

Intro to Discharge Upgrades with Some Intermediate Discharge Practice

- Rob Cuthbert, former Pro Bono Coordinator of the Discharge Upgrade Clinic at the Veteran Advocacy Project of the Urban Justice Center
- Alan Goldsmith, Chair, Veterans and Military Law Section, Federal Bar Association; Former Section Head, BCNR
- Dana Montalto, Attorney & Clinical Instructor, Veterans Legal Clinic, Legal Services Center of Harvard Law School

Veterans Law CLE

Missoula, Montana

March 20-21, 2019

Alexander Blewett III

SCHOOL OF LAW

UNIVERSITY OF MONTANA

Agenda

Part I: The Law of Discharge Upgrades—Dana Montalto

Part II: Mechanisms For Discharge, the Boards of Review in Depth, and Judicial Review of DU Applications —Alan Goldsmith

Part III: Discharge Upgrades: Step by Step—Dana Montalto

Part IV: Investigation for DU Applications with a Focus on the Discharge Review Boards—Rob Cuthbert

Q&A

Alexander Blewett III

SCHOOL OF LAW

UNIVERSITY OF MONTANA



The Law of Discharge Upgrades

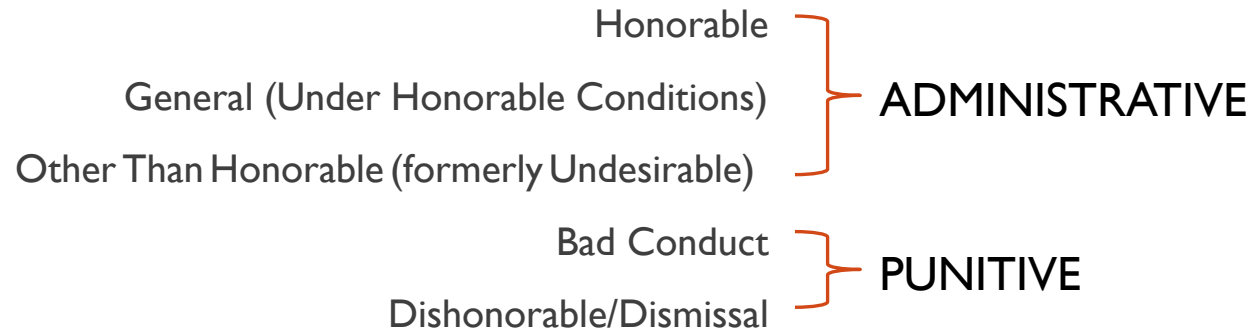
DANA MONTALTO, ATTORNEY & CLINICAL INSTRUCTOR

VETERANS LEGAL CLINIC, LEGAL SERVICES CENTER OF
HARVARD LAW SCHOOL

UNIVERSITY OF MONTANA VETERANS LAW CLE, MARCH 21, 2019



Discharge Status & Narrative



NARRATIVE REASON EXAMPLES:

- Completion of Required Active Service
- Misconduct (Pattern of Misconduct, Drug Abuse, Serious Offense)
- In Lieu of Court-Martial
- Personality Disorder
- Homosexual Act, Homosexual Admission (formerly)

Important!
Not talking today about
medical discharge or
retirement.



Discharge Status by the Numbers

22 million veterans in the United States and 98,300 veterans in Montana

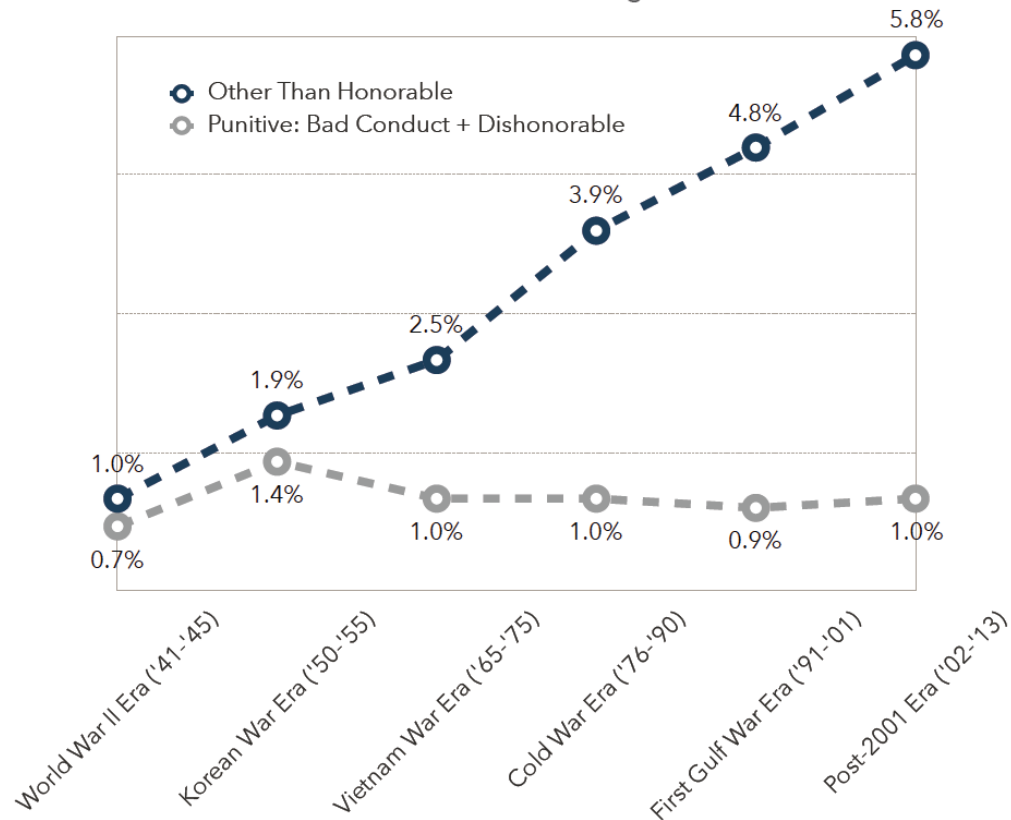
From World War II to the present, more than 2.36 million veterans received a less-than-fully-honorable discharge

	General	OTH/BCD/DD	%General	%OTH/BCD/DD
World War II	12,979	118,327	0.2%	1.7%
Korean War	122,381	137,509	3.0%	3.3%
Vietnam War	354,484	267,199	3.9%	3.5%
Gulf War ('91-'01)	128,315	139,445	5.3%	4.9%
Post-9/11 ('02-'13)	150,434	121,490	8.4%	6.8%

Source: Veterans Legal Clinic, Underserved (2016).

Discharge Status by the Numbers

Veterans with Bad-Paper Discharges as Percent of All Veterans with Characterized Discharges



Source: Veterans Legal Clinic, Underserved (2016).

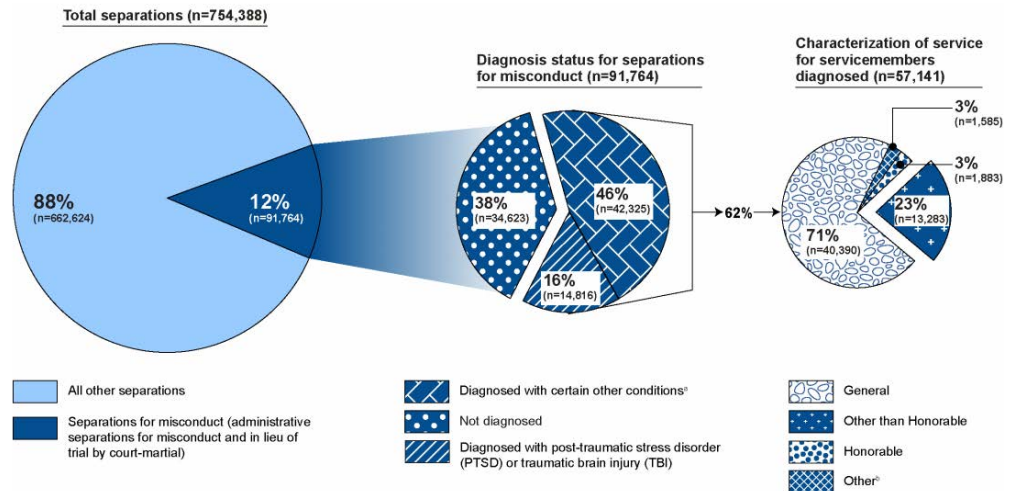
Discharge Status by the Numbers

Marine combat veterans diagnosed with PTSD 11 times more likely to be discharged for “misconduct”

From 2009 to 2015, Army discharged for “misconduct” 22,000 Soldiers who had deployed and been diagnosed with PTSD or TBI

From FY2011 to FY2015, 62% of servicemembers separated for misconduct had been diagnosed with a mental health condition

Figure 2: Diagnosis Status and Characterization of Service for Servicemembers Separated for Misconduct from Fiscal Years 2011 through 2015



Sources: Highfill-McRoy et al., Psychiatric diagnoses and punishment for misconduct (2010); NPR, Thousands of Soldiers with Mental Health Disorders Kicked Out for Misconduct (2015); GAO, Actions Needed to Ensure PTSD & TBI Are Considered in Misconduct Separations (2017).



Discharge Status by the Numbers

Disparities exist among service branches:

Enlisted Servicemembers Discharged as Percent of Characterized Discharges, FY11

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
Army	81%	15%	3%	0.6%	0.1%
Navy	85%	8%	7%	0.3%	0.0%
Marine Corps	86%	3%	10%	1%	0.1%
Air Force	89%	10%	0.5%	0.5%	0.0%
Total	84%	10%	5%	1%	0.1%

Source: Veterans Legal Clinic, Underserved (2016).



Top 5 Discharge Upgrade Myths

1. The military will automatically upgrade a discharge after six months.
TRUTH: There is no such thing as an “automatic upgrade.” You must apply.
2. It’s easy to “go get an upgrade.”
TRUTH: Success rates are quite low, and it can take many months to apply and get a decision.
3. It’s so difficult to get an upgrade that it’s not worth it.
TRUTH: It is possible for some veterans to get an upgrade, and you can improve your chances.
4. Filling out the DD 149/DD 293 form and sending it in is sufficient to get an upgrade.
TRUTH: Rarely is it sufficient to just fill out the single-page form. Need evidence and arguments.
5. A veteran with a less-than-honorable discharge cannot get any VA services until s/he gets an upgrade.
TRUTH: Veterans may be able to access full or limited VA services even without an upgrade.



The Military Review Boards

DISCHARGE REVIEW BOARDS

Army Discharge Review Board

Navy Discharge Review Board

Air Force Discharge Review Board

Coast Guard Discharge Review Board

RECORDS CORRECTION BOARDS

Army Board for Correction of Military Records

Board for Correction of Naval Records

Air Force Board for Correction of Military Records

Coast Guard Board for Correction of Military Records

Important!

1. Boards are within DOD *not* VA.
(There is no such thing as a “VA upgrade.”)
2. There are no automatic upgrades!
(You must apply. Success is not guaranteed.)



Military Review Boards: Procedure

	Discharge Review Boards	Records Correction Boards
Application Form	DD 293	DD 149
Members	5 officers (usually active duty officers)	3 civilian employees
Voting	Majority vote	Majority vote
Deadline	15 years from date of discharge	Within 3 years of discovery of the “error or injustice” that requires correction (but waivable in the interest of justice)
GCM Discharge	Cannot change discharge by GCM	Can change discharge by GCM
Hearing	Right to a personal hearing	No right to a hearing, may request
Reconsideration	Allowed under circumstances 32 CFR 70.9	Granted if new and material evidence
Mental Health	If veteran has PTSD/TBI & served in contingency operation, 1 member is mental health doctor	May request medical advisory opinion



Military Review Boards: Law

DISCHARGE REVIEW BOARDS

- “Propriety” or “Equity”
- For BCD: “Clemency”

RECORDS CORRECTION BOARDS

- “Error” or “Injustice”
- For BCD/DD: “Clemency”

PROPRIETY OR ERROR



ILLEGALITY

EQUITY, INJUSTICE OR CLEMENCY



UNFAIRNESS



Rates of Success at Boards

Historically, rates of success at Boards have varied considerably.

Currently, rates of success are pretty low (single digits) but higher for certain categories of applicants.

Applications under the Hagel Memorandum (PTSD/TBI) have higher rates of success. For 2017, data are:

- Army 47%
- Navy 31%
- Air Force 38%

Important!

It's not easy to "go get an upgrade."
But preparation can increase chances of success.



Part II: Mechanisms For Discharge, the Boards of Review in Depth, and Judicial Review of Discharge Upgrade Applications

Alan Goldsmith, Chair, Veterans and Military Law Section, Federal Bar Association, Former Section Head; Board for Correction of Naval Records

University of Montana Alexander Blewett III School of Law

Veterans Law CLE, March 21, 2019

Who is a “Veteran?”



“ . . . a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions *other than dishonorable.*”

38 USC § 101 (2)

Why Discharge Review? (no “automatic” upgrades)



1. VA/Federal/State Benefits
(see attachment)
2. Employment
3. Self-Image

Recap: Types of Discharges



- 1. Administrative Discharges – any separation from the Armed Forces not imposed by a court-martial (Honorable, General, Under Other Than Honorable Conditions/Undesirable).
- 2. Punitive Discharges – any discharge adjudged by a court-martial (Bad Conduct, Dishonorable, Dismissal [officer]).

Recap: Character of Discharge



- Honorable ([HD] most favorable characterization)
- General ([GD] Under Honorable Conditions)
- Under Other Than Honorable Conditions ([OTH] formerly “undesirable”)
- Bad Conduct Discharge (BCD)
- Dishonorable Discharge (DD)
- Dismissal (Officers Only)
- Entry Level Separation/Uncharacterized

VA Benefits



- As a general rule, to be entitled to VA benefits a former service member has served on active duty for twenty-four months (post Sep. '80) and received at least a “General” (under honorable conditions) discharge.
- If a former service member has received anything less (other than honorable conditions, bad conduct, dishonorable) he/she is usually precluded from VA benefits.
- Discharges considered to characterize service as “under conditions of dishonor.”
- If the individual completed the full period of active duty or was discharged for hardship, the 24-month requirement does not apply.
- For post-1984 educational benefits (Montgomery GI Bill [MGIB]), a fully honorable discharge is required.



Reasons For Discharge

- Convenience of the government
- Unsuitability (pre-1982)
- Unsatisfactory Performance
- Misconduct
- Unfitness (pre-1976)
- Discharge in Lieu of Court-Martial
- Sentence of Court-Martial (punitive)

Appendix A
Sample Separation from Service Form



THIS IS AN OPTIONAL FORMULARY SEPARATION FORM.

1. COPY MANUFACTURER'S NAME: FORM 1

2. SERVICE NUMBER: 032

3. SOCIAL SECURITY NUMBER: 682

4. BRANCH, COMPONENT AND GRADE OF LEADER: USMC

5. GRADE, RATE OR RANK: Private

6. DATE OF GRADE, RATE OR RANK: 1 Jun 68

7. NAME OF LEADER: Portaferry, North Ireland

8. DATE OF BIRTH: 17 May 45

9. ADDRESS OF LEADER: Local Board #21, Poughkeepsie, New York

10. DATE OF ENTRY INTO SERVICE: 30 Jul 66

11. STATION OF LEADER AT WHICH EMPLOYED: Marine Barracks, New York 11251

12. TRANSFERRED TO MARINE CORPS RESERVE: Naval Base, New York, NY

13. MARINE CORPS RESERVE: 1525th Marine Corps Personnel Marine and MCO 1910.23

14. DATE OF TRANSFER TO RESERVE: 30 Sep 66

15. ADDRESS OF LEADER AT WHICH EMPLOYED: 27th Mar. Amphib. FPC SFRAH, HONOLULU

16. STATION OF LEADER AT WHICH EMPLOYED: Marine Corps Automated Data Service Center, 600 E. Main St., Kansas City, Missouri

17. DATE OF ENTRY INTO SERVICE: 2 Oct 72

18. ADDRESS OF LEADER AT WHICH EMPLOYED: Albany, New York

19. GRADE, RATE OR RANK: Private (E-4)

20. DATE OF GRADE, RATE OR RANK: 3 Oct 66

STATION OF LEADER AT WHICH EMPLOYED	PLANS	MONTHS	DATE
Poughkeepsie, Dutchess, New York 2603	01	11	68
Honolulu Engineer (Honolulu)	01	12	68
Albany	01	12	68
Honolulu	01	02	75

21. MEDALS AND DECORATIONS: Purple Heart Medal (Vietnam); National Defense Service Medal; Vietnam Service Medal; Vietnam Campaign Medal w/Device (1966-68); Rifle Marksmanship Qualification Badge.

22. EDUCATION: College 2 - Physics; MCS, MCS, COLLEF - 4 years - 1967 - Combat Engineer Course; WGI, Wash, D. C. - 1968 - Marine Corp 6 Week Dict

23. SERVICE RECORD: AC doing

24. AMOUNT OF ALLOWANCE: N/A

25. NAME: N/A

26. GRADE: N/A

27. ADDRESS OF LEADER AT WHICH EMPLOYED: Head Ordnance Medal, Fort Belvoir, #3246

28. DATE OF ENTRY INTO SERVICE: 30 Sep 66

29. ADDRESS OF LEADER AT WHICH EMPLOYED: Albany, New York

30. DATE OF GRADE, RATE OR RANK: 3 Oct 66

31. SIGNATURE OF OFFICER AUTHORIZED TO SIGN: [Signature]

32. SIGNATURE OF OFFICER AUTHORIZED TO SIGN: [Signature]

Basic Military Justice



- Nonjudicial Punishment (NJP)
(AKA Captain's Mast, Article 15, Office Hours)
- Summary Court-Martial (SCM)
- Special Court-Martial (SPCM)
- General Courts-Martial (GCM)

Nonjudicial punishment



- Uniform Code of Military Justice (UCMJ), Article 15 (10 USC 815).
- Imposed by commanding officer for minor offenses after notice and hearing.
- Limitations on punishment are set by the grade of officer imposing punishment.
- Punishments may include reprimand, reduction in rank, loss of pay and restraints on liberty.
- Appeals to next senior in command.

Hierarchy of Courts-Martial



- Summary Court-Martial (SCM)– Used for relatively minor offenses committed by enlisted personnel; punishment is limited to confinement for 30 days; partial forfeitures of one month’s pay and reduction in grade (10 USC 820).
- Special Court-Martial (SPCM)– Often compared to a misdemeanor court. Punishment limited to confinement for one year; partial forfeitures of pay for one year ; reduction in grade for enlisted personnel and a bad conduct discharge (BCD) for enlisted personnel (10 USC 819).
- General Court-Martial (GCM)– Comparable to courts handling felony cases; may impose punishments including death or life imprisonment, BCD, DD or dismissal (officers) (10 USC 818).

Punitive Discharges



- BCD – Imposed by either a SPCM or GCM on enlisted members.
- DD– Imposed by a GCM on enlisted members and warrant officers (WO1).
- Dismissal – Imposed by a GCM on commissioned officers and students at a service academy.

Administrative Discharges

10 USC 1169 (enlisted) & 10 USC 630, 1181-86 (officer)



- Any termination of service prior to the completion of enlistment (includes entry level separation).
- DoDI 1332.14 (enlisted); DoDI 1332.30 (officer); service regulations.
- May not require a due process hearing.
- Discharge authority is an officer exercising SPCM or GCM jurisdiction (enlisted); or service secretary or designee (officer).

The Administrative Discharge Process



- Initiated by a commander, typically a company grade (O-1 to O-3) or field grade (O-4 to O-6) officer.
- Service member must be notified of intent to discharge.
- If an honorable or general discharge is proposed and the respondent has less than six years of service, he or she may consult with a lawyer and respond in writing to the recommendation for discharge.

The Administrative Discharge Process (Continued)



- If the respondent has six years of service or is facing discharge under other than honorable conditions, a board hearing is authorized.
- At the hearing, the respondent may be represented by military counsel, present evidence and call witnesses.
- After counsel review of the board's recommendations on discharge and characterization, the decision is made by the discharge authority.

The Legislative Reorganization Act of 1948



- Purpose was to eliminate “private bills.”
- Empowered Correction Boards and other similar entities to do all the things previously handled by Congress by private relief act.
- Some limitations e.g., no review of conviction by courts-martial; only clemency on the sentence.

Exclusive Remedy



- Chappell v. Wallace, 426 US 206 (1983)
Availability of correction boards and other remedies means Federal Tort Claims Act does not apply to actions of superiors in military.
- United States v. Stanley, 483 US 669 (1987) Reiterates Feres Doctrine.

In Depth: Discharge Review Boards (DRBs)



- 10 USC 1553; DRB for each branch.
- DD 293 – Application form (attached).
- Board members are military officers.
- Hearings generally held in Washington DC area, with some exceptions.
- Statutory 15-year statute of limitations; but see DOD Memo of Feb. 24, 2016/PTSD & TBI (attached).
- May only review GD, OTH & SPCM/BCD .
- HD under very limited, specific circumstances related to record correction.



DRBs: Panels of 5 Senior Commissioned Officers (With Some Exceptions)

- "Two Bites at the Apple:" Either a document review or a personal appearance – if the veteran is denied relief on a document review he/she may request a personal appearance.
- Allege an "inequity" or an "impropriety." An "inequity" equates to a departure from service traditions and standards. An "impropriety" generally refers to legal or factual errors in the process. (see attachment for issues/index categories)

Special considerations for TBI and PTSD



- 10 USC 1553(d)
- (1) Where applicant was diagnosed with Traumatic Brain Injury (TBI) or Post Traumatic Stress Disorder (PTSD) during a deployment and the application for review is based on that diagnosis, the DRB panel must include a medical or mental health professional.
- (2) Expedited and liberal consideration required.

In Depth: Boards for Correction of Military or Naval Records (BCMR/BCNR)



- 10 USC 1552 – Secretary may correct any record of their department when they consider it necessary to correct an error or remove an injustice.
- Acts through “boards of civilians.” Board membership is not a full time position but an additional duty. The members may or may not have prior military service.
- Must apply within three years of discovery of the error or injustice (See caveat).

Boards for Correction of Military or Naval Records(BCMR/BCNR) (Continued)



- Application– DD149 (attached).
- Senior Civilian employees (GS-13 through SES) of each service department.
- Mostly a review on the record. In rare cases, the board may authorize a hearing.
- May review any discharge or dismissal.
- Considers appeals of DRB decisions.
- May remove bar to VA benefits.

Strategies



- Failure to follow discharge regulations.
- Failure to properly counsel former member as to conduct or performance of duty.
- Improper basis for discharge (e.g. vet was discharged for misconduct but should have been separated for unsuitability).
- Unduly harsh given extenuating/mitigating factors-e.g. the overall quality of the veteran's service, combat service, personal decoration, personal problems (see list of issues/categories).

Strategies (Cont'd)



- Changed standards (i.e. the discharge may have been proper when issued but new standards warrant a better discharge).
- The former member had medical or mental issues, especially TBI or PTSD (see attached DoD memos; TBI/PTSD checklists).
- The former member has led an exemplary post-service life.

Strategies (Cont'd)



- Insure that your client has exhausted all intraservice remedies (e.g., the DRB, if applicable).
- State all legal claims and every argument in equity (the standard is error or “**injustice**”).
- When obtained by the board, request to review records.
- Draft a clear concise statement of facts and references. Cite and attach, if possible, any relevant law or regulation. Make a clear statement of the relief you are seeking. Anticipate possible judicial review.
- Any witness statements should be under oath.
- Use expert witnesses where germane (e.g. substance abuse, mental status).
- If the client is presentable, request a personal appearance even though they are rarely granted.

PTSD vs. Personality/Adjustment Disorder



- Many vets discharged with a personality/adjustment disorder were really suffering from PTSD (new discharge regs).
- Check med records to see if the vet was seen by a military mental health professional before separation and/or processing.
- Particularly important for vets discharged prior to 1980—PTSD not recognized until then.

DOD Guidance on Special Situations



- SecDef Memorandum of Sept 3, 2014 w/supp—PTSD (attached).
- SecDef Memorandum of Aug. 25, 2017—Mental Conditions, Sexual Assault, Sexual Harrassment (attached).

The Advisory (Staff) Opinion



- Board may not request such an opinion; often the BCNR does not do so in discharge cases; the Air Force BCMR almost always requests such an opinion.
- The board must provide a copy of the opinion; always ask that it be provided before the board meets.
- Always respond to the opinion even if favorable – the board is not bound by it.

Special Situations



- Discharge/resignation in lieu of trial or administrative proceedings (RILO, GOS, Chapter 10) Very difficult to change. May not relitigate the underlying misconduct Wilson v. McHugh, 842 F.Supp 310 (D.D.C. 2012).
- Discharge requested by accused during sentencing at a court-martial.
- I lied to get out of the military. Weir v. United States, 474 F2d. 617 (CtCl. 1973).
- Reserve discharges – Is the basis something unrelated to the former member's service?

Special Situations (Continued)



- Homosexual conduct/tendencies (aggravating factors).
- PP 4313 – Clemency Discharges/SDRP discharges.
- Unavailability of records—duty of board to assist.
- Recommendation for corrective action—who must approve



Reconsideration By the Boards of Review

1. Must it be supported by “new and material evidence?” (statute v. regulations)
2. Who makes the decision, staff/Board?
3. Time limits – no time limit for filing request for reconsideration
4. See Feb. 24, 2016 DoD Memo/TBI/PTSD (attached)

Judicial Review



- May be either to the Court of Federal Claims or District Court.
- “Little Tucker Act” 28 USC 1346(a)(2).
- General six-year statute of limitations runs from the date of discharge
Martinez v. United States 333 Fed 3d 1295 (Fed Cir 2003).
- May also seek review under the APA; most circuits apply an “arbitrary and capricious” standard to such decisions.
- Deferential standard of review See Kreis v. Secretary of the Air Force, 866 F2d 1508 (D.C. Cir 1989).
- Look at sufficiency of decisional document.

Additional Avenues of Review



- Art 74 UCMJ (10 USC 874) – Secretary may substitute administrative discharge for a punitive discharge.
- Art 73 UCMJ (10 USC 873) petition for a new trial – must be made within two years of date of trial. Similar to federal standard.
- Art 69 UCMJ (10 USC 869) review of court-martial not reviewable by CCA or CAAF (two years to seek review).
- 10 USC 951 et seq. – Clemency and Parole Board – can direct remission of punitive discharge.



Part III: Discharge Upgrades: Step by Step

DANA MONTALTO, ATTORNEY & CLINICAL INSTRUCTOR
VETERANS LEGAL CLINIC, LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
UNIVERSITY OF MONTANA VETERANS LAW CLE, MARCH 21, 2019



Step by Step

1. Meet with veteran
2. Gather documents
3. Research law
4. Get letters of support
5. Draft memorandum
6. Submit application to the Board
7. Hearing (if applicable)
8. Wait ...
9. Get decision and evaluate next steps

Step I: Meet with veteran

Have a conversation with the veteran about:

- What happened during the veteran's military service
 - Review total service history from enlistment to discharge
 - Discuss in detail the events that led up to discharge
 - Consider carefully how to address any trauma history
 - Also ask what the veteran has been doing since discharge
- Why the veteran wants a discharge upgrade
 - Any prior attempts to upgrade discharge
- Who might be willing to write letters of support for application
- Permission (written) to request various records
- Plan for representation going forward
- Questions veteran has about discharge upgrades





Step I: Meet with veteran

Common questions veterans ask about discharge upgrades

- How long will it take to put together an application?
- How long will it take for the Board to make a decision?
- Who are the Board members?
- If there is a hearing, where is it and how am I supposed to get there?
- What is the likelihood of success?
- If the Board denies my application, what happens next?
- What can I be doing to make my application stronger?
- Can I access any veteran benefits in the meantime?



Step 2: Gather documents

Government records

- ***Official Military Personnel File: Standard Form 180
- Service Treatment Records: Standard Form 180
- DOD Mental Health or In-Patient Treatment Records: DD Form 2870
- VA Claims File: Privacy Act Waiver Form or VA Form 3288
- VA Medical Records: VA Form 10-5345
- Other military or service records: Freedom of Information Act Request with Privacy Act Waiver
- Criminal records check: State or federal background check or local police department

ADVOCACY TIP!

Congressional district offices can help with obtaining records.

Step 2: Gather documents

Non-Government records

- Private medical records
- Letters or correspondence
- Government or NGO reports
- Diaries
- Photographs





Step 2: Gather documents

Selected relevant NGO & government reports:

Government Accountability Office, *Actions Needed to Ensure Post Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations*,
<https://www.gao.gov/assets/690/684608.pdf>

Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors*, https://www.hrw.org/sites/default/files/report_pdf/us0516_militaryweb_1.pdf

Veterans Legal Clinic, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*,
<https://www.swords-to-plowshares.org/wp-content/uploads/Underserved.pdf>

YLS Veterans Legal Services Clinic, *Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem*,
https://law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf

YLS Veterans Legal Services Clinic, *Unfinished Business: Correcting "Bad Paper" for Veterans with PTSD*, <https://law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf>



Step 2: Gather documents

Do not need to gather all of the types of records listed above.

Think about what will **support** your arguments for an upgrade and make the application **stronger**.

Review the **Official Military Personnel File** carefully.

The Board will have its own copy of the OMPF.

A good advocate will address the “bad” parts of the OMPF, will fill in any gaps, and will build a more complete record of the veteran’s service.

Common challenge: “It’s taking forever to get my client’s records.”



CHALLENGES

- Wait times > 120 days for Official Military Personnel File (OMPF) & Service Treatment Records (STR) requests using SF180
- Private medical providers ignore record request
- VA does not respond to request for VA claims file
- Only partial records provided

TIPS

- After 45-60 days, send follow up request letter
- After 60 days or longer, make a phone call and ask to expedite the request
- Set calendar reminders to prompt follow up
- Seek assistance from congressional office
- Use private medical provider’s own release forms
- On SF180, check all boxes and request “full and complete military personnel and medical records”



Step 3: Research law

Military Review Board decisions

- Available online: <http://boards.law.af.mil/>
- BCMR decisions available on Lexis

Military Review Board regulations & memoranda

- 32 C.F.R. 70.9 Discharge Review Board regulations

Military regulations

- Separation regulations (current and past)
- Other applicable regulations

Federal statutes and federal court decisions

Boards of Review Reading Rooms

This is the Department of Defense Electronic Reading Room for the Military Departments Boards for the Corrections of Military/Naval Records(BCMR) and the Discharge Review Boards(DRB). The Reading Room contains the decisional documents for each of the Boards from October 1998. The personally identifiable information has been removed (redacted) from these documents.

- ▶ Air Force Boards
- ▶ Army Boards
- ▶ Navy Boards
- ▶ Coast Guard
- ▶ Boards Statistics

Please Read Our Privacy and Security Notice
Disclaimers & Government Information
Page last updated: 28 February 2018

Contact
The Department of the Army is the executive agent for this DOD Boards Reading Room.
If you have questions about this reading room, please contact usarmy.pentagon.hqda-urba.mbx.webmaster@mail.mil.



Step 3: Research law

May find a legal error:

- New law or policy that is expressly **retroactive**.
- **Violation** of law that **prejudiced** the servicemember.

Therefore, see whether separation process violated Constitution, statute, or regulation.

May find a law-based injustice:

- New law or policy that represents a **substantial enhancement of rights** such that there is substantial doubt that veteran serving today would receive same discharge.



Step 3: Board decisions

Reading past decisions of the Boards may **provide information** about what arguments and evidence are persuasive (or not).

Past decisions of the BCMRs have **some precedential effect**.

Wilhelmus v. Geren, 796 F. Supp. 2d 157 (D.D.C. 2011): the BCMRs must adhere to its own precedent in adjudicating cases, because to do otherwise would constitute arbitrary & capricious action in violation of the Administrative Procedures Act.

In memorandum, **cite** any persuasive, helpful, and substantially similar past decisions of the relevant Board, highlighting similarities between that case and present application, and **include** copies of decisions as exhibits.

Common challenge: “I can’t find any useful precedent.”




CHALLENGE

- Board websites are hard to navigate and search for cases
- Law is sparse
- Changes on the horizon: recent passage of Amendment #42 to the National Defense Authorization Act (NDAA) will require the Boards of Correction of Military Records (BCMRs) to publish their decisions with indices and summaries

Boards of Review Reading Rooms

boards.law.af.mil

Westlaw CAVC NOVA DVS DAV Local Offices VA.gov HARVIE LSC - WP login



Advance Search
Enter Search Terms:
PTSD
Select board to search
Air Force BCMR
Search

Boards of Review Reading Rooms

This is the Department of Defense Electronic Reading Room for the Military Departments Boards for the Corrections of Military/Naval Records(BCMR) and the Discharge Review Boards(DRB). The Reading Room contains the decisional documents for each of the Boards from October 1998. The personally identifiable information has been removed (redacted) from these documents.

- [Air Force Boards](#)
- [Army Boards](#)
- [Navy Boards](#)
- [Coast Guard](#)
- [Boards Statistics](#)

Common challenge: “I can’t find any useful precedent.”



Tips:

- Search using a single keyword
- Where possible, search by number (e.g. separation regulation)
- Yale Law School lawsuit resulted in settlement requiring DOD to disclose, on a quarterly basis, reports on: 1) the number of discharge upgrade applications submitted to the boards; 2) the number of such applications granted and denied by each board; and 3) the docket number for each. See YLS website for reports with case numbers:
<https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/vva-and-nvclr-v-dod-ptsd-upgrade-foia-suit>
- Board members generally care more about strength of argument than about whether you cite precedent

Step 3: Separation regulations

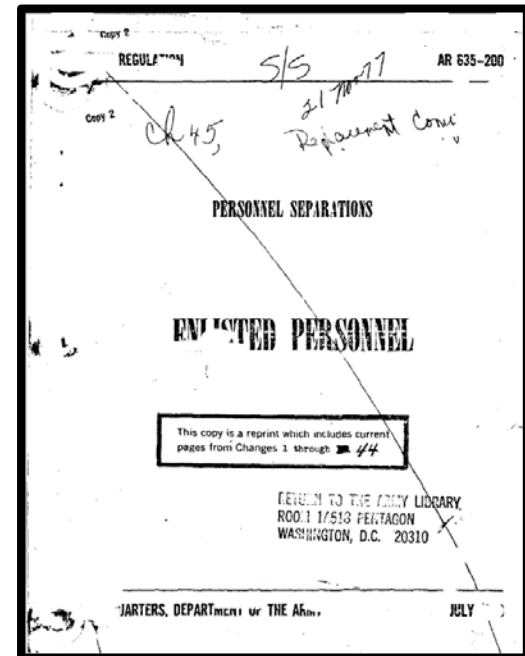
Look at the separation regulations for the particular service branch that applied at the time of the veteran's discharge.

Regulations are often online. If not, write to the service branch to request them under the Freedom of Information Act.

NOTE

There have been significant changes in regulations affecting servicemembers who:

- Are being discharged for *Personality Disorder*
- Have been diagnosed with *PTSD* or *TBI* and *deployed* in support of a contingency operation
- Have been diagnosed with *PTSD* or *TBI* and experienced *Military Sexual Trauma*
- Are being discharged on account of their *sexual orientation*





Step 3: Board Memoranda

A few key DOD memoranda from recent years:

DADT Repeal Memo: on occasion of repeal of Don't Ask, Don't Tell, instructs Boards to change discharge statuses, narrative reasons, and other derogatory information where veteran (1) discharged under DADT or prior policies and (2) no aggravating circumstances

Hagel Memo: instructs Boards to give “liberal consideration” of applications of Vietnam veterans with PTSD or related conditions that contributed to misconduct leading to OTH discharge; applied broadly to all eras of service, all types of discharge, and all review Boards

Carson Memo: provides for liberal waiver of statute of limitations period at BCMRs for applications based on Hagel Memo

Kurta Memo: expressly expands “liberal consideration” to veterans of all eras, with any mental health condition, with any discharge characterization, before all Boards; look for “markers” of mental health disorder

Step 3: DADT Repeal Memorandum

Don't Ask, Don't Tell & prior policies: servicemembers could be discharged for “homosexual acts or conduct” or “homosexual admission” and sometimes could receive a less-than-honorable discharge

After the repeal of Don't Ask, Don't Tell in 2011, DOD issued a policy about discharge upgrades and records correction for servicemembers separated under DADT

- **Upgrade** less-than-honorable discharge status and change narrative reason
- *Unless* there are “**aggravating circumstances**”





Step 3: Kurta Memorandum

Discharge impacted by a mental health condition such as **PTSD** or **TBI**

Kurta Memorandum listed four questions typically involved in discharge relief:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
2. Did that condition exist/experience occur during military service?
3. Does that condition actually excuse or mitigate the discharge?
4. Does that condition or experience outweigh the discharge?

ADVOCACY TIP!

Answer the four questions.

ADVOCACY TIP!

Read the Memos and quote helpful language. There's good stuff in there!



Step 3: Personality Disorder DUs

No Memorandum on discharges for improper diagnosis of Personality Disorder or Adjustment Disorder

May seek change to narrative reason for separation, and potentially also characterization of discharge.

PD misdiagnosis cases can be relatively straightforward to prove: if no PD dx now, then no dx in service.

Common arguments for discharge relief often include:

- Error or Impropriety in following separation regulations for PD/AD discharge
- Unjust or inequitable because subsequent changes in separation regulations substantially enhance the rights provided to servicemembers
- Unjust or inequitable because veteran did not have PD/AD—instead correct diagnosis was PTSD, TBI, or other mental health condition
- (If less-than-fully-honorable) Unjust or inequitable because no record of misconduct

ADVOCACY TIP!

Medical evidence is key: doctor opine that no PD diagnosis—then or now.



Step 3: DU Manuals

Addlestone & Ettlinger, *Military Discharge Upgrading* (1990),
https://ctveteranslegal.org/wp-content/uploads/2012/12/MilitaryDischargeUpgrading_lr.pdf

Self-Help Materials:

Swords to Plowshares, *Upgrading Your Military Discharge & Changing the Reason for Your Discharge*, <https://www.swords-to-plowshares.org/wp-content/uploads/Upgrading-Your-Discharge-1.pdf>

YLS Veterans Legal Services Clinic, *Applying for a Discharge Upgrade When You Have PTSD*,
https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_PTSDdischargeUpgradeSupplement.pdf



Step 4: Get letters of support

Two main categories:

1. Fact witnesses: people who saw important events and will talk about them
2. Character references: people who will say nice things about the veteran

Possible supporters:

- Fellow servicemember
- Family member
- Friend
- Employer
- Clergy member
- Community service organization
- Teacher or professor
- Social worker or case manager



Step 4: Get letters of support

A strong letter of support might include the following:

- Who the writer is (including whether s/he served in or is connected to the military)
- How the writer knows the veteran
- (for fact witnesses) What the writer witnessed
- Any stories that exemplify important attributes of the veteran or shed light on his/her true character
- Expression of why the Board should upgrade the veteran's discharge
- The writer's signature and contact information

ADVOCACY TIPS FOR GETTING STRONG LETTERS OF SUPPORT



- Ask client to provide names and contact info for supporters
 - Client should describe their relationship with the supporter and what they know
 - Ask whether client wants to reach out first to let person know you will be contacting them, or if it's ok for you make first contact
- Use internet (LinkedIn, Facebook, etc.) to track down as needed – verify identity first
- First conversation does not have to include commitment to write letter, just an interview
 - Take good notes during initial conversation
 - Notes can later be used to write first draft of letter for supporter to reduce time and effort
 - Inquire about willingness to write letter after initial conversation if info is helpful
- Obtain as many statements as practicable
 - Some supporters may not follow through with letter, best to keep multiple irons in fire
 - Numerous letters can make impact on board's view of client
 - Ask supporters who else they recommend to contact → may have good leads
- Can be sworn statements/affidavits or letters



Step 4: Get letters of support

Even more potential supporters ...

- Mental health professionals: treating doctor or medical expert
 - If the veteran's service or discharge was impacted by a mental health condition, it is critical to get medical evidence to support the application
 - The Boards want proof of a **mental health diagnosis** and a **nexus** between the mental health condition and the conduct leading to discharge
 - A strong letter from a medical professional would include information about how the doctor knows the veteran, whether the veteran met the criteria for a mental health disorder in service, and whether (in the doctor's professional medical opinion) the mental health disorder contributed to the conduct leading to discharge
 - Best if the mental health professional is a psychologist, psychiatrist, or medical doctor with mental health specialty
- Other medical professionals
- Congressional representative



Step 4: Mental health experts

A strong **expert report** from a mental health professional can be key to a successful discharge upgrade petition

They are particularly important in cases where:

- the veteran does not have a strong or long history of mental health treatment;
- the veteran served a long time ago; or
- the veteran's current treatment providers are unwilling to write letters

Best practices for engaging a mental health expert

- To start, have a conversation with the potential expert to learn about his/her background and qualifications and to share requirements for and objective of the report
- Provide a referral letter that provides relevant facts and legal framework and clearly states the referral questions



Step 4: Mental health experts

Example referral questions for a mental health expert:

- Whether in your professional medical opinion Mr. Jones met the standards for any mental health disorder(s) upon his entry into the military in January 2006.
- Whether in your professional medical opinion Mr. Jones met the standards for any mental health disorder(s) from January 2009 through January 2012, and if so, for which disorder(s).
- Whether in your professional medical opinion there exists a nexus or causal link between any mental health disorder(s) and the conduct leading to discharge.
- Whether the diagnosis Mr. Jones received in service was appropriate.
- Whether the treatment Mr. Jones received in service was adequate.



Step 4: Congressional offices

Tips for working with congressional offices

- Every Representative and Senator provides assistance to constituents in dealing with federal agencies
- Constituent services caseworkers usually work out of the district offices (i.e., in Montana, not DC)
- Can assist in obtaining government records (including military personnel files, service treatment records, court-martial records, etc.)
- Can make inquiries of federal agencies about case status
- Call office and ask to speak with caseworker who specializes in veterans issues
- Be prepared to provide a Privacy Act Waiver signed by veteran-client (preferred form is on congressperson's website)



Step 5: Draft memorandum

Basic components of a memorandum:

- Introduction: basic overview of the case, why the Board should upgrade, relief sought (one page)
- Statement of Facts: what happened, in detail
- Arguments: grounds for an upgrade
- Conclusion



Step 5: Draft memorandum

EXAMPLE 1

- I. The Conduct That Led to Mr. Baker's Discharge Was Caused by his Undiagnosed and Untreated PTSD, and Thus the Resulting Discharge is Unjust.
- II. Under Current Army Regulations, Mr. Baker Would Receive Treatment for War-Related PTSD Rather than Issued a Bad Discharge, and His Discharge Is Therefore Unjust.
- III. Mr. Baker Served Commendably in One of the Most Dangerous Battle Zones of the Vietnam War and Has Suffered from PTSD for Almost 50 Years. In Light of His Service and His Post-Service Accomplishments, the Resulting Discharge Is Unjust.
- IV. This Application Is Timely, or Alternatively the Statute of Limitations Period Should Be Waived in the Interest of Justice.

EXAMPLE 2

- I. SSG James Was Denied Fundamental Rights in the Separation Process, and Therefore the Discharge Is Improper and Inequitable.
- II. Discharging SSG James After 14 Years of Service and Assigning a Less Than Fully Honorable Characterization Is Unfair and Unjust.



Step 5: Supporting affidavit

If submitting application for records review, also draft an **affidavit** on behalf of the veteran testifying to necessary facts and including any other important information.

If submitting application for personal hearing, can submit an affidavit or can state facts in memorandum, footnote that those facts are what veteran is expected to testify to at a hearing, and have veteran sign brief under pains & penalties of perjury.



Step 6: Submit application

- Cover Letter
- Application Form (DD 149 or DD 293)
- Memorandum
- Exhibits

IMPORTANT

Be clear about the grounds for requesting an upgrade.

Support your arguments with evidence.

Submit a paper copy to the Board (or file online for some Boards).

Should receive letter confirming receipt of application within 4-6 weeks.

May receive Advisory Opinion or Notice of Records from BCMR, soliciting input.



Step 6: Where should I apply?

Was veteran discharged by order of a general court-martial?

↓ NO

YES

Was veteran discharged more than 15 years ago?

↓ NO

YES

Was veteran previously denied by a DRB after a personal hearing?

↓ NO

YES

BCNR

DRB

IMPORTANT

Go to the DRB if you can. The opportunity for a personal hearing is invaluable. If the veteran is getting close to the 15-year deadline, be sure to get the DD 293 Form filed!



Step 7: Hearing

Can request a hearing at the Records Correction Boards, but very rarely granted.

Have a right to a personal hearing at the Discharge Review Boards.

Discharge Review Board Hearings

- Hearings are held in/around Washington, D.C. (occasional travel boards for some branches)
- Can ask to appear by telephone (veteran, advocate, and/or witnesses)
- Can call witnesses
- Opportunity to present arguments and testimony

IMPORTANT

If close to 15-year deadline and have never applied before, ask for a personal hearing.

Step 8: Wait ...

Records Correction Boards have to decide 90% of cases within 10 months and 100% of cases within 18 months.

Generally plan on waiting the full 18 months.

Discharge Review Boards have no time limit for action.

Generally plan on waiting 10 to 16 months.





Step 8: Wait ...

Can ask to expedite cases.

BCMRs generally require evidence of terminal illness to expedite matter.

Discharge Review Board: expedited resolution of applications by veterans who deployed in support of a contingency operation and were later diagnosed with PTSD or TBI and whose applications are based on matters relating to PTSD or TBI. 10 U.S.C. § 1553.



Step 9: Get decision

Once you receive decision from Board . . .

If favorable, may receive DD 214 with decision or DD 214 may arrive separately in a few weeks.

If unfavorable (or less than fully favorable), right to appeal.

- DRB Records Review: ask for personal hearing (or go to BCMR or federal court)
- DRB Personal Hearing: go to BCMR or federal court
- BCMR: seek judicial review in federal court

Pay attention to deadlines!

Part IV: Investigation for Discharge Upgrade Applications with a Focus on the Discharge Review Boards

Rob Cuthbert, Former Pro Bono Coordinator, Discharge Upgrade
Clinic, Urban Justice Center-Veteran Advocacy Project

University of Montana Alexander Blewett III School of Law

Veterans Law CLE, March 21, 2019

Focus of Part IV: DRBs v. BCM/NRs

- Discharge upgrade applications to the DRBs and the BCM/NRs both require thorough investigation, lots of evidence, and strong, well-supported arguments for relief.
- Functionally, the arguments for relief can be almost identical when applying to the DRBs and BCM/NRs.
- Part IV focuses on the DRBs' rationale for relief that is found within 32 C.F.R 70.9, 33 C.F.R 51, and DODI 1332.28.

Why Do We Investigate and When Can We Stop?

- While an application is being submitted, investigation never stops.
- It begins during intake and it continues until the submission of an application for documentary review and/or a personal appearance has occurred.
- We investigate because we are looking for all facts that will either **enable** or **obstruct** relief for our client. If we haven't thoroughly looked for "it," we don't really know "it."
- Facts that enable relief before the DRBs support categories of relief that are enumerated in Title 32 of the Code of Federal Regulations (C.F.R) and Department of Defense Instruction (DODI) 1332.28—See Title 33 C.F.R for the Coast Guard DRB. Note: these categories of relief only officially apply to the DRBs, but are potentially instructive for the BCM/NRs.

What is Relief?

It is the benefit that we seek in any discharge upgrade or record correction application.

In most discharge upgrade cases before the Boards of Review, it is a combination of four things:

- A change in the character of discharge (ex. **BCD** to **GEN** or **OTH** to **HON**);
- A change in the narrative reason for discharge (ex. **Personality Disorder** or **Misconduct** to **Secretarial Authority**);
- A change in the separation code (ex. **JFX (Personality Disorder)** or **JKM (Misconduct)** to **JFF (Secretarial Authority)**);
- A change in the reenlistment code (ex. **RE-4** to **RE-2** or **RE-3G**).

Note: Both advocates and applicants sometimes file applications where they forget to request all the relief that a Board of Review can grant.

Successful Applications Give the DoD/DHS Boards of Review Reasons to Grant Relief.

As advocates, we want the DoD/DHS Boards of Review to grant relief for the applicant that we are assisting.

For example, the DRBs are highly discretionary, but, in general, if they are going to grant relief it usually falls into one of **nine** general categories that can be found in 32 C.F.R 70.9, 33 C.F.R 51 and DODI 1332.28 (Pages 31-33) under the headings of equity and propriety.

Propriety: Errors of Fact, Law, Procedure, or Discretion	Quality of In-Service Conduct	A Current Change in Policy that Would Have Benefited an Applicant
Outstanding Post-Service Conduct	Total Capabilities	Family and Personal Problems
Arbitrary or Capricious Action	Discrimination	Clemency

Again: these categories of relief only apply to the DRBs, but are potentially instructive for the BCM/NRs.

This Is Not Federal Court. But, We Are Preparing For Federal Court.

- The DRBs and BCM/NRs are non-adversarial, administrative boards with informal rules of evidence.
- This means that—unlike federal court—applicants can have more latitude with the evidence that they present.
- The DRBs explicitly give applicants more freedom to present evidence. (10 U.S.C. § 1553 (c), 32 C.F.R 70.9 (a), 33 C.F.R 51.9 (g)(2)).
- However, we also know that—if relief is not granted—our application might end up being reviewed by a federal judge, so we have another incentive to create extremely robust applications that are supported by thorough fact development.

A Weak and Incomplete Application Will Disadvantage An Applicant, Over and Over Again.

If an application doesn't make strong, well-supported, and informed arguments for relief based in laws and regulations:

- An applicant will likely be denied relief by a DRB or BCM/NR;
- An applicant could lose most—if not all—of their eligibility before the DRBs and BCM/NRs;
- An applicant will not have a strong administrative record that could lead to relief in federal court;
- Everyone involved—especially the applicant—will have expended effort while making a future path to relief more difficult. Also known as: “the worst of both worlds.”

However, strong applications do the opposite: as eligibility is used before a DRB and a BCM/NR, an application usually improves, and, if it winds up in federal court, it will go there with a potentially strong administrative record.

Strong DRB Applications Usually Focus on Nine Categories of Relief.

Thus, we should keep these categories in our minds throughout the creation of a DRB application:

Propriety: Errors of Fact, Law, Procedure, or Discretion	Quality of In-Service Conduct	A Current Change in Policy that Would Have Benefited an Applicant
Outstanding Post-Service Conduct	Total Capabilities	Family and Personal Problems
Arbitrary or Capricious Action	Discrimination	Clemency

This starts with the first interview with an applicant, and it continues until all requested relief is granted or the applicant no longer has the possibility of review.

Impropriety: Errors of Fact, Law, Procedure, or Discretion

- A propriety-based argument is centered on the question: is there an error in the discharge that “prejudiced” the “rights of an applicant” and casts “substantial doubt that the discharge would have remained the same if the error had not been made?”
- Finding propriety-based arguments takes time, patience, and diligence: i.e. you have to know what a proper discharge would have looked like at the time of an applicant’s discharge, then you have to identify what, if anything, went wrong.
- The key resource for these arguments are the contemporaneous regulations of the service in question, which can be obtained, at last resort, via a Freedom of Information Act (FOIA) Request.
- Chapter 12 of Addlestone and Ettlinger’s *Military Discharge Upgrading* (1990) is an invaluable resource. On web, via Connecticut Veterans Legal Center, at: https://ctveteranslegal.org/wp-content/uploads/2012/12/MilitaryDischargeUpgrading_lr.pdf
- It is critical to preserve these arguments for potential future claims in federal court.
- The Government Accountability Office (GAO) has looked into widescale potential impropriety in the past. For Example: *Additional Efforts Needed to Ensure Compliance with Personality Disorder Separation Requirements* (Oct. 31, 2008): <https://www.gao.gov/products/GAO-09-31>

Equity: Quality of In-Service Conduct

- 32 C.F.R 70.9, 33 C.F.R 51, and DODI 1332.28 enumerate some of the “areas of consideration” for positive in-service conduct that could support relief, including: service history, rank, awards/commendations, evaluations, combat service, wounds received in action, promotions, level of responsibility at which the applicant served, length of service, and other acts of merit that might not have been formally recognized.
- Lack of official documentary evidence can be mitigated by witness statements, personal correspondence/documentation, and media coverage.
- Note: Official Military Personnel Files (OMPFs) are often incomplete. If possible, applicants should search their own personally-held military records for evidence of positive in-service conduct. Also, OMPFs sometimes retain pejorative information that should have been purged from their files, and this is a situation that needs to be addressed directly with the relevant branch of service.

Equity: A Current Change in Policy that Would Have Benefited An Applicant

- If service-wide policies and procedures have changed in a way that would have represented a “substantial enhancement” of their rights at the time of discharge, then an argument for relief can be made on the basis of equity.
- **A clear example:** After the repeal of the prohibition on gay, lesbian, and bisexual servicemembers, applicants who were discharged solely on the basis of their sexuality are eligible to make a strong argument for relief based on the fact that the repeal of the prohibition leads to a “substantial enhancement” of rights that casts “substantial doubt” that they would have received the same discharge had the current policy have been in place at the time of their discharge proceedings.
- Change in policy arguments are not limited to those applicants who were discharged under prohibitions on gay, lesbian, and bisexual servicemembers.

Equity: Outstanding Post-Service Conduct

- This is one of the few arguments for relief that an applicant can develop after their discharge from military service.
- The Naval Discharge Review Board provides a non-exhaustive list of evidence they look for when evaluating outstanding post-service conduct including: verifiable continuous employment, marriage, children, character witness statements, community/religious organization service, certificates of non-involvement with civil authorities, financial stability, completion of or attendance in a program of higher education, and documentation of a drug-free lifestyle.
- However, an applicant does not have to be perfect to make an outstanding post-service conduct argument. Even if an outstanding post-service argument in an application does not merit relief, it can be useful in the aggregate, and it can provide context for understanding an applicant's life.
- Arguments based in positive post-service conduct should be made in the full context of an applicant's life, their mental health, their economic standing, and other factors. If an applicant is doing the best they can—despite significant challenges—you should communicate that in an application.

Equity: Total Capabilities

- There is no explicit mental health rationale enumerated in 32 C.F.R 70.9, 33 C.F.R 51, or DODI 1332.28. Mental health issues can fall under “total capabilities” or “family and personal problems.” However, total capabilities and family and personal problems arguments are not limited to mental health issues.
- “Total capabilities” is described in DODI 1332.28 as “an evaluation of matters, such as age, educational level, and aptitude scores.” It also encompasses the “ability to serve satisfactorily” and “ability to adjust to military service.”
- Some total capabilities arguments chronicle a servicemember’s demonstrated ability to serve satisfactorily, and then use facts to show how the presence of factors like posttraumatic stress, traumatic brain injury, or military sexual trauma contributed to the circumstances that led to the discharge.

Equity: Family and Personal Problems

- “Family and personal problems” arguments are self-explanatory and extremely broad. They include “matters” that are in “extenuation or mitigation of the reason for discharge that may have affected the applicant’s ability to serve satisfactorily.”
- Frequently, total capabilities arguments also qualify as “family and personal problems” arguments as well—and vice versa. Separate arguments should be made for each, as they are separate rationales for relief.
- Family and personal problems arguments for relief can also encompass health issues, including mental health issues. It also encompasses issues that pre-date military service.
- A potential repository of documentary evidence supporting a family and personal problems argument for relief are American Red Cross Emergency Messages sent to servicemembers. These messages can sometimes be retrieved from the American Red Cross.
- Arguments for relief that arise from posttraumatic stress, traumatic brain injury, and military sexual trauma can also potentially fall under “family and personal problems.”

Equity: Arbitrary or Capricious Action

- “Arbitrary or capricious actions” are defined as “actions by individuals in authority constituting a clear abuse of such authority” that “although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.”
- If improprieties are found in an applicant’s record that lead to arguments based in “error[s] of fact, law, procedure, or discretion,” then it might be possible to make a mirror argument that the individuals who are responsible for those improprieties committed arbitrary or capricious actions.

Equity: Discrimination

- As an argument for relief, discrimination is defined in 32 C.F.R 70.9 and DODI 1332.28 as “unauthorized acts as documented by records or other evidence.”
- If an applicant filed an equal opportunity complaint as a servicemember, then that complaint and its outcome must be investigated.
- There are many well-documented periods of time where an applicant or an advocate can present clear evidence of a climate of systemic discrimination. See *DoD Report of the Task Force on the Administration of Military Justice in the Armed Forces V.1 and V.2 (1972)* via Connecticut Veterans Legal Center: <https://ctveteranslegal.org/wp-content/uploads/2013/03/DoD-Task-Force-on-the-Administration-of-Military-Justice-in-the-Armed-Forces-v1.pdf> ; <https://ctveteranslegal.org/wp-content/uploads/2013/03/DoD-Task-Force-on-the-Administration-of-Military-Justice-in-the-Armed-Forces-v2.pdf> And, *Protect our Defenders’ Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System*: https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf

Equity: Clemency

- Arguments for clemency can be based on equitable arguments for relief (i.e. family and personal problems, discrimination, etc.).
- Applicants who received punitive discharges—bad conduct discharges (BCDs), dishonorable discharges (DDs), and dismissals—can be granted relief (e.g. a discharge upgrade) on the basis of clemency. With regard to punitive discharges, DRBs will only adjudicate BCDs that were not the result of a general court-martial. BCM/NRs will adjudicate BCDs and DDs, and dismissals.

Prelude to the The First Interview: An Interview Structure You Could Apply to Any Person Who Has Served in the Military

- President George Washington
- James “Jimi” Hendrix
- Woodrow W. Keeble
- Elvis Presley
- Imam Talib M. Shareef
- Rodolfo “Rudy” Hernandez
- Leonard Matlovich
- Harvey Milk
- MAJ GEN Irene Trowell-Harris, ANG (Ret.)
- Joseph Medicine Crow
- Secretary Colin Powell
- Senator Tammy Duckworth
- George Carlin
- Kristin Beck
- Robert Mueller III
- Alex Haley
- RDML Grace Hopper, USNR (Ret.)
- Beatrice “Bea” Arthur

The First Interview: The Beginning of a Systematic Search for Evidence That Will Support DRB Arguments for Relief.

Every person who has served in the military has had four time periods in their life, and, from the first interview to the filing of the application, we examine each of those periods and look for arguments for relief:

Propriety: Errors of Fact, Law, Procedure, or Discretion	Quality of In-Service Conduct	A Current Change in Policy that Would Have Benefited an Applicant
Outstanding Post-Service Conduct	Total Capabilities	Family and Personal Problems
Arbitrary or Capricious Action	Discrimination	Clemency

Time Period	Examples of Things We Could Examine in Interview
Pre-Service: Adolescence, Young Adulthood	Family and Personal Problems (FPP), Total Capabilities (TC)
In-Service: Indoctrination, Promotion, Deployment, Etc.	In-Service Conduct, Discrimination, FPP, TC
Discharge	Propriety, Discrimination, Arbitrary/Capricious Action, FPP, TC
Post-service	Post-Service Conduct, FPP, TC

Some Less Obvious Records: Turning Over Every Stone For Evidence That Could Support Relief

- Sometimes former service members have local military health/ substance abuse treatment records—for example mental health records—that have not been transferred to their medical file. If these records haven't yet been destroyed, it is essential to retrieve them. Work to make a list of locations of all mental health/substance abuse treatment. File separate local requests with DD 2870s for general mental health records and psychotherapy notes.
- An American Red Cross message is often required for a command to take action on behalf of a service member during a family emergency. These messages are sometimes detailed, and they can prove that an emergency occurred. They can sometimes be retrieved by the American Red Cross, years after the emergency occurred.
- Unit Records such as “unit logs” and “deck logs” can sometimes be retrieved by using federal Freedom of Information Act (FOIA) requests. These types of documents can substantiate events—such as combat—that might not be in a service member's file.
- Childhood health/school records can be essential for substantiating some arguments for relief based in “total capabilities” and “family or personal problems.”

Witness Statements

- **Remember:** all witnesses do not have to have a positive view of a former service member. Character witnesses have something positive to say about an applicant, but collateral witnesses establish facts, whether or not they like a former service member. In the end, you might be surprised by the people who will agree to assist an applicant with their application (e.g. an officer who participated in processing the former service member's discharge).
- Advocates can potentially provide a useful buffer between witnesses and applicants, but the advocate and applicant should always agree on the plan to contact a potential witness.
- **Remember:** the DRBs and BCM/NRs have informal rules of evidence. We can submit letters or affidavits as evidence to the DRBs and BCM/NRs. After an interview, short affidavits can be a very effective way of getting facts into the record without asking a witness to draft a letter themselves.
- Scour military records for names of potential witnesses, and use social media, LexisNexis, whitepages.com, etc. to contact them.
- At applicable points during an interview, ask: "is there anyone else that I should speak to about this?"

The Witness List: an Ongoing Project for an Applicant

Remembering people from one's past can take time. Therefore, developing a list of witnesses takes time. If possible, applicants should keep a running list of witnesses that they routinely share with an advocate via email or some other means.

Name	Time Periods Known	Relationship	How to Contact
Jane Johnson	Pre-Service to Present	Mother	Phone: 555-555-5555
Sergeant Bill Tran	In-Service	First Line Supervisor	I don't know.
Master Sergeant Mohammed Abboud	In-Service	Drill Sergeant	Facebook
Alex Ramirez	Post-Service	My manager at work.	I will ask them if I can give you their email.

We Use Investigation to Find Facts that Support Arguments for Relief.

Ex. If a former service member who is now a student was discharged after going AWOL to care for a sick family member, we could focus on:

- Getting affidavits from family members who could describe a “family or personal problem;” and, trying to find American Red Cross messages they might have sent to the applicant;
- Combing through service records and speaking to those who served with the applicant to demonstrate positive “in-service conduct;” and, looking for press reports about the applicant’s unit;
- Researching contemporaneous regulations whether the applicant’s discharge was “proper” and whether their command followed all applicable laws and regulations;
- Running a background check and getting affidavits and transcripts from employers, professors, or community leaders to demonstrate outstanding “post-service” conduct.

<input checked="" type="checkbox"/> <input type="checkbox"/> Propriety: Errors of Fact, Law, Procedure, or Discretion	<input checked="" type="checkbox"/> <input type="checkbox"/> Quality of In-Service Conduct	A Current Change in Policy that Would Have Benefited an Applicant
<input checked="" type="checkbox"/> <input type="checkbox"/> Outstanding Post-Service Conduct	Total Capabilities	<input checked="" type="checkbox"/> <input type="checkbox"/> Family and Personal Problems
<input checked="" type="checkbox"/> <input type="checkbox"/> Arbitrary or Capricious Action	Discrimination	Clemency

We Use Investigation to Find Facts that Support Arguments for Relief.

Ex. If a homeless former service member was discharged for one-time drug use and has a current diagnosis of post-traumatic stress (PTS)—incurred after 12 months of combat—we could focus on:

- Researching regulations to make sure that the applicant was discharged properly by their command; attempting to get local military psychotherapy notes and mental health records, in addition to the former service member’s service treatment records (STRs); and, if applicable, getting records from an in-service military substance abuse treatment program;

- Getting affidavits from collateral witnesses who can describe changes in behavior, and the progression of the applicant’s diminished “total capabilities;”

- Examining the applicant’s “in-service conduct” before and during their deployment to chart the emergence of a “family and personal problem:” PTS;

- Running a background check; examining the challenges of the applicant’s housing insecurity; and, getting affidavits from the people the applicant interacts with that could potentially support an argument for relief based in “outstanding post-service conduct.”

<input checked="" type="checkbox"/> <input type="checkbox"/> Propriety: Errors of Fact, Law, Procedure, or Discretion	<input checked="" type="checkbox"/> <input type="checkbox"/> Quality of In-Service Conduct	A Current Change in Policy that Would Have Benefited an Applicant
<input checked="" type="checkbox"/> <input type="checkbox"/> Outstanding Post-Service Conduct	<input checked="" type="checkbox"/> <input type="checkbox"/> Total Capabilities	<input checked="" type="checkbox"/> <input type="checkbox"/> Family and Personal Problems
<input checked="" type="checkbox"/> <input type="checkbox"/> Arbitrary or Capricious Action	Discrimination	Clemency

Final Thoughts

- These investigative techniques apply to the DRBs and BCM/NRs. But the nine categories of relief apply directly to the DRBs, however, they are potentially instructive for the BCM/NRs as well.
- Thorough investigation allows us to present a narrative that is supported by facts.
- Facts allow us to make well-supported arguments for relief based in law and/or regulation.
- Expert witnesses—including forensic psychiatrists and psychologists—can potentially provide valuable evidence for an application.

Final Thoughts

- Procedurally, discharge upgrades are not difficult. But, a strong application requires thorough investigation, significant research, considerable effort, and well-supported arguments for relief.
- Relief—in the form of an discharge upgrade—can restore honor, reduce shame, and, in some cases, it can restore benefits.
- Advocates with training and resources can **dramatically** improve the strength of a discharge upgrade application.
- Discharge upgrades can have an extremely positive, profound, and lasting impact on the life of a former service member.



Questions?

Alexander Blewett III

SCHOOL OF LAW

UNIVERSITY OF MONTANA