that it is sufficient by itself to establish a basis for relief.
11. Cases falling under this guidance shall receive timely consideration consistent with statutory requirements.
12. The guidance below is organized by the following four questions, which the Board typically considers when deliberating such requests for discharge modifications:
  - a. Did the veteran have a mental health condition or experience a sexual assault or sexual harassment that may excuse the conduct or poor performance that adversely affected the discharge or may otherwise warrant modifying the discharge?
  - b. Did the mental health condition exist or did the experience of sexual assault or sexual harassment occur during military service?
  - c. Does the mental health condition or experience of sexual assault or sexual harassment excuse the conduct or poor performance that adversely affected the discharge?
  - d. Does the mental health condition or sexual assault or sexual harassment outweigh the conduct or poor performance that adversely affected the veteran's discharge or otherwise warrant modifying the discharge?

***Did the veteran have a mental health condition or experience a sexual assault or sexual harassment that may excuse the conduct or poor performance that adversely affected the discharge or may otherwise warrant modifying the discharge?***

13. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence that the veteran has or had the diagnosed mental health condition.
14. If a veteran claims to have a mental health condition but has no corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, the Board shall liberally consider other evidence that may support the existence of such a condition.
15. Medical and mental health diagnoses rendered before PTSD, TBI, and other modern mental health diagnoses were established, such as "acute stress reaction," "combat fatigue," and "concussion," shall be liberally considered as supporting a similar modern mental health diagnosis, such as PTSD or TBI, that may excuse the conduct or poor performance that adversely affected the veteran's discharge or otherwise warrant modifying the discharge.
16. The evidence considered by the Board may include common symptoms and consequences of PTSD, TBI, sexual assault, or sexual harassment, including changes in a veteran's conduct or performance; requests for transfer to another military duty assignment; deteriorating work performance; increasing inability to conform behavior or performance to expectations; episodes of depression, panic attacks, or anxiety without an identifiable

cause; unexplained changes in financial or social behavior; relationship issues; and sexual dysfunction.

17. The Board may consider evidence of misconduct or inappropriate conduct—particularly unpremeditated conduct and including conduct that was cited as grounds for the veteran’s separation—to be evidence of an existing mental health condition or of a sexual assault or sexual harassment.
18. The Board is not required to find by a preponderance of the evidence that a particular incident of sexual harassment occurred or that all of the elements of the crime of sexual assault have been met to find by a preponderance of the evidence that a veteran experienced sexual assault or sexual harassment and grant liberal consideration to the veteran’s claims.

***Did the mental health condition exist or did the experience of sexual assault or sexual harassment occur during military service?***

19. A diagnosis made by a licensed psychiatrist or psychologist indicating that a mental health condition existed during military service shall be liberally considered along with other evidence.
20. A determination made by the Department of Veterans Affairs that a veteran’s mental health condition, sexual assault, or sexual harassment is “service connected” is not binding on the Board but shall be considered persuasive evidence that the condition existed or the experience occurred during military service.
21. Liberal consideration is not required for cases involving mental health conditions that were not incurred while the veteran was on active or inactive duty or experiences of sexual assault or sexual harassment that did not occur while the veteran was on active or inactive duty unless the Board finds that the condition or experience was aggravated by or causally related to the veteran’s military service.

***Does the mental health condition or experience of sexual assault or sexual harassment excuse the conduct or poor performance that adversely affected the discharge?***

22. The Board shall liberally consider whether the conduct or poor performance that adversely affected a veteran’s discharge should be considered excused by a mental health condition or experience of sexual assault or sexual harassment that the Board believes to have existed at the time of that conduct or poor performance.
23. A veteran’s mental health condition or experience of sexual assault or sexual harassment does not generally excuse premeditated misconduct. The Board shall exercise caution in assessing the causal relationship between any asserted mental health condition, sexual assault, or sexual harassment and a veteran’s premeditated misconduct.

*Does the mental health condition or sexual assault or sexual harassment outweigh the conduct or poor performance that adversely affected the veteran's discharge or otherwise warrant modifying the discharge?*

24. The Board shall liberally consider whether a mental health condition or experience of sexual assault or sexual harassment that the Board finds to have existed at the time of separation outweighs the conduct or poor performance that adversely affected the veteran's discharge or otherwise warrants modifying the discharge.
25. The Board may find that a veteran's misconduct is so severe that it should not be excused because of a mental health condition, sexual assault, or sexual harassment.
26. When a veteran's narrative reason for separation is a mental health diagnosis, such as "Personality Disorder," the Board shall liberally consider whether the circumstances of the case warrant changing the narrative reason to "Secretarial Authority," "Condition Not a Disability," or another authorized narrative reason for separation.