

CHAPTER 20

STUDY PLAN

DISCHARGE UPGRADES AND CORRECTIONS OF MILITARY RECORDS

OBJECTIVE

To learn how to assist a veteran requesting an upgrade in the character of his or her discharge from service, a change in the narrative reason for separation, and other corrections of military records.

REFERENCES

- 10 United States Code §§ 877-934, 1552, 1553
- 32 Code of Federal Regulations §§ 70.9(b), (c)
- Department of Defense Instruction 1332.28
- Manual for Courts-Martial
- Veterans Benefits Manual, Chapters 20, 21
- Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: *Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (3 Sept. 2014)*
- Memorandum, Under Secretary of Defense, to Secretaries of the Military Departments, subject: *Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code (20 Sept. 2011)*

INTRODUCTION

Veterans whose discharge status is not fully honorable or general (under honorable conditions) have what many refer to as “bad paper.” Bad paper can not only cause problems with eligibility for VA benefits and services, but can also cause potential problems with housing, employment, and educational opportunities. Bad paper can also damage the



psyche, and one’s sense of dignity and pride.

The most common requests for discharge review include upgrading the character of service (e.g. from OTH to honorable), and changing the narrative reason for separation. This chapter discusses both of these options.

UPGRADING THE CHARACTER OF SERVICE

Because bad paper can have such a negative impact on a veteran’s life, many with bad paper desire to upgrade their discharges to honorable or general (under honorable conditions). Veterans may believe their discharge characterization was unjust, or that they have suffered the negative consequences of the bad paper for too long. In addition, many veterans with bad paper feel their military service and experiences were invalidated because their discharges were not honorable.

CHANGING THE REASON FOR DISCHARGE

There are dozens of reasons for separation, including those with potentially negative connotations, such as “misconduct,”

“alcohol abuse rehabilitation failure,” “homosexual conduct,” and “**personality disorder.**” A large population of veterans struggle because their discharge paperwork denotes something derogatory or inaccurate. Thousands of these individuals likely suffered from a medical condition that warranted military medical retirement. Because of a personality disorder discharge; however, they were deprived of this benefit.

Between fiscal years
2001-2010, over 31,000
service members were
discharged for
personality disorders.

DISCHARGE REVIEW BOARDS

Each branch of service has a **Discharge Review Board (DRB)** and a **Board for Correction of Military/Naval Records (BCMR/BCNR)** that review applications for changes to veterans' paperwork including discharge upgrades. (The U.S. Marine Corp does not have its own Board, instead its cases are reviewed by the Navy Board.) The DRBs have more limited powers than the BCMRs. If the relief sought may be granted by a Discharge Review Board, then a veteran must petition the review board before applying to a corrections board.

A DRB may upgrade the characterization of service, except that given as a result of a general court-martial, and may change the narrative reason for separation, except to or from a disability discharge.

BCMRs have more extensive authority: they can upgrade any discharge characterization and change any reason for discharge, change the date of issue of discharge (which may result in back pay), change a discharge to a disability retirement, remove inaccurate performance evaluations or other records, and change reenlistment codes.



The DRBs have different procedures and rules than the BCMRs. The statute of limitations for all Discharge Review Boards is **15 years** from the date of discharge. There are *no* exceptions to this rule. The DRBs are composed of five military officers. Veteran applicants may request either a **documentary review** or a **personal appearance hearing**. The Boards make decisions based on service personnel and medical records (if applicable), the application and accompanying brief, and any other evidence submitted by the applicant. If an applicant's request for upgrade or change in reason for separation is denied via documentary review, the applicant has the right to a personal appearance hearing. At personal appearance hearings, the Boards utilize all written evidence and oral testimony of the applicant and witnesses. Unfortunately, most review boards no longer travel, thus requiring veterans to travel to Washington, DC at their own expense. VSRs should contact the applicable DRB to

find out whether any travel board hearings are planned for California. At personal appearance hearings, the Boards utilize all written evidence and oral testimony of the applicant and witnesses. Personal appearance hearings generally have greater success rates than documentary review alone.

BOARDS FOR CORRECTION OF MILITARY / NAVAL RECORDS

If a veteran has exhausted all available remedies at the appropriate DRB, the veteran may then seek relief from a BCMR. BCMRs are composed of civilian employees of the pertinent military branch. BCMRs maintain a **three year statute of limitations** from the date of discovery of the "error or injustice." Date of discharge, or three years from



the date of an adverse DRB decision. The statute of limitations may be waived "in the interest of justice." Corrections Boards must review entire applications in order to determine whether the statute of limitations should be waived. Generally, if a board would grant relief, the statute of limitations will be waived; if the Board finds the case lacks merit; however,

Veterans whose sole reason for a discharge upgrade is to become eligible for certain VA benefits may want to request a favorable **character of service determination** from the VA instead of, or in addition to, a request for a discharge upgrade. Please see Chapter 19 for more information.

relief is denied on the basis of the statute of limitations rather than the merits of the case. If filing an application after the three year deadline, one must include an explanation of why it is in the interest of justice to waive the deadline.

Boards for Correction of Military Records do not normally hold personal hearings for the applicants. The Board will review the evidence and documentation submitted and will determine

if a hearing would be necessary or appropriate and if so, will notify the applicant accordingly. If the Board determines that a personal hearing is necessary and appropriate—which rarely occurs—the hearing will be conducted in Washington, DC.

BASES FOR UPGRADE OR RECORD CORRECTION

EQUITY/INJUSTICE



Inequity (or injustice) exists when current policies and procedures are more favorable than those existing at the time of discharge; the discharge was inconsistent with disciplinary standards at the time; or quality of service and capability to perform military service make the

discharge unfair. Factors for consideration of the quality of service include military ranks, awards, and decorations; letters of commendation or reprimand; combat service; acts of merit; length of service; prior military service; civilian convictions; courts-martial and other forms of discipline; and records of unauthorized absence.

PROPRIETY/ERROR

Impropriety (or error) may be found to exist when an error of fact, law, procedure or discretion occurred and the error was prejudicial to the discharge process; or a favorable change in law or policy has been enacted that is expressly made retroactive.

CLEMENCY

Veterans with bad conduct or dishonorable discharges received them as the result of a court-martial conviction. This is the equivalent of being convicted of a misdemeanor (bad conduct discharge) or a felony (dishonorable discharge) in the civilian criminal justice system. These negative discharges appear on veterans' criminal rap sheets. Review boards cannot find these veterans not guilty of the crimes for which they were convicted. Instead, they can merely upgrade the character of service. The basis for upgrading such a discharge is **clemency** only.

The standard for clemency is much higher than that for equity or injustice. Veterans must demonstrate not only that the crimes for which they were convicted were a true aberration in their behavior, but they are truly model citizens now. Advocates state that a veteran eligible for clemency must be someone who "walks on water"—that is, it is not enough to

simply “keep a clean nose.” The veteran must have stellar educational, civic, or career accomplishments.

POST-SERVICE HISTORY



The Boards want to see exhaustive evidence regarding the veteran’s positive post-service history. This is important to demonstrate both reform and that the misconduct in service does not speak to the veteran’s character. Important evidence to include, as applicable:

- school transcripts,
- diplomas,
- marriage and birth certificates,
- certificates of completion of alcohol or drug treatment programs, and
- “clearance” letter from the local police stating the veteran has no history of arrests or convictions

SUPPORTING EVIDENCE

A strong application for review also includes at least three letters of support or witness statements. The letters should speak to the veteran’s strong moral character, honesty and integrity, leadership qualities, and anything else that is viewed as helpful. Often, a well-rounded application would include letters from:

- An employer or professor
- A community leader (such as a pastor, if the person is religious)
- A family member or close friend who has known the person for a long time and can attest to strong moral character

It is important to note that review boards will not grant an upgrade based on positive post-service history alone.

DRBs grant upgrades on the basis of **equity** or **propriety**. BCMRs use different terms than the DRBs but they hold the same meaning: instead of equity and propriety BCMRs consider **injustice** or **error**.

MAKING THE CASE FOR DISCHARGE REVIEW

1. INTERVIEW VETERAN TO GET ALL PERTINENT INFORMATION

Meet with the veteran to find out what led to the veteran's discharge, and what the veteran hopes to accomplish with a discharge review. You will want to get very detailed information about the veteran's life pre-service, military history, and post-service history. If, based on the information the veteran provides to you, you believe the veteran may have a valid discharge review claim, move on to the next step.

2. REQUEST AND REVIEW RECORDS

Military and medical records form the primary body of evidence for any case. As such, the first step is to request service personnel and medical records. Please see Chapter 27 for information about requesting records. Other important military records to review include **unit-specific files**, such as unit log books or after-action reports. If the veteran was involved with criminal misconduct in the military, request copies of **criminal investigative files**. If the military ever held an **Article 32 evidentiary hearing** (military equivalent of a grand jury hearing), then request a copy of the hearing summary. If the veteran was court-martialed, be sure to request a copy of the **court-martial transcript**.



ADVOCACY TIP

Talking about the circumstances of a negative discharge can be difficult for many veterans; it can bring up feelings of shame or re-traumatize some. In Chapter 29, you'll learn interviewing skills that can help you through this process.

Upon receipt of the records, review them for any punishment or discipline the veteran received. Commanders may punish service members for anything found to be in violation of good order and discipline.

Non-judicial punishment (NJP) is used regularly as a form of discipline less severe than a court-martial. VSRs

should review the records, noting the number of punishments received, the degrees of severity, and when they occurred. Of course, one should also take note of any awards, good



performance scores, medals, letters of commendation, or other positive notice the veteran received in service. If misconduct occurred only after combat exposure, one could make an argument that the “acting out” was simply a symptom of an underlying medical condition, such as PTSD or TBI.

If the case relates in any way to a medical condition, be sure to obtain current medical records. For example, if a psychiatric disability could have led to misconduct, which in turn led to a bad discharge, include a detailed psychiatric evaluation.



ADVOCACY TIP

Veterans with cognitive impairments, or who served long ago, may not be the most reliable historians; it can be difficult to remember details of military service, particular if it triggers negative emotions. How the veteran relates his or her military experience may be significantly different from what the records reveal. As such, one must always request and review all records.

3. CONDUCT RELEVANT FACTUAL AND LEGAL RESEARCH; GATHER OTHER EVIDENCE

In addition to reviewing the relevant military records, VSRs will want to conduct factual research to corroborate any events that occurred that are not detailed in military records. VSRs may also need to do some factual research to obtain documentation of positive post-service history.

Researching relevant **military regulations** may also be necessary. For example, if the veteran believes he or she should have been given a different narrative reason for discharge, the VSR will need to look up the relevant military regulations related to that discharge, to

determine whether the veteran's circumstances meet all of the elements required for the type of discharge. VSRs generally will need to research both the military separation regulations in place at the time of discharge and now. The most common military regulations VSRs need to review are those related to administrative separations; below you'll find a list of the most common regulations:

- **DODI 1332.14**
- **Air Force:** AFI 36-3208
- **Army:** AR 635-200
- **Coast Guard:** COMDTINST M1000.4
- **Marines:** MCO P1900.16
- **Navy:** MILPERSMAN 1900-1999, NAVPERS 15560D

Other evidence to assemble includes having the veteran write a statement that explains what led to the discharge in his or her words. While the veteran can and should write about why s/he believes the discharge was unfair, the veteran should not write anything negative about the military. The veteran's statement should also include remorse for the misconduct, and information regarding positive post-service history.

4. WRITE BRIEF IN SUPPORT OF THE UPGRADE

Briefs that accompany discharge upgrade or records correction applications are similar to statements in support of claims for VA benefits, with a few important exceptions. First, they generally need to be more detailed than a statement in support of claim.

Second, briefs need to include explicit reasons for upgrading the discharge or correcting the record. Some examples of typical reasons for requesting an upgrade or records correction include:

- The applicant's judgment was impaired by his traumatic brain injury when the minor misconduct occurred.
- The applicant's otherwise laudable combat service renders the discharge inequitable

- The applicant's narrative reason for discharge should be changed from "Homosexual Admission" to "Secretarial Authority" because there is no longer a ban on lesbian, gay, or bisexual individuals serving in the military.

Any/all evidence should be referenced in the brief, and copies of the evidence should be included with the application.

Towards the end of this chapter, there is a sample brief to review.

5. SUBMIT THE APPLICATION

Discharge Review Boards require use of DD Form 293, *Application for Review of Discharge or Dismissal from the Armed Forces of the United States*; Boards for Correction of Military/Naval Records require use of DD Form 149, *Application for Correction of Military Record Under Provisions of Title 10, U.S.C., Section 1552*.

A complete discharge review request includes:

- A cover letter detailing all documents included in the application packet;
- A completed DD 293 for DRBs or DD 149 for BCMRs/BCNRs;
- A brief; and
- Copies of all evidence, including relevant military and other records, veteran's statement, letters of support, and other evidence.

The entire application packet should be sent via certified mail, return receipt requested.

INTERACTION BETWEEN VA AND REVIEW AND CORRECTIONS BOARDS

VA decisions are **not** binding on the review boards, although evidence of service-connection for a disability whose symptoms may have been perceived as misconduct (i.e. PTSD) could provide helpful mitigation.



Decisions of Review and Corrections Boards **are** binding on the VA. There are some upgrades; however, that **will never** grant veterans access to VA benefits and services. This includes veterans whose discharges were upgraded under the following programs:

- The Presidential Memorandum on January 19, 1977 (President Ford's grant of clemency to Vietnam veterans who were wounded or won awards for valor but were discharged as deserters from the military), and
- The Department of Defense Special Discharge Review Program (allowed all veterans discharged with less than honorable discharges an opportunity to apply for upgrades).

RECENT DEVELOPMENTS IN DISCHARGE REVIEW

DISCHARGE REVIEW BOARD STATUTE REVISED

Congress amended the DRB statute in 2009 in response to the discharge of tens of thousands of service members suffering from PTSD or TBI with less than fully honorable discharges. The amended statute includes two important provisions that attempt to address this issue. First, for a veteran deployed "in support of a contingency operation" and who afterwards was diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing PTSD or TBI as a result, one member of the review board panel must be a physician, clinical psychologist, or psychiatrist. Second, if the request for relief "is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain

injury,” the Board must “expedite a final decision and shall accord such cases sufficient priority to achieve an expedited resolution.”

Don't Ask, Don't Tell Policy Repealed



On September 20, 2011, the Department of Defense's controversial “Don't Ask, Don't Tell” (DADT) policy officially ended; over 14,000 service members were discharged under the policy, which was in effect from 1994 through 2011.

Service members discharged under the policy received no reparations or compensation for monetary damages. Those who wish to rejoin receive no special dispensation; they must re-apply through a recruiter and are assessed using the same criteria as other prior-service applicants.

The Department of Defense has issued guidance to the Boards on how to handle requests for upgrade or change in the narrative reason for discharge. Most service members who were discharged under DADT received honorable discharges. Some received general (under honorable conditions) or other than honorable discharges due to so-called “**aggravating factors**”. “Aggravating factors” could include sex with minors or coercive behavior, misconduct that would be punishable regardless of the offender's sexual orientation. But “aggravating factors” also included harmless behavior such as hand holding or hugging on base or in public view. Those punished for the latter should receive upgrades to honorable upon application, while the former will not.



Those with honorable discharges separated under DADT may still feel demeaned by the narrative reason for discharge on their DD214s reading “homosexuality,” “homosexual conduct,” or “homosexual admission.” Veterans who apply for a

change in the narrative reason for discharge will likely be granted one.

DEPARTMENT OF DEFENSE SETS NEW POLICY FOR BCMRs/BCNRs

On September 3, 2014, in response to a lawsuit by five Vietnam veterans discharged with less than fully honorable discharges, the Department of Defense announced a new policy (known as the “**Hagel Memo**”) relating to discharges of service members with PTSD. According to the Hagel Memo, the BCMRs are supposed to:

- Give liberal consideration to military records that document symptoms of PTSD despite a lack of diagnosis (PTSD was not a diagnosable illness prior to 1980);
- Give liberal consideration to a PTSD diagnosis from a civilian provider;
- Give special consideration to a Department of Veterans Affairs (VA) diagnosis of service-connected PTSD;
- Consider whether undiagnosed PTSD contributed to misconduct at the time of discharge;
- Liberally waive time limits to consider applications or reconsider prior decisions;
- Give applications that involve PTSD timely consideration; and
- Consult Department of Defense mental health professionals to assess a veteran’s claim of PTSD.

It is too early to tell what affect this Memo will have on Boards’ decisions pertaining to veterans with PTSD.

RECOMMENDED READING

- *The American Veterans and Servicemembers Survival Guide*, Chapters 15 and 16, available at www.nvlsp.org/images/products/survivalguide.pdf.



STUDY QUESTIONS

Using the assigned references and reading materials, answer the following questions:

1. The BCMRs' deadline of three years can be interpreted to mean three years from the date of learning of the existence of the BCMR. (T/F)
10 U.S.C. §1552(b)
2. A former member of the Air Force who applies to the Air Force BCMR can elect to have a personal appearance hearing before the BCMR. (T/F)
32 CFR 865.4(f)
3. Individuals who received "homosexual" discharges have been allowed to return to the positions they held prior to their discharge under "Don't Ask, Don't Tell". (T/F)
10 U.S.C. § 654, Chapter 37
4. The DRBs deadline of 15 years can be waived in the interest of justice. (T/F)
10 U.S.C. § 1553(a)
5. Hagel's Memo requires BCMRs to grant upgrades to Vietnam veterans with documented symptoms of PTSD during service. (T/F)
Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: *Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (3 Sept. 2014).*
6. The BCMRs' deadline of three years can be interpreted to mean three years from the date of a DRB decision. (T/F)
10 U.S.C. § 1552(b)
7. The DRB must have a physician, clinical psychologist, or psychiatrist sit as a member of the Board when reviewing the case of any veteran with PTSD or TBI. (T/F)
10 U.S.C. § 1553(d)(1)
8. The DRBs must expedite a final decision when an application involves in whole or in part, matters pertaining to PTSD or TBI. (T/F)
10 U.S.C. § 1553(d)(2)

9. The DRBs have the power to do which of the following:
 - a. Change a re-enlistment code
 - b. Change a date of discharge
 - c. Change the "Narrative reason for discharge"
 - d. Grant a medical discharge

32 C.F.R. § 70.3(e)

10. The BCMRs can grant full [longevity] retirement if they deem it appropriate. (T/F)

10 U.S.C. § 1552(a)(1)