Chapter 2

Law of Discharge Upgrades

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1.0 Introduction

Hundreds of thousands of veterans have less-than-honorable or otherwise stigmatizing discharges from their service in the armed forces. Because of that discharge status, they may suffer numerous harms, including shame and dishonor; exclusion from veterans organizations; denial of federal and state veterans benefits; and adverse health, employment, and social consequences.

Obtaining a discharge upgrade may remedy many or all these harms: it can restore honor, remove barriers to accessing veteran benefits and health care, and improve employment prospects. The outcome, and even the process of achieving

it, can provide immeasurable psychological relief to many clients, especially those who experienced trauma in service.

Knowing the processes and standards that apply at the military review boards is essential to giving that veteran the best possible chance for obtaining a discharge upgrade.

1.1 Scope

This chapter provides an overview of the military review boards that have the power to change a veteran's discharge status and other stigmatizing information in a veteran's military record, as well as to make any other correction to a veteran's military record. The chapter will address the structures, composition, procedures, and standards of each of the boards; the procedures, standards, and timelines for challenging or seeking reconsideration of an unfavorable board decision, including judicial review in federal court; and alternative options that may exist for some veterans to access veteran benefits without obtaining a discharge upgrade.

This chapter briefly addresses the legal standards that apply at the boards and potential arguments for relief; later chapters describe in greater detail how to develop equitable and legal grounds to support an upgrade.

2.0 Overview of Records Correction and Discharge Upgrades

Every veteran has a military personnel file that contains certain essential documents related to the veteran's service, such as enlistment and reenlistment contracts, evaluation reports, and separation records. Separation records include the Department of Defense Form 214 (DD 214) discharge paper that, among other things, lists the veteran's character of service ("discharge status") and narrative reason for separation.

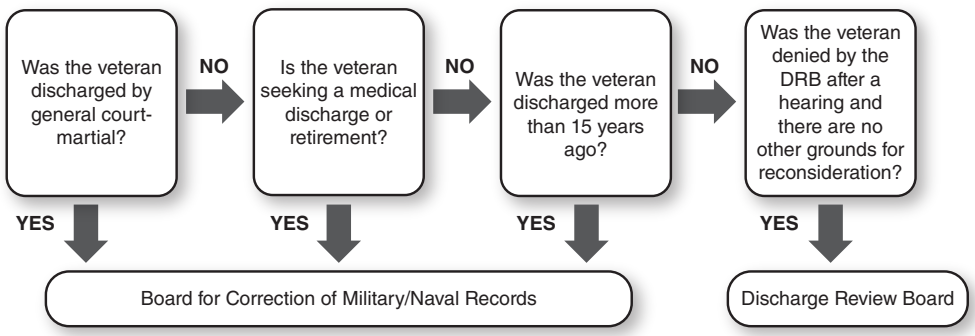
Records correction refers to the process and remedy of making a change in one's military records. A discharge upgrade is one type of records correction that pertains specifically to changes in the veteran's character of service, narrative reason for separation, separation code, or reentry code.

> **Advocacy Tip:** A discharge upgrade application can never result in a veteran's discharge being "downgraded"—that is, in the board assigning the veteran a character of service that is "lower" or "less honorable" that the one assigned at the time of discharge.

There are two main types of boards: the Boards for Correction of Military or Naval Records (BCM/NRs) and the Discharge Review Boards (DRBs). Both have

authority to grant discharge upgrades but have different jurisdictions, standards, and powers, as discussed in detail later in the chapter. Figure 2.1 provides a flow chart demonstrating to which board a former servicemember seeking a discharge upgrade should apply. The legal basis for this chart is discussed in sections 3.0 and 4.0.

FIGURE 2.1 How to Determine Whether to Apply to a DRB or BCM/NR



2.1 Discharge Upgrades: The Big Picture

Before delving into the intricacies of discharge upgrade law and practice, it may be helpful to take a broader look at what is involved in putting together a discharge upgrade application and to whom these applications are directed:

- A veteran with a less-than-honorable or otherwise stigmatizing discharge can apply to administrative boards within the Department of Defense to change that discharge.
- These boards—the Discharge Review Boards and Records Corrections Boards—review applications and will grant changes on the basis of legal error or inequity, depending on the facts of the case.
- The boards are composed of current servicemembers (usually officers or high-ranking enlisted servicemembers) or civilian service branch employees.
- The boards decide most cases "on the papers" without a hearing, though hearings are available in some cases.
- Putting together a strong discharge upgrade application usually involves gathering existing records, developing other supportive evidence, writing a letter brief or memorandum of law that sets forth the grounds for relief, and submitting the application with supporting memorandum and exhibits to the boards . . . and then waiting for at least one year to receive a decision.
- For cases proceeding to a hearing, those hearings are usually held in the Washington, D.C., metropolitan area, with the cost of travel borne by the veteran and his or her advocate.

- If the board denies a discharge upgrade application, there are ways to challenge that denial—whether by seeking reconsideration, applying to a different board, or seeking federal court review—but there are deadlines and statutes of limitations that may apply.

Developing a discharge upgrade application is not an inherently complex process—but doing it successfully benefits greatly from dedicated, knowledgeable, persistent, and creative advocacy. Guidance on how to do so is the topic of the rest of this chapter.

2.2 Character of Service and Discharge Status

All service branches characterize every term of service in the armed forces. Character of service is also called discharge status or discharge characterization or, simply, characterization.

The current characters of service are:

- Honorable
- General (Under Honorable Conditions)
- Other Than Honorable
- Bad Conduct
- Dishonorable (or Dismissal, for officers)

Another option is to have an "Uncharacterized" character of service, which is used for servicemembers who do not complete more than 180 days on active duty and therefore do not receive a characterization. An Other Than Honorable discharge used to be known as an "Undesirable" discharge and before that a "blue" discharge, because of the blue paper on which the discharge certificate was printed. There is no discharge status of "General Under Other Than Honorable Conditions," though some mistakenly use that term.

Characters of service are hierarchical; an Honorable is the best, followed by General, then Other Than Honorable, and so forth.

The use of acronyms to refer to certain characters of service is common. A General (Under Honorable Conditions) discharge is sometimes abbreviated UHC on documents, though that term is not used in conversation. An Other Than Honorable discharge is commonly referred to as an OTH, and a Bad Conduct discharge as a BCD.

What character of service a servicemember receives depends on three main factors: the servicemember's conduct; the chain of command's views on that conduct; and Department of Defense and service branch regulations. More information about the interplay of those factors is addressed in Chapter 1.

2.3 Narrative Reason, Separation Code, and Reentry Code

In addition to receiving a character of service at the time of discharge, every servicemember also receives a narrative reason for separation, separation code, and reentry code.

The narrative reason is a two-to-five-word explanation of the basis of the servicemember's separation. Examples include Completion of Required Active Service, Condition Not a Disability, Personality Disorder, Pregnancy, Hardship, Serious Misconduct, Pattern of Misconduct, In Lieu of Court-Martial, and Court-Martial. Each of the possible narratives is listed in the Department of Defense Instructions and service branch regulations governing separation, along with the procedural requirements for separating a servicemember on that basis.[1]

The separation code is a three-letter designation that corresponds with a particular narrative reason. Both the separation code and the reentry code are largely determined, per regulation, by the character of service and narrative reason assigned to the servicemember.

Advocacy Tip: In cases where the veteran was less-than-honorably discharged for misconduct, best practice is always to request changes to the narrative reason, separation code, and reentry code in addition to the change to the character of service. The default narrative reason that many boards use is "Secretarial Authority," and many advocates therefore expressly request that narrative reason. While Secretarial Authority is less stigmatizing than Misconduct, it may be a red flag to those who regularly review DD 214s. Advocates should therefore consider whether there is an argument to make to the boards in support of a different narrative reason, such as Completion of Required Active Service or Hardship.

2.4 Caseloads and Backlogs

The boards collectively hear tens of thousands of cases per year, and the number of applications to the boards has been rising in recent years. In 2012, the BCM/NRs received 36,638 applications.[2] Most applicants are pro se. There are significant backlogs at most of the boards,[3] and it generally takes at least one year—if not more—to receive a decision from a board. As discussed in Section 4.9, there is a statutory deadline for the BCM/NRs to decide all cases within 18 months;[4] however, not all boards are in compliance with this mandate.

Given the backlog and high number of unrepresented applications, anything advocates can do to decrease the administrative burden on board members and

1. *See* Department of Defense Instruction 1332.14; Army Regulation 635-200; Bureau of Naval Personnel Military Personnel Manual; Marine Corps Order P1900.16G; Air Force Instruction 36-3208.

2. Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors* 10 (May 19, 2016) [hereinafter *Booted*], https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors.

3. *See* Francine Blackmon, Statement to the Subcomm. Mil. Personnel of the H. Armed Services Comm. (Sept. 27, 2018); John A. Fedrigo, Statement to the Subcomm. Mil. Personnel of the H. Armed Services Comm. (Sept. 27, 2018) (reporting a backlog of 7,000 cases at the end of fiscal year 2017 and 4,915 cases near the end of fiscal year 2018).

4. 10 U.S.C. § 117(a)–(b).

staff may redound to the benefit of the veterans they are representing. Examples include organizing all evidence into exhibits with tabs, including a one-page cover memorandum, prominently indicating if the case is entitled to expedited review, and being specific about the issues presented and relief requested. Advocates should also consider how to make their applications stand out from the pile, for example, by including compelling, descriptive evidence and case narrative.

Advocacy Tip: General guidelines for board processing times are discussed later, but a one-to-two-year wait is common.

2.5 Who Can Apply for a Discharge Review or Records Correction

In general, the veteran with the less-than-honorable discharge applies for the discharge upgrade. However, if the veteran is deceased or incompetent, someone else may apply on the veteran's behalf, including a spouse, widow, or widower; next of kin; or legal representative.[5] In such cases, the applicant must submit some documentation of the veteran's death or incompetency.

2.6 Legal Standards

The Boards for Correction of Military/Naval Records (BCM/NRs) and Discharge Review Boards (DRBs) phrase differently the legal bases on which they grant upgrades at their respective boards, but they are essentially the same: "error" and "impropriety" represent illegalities or unlawfulness of the discharge, and "injustice" and "inequity" represent unfairness of the discharge. Moreover, other legal concepts apply across all boards, including the standard of proof and the presumption of regularity. Therefore, these common principles are addressed together.

Information about the different policies and procedures that apply at the BCM/NRs versus DRBs are discussed later in individual sections. Further information about how to craft arguments based on error/impropriety and injustice/inequity is addressed in Chapter 6.

2.6.1 Error and Impropriety

The boards can grant an upgrade on the basis of an error or impropriety for applicants who were administratively discharged (not punitively discharged).

"Impropriety" is defined in DRB regulation as being:

5. *Id.* § 1553(a).

1. "An error of fact, law, procedure, or discretion associated with the discharge at the time of issuance" that prejudiced the rights of the applicant;[6] and
2. A change in service branch policy "made expressly retroactive to the type of discharge under consideration."[7]

Under the first ground, the requirement that the error have "prejudiced" the rights of the applicant is defined as raising "substantial doubt that the discharge would have remained the same if the error had not been made."[8]

The first ground is much more common than the second. Error and impropriety on this first basis usually consist of violations of constitutional right, law, regulation, or guidance that occurred during the separation process.

"Error" is not defined by statute or regulation but is generally understood as being analogous to the DRB standard of impropriety.

Advocacy Tip: Carefully review the separation regulations that applied at the time of the veteran's discharge to determine whether any of the multiple procedural steps required were not followed.

Error and impropriety can be difficult for advocates new to this area of law to identify, in part because they require researching and cross-referencing multiple regulations. Chapter 6 discusses more about how advocates can screen a case for such procedural issues.

2.6.2 Injustice and Inequity

The boards can grant upgrades on the basis of injustice or inequity to veterans who were administratively discharged (not punitively discharged). Injustice, like error, is not defined by statute but can be understood by reference to the DRB's regulations defining inequity:

1. Changes in policies and procedures that meet three criteria: (1) the policies and procedures under which the veteran was discharged materially differ from current policies and procedures; (2) the current policies and procedures represent "a substantial enhancement of rights" afforded to servicemembers; and (3) there is "substantial doubt" the veteran would have received the same discharge under the current policies and procedures;[9]

6. 32 C.F.R. § 70.9(b)(1)(i).
7. *Id.* § 70.9(b)(1)(ii).
8. *Id.* § 70.9(b)(1)(i).
9. *Id.* § 70.9(c)(1).

2. The discharge was inconsistent with the service branch's standards of discipline at the time of discharge;[10] and
3. Balancing of various equitable factors, including but not limited to:
   a. Quality of service, such as service history, awards and decorations, letters of commendation or reprimand, combat service, wounds received in action, records of promotions and demotions, level of responsibility at which veteran served, acts of merit, length of service, prior military service, convictions by court-martial, nonjudicial punishment, civil convictions, unauthorized absences, and records of discharge instead of court-martial;[11] and
   b. Capability to serve, such as age, educational level, aptitude scores, family and personal problems, arbitrary and capricious action, and discrimination.[12]

On the first ground relating to changes in policies and procedures, the Wilkie Memorandum appears to have lowered the standard to upgrade on this basis. That memo provides that a change in policy need only "reasonably be expected" to have caused a more favorable outcome for the veteran.[13]

The Wilkie Memorandum, which was issued in July 2018, provides additional guidance about equity and injustice grounds for upgrade. The memorandum states that the boards are authorized to grant relief on these bases "to ensure fundamental fairness."[14] The memorandum, which advocates should read in full, contains an extensive list of potential inequities and injustices, including:

1. Changes in policy where a servicemember today would "reasonably" be expected to receive a more favorable outcome than the veteran received;
2. Whether the punishment was too harsh or further punishment will be too harsh;
3. Post-service conduct that demonstrates character and rehabilitation, including consideration of the length of time since misconduct and job history;
4. Acceptance of responsibility, remorse, or atonement for misconduct; and
5. Critical illness or old age.[15]

Furthermore, the Wilkie Memorandum provides the boards with certain principles to be used in weighing the merits of veterans' applications, including such guidance as:

1. "An honorable discharge characterization does not require flawless military service";

10. *Id.* § 70.9(c)(2).
11. *Id.* § 70.9(c)(3)(i).
12. *Id.* § 70.9(c)(3)(ii).
13. Wilkie Memorandum ¶ 6(f).
14. *Id.* ¶ 2.
15. *Id.* ¶¶ 6–7.

2. On post-service conduct, "relief should not be reserved only for those with exceptional aptitude" but rather "weigh more heavily" "character and rehabilitation";
3. "The relative severity of some misconduct can change over time"; and
4. "Relief is generally more appropriate for nonviolent than for violent offenses."[16]

Chapter 6 provides more detailed information about crafting injustice and inequity contentions. For now, it suffices to note that the equitable standards for upgrade are much broader than the legal standards. The DRB regulations provide some structure to thinking about what types of equitable arguments might be persuasive to the board, but advocates should not feel constricted by the regulations on equity—to which the DRBs rarely refer and which do not apply to the BCM/NRs at all. Other ways of framing arguments may be more persuasive, and due note should be taken of new memoranda that provide additional or special grounds for upgrade, as discussed later.

2.6.3 Clemency

Clemency is the standard at both the DRBs and BCM/NRs to review punitive discharges. In past decisions, the Army BCMR has described clemency as "an act of mercy, or instance of leniency, to moderate the severity of the punishment imposed."[17]

The boards cannot overturn a court-martial conviction,[18] and there is an automatic appellate review process within the military justice system for all punitive discharges.[19] One theory to understand clemency is that, because there was an appellate review process in the military that should have addressed any legal errors in the discharge, the only review necessary is whether the discharge was equitable. Thus, the full range of equitable arguments can generally be framed as "clemency" arguments to the boards.

The Wilkie Memorandum is recent guidance that expands on the definition of clemency. The memo confirms that clemency is like inequity and injustice in that it is a way for the boards to ensure "fundamental fairness."[20] The prior section on inequity and injustice lists various forms of inequity and injustice that could support a clemency-based upgrade. Advocates should read the memorandum in full to determine how best to incorporate it into an application, as the provisions could help support nearly all types of discharge upgrade applications.

16. *Id.* ¶ 6.
17. No. 20100014990 (Army Board for the Correction of Military Records Jan. 3, 2011).
18. 10 U.S.C. §§ 1552(f), 1553(a).
19. Uniform Code of Military Justice, art. 66(b)(3).
20. Wilkie Memorandum ¶ 3.

2.6.4 Standard of Proof

Though interservice-branch statutes and regulations do not specify the standard of proof, it is generally understood that a "preponderance of the evidence" standard applies.[21] In other words, the veteran must show that it is "more likely than not" that an error/impropriety or injustice/inequity occurred, or that clemency is deserved. The burden is on the veteran to prove that a discharge upgrade is warranted.

Some cases related to in-service mental health conditions are entitled to "liberal consideration."[22] How liberal consideration affects the standard of proof is unclear. Liberal consideration is to be given to certain findings or evidence, such as that a former servicemember had a mental health condition in service if certain markers are present in his or her record.[23] However, liberal consideration does not shift the burden of proof from the veteran or create a presumption in favor of an upgrade.[24]

2.6.5 Presumption of Regularity

The boards all apply a "presumption of regularity in the conduct of governmental affairs."[25] The presumption can be rebutted by showing "substantial credible evidence" that the presumption should not apply.[26] This means that the boards begin reviewing each case with the assumption that the discharge was appropriate and correct—that is, that the command made the right choice to discharge the former servicemember with that characterization and followed all required procedures to do so.

In practice, the presumption of regularity is hard—though not impossible—to rebut. As one example, boards often cite the presumption of regularity in cases where the veteran's separation packet is missing key documents, concluding that the absence of those records does not itself show that an error or impropriety occurred.[27] Rebutting the presumption in missing records cases (of which there are multitudes) generally requires more than pointing to the absence of a record; there must be some positive evidence that the records do not and did not ever

21. *See* Army Regulation 15-185 ("The applicant has the burden of proving an error or injustice by a preponderance of the evidence.").

22. *See* 10 U.S.C. §§ 1552(h), 1553(d)(3); Hagel Memorandum, attachment ¶¶ 1, 3; Kurta Memorandum ¶¶ 3, 13, 25.

23. Hagel Memorandum, attachment ¶¶ 1, 3; Kurta Memorandum ¶¶ 9–11, 13.

24. Kurta Memorandum ¶ 26(k) ("Liberal consideration does not mandate an upgrade.").

25. *See* 32 C.F.R. § 70.9(b)(12)(vi).

26. *See id.*

27. *See, e.g.*, No. 5871-15 (Bd. Corr. Naval Records Feb. 1, 2017) (denying upgrade despite separation packet missing from personnel file based on presumption of regularity, on which board concludes that nonjudicial punishment and administrative separation were in accordance with Navy regulations); No. BC201401938 (Air Force Bd. Corr. Mil. Records Apr. 16, 2015) (denying application despite no separation records in military personnel file based on presumption of regularity); No. 20140004994 (Army Bd. Corr. Mil. Records Nov. 6, 2014) (holding that the lack of military records does not overcome the presumption of regularity).

exist. Options for such proof might include a statement from someone involved in separation processing stating that procedures were not followed; correspondence with multiple records-holding agencies and the veteran's installation at separation showing unsuccessful attempts to obtain the missing records; a sworn statement from the veteran-applicant that the veteran never received or reviewed a missing record, if such step was required; or some similar evidence or combination of the above. More about rebutting the presumption is discussed in Chapter 6.

The presumption of regularity creates a high bar for obtaining a discharge upgrade. However, the boards will grant upgrades even without finding the presumption overcome.[28]

2.6.6 Department of Defense Memoranda

In addition to statutory and regulatory provisions that govern the military review boards, the Department of Defense has issued numerous memoranda to the boards over the past decades. Although they have long titles that detail their content, they are by convention known by the Department of Defense official who issued the memorandum. These memoranda are sub-regulatory guidance, with less legal authority than statutes or regulations. However, they tend to be much more detailed and, especially when relied upon close to the time of their issuance, they can be very powerful grounds on which to base a discharge upgrade application. Advocates should closely review any memorandum that addresses a topic related to the case of a veteran they are representing.

These memoranda are often difficult to locate, because they are not published or publicized in a central location. Copies of the known memoranda are included in Appendix B. The memoranda, by name and general topic, are:

- Brotzman Memorandum (Feb. 1977): veterans discharged for personality disorder on the basis of unsuitability who have clean records or were not diagnosed by a psychiatrist
- Laird Memorandum (Aug. 1972): veterans with undesirable discharges issued solely on the basis of personal use or possession of drugs prior to July 1971
- Stanley Memorandum (Sept. 2011): veterans discharged based on their LGB sexual orientation under the now repealed Don't Ask, Don't Tell (DADT) policy or similar prior policies (discussed in Chapter 12)
- Hagel Memorandum (Sept. 2014): veterans discharged for conduct related to an in-service mental health condition, providing for liberal consideration (discussed in Chapter 8)

28. *See, e.g.*, No. AR20140008438 (Army Discharge Review Bd. Sept. 12, 2014) (upgrading from BCD to OTH based on length and quality of service, despite presumption of regularity); No. AR20130014327 (Army Discharge Review Bd. Apr. 28, 2014) (upgrading from OTH to General based on length and quality of service, despite presumption of regularity); No. AR20130020628 (Army Discharge Review Bd. Mar. 14, 2014) (upgrading from OTH to General, despite presumption of regularity).

- Carson Memorandum (Feb. 2016): veterans discharged for conduct related to an in-service mental health condition, including waiver of statute of limitations at Records Correction Boards and clarification of Hagel Memorandum (discussed in Chapter 8)
- Kurta Memorandum (Aug. 2017): veterans who had a mental health condition in service or experienced military sexual trauma, which contributed to their discharge, expanding on and clarifying the Hagel Memorandum (discussed in Chapters 8 and 9)
- Wilkie Memorandum (July 2018): veterans seeking upgrades on the basis of injustice, equity, or clemency, including guidance about upgrades based on good post-service conduct (discussed in Chapter 6)

2.7 Precedent

The boards take the view that they are boards of equity, that each applicant and each application are unique, and therefore that cases do not have any precedential value in or impact on future adjudications.[29]

However, a federal district court held that the boards cannot ignore prior cases or decide differently cases that have substantially similar facts.[30] To do so would be "arbitrary and capricious" action, which would violate the Administrative Procedure Act.[31] If an applicant cites a "specific prior decision as very similar to his own situation," "the Board may not simply ignore such precedent."[32]

Advocacy Tip: Keep in mind that the boards do not place a high value on past board cases as precedent, and do not cite past decisions to a board as if arguing before an appellate court. They often may be better used to buttress an argument for relief, rather than to lead it.

Best practice therefore is to review prior decisions of the board to which the veteran is applying to find factually similar cases. Cases that share similar facts may be cited in support of an argument for relief, with a brief explanation for why a similar (or different) outcome is warranted here. This research will provide helpful information about how the board views these types of cases, including what framing, arguments, and evidence it finds persuasive.

29. *See, e.g.*, Wilhelmus v. Geren, 796 F. Supp. 2d 157, 162 (2011).

30. *Wilhelmus*, 796 F. Supp. 2d at 162 (stating that "[i]t is axiomatic that '[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so" and that a "fundamental norm of administrative procedure requires an agency to treat like cases alike" (quoting Kreis v. Sec'y of Air Force, 406 F.3d 684, 687 (D.C. Cir. 2005), and Westar Energy, Inc. v. Federal Energy Regulatory Com'n, 473 F.3d 1239, 1241 (D.C. Cir. 2007)).

31. *Wilhelmus*, 796 F. Supp. 2d at 162.

32. *Id.*

Citing past cases provides a potential ground for later judicial review, if the board fails to respond to the citations with reasoning or acts differently such that the decision is "arbitrary and capricious."

Advocacy Tip: When citing a prior board case in a discharge upgrade petition, briefly explain to the board why it is important and mandates a similar—or different—outcome here.

Although the boards' general rejection of precedent may be frustrating to many advocates, there may be a positive side. The low grant rates that have persisted for many decades at the boards mean that there may be few, if any, cases of similarly situated veterans with favorable outcomes. Just as good outcomes do not bind the boards, neither do the decades of bad outcomes. Advocates therefore should not necessarily be discouraged by the inability to find helpful past cases and can proceed knowing that the boards may, with compelling evidence and argument, be convinced to act more favorably on a case that a prior board would have rejected.

2.8 Guidance on Framing Requested Relief

Every application should specify what relief the veteran seeks, whether changes to the character of service, narrative reason, separation code, reentry code, or other record, or some combination of those. This relief should be stated clearly on the application form itself and in the introduction of the memorandum supporting the application.

While the application must state what the veteran wants changed, the application does not have to list the specific desired outcome of any change. However, not specifying a desired outcome will risk the board directing a change that—in the mind of the veteran—is "worse." The board cannot "downgrade" a veteran's character of service (e.g., change a General to an Other Than Honorable),[33] but it could, for example, change a narrative reason from Misconduct to Alcohol Rehabilitation Failure.

In general, a veteran asking for a discharge upgrade should request that the board grant a fully Honorable discharge, unless compelling reasons suggest otherwise. If appropriate, the advocate could ask "in the alternative" for a General or other less-than-fully Honorable discharge. The theoretical strategic value of asking for a less-than-fully Honorable discharge as a way of demonstrating remorse and acceptance of responsibility seems of little value to the boards, and it poses the risk that the board could not award an Honorable discharge because the veteran did not ask for it. The boards will decide what character of service they think

33. 10 U.S.C. § 1552(a)(2); 32 C.F.R. § 70.9(a).

the veteran earned—it is the advocate's job to convince them that the veteran deserves a fully Honorable discharge.

If a specific narrative reason is sought, advocates should argue why the desired narrative is fitting, with reference to the applicable separation regulations. Some narratives sound much less stigmatizing than others—such as Hardship or Early Release to Attend School—with the least-stigmatizing reason being Completion of Required Active Service. Advocates should review existing evidence and develop other evidence to argue for one of those narrative reasons. Many boards will provide a default narrative reason change to Secretarial Authority. That reason has the benefit of being vague and may not appear harmful to casual reviewers of DD 214s; however, to a knowledgeable DD 214 reader, it would be a red flag that someone's discharge had been upgraded. Moreover, a Department of Labor manual has included Secretarial Authority as a signal of a veteran's "inaptitude."[34] This is an area where further advocacy, both legal and policy, is needed in order to provide veterans wrongfully discharged with the opportunity to truly clear their military records.

The separation code is a three-letter code that corresponds to the narrative reason, so advocates do not need to specify what code is desired. The best reentry code is RE-1, which signifies that the veteran could reenlist in the armed forces. Thus, asking for an RE-1 would create the least stigmatizing DD 214, if relief were granted, even though the individual veteran may not wish to volunteer to serve in the future.

2.9 Secretarial Review

After a board votes on an application and renders its decision, that decision undergoes a review process. In some cases, a designee of the respective service branch secretary will disagree with the board's decision and direct a different outcome, which could be favorable or unfavorable to the veteran applicant. When the Secretarial Review Authority (SRA) makes a different determination than the board, the resulting decision should include a paragraph so noting.

2.10 Article 74(b) Review

The Secretary of the relevant service branch can substitute an administrative discharge for a punitive discharge (Bad Conduct, Dishonorable, or Dismissal).[35] The standard for directing a change is "good cause."[36] Article 74(b) therefore presents

34. Department of Labor, ET Handbook No. 384, appx. D (Dec. 23, 1994) (listing "Secretarial Authority" as one of the narrative reasons for separation that the Department of Labor "has determined constitute 'inaptitude'" for purposes of the Unemployment Compensation for Ex-Servicemembers (UCX) program) (on file with authors).

35. 10 U.S.C. § 874(b) (Article 74 of the Uniform Code of Military Justice).

36. *Id.*

another avenue for relief from any veterans who received punitive discharges, besides the options of review by the DRB or BCM/NR—and it could be a "third bite at the apple" for veterans with punitive discharges denied by a DRB and BCM/NR.

Review under 74(b) is infrequently used,[37] and therefore little guidance exists on the subject. Secretarial action under 74(b) is a form of executive clemency, and therefore strong equitable arguments—not legal arguments attacking the conviction itself—are likely best suited for this type of review.[38] Navy regulations state that the primary ground for relief is generally the applicant's "record in the civilian community."[39] Because the service secretaries are sole decision makers and political appointees, they may be more responsive to congressional or other political involvement than the boards. Advocates may therefore wish to consider obtaining political and community allies for any 74(b) application.

Procedurally, an application under Article 74(b) should be directed to the Secretary of the relevant service branch. The Secretary will likely delegate processing of the case to a Judge Advocate General (JAG) attorney or other subordinate. Navy regulations do counsel that an application should not "normally" apply within five years of discharge or of any prior request under 74(b).[40] Those regulations also list the substantive and procedural requirements for filing a 74(b) application.[41] Like any discharge upgrade application, an application under 74(b) should include a memorandum setting forth the narrative and grounds for relief and supporting evidence. In addition, any application should clearly state what character of service the veteran seeks to have in place of the punitive discharge, including any outcome the veteran does not seek; that is, if the veteran does not wish to be considered for an Other Than Honorable discharge, the application should so state.

37. Annual Reports of the Code Committee on Military Justice from fiscal years 1998 to 2008 show that the Secretary of the Army received an average of five clemency petitions under Article 74(a) and 74(b) each year. The Reports do not specify the subset of clemency petitions under Article 74(b) alone, nor are data from other years or branches publicly available. Code Committee on Military Justice, Annual Report for the Period October 1, 2007 to September 30, 2008, § 3 at 7 (2008); Code Committee on Military Justice, Annual Report for the Period October 1, 2006 to September 30, 2007, § 3 at 7 (2007); Code Committee on Military Justice, Annual Report for the Period October 1, 2005 to September 30, 2006 § 3, at 5 (2006); Code Committee on Military Justice, Annual Report for the Period October 1, 2004 to September 30, 2005, at 2 (2005); Code Committee on Military Justice, Annual Report for the Period October 1, 2003 to September 30, 2004, § 3 at 2 (2004); Code Committee on Military Justice, Annual Report for the Period October 1, 2002 to September 30, 2003, § 3 at 2 (2003); Code Committee on Military Justice, Annual Report for the Period October 1, 2001 to September 30, 2002, § 3 at 1 (2002); Code Committee on Military Justice, Annual Report for the Period October 1, 2000 to September 30, 2001, § 3 at 1 (2001); Code Committee on Military Justice, Annual Report for the Period October 1, 1999 to September 30, 2000, § 3 at 4 (2000); Code Committee on Military Justice, Annual Report for the Period October 1, 1998 to September 30, 1999, § 3 at 3 (1999).

38. *See* 32 C.F.R. § 719.155(c)(18).

39. *Id.* § 719.155(c)(18).

40. *Id.* § 719.155(b).

41. *See id.* § 719.155(c).

Advocacy Tip: After submitting an application under Article 74(b), advocates should follow up with the Secretary's office to ensure that the application is received and properly processed and to obtain a point of contact for the case moving forward.

Strategic considerations should guide if and when to apply for Article 74(b) review in relation to any application to the BCM/NRs or DRBs. Theoretically, a veteran could apply simultaneously to a board and to the Secretary under 74(b). However, pursuing one path before another may be advantageous, depending on the circumstances of the case. For example, if a veteran seeks 74(b) review first and is unsuccessful, a notation will likely be made in the file and could undermine a future application to the boards. On the other hand, if a veteran applies first to the boards and receives only partial relief in the form of an upgrade to Other Than Honorable, a 74(b) application is no longer an option, because that article allows a Secretary to change a punitive discharge only, not an administrative discharge.

The most notable example of a Secretary exercising authority under Article 74(b) is when the Secretary of the Army substituted Honorable discharges for Dishonorable discharges issued to 11 American soldiers of Japanese descent who, during World War II, refused combat training to protest the government's unconstitutional treatment of Japanese-Americans at that time. In 1981, the Secretary granted relief based on the veterans' honorable post-service conduct.[42]

2.11 Issuance of a New DD 214

If a board grants, in whole or in part, a veteran's discharge upgrade application, the board will issue the veteran a new DD 214 and mark the veteran's prior DD 214 "void." The DD 214 will reflect the new character of service or other changes as directed by the board. Some boards send the new DD 214 with the final decision on the application; other boards direct another agency in their respective service branches to issue the new DD 214, and the DD 214 will arrive separately from the decision.

If a veteran has not received a new DD 214 three months after a favorable board decision, the advocate should follow up with the board and with the human resources command for the veteran's service branch.

2.12 Differences among the Military Review Boards

With more practice in this area of law, advocates come to learn the differences among the various boards and to understand how the boards can change over time. These differences may be due to training, leadership, service branch philosophy,

42. For more information, see Linda Tamura, Nisei Soldiers Break Their Silence: Coming Home to Hood River (2012).

or other factors. As an example, a seasoned advocate will likely package a case for an Air Force veteran applying to the AFBCMR differently than a case for an Army veteran applying to the ADRB because the AFBCMR has long placed a stronger emphasis on post-service conduct as meriting clemency than other boards.

This should not intimidate advocates new to discharge upgrade law—as it is always the case that experience in an area of law, gained over time, will inform one's advocacy. Rather, this should encourage new advocates to seek out information specific to the board before which they are appearing. Ways to do so include reaching out to other advocates with more experience, reading recent board decisions, and attending trainings where board representatives present. This Manual also provides some examples of where board practices differ.

3.0 Discharge Review Boards

There are four Discharge Review Boards (DRB): Army Discharge Review Board (ADRB), Naval Discharge Review Board (NDRB), Air Force Discharge Review Board (AFDRB), and Coast Guard Discharge Review Board (CGDRB). The Naval Discharge Review Board hears cases from veterans of both the Navy and the Marine Corps.

3.1 Legal Standards

The Discharge Review Boards have the authority to review the discharge or dismissal of any former servicemember.[43] The authorizing statute is 10 U.S.C. § 1553. The applicable regulations are at Title 32 of the Code of Federal Regulations, Part 72. The discharge review procedures and standards are at 32 C.F.R. §§ 70.8 and 70.9, respectively. The DRBs are also governed by Department of Defense Instruction 1332.28 and various memoranda issued by the Department of Defense, discussed earlier in subsection 2.7.6.

The boards are empowered to direct changes to discharges on the basis of "propriety" and "equity,"[44] or, if the relevant discharge was a Bad Conduct discharge by special court-martial, on the basis of "clemency."

3.2 Structure and Composition

The DRBs are administrative boards within the various service branches.

Each board is composed of three to five board members, with regular rotation of membership. The board members may have legal backgrounds, but most have no advanced legal training or prior service in the Judge Advocate General (JAG) Corps. They have been trained in the laws and procedures that apply to the board on which they are serving but are not general legal experts.

43. 10 U.S.C. § 1553(a).
44. 32 C.F.R. § 70.9(a)–(c).

Who serves as a member depends on the board. The Army DRB relies on officers, usually Colonels (O-6) on active duty. The NDRB relies mostly on high-ranking officers, but the current president of the board is a civilian who retired from the Marine Corps and the board sometimes includes a senior enlisted servicemember. The Air Force DRB regularly has senior officers and senior enlisted servicemembers as board members, and the Coast Guard DRB has senior officials who work for the Department of Homeland Security but are not Coast Guard officers.

In certain cases, specific types of board members are required. At the NDRB, because it hears cases arising out of both the Navy and the Marine Corps, the majority of the board members must be members of the branch that the veteran-applicant served in. That is, if the veteran was a Sailor, at least three members must be from the Navy. Across all DRBs, if the veteran (1) deployed in support of a contingency operation, was diagnosed with PTSD or TBI related to that deployment, and submits an application based in whole or in part on PTSD or TBI; (2) has a diagnosis of PTSD or TBI related to combat or military sexual trauma and submits an application based in whole or in part on those diagnoses; or (3) was diagnosed with a mental health condition while serving in the armed forces, then at least one board member must be a clinical psychologist, psychiatrist, or physician with training on mental health issues.[45]

The boards operate by majority vote. Thus, to succeed in obtaining a change, a veteran must convince at least three of the five board members.

3.3 Powers

The Discharge Review Boards, unlike the Records Corrections Boards, hear only discharge upgrade applications. Their powers are limited to changing information related to the veteran's discharge or release from the armed forces—namely, character of service, narrative reason for separation, separation code, and reentry code.

The DRBs also cannot change a discharge by general court-martial (whether Bad Conduct, Dishonorable, or Dismissal) or to or from a medical discharge or retirement. For such changes, the veteran must apply to the relevant Records Correction Board. Although the DRBs cannot change a Bad Conduct discharge issued by a general court-martial, they can change a Bad Conduct discharge issued by a special court-martial.

3.4 Records and Evidence

Upon receiving an application for a discharge upgrade, the Discharge Review Board will obtain a copy of the veteran's Official Military Personnel File (OMPF) from the relevant records center.

45. 10 U.S.C. § 1553(d)–(e).

Advocacy Tip: Be sure to obtain a "full and complete" copy of a veteran's Official Military Personnel File directly from the federal records center so that you have the same documents that the board has. Do not rely on records that a veteran has held onto from service or previously obtained, as records may have been lost or the records center may not have provided the full and complete file.

The boards are not investigative bodies and will usually take limited action to gather records relevant to an applicant's case. The boards occasionally will request additional military service records that are not in the military personnel file, such as a military police report if the veteran reported being sexual assaulted during military service. In cases involving mental health conditions, the Army Discharge Review Board regularly reviews the veteran's service treatment records, as well. The boards do not subpoena witnesses or seek input from the veteran's former command or others.

The Federal Rules of Evidence do not apply, nor do any other formal rules of evidence.[46] Veterans and their advocates can submit any and all evidence that supports or relates to their applications. This can include documents that existed at the time of the veteran's service or were created afterward; documents developed specifically to support the application; certificates, letters, photographs, drawings, and any other type of record. The board will review whatever the applicant submits. Documentary evidence appears to be especially persuasive, and it is one of an advocate's main tasks to balance out or provide context for the "negative" evidence that likely exists in the veteran's military personnel file with positive and mitigating evidence. Advocates should consider how to submit sufficient evidence to support the upgrade and humanize the veteran without the risk of overwhelming the board members with too many documents.

Advocacy Tip: Remember that the boards review multiple cases per day and are confronted with stacks and stacks of papers. Find a way to humanize the veteran and to make the veteran's case stick out from the pile. Photographs are a particularly powerful medium, which advocates should consider including in every application.

46. 32 C.F.R. § 70.9(b)(12)(ii).

3.5 Records Review and Personal Appearance Hearings

Every applicant has the option for the Discharge Review Board to decide the application on a records review or to appear before the board at a personal appearance hearing.

In most cases, it is preferable to first apply to the DRB for a records review, in which the applicant submits a petition on the papers (i.e., consisting of documentary and written evidence and argument only). Seeking records review first could conserve resources (because it does not require the time and costs of travel to the board), and the boards generally prefer to conduct a records review before proceeding to a hearing. If records review does not result in a fully favorable outcome, the applicant may still seek a hearing before the board, at which the board will review de novo the applicant's case, including new argument and evidence. However, if the 15-year deadline is approaching or there are other special circumstances, an applicant may wish to proceed directly to a hearing, without first applying for records review.

At a personal appearance hearing, the veteran has a right to present a case in person to the board members. The veteran has a right to have counsel at the hearing, at no cost to the government, and generally may bring witnesses or supporters to the hearing.

Although there are no statistics available, past information from the boards indicates that the success rates of cases are higher at the personal hearing stage than at records review. At the very least, hearings are a "second bite at the apple" in obtaining a discharge upgrade (after the "first bite" of receiving a records review by the DRB). Hearings provide an invaluable opportunity to present a case before the board, as well as offer a meaningful opportunity for a veteran to feel heard. Advocates can help veterans tell their stories, can highlight key evidence, can frame the case, and can engage the board members and answer their questions. Thus, although preparing for and attending a hearing are significant investments of time and money, the opportunity they provide for relief is substantial and often well worth the cost.

Most of the boards hold hearings at a central location in the metropolitan Washington, D.C., area. The Army has periodically held Travel Board hearings at certain Army installations around the country. However, when active, the wait for a Travel Board hearing is generally longer than the wait for a hearing in the D.C. area. The boards do not cover any travel costs so that veterans, who may have little income or live across the country, can appear in person before the board. Some boards permit veterans and their advocates to appear by telephone at a personal appearance hearing as discussed further later in the chapter.

Each board conducts hearings in a slightly different manner. However, the hearings are usually held in a conference room or hearing room environment, with the board members, applicant, and any other attendees seated. They are generally scheduled to last about one hour, though some cases require more or less time.

Before the hearing begins, there may be some initial orientation by a board member, the recorder for the board, or a board staff person that explains the hearing process. The hearings are audio recorded.

The hearing itself generally consists of testimony by the veteran and questions from the board members, particularly where there is no advocate present. When an advocate is present, the boards often allow the advocate a significant amount of control over how to present the case, though the board members will in all cases ask their own questions of the veteran. A standard outline for an advocate to use at a hearing is:

1. Brief opening statement
2. Direct examination of the veteran
3. Board questions to the veteran
4. Direct examination of any other witness (lay or expert)
5. Board questions to the witness
6. Highlight key evidence
7. Closing statement

This framework may not work for every case, and advocates should design a case presentation specific to the veteran's case. For example, it might make sense for a mental health expert to testify before the veteran, to provide context and explanation to the veteran's later testimony. Also, board members at any point could direct that a different plan be followed or ask questions, and advocates generally should defer to the board's preferences for how the hearing proceeds.

Advocates should remember that the Discharge Review Board members are not lawyers. They are servicemembers, usually officers, with years of service in the armed forces or federal government. Best practice is to frame and present your argument to this specific audience. This may mean, among other things, creating a compelling narrative about the veteran's life and service, avoiding legal jargon, having familiarity with key military terminology, considering carefully to what extent blame should be assigned to the veteran's chain of command or service branch, avoiding excessive citations to federal court cases, and highlighting arguments that the board members may find more persuasive (i.e., some boards weight equitable arguments more heavily than legal/procedural arguments).

Although advocates play an important role in presenting a case before the board, keep in mind that the board wants to hear most from the veteran directly. The hearing presents an opportunity for the advocate to show the board the good character of the veteran—not to impress the board with the advocate's own lawyering skills.

For this reason, unless there is a compelling or unavoidable reason that the veteran cannot be present at the hearing, the veteran should attend the hearing in person, or at least by telephone. The boards may allow a presentation by an advocate without a veteran present (in person or telephonically), but may express displeasure or shorten the amount of time allowed for the hearing.

The boards have different policies about telephonic appearances by veterans, advocates, or lay or expert witnesses. Advocates should contact the board in advance of a scheduled hearing to inquire as to the board's current policy. If the board does not allow a person to testify telephonically, that person can submit a sworn statement, letter, or other document that includes the contents of what his or her testimony would have been. Some of the boards use videoconference technology, though not the Army or Navy Boards.[47]

The board will usually provide at least one month's notice before a hearing is scheduled. If that date and time do not work for the advocate or veteran, hearings can be rescheduled. If an applicant fails to appear for a scheduled hearing, the board may make a decision based on the records alone or may close the matter without a decision for failure to appear.

Best practice is to submit a memorandum in support of the upgrade, setting forth the case narrative and analyzing the grounds for relief, along with all supporting evidence at least one month before the hearing date, if such a packet was not submitted already along with the DD 293 application form. Boards will accept evidence on the day of the hearing, but evidence may have its greatest impact if the board has had an opportunity to review it before the hearing. Veterans and their advocates have a right to review the board's copy of their case files in advance of the hearing, and a time to review that file can be arranged with the board (usually the day before the hearing).

3.6 Relief

The Discharge Review Boards can direct changes to the character of service, narrative reason, separation code, and reentry code. The board votes on whether to grant or deny each item of requested relief. Thus, if a veteran requests changes to some or all those designations, the board may grant some but not all the relief sought (e.g., change the character of service but not the narrative reason). The board also may grant partial relief and commonly does so regarding changes to character of service. That is, if a veteran with an Other Than Honorable discharge requests an Honorable characterization, the board may deny an Honorable but grant a General discharge status.

Sometimes a veteran requests relief that the board cannot grant or the board finds an error that it cannot address due to the limitations on its remedial powers. In such cases, a board will sometimes recommend that the veteran seek further relief from a Records Corrections Board or itself recommend that a Records Correction Board take action.

47. Hearing before the Subcomm. on Military Personnel of the H. Armed Services Comm. (Mar. 2, 2017).

3.7 Statute of Limitations

The Discharge Review Boards have a statute of limitations period of 15 years that runs from the date of the veteran's discharge.[48] For purposes of calculating the deadline, the relevant date is the date of the discharge that the veteran seeks to have corrected.[49] The date is listed on the DD 214 under the item marked "Separation Date This Period" or "Effective Date."

There is no provision to waive the 15-year statute of limitations, as there is for the Records Correction Boards' statute of limitations. It is a hard deadline.

If the 15-year deadline is approaching, advocates should strongly consider not only submitting ahead of the deadline—rather than waiting for it to pass and applying to the Records Correction Board—but also asking for a personal appearance hearing, even if the veteran has not previously applied for records review. As discussed earlier, hearings provide an invaluable opportunity to speak directly to the board members and appear to grant upgrades at higher rates. Because the Records Correction Boards rarely grant hearings, requesting a Discharge Review Board hearing before the 15-year deadline is the only way to guarantee that a veteran appears before a board.

Whether an application is timely is marked by when the board receives the DD 293 application form. Thus, if the deadline is approaching and there is insufficient time to develop a full application packet, advocates can consider submitting the DD 293 with a cover letter noting an intent to supplement the application with additional evidence and argument, preferably by a specified date. The advocate should then submit the supplement as soon as possible afterward.

3.8 Reconsideration

In the context of the Discharge Review Board, reconsideration means that, where a board has previously denied or only partially granted a veteran's application for discharge review, the board will conduct a de novo review of the case and render a new decision. The board accepts new evidence and argument on reconsideration; the review is not limited to the record on prior review.

The bases on which an applicant can request reconsideration of an unfavorable or less-than-fully favorable Discharge Review Board decision are set forth in regulation:

1. When the previous decision was on the motion of the board;
2. When the previous decision was on records review, and the applicant now requests a hearing;*
3. When after a prior decision, changes in discharge policy are announced and made expressly retroactive;

48. 10 U.S.C. § 1553(a).

49. That is, if after being less-than-honorably discharged the veteran served a later period of service that he or she does not want to have corrected, that later service does not restart the DRB clock.

4. When the policies and procedures under which the applicant was discharged differ in material respect from current policies and procedures and the current policies represent a substantial enhancement of rights;*
5. When the applicant did not have counsel in a prior application and now does;*
6. When the case was not considered under uniform standards published pursuant to Public Law 95-126; and
7. When there is "new, substantial, relevant evidence not available to the applicant at the time of the original review."[50]*

The bases for reconsideration that are most common and likely most helpful to advocates are indicated with an asterisk. Of special note are the provisions for reconsideration based on a hearing request and on newly obtained counsel.

The deadline for applying for reconsideration is 15 years from the date of discharge. That is, after the board's initial unfavorable review, an applicant has whatever remains of the original 15-year statute of limitations period to seek reconsideration.

3.9 Timeline and Expediting

The length of time it takes for a board to render a decision on a case varies from branch to branch. A general estimate is that it will take at least six months and possibly two years or more, with a usual processing time of 12 to 18 months. There are no deadlines for the boards to render a decision.

In cases where a hearing is requested, the boards generally schedule a hearing 6 to 12 months after receiving the application. After holding the hearing, boards usually issue a decision within 6 to 12 weeks.

By statute, applicants by veterans who deployed in support of a contingency operation and have a diagnosis of PTSD or TBI must be expedited.[51] No statistics are available to quantify how shortened an "expedited" timeline is, but advocates report that the wait time is still at least one year.

Advocacy Tip: For veterans who are entitled to an expedited decision under 10 U.S.C. § 1553(d)(2) based on contingency deployment and PTSD or TBI diagnosis, advocates should highlight that fact in the cover letter with the application.

Advocates also can request that a case be expedited for other reasons, such as terminal illness, advanced age, or other hardship, though whether the request will be granted is at the discretion of the board. The request likely will be more

50. 32 C.F.R. § 70.9(b)(8).
51. 10 U.S.C. § 1553(d)(2).

successful if supported by documentation, such as, in requests based on illness, a letter from the applicant's doctor confirming a diagnosis and prognosis.

3.10 Success Rates at the Discharge Review Boards

Detailed and comprehensive statistics for current success rates at the board are not available but, historically, they have been quite low. A 2013 analysis of DRBs found that they awarded discharge upgrades in fewer than 10 percent of cases.[52]

In recent years, certain categories of cases have significantly higher rates of success, especially veterans who were discharged under Don't Ask, Don't Tell and similar earlier policies, and veterans with in-service experiences of PTSD, TBI, or military sexual trauma that contributed to the discharge. For example, in fiscal year 2018, the Army DRB upgraded 45 percent of cases based on PTSD or TBI; the Naval DRB upgraded 21 percent; and the Air Force DRB upgraded 13 percent.[53]

4.0 Boards for Correction of Military or Naval Records

There are four Boards for Correction of Military or Naval Records (BCM/NRs) or Records Correction Boards: Army Board for Correction of Military Records (ABCMR); Board for Correction of Naval Records (BCNR); Air Force Board for Correction of Military Records (AFBCMR); and Coast Guard Board for Correction of Military Records (CGBCMR). The Board for Correction of Naval Records hears cases from veterans of both the Navy and the Marine Corps.

4.1 Legal Standards

The Secretaries of the Army, Navy, Air Force, and Homeland Security, acting through boards of civilians, have the authority to "correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice."[54] The legal standards therefore are "error" and "injustice,"[55] except for veterans with punitive discharges, where the standard is "clemency."[56]

52. *Booted*, at 90.
53. Legal Services Center of Harvard Law School et al., *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges* 9 (Mar. 2020) [hereinafter *Turned Away*], http://www.legalservicescenter.org/turnedawaybyva.
54. 10 U.S.C. § 1552(a)(1).
55. *Id.* § 1552(a)(1).
56. *Id.* § 1552(f)(2).

Each BCM/NR has its own specific regulations, which generally cover the procedures and operations of the boards.[57]

4.2 Structure and Composition

The Records Correction Boards are administrative boards within the various service branches.

Each board is composed of three board members, who are civilian staff of the service branches. Service as a board member is not the member's full-time assignment; rather, it as an additional duty for which employees of the various service branches can volunteer. Like the DRBs, the BCM/NR board members may have legal backgrounds, but the majority do not. To become a board member, they receive training in the laws and procedures that apply to the board on which they are serving. Each individual three-member board is chosen out of dozens of potential board members, with regular rotation of membership.

Unlike the DRBs, the BCM/NRs do not have members with mental health training that serve on the boards. Rather, the boards will sometimes obtain medical or legal advisory opinions from board or service branch employees. The boards routinely request medical advisory opinions for cases that present Hagel or Kurta Memoranda arguments that an in-service mental health condition contributed to the basis for separation.[58] If the veteran was diagnosed with a mental health disorder during service, and the application is related to that mental health disorder, then the medical opinion must be from a clinical psychologist or psychiatrist.[59] In all cases, the Coast Guard BCMR will obtain an advisory opinion from the Office of the Judge Advocate General of the Coast Guard.[60] For any advisory opinions a board obtains, the board will provide a copy to the applicant and allow him or her an opportunity to submit a written response.

The boards operate by majority vote. Thus, to succeed in obtaining a change, a veteran must convince at least two of the three board members.

4.3 Powers

The Records Correction Boards have very broad powers. They can correct any military record, not just those parts related to character of service, narrative reason, separation code, and reentry code. The BCM/NRs also may grant changes to such records as the veteran's rank at discharge and credit a veteran with additional time in service.

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57. 32 C.F.R. § 581.3 (Army Board for Correction of Military Records); 32 C.F.R. pt. 723 (Board for Correction of Naval Records); 32 C.F.R. pt. 865, subpt. A (Air Force Board for Correction of Military Records); 33 C.F.R., pt. 52 (Coast Guard Board for Correction of Military Records). *See also* Army Regulation 15-185 (Army Board for Correction of Military Records); Air Force Instruction 36-2603 (Air Force Board for Correction of Military Records).

58. For more on the Hagel and Kurta Memoranda, see Chapter 8.

59. 10 U.S.C. § 1552(g).

60. 33 C.F.R. § 52.42(b).

The BCM/NRs have the authority, unlike the DRBs, to change the character of service of a veteran discharged by general court-martial and to change a discharge to or from a medical discharge or retirement.

4.4 Records and Evidence

The guidance relating to records and evidence at the BCM/NRs is similar to that discussed previously in relation to the DRBs. The board will obtain a veteran's Official Military Personnel File. They may request additional records, but they are not investigative bodies.

Also like the DRBs, the Federal Rules of Evidence do not apply. Veterans may submit any and all evidence they choose, and the board will decide what weight to accord that evidence.

4.5 Hearings

The BCM/NRs have the authority to hold hearings but do so very rarely. Hearings are granted, at most, in a handful of cases each year.[61] The DD 149 application form includes a box to check to request a hearing before the board, and advocates should request a hearing if one is desired, but they should do so knowing that the request is unlikely to be granted.

4.6 Relief

The Records Correction Boards have the authority to correct any record in a veteran's military personnel file. The board votes on whether to grant or deny each item of requested relief, and may grant some but not all of the relief sought or may grant partial relief.

4.7 Statute of Limitations

A veteran must apply to a BCM/NR for a records correction within three years of the discovery of the error or injustice to be corrected.[62] The board can waive the three-year statute of limitations period "in the interest of justice."[63]

Note that the statute of limitations period does not begin to run on a fixed date, such as the date of the veteran's discharge. Rather, the period starts on the "discovery" of the error or injustice. "Discovery," in this context, means actual knowledge, not constructive knowledge.[64] Advocates have successfully argued that an error or injustice was discovered decades after a veteran left the service.

61. Eugene R. Fidell, *The Board for Correction of Military & Naval Records: An Administrative Law Perspective*, 65 ADMIN. L. REV. 499, 502 (2013) (noting that the ABCMR held no hearings in fiscal year 2012, the BCNR held no hearings from 1993 to 2013, and the CGBCMR held no hearings from 2003 to 2013).

62. 10 U.S.C. § 1552(b).

63. *Id.*

64. Ridgely v. Marsh, 866 F.2d 1526, 1529 (D.C. Cir. 1989).

For example, a veteran who developed a mental health condition in service that contributed to the basis for discharge, but who did not receive a diagnosis until after discharge, could argue that he or she "discovered" the injustice on the date he or she received the diagnosis. A new law, regulation, or guidance that creates more liberal standards at the boards or more servicemember-friendly procedures in the separation process might also be grounds on which to argue an application is timely.

If the application is not timely, the boards do have the authority to waive the three-year statute of limitations period. While the boards in the past denied many requests for waiver, the current practice of the boards appears to be to waive the statute of limitations period if the application appears to have any merit. Because the standard for waiver invokes "justice" and a basis for correction is the presence of "injustice," the board already has to review the full application to determine whether to waive the statute of limitations period, at which point many boards choose to render a decision on the merits. A common reason to request that the board waive the limitations period is that the case has merit and that it would be unjust to allow an error or injustice to remain on the veteran's record.

Furthermore, for applications based on the Hagel or Kurta Memoranda concerning in-service mental health conditions or experiences that contributed to the discharge, the Carson and Kurta Memoranda provide that the statute of limitations period should be waived, if it applies.[65]

Advocacy Tip: All applications to the BCM/NRs should address whether the application is timely or, if not, why the statute of limitations period should be waived. Waiver arguments can be relatively short—generally one to two paragraphs.

4.8 Reconsideration

A veteran may apply to a Records Correction Board for reconsideration of a prior determination on the basis of "materials not previously presented to or considered by the Board in making such determination."[66] Note that the evidence need only be newly presented to the board to warrant reconsideration; the evidence does not have to be "new" in the sense of having been created or discovered subsequent to the prior board decision.

65. Carson Memorandum ("[T]he BCMRs/BCNR will waive, if it is applicable and bars consideration of cases, the imposition of the statutue [*sic*] of limitation. Fairness and equity demand, in cases of such magnitude, that a Veteran's petition receives full and fair review, even if brought outside of the time limit."); Kurta Memorandum ¶ 23 (providing that the Carson Memorandum applies to the BCM/NRs and the DRBs "with regards to de novo reconsideration of petitions previously denied without the benefit of all applicable supplemental guidance").

66. 10 U.S.C. § 1552(a)(3)(D).

Advocacy Tip: When applying for reconsideration, explain what evidence is new and why it is important. Not only does this help justify the board members' efforts in reconsidering the case, but it also provides them a diplomatic basis on which to disagree with a prior board's denial without having to state that the prior board was incorrect—rather, the prior board did not have the full benefit of the new information that tips the scales in favor of the veteran.

There is no deadline to file for reconsideration.[67] Some boards used to impose a one-year deadline for reconsideration, but that limitation was overruled by statute.[68] The Carson and Kurta Memoranda both expressly state that the boards must reconsider new applications by veterans previously denied if they fit within the ambit of the Hagel, Carson, or Kurta Memoranda guidance about veterans with in-service mental health conditions.[69]

4.9 Timeline and Expediting

By statute, the Records Corrections Boards must take final action on 90 percent of cases within 10 months of receiving the application, and they must act on 100 percent of cases within 18 months.[70] However, not all boards are compliant with this standard.[71] Because discharge upgrade cases are more complex than other cases heard by the BCM/NRs, they tend to have a longer processing time—closer to the 18-month deadline than the 10-month deadline.

Unlike the DRBs, there is no express statutory provision that certain cases must be expedited. However, the BCM/NRs will consider requests to expedite and decide whether to grant them, in their discretion. Potential reasons to request an expedited decision are terminal illness or advanced age. Evidence to support the request, such as medical documentation or a doctor's letter, will likely improve the odds that the board will grant the request to expedite.

4.10 Success Rates at the Records Correction Boards

Historically, the success rates for discharge upgrades at the BCM/NRs have been low.[72] Comprehensive data are not available, but one report found that between 2009 and 2012, the BCNR granted upgrades to 1 percent of veteran-applicants with

67. *Id.*

68. Pub. L. 115–91, div. A, tit. V, §§ 520(a), 521(a), (c)(1), tit. X, § 1081(a)(27), Dec. 12, 2017, 131 Stat. 1379, 1380, 1595.

69. Carson Memorandum; Kurta Memorandum ¶ 26.

70. 10 U.S.C. § 117(a)–(b).

71. *See* Francine Blackmon, Dep'y Asst. Sec'y of the Army, Statement to the Personnel Subcomm. of the H. Armed Services Comm. (Sept. 27, 2018) (reporting that the Army BCMR did not meet the timeliness standards).

72. *Booted*, at 89.

Other Than Honorable discharges.[73] Similarly, a 2015 report found that from 1998 to 2013, the success rate for veterans applying to the ABCMR for an upgrade on the basis of undiagnosed PTSD was 3.7 percent.[74]

However, the success rates at the boards have been increasing in recent years, particularly in certain subcategories of cases. In fiscal year 2018, for applications involving PTSD, TBI, or related conditions, the percentage of applicants claiming such conditions who received upgrades were 34 percent at the Army BCMR, 31 percent at the Navy BCNR, and 7 percent at the Air Force BCMR.[75]

5.0 Discharge Appeal Review Board

See page 99 for information about the newly created Discharge Appeal Review Board.

6.0 Federal Court Judicial Review

Very few veterans denied relief by the boards seek judicial review. From 2009 to 2013, only 46 applicants denied by the AFBCMR challenged those decisions in court.[76] Of those, eight were remanded, and two of those remands led to relief for the applicants.[77] Likely reasons for the low rates of federal court challenges include that few veterans know that judicial review is an option, or, if they do know it is possible, do not know how to file for or pursue judicial review, and that very few lawyers practice this type of law, with even fewer practicing pro bono or at a cost that veterans can afford.

There are therefore very few federal court decisions relating to discharge upgrades, with a tiny minority being precedential decisions from the federal courts of appeals. Many of the important precedents in judicial review of military review board decisions were issued in the 1970s and 1980s, an era when discharge upgrade advocacy work was at its historical peak. Also, the cases are clustered in the Court of Federal Claims and the Federal District Court for the District of Columbia, because those courts have special jurisdiction over certain types of claims or over the military review boards, respectively.

Federal court review is a powerful and underutilized tool in discharge upgrade practice. Challenging a board's denial in court provides an opportunity to be heard by a fully civilian, nonmilitary judge, who may bring a different perspective to the case. Although there are principles and cases supporting special deference to military decisions, the federal judge—as well as the assistant United States attorney

73. *Id.*

74. Sudiata Sidibe & Francisco Unger, Veterans Legal Services Clinic, *Unfinished Business: Correction "Bad Paper" for Veterans with PTSD* 2 (2015) [hereinafter *Unfinished Business*], https://www.law.yale.edu/sites/default/files/documents/pdf/unfinishedbusiness.pdf.

75. *Turned Away*, at 9.

76. *Booted*, at 12.

77. *Id.*

assigned to defend the board's decision—can be persuaded that the board's decision was unlawful or insufficient. Federal court review can result in meaningful relief to a veteran.

There are significant opportunities for veterans' advocates to develop federal law regarding discharge upgrades and to ensure that the military review boards are held accountable.

6.1 Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. §§ 500 *et seq.*, provides certain standards and structure that govern the actions of numerous federal government agencies. In the context of discharge upgrades, the APA defines that standards by which an individual may challenge a final decision of one of the military review boards in federal court.[78]

6.1.1 Legal Standards

The APA directs courts to take two types of actions in regards to unlawful final agency action.

First, the APA provides that a court shall "compel agency action unlawfully withheld or unreasonably delayed."[79] Though there do not appear to be any cases based on this provision challenging the length of time the boards take to render a decision, advocates may wish to look further into this topic as appropriate.

Second, the APA states that a court shall "hold unlawful and set aside" a military review board's decision that is:

1. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
2. Contrary to constitutional right, power, privilege, or immunity;
3. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
4. Without observance of procedure required by law; or
5. Unsupported by substantial evidence.[80]

This second ground is the primary basis for seeking judicial review of discharge upgrade decisions, in particular the first prong regarding arbitrary and capricious action.

Review under the APA is not "de novo." The court will review the administrative record, which is generally the evidence and other documents before the agency, and determine whether the agency's decision was arbitrary, capricious,

78. 5 U.S.C. §§ 702, 704, 706.

79. *Id.* § 706(1).

80. *Id.* § 706(2). Section 706 also provides a sixth ground to challenge a final agency decision on the basis that it is "unwarranted by the facts." *Id.* § 705(2)(F). However, this ground applies only to cases where the facts are subject to trial de novo by the reviewing court, which is not the case in discharge upgrades. *Id.*

unlawful, or otherwise meets the specific grounds to set it aside. It may be possible to supplement the administrative record or to challenge what the agency files as the administrative record. Courts give deference to administrative agencies, and often grant special deference to the military.[81] However, this deference does not mean that a court must accept a military review board's decision.[82] As the Second Circuit held, "[w]hile the scope of our review of agency decisions is ultimately narrow, it is to be plenary, careful and searching."[83]

6.1.2 Jurisdiction, Statute of Limitations, Venue, and Proper Parties

Federal district courts have jurisdiction under the general federal question statute.[84] The statute of limitations period is six years from the date of the board's decision.[85] Venue is proper in the federal district where the veteran currently resides or in the District of Columbia.

The defendant is the Secretary of the respective service branch, in his or her official capacity; the military review board or its director, in his or her official capacity; or the United States.[86]

6.1.3 Exhaustion

A general principle of administrative law is that an individual must "exhaust" any required, available remedies before the government agency before seeking judicial review of a court, unless an exception to the "exhaustion" doctrine applies. What "exhaustion" is required must be expressly set forth in statute or regulation, under the Supreme Court's decision in *Darby v. Cisneros*.[87]

A decision of a military review board to deny or partially grant a veteran's application for discharge upgrade or record correction qualifies as final agency action under the APA. The veteran does not need to take any further action to "exhaust" his or her administrative remedies before seeking judicial review under

81. *See* Kreis v. Sec'y of the Air Force, 866 F.2d 1508, 1512 (D.C. Cir. 1989) (referring to judicial review of military review board decisions under the APA as a "deferential standard of review").

82. *See id*. (defining judicial review of AFBCMR decision as determining "whether the Secretary's decision making process was deficient, not whether his decision was correct" and stating that "the review sought by [the service member] looks like nothing more than the normal review of agency action, in which we require only that the agency exercise its discretion in a reasoned manner, but we defer to the agency's ultimate substantive decision").

83. Blassingame v. Sec'y of the Navy, 866 F.2d 556, 559 (2d Cir. 1989) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

84. 28 U.S.C. § 1331. *See Blassingame*, 811 F.2d at 69.

85. 28 U.S.C. § 2401. *See Blassingame*, 811 F.2d at 71 (holding that a veteran has six years from the date of a military review board's decision to challenge that decision in court under the APA); Geyen v. Marsh, 775 F.2d 1303, 1309 (5th Cir. 1985) (holding that veteran's suit was timely because the six-year statute of limitations period ran from the date of the ABCMR's decision); Dougherty v. U.S. Navy Bd. for Corr. of Naval Records, 784 F.2d 499, 501 (3d Cir. 1986) (holding that the statute of limitations period began to run when the BCNR issued its decision).

86. 5 U.S.C. § 703 ("If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.").

87. Darby v. Cisneros, 509 U.S. 137, 354 (1993).

the APA, because there is no statute or regulation that so requires.[88] That is, a veteran denied by a military review board does not need to seek reconsideration, nor does a veteran denied by a Discharge Review Board specifically need to request a personal appearance hearing or apply to a Records Correction Board, even though reconsideration, hearing, or re-application could offer the desired relief. Indeed, strictly read, *Darby v. Cisneros* appears to state that a veteran does not need to apply to a military review board at all, but rather may proceed directly to federal court to challenge a discharge as unlawful.[89]

Despite the Supreme Court's decision in *Darby v. Cisneros*, some federal district courts have refused to hear a discharge upgrade judicial review case without the veteran exhausting some or all available remedies before the military review boards, even if not required by statute or regulation.[90] These cases tend to cite precedents that predated *Darby* or that invoke the special status of the military and judicial doctrine of noninterference with military decision making.[91] Advocates should take note of these contrary cases and research decisions that would apply in the relevant district and circuit if they are to pursue a case in federal court.

Advocacy Tip: There are differences among the federal district and circuit courts in judicial review of military review board decisions. Because more than one venue may be proper, advocates should research the law in all potential venues and weigh that in the consideration of where to file.

6.1.4 Relief

The APA gives federal courts the authority to "hold unlawful," "set aside," and "compel" agency action if certain conditions are met.[92] Potential relief therefore includes the decision being vacated, reversed, remanded, or affirmed, and the court directing the board to act or not act according to certain guidelines.

88. *See, e.g.*, St. Clair v. Sec'y of the Navy, 970 F. Supp. 645, 647 (C.D. Ill. 1997) (holding that veteran with General discharge characterization denied by the Naval Discharge Review Board does not need to apply to the Board for Correction of Naval Records to exhaust administrative remedies prior to filing challenge to NDRB's decision in federal court under the APA).

89. *See, e.g.*, Crane v. Sec'y of the Army, 92 F. Supp. 2d 155, 161–63 (W.D.N.Y. 2000) (holding that former servicemember is not required to exhaust administrative remedies at the military review boards to challenge his involuntary separation from the military in federal court); Watson v. Perry, 918 F. Supp. 1403, 1411 (W.D. Wash 1996) (same); Perez v. United States, 850 F. Supp. 1354, 1359-60 (E.D. Ill. 1994) (same).

90. *See, e.g.*, Saad v. Dalton, 846 F. Supp. 889, 891 (S.D. Cal. 1994) (dismissing complaint of former Sailor involuntarily separated because of her failure to first apply to the Board for Correction of Naval Records and distinguishing *Darby v. Cisneros* because that case arose out of the Department of Housing and Urban Development, not the Department of Defense).

91. *See, e.g.*, *id.* (citing pre-*Darby* Ninth Circuit precedent that military personnel must exhaust intra-service administrative remedies).

92. 5 U.S.C. § 706.

Successful federal court challenges usually result in the court setting aside the board's decision and remanding the case to the board for further adjudication. The court may provide certain instructions to the board in how it must conduct that review. A court, if asked, also might be willing to set a timeline for the further adjudication and to retain jurisdiction over the case for the duration of the remand with a requirement that the parties report back on the outcome. Rarely would the court itself grant the veteran's application or direct that the board grant the application. Nevertheless, common practice is to ask the court to grant the veteran's application and ask in the alternative for the relief of a remand to the agency.

The possibility of obtaining attorney's fees is discussed in section 7.0 regarding the Equal Access to Justice Act.

6.2 Tucker Act

The Tucker Act is a federal statute that allows individuals to seek monetary and other relief from the federal government.[93] In the context of discharge upgrades, veterans aggrieved by a decision of the military review boards can seek review of the board's decision and relief in the form of back pay, reinstatement, records correction, and accrual of active duty days.

The Tucker Act itself is a jurisdictional right; it does not create a cause of action, but rather waives sovereign immunity for certain suits. Therefore, to seek relief under the Tucker Act, a veteran or other plaintiff must also point to a money-mandating statute, federal regulation, or government contract that confers the right to damages. Money-mandating statutes most relevant to discharge upgrade practice include the Military Pay Act,[94] certain "special and incentive pay" statutes for servicemembers,[95] and statutes relating to medical discharge and retirement.[96]

6.2.1 Legal Standards

In cases arising out of the military review boards, under the Tucker Act, the Court of Federal Claims reviews the case under a "substantial evidence" test.[97] Thus, the question is not whether the board arrived at the outcome that the judge might direct on de novo review, but rather whether the board acted in accordance with proper procedures and provided sufficient reasoning for its decision.

As discussed in subsection 5.2.3 on exhaustion, applying first to the military review boards is not required, except in limited circumstances. However, a veteran may wish to seek relief from a military review board before filing in court, because it could provide the sought relief, further develop the record, or provide other advantages. That said, if a veteran does apply first to a board, that application will

93. 28 U.S.C. § 1491 (Big Tucker Act); *id.* § 1346(a)(2).
94. 37 U.S.C. § 204(a).
95. *See id.* §§ 301–330.
96. 10 U.S.C. §§ 1201, 1203.
97. Heisig v. United States, 719 F.2d 1153, 1157 (Fed. Cir. 1983).

affect the Court of Federal Claims' review.[98] In such cases, the court's review is limited to the administrative record, unless certain narrow exceptions apply.[99] Furthermore, the court will apply traditional principles of administrative law, including that it will give deference to the agency[100] and that its review will focus on whether the board's decision "is arbitrary, capricious, unsupported by substantial evidence, or contrary to law."[101] The court may refuse to consider an argument that a veteran failed to present first to the military review board.[102]

6.2.2 Jurisdiction, Statute of Limitations, Venue, and Proper Parties

The statute of limitations period is six years, which, with rare exception, begins to accrue on the date of the veteran's discharge.[103]

There are two scenarios in which the claim might not accrue exactly six years from the date of discharge that are of special relevance in discharge upgrade practice. One is for medical discharge or retirement cases where the veteran was denied a medical evaluation for purposes of medical discharge or retirement in service. Because the Court of Federal Claims requires that the veteran first seek to obtain such an evaluation by applying to the appropriate military review board, the six-year statute of limitations period does not begin to run until a decision of that board.[104] The second is where the veteran continues to serve on active duty and the statute of limitations period is tolled under the Servicemembers Civil Relief Act.[105]

A pending application before the military review boards does not toll the statute of limitations period,[106] nor will a military review board decision restart the six-year statute of limitations period.[107] Some practitioners will, however, file the Tucker Act complaint and seek a stay of the action pending application to the military review board. Moreover, the Court of Federal Claims has dismissed cases filed within the six-year statute of limitations period under the doctrine of laches, based on a finding that the veteran unreasonably delayed in bringing his or her claim.[108]

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98. *See* Metz v. United States, 466 F.3d 991, 998 (Fed. Cir. 2006).

99. *Id*.

100. Patterson v. United States, 44 Fed. Cl. 468, 471 (Fed. Cl. 1999), *aff'd*, 250 F.3d 757 (Fed. Cir. 2000).

101. *Metz*, 466 F.3d at 998; French v. United States, 42 Fed. Cl. 49, 56 (Ct. Cl. 1998).

102. *Metz*, 466 F.3d at 999.

103. 28 U.S.C. § 2501. *See* Martinez v. United States, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc) (holding that a claim under the Tucker Act accrues "as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, i.e., when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his'" money (citations omitted)).

104. Chambers v. United States, 417 F.3d 1218, 1224–25 (Fed. Cir. 2005).

105. 50 U.S.C. app. § 526(a). *See* Bickford v. United States, 656 F.2d 636, 639 (Ct. Cl. 1981).

106. *Martinez*, 333 F.3d at 1309 (en banc).

107. *Id*. at 1309–10.

108. *See* Ingham v. United States, 2007 U.S. Claims Lexis 497, at *18, 2007 WL 5172422 (Ct. Fed. Cl. 2007) (unpublished) ("The doctrine of laches is an affirmative defense which may be applied to military cases irrespective of the statute of limitations."); Deering v. United States, 620 F.2d 242, 246 (1980).

The appropriate venue depends on the amount of money sought. For money claims of $10,000 or less, the Court of Federal Claims and federal district courts have concurrent jurisdiction under the Little Tucker Act.[109] For claims of more than $10,000, the Court of Federal Claims has exclusive jurisdiction.[110] Moreover, the Court of Federal Claims has jurisdiction only if money damages are sought[111] and cannot grant additional relief unless such relief is sufficiently related to the money damages.[112] The Court of Federal Claims sits in Washington, D.C.

6.2.3 Exhaustion

For cases involving discharge upgrades, there is no administrative exhaustion requirement under the Tucker Act, because seeking a discharge upgrade or records correction from the military review boards is permissive, not mandatory.[113]

For cases involving medical disability discharge or retirement, the Court of Federal Claims requires that some board have first evaluated whether the veteran is entitled to medical discharge or retirement. Some veterans will have received such a board evaluation in service, in which case no further exhaustion is required. However, if the veteran was denied a board in service, then he or she must first apply to the appropriate military review board before seeking review in court.[114] More about seeking medical discharge or retirement is in Chapter 13.

6.2.4 Relief

Under the Tucker Act, a court can award monetary relief, such as back pay, as well as any additional relief that is "incident of and collateral to" that money judgment.[115] Such additional relief may include reversal and vacation of any prior board decision, correction of records, removal or expungement of records, and reinstatement. The court also could remand a case that arose out of the military review boards back to the board for further proceedings, possibly with instructions or with the court retaining jurisdiction with deadlines for the parties to report back on further adjudication.

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109. 28 U.S.C. § 1346(a)(2). A plaintiff may waive the right to any recovery in excess of $10,000 in order to preserve district court jurisdiction over the claim. *See* Roedler v. Dep't of Energy, 255 F.3d 1347, 1351 (Fed. Cir. 2001); Smith v. Orr, 855 F.2d 1544, 1552–53 (Fed. Cir. 1988).

110. 28 U.S.C. § 1491.

111. *Id.*; Glidden Co. v. Zdanok, 370 U.S. 530, 537 (1962), *reh'g denied*, 371 U.S. 854 (1962).

112. 28 U.S.C. § 1491(a)(2). *See* United States v. Testan, 424 U.S. 392, 407 (1976).

113. *Martinez*, 333 F.3d at 1303–04.

114. *Chambers*, 417 F.3d at 1225.

115. 28 U.S.C. § 1491(a)(2). *See, e.g.*, Strickland v. United States, 73 Fed. Cl. 631, 632–33 (Ct. Cl. 2006); Strickland v. United States, 69 Fed. Cl. 684, 709 (Ct. Cl. 2006) (stating that, in records correction cases, "the Secretary is obligated not only to properly determine the nature of any error or injustice, but also to take such corrective action as will appropriately and fully erase such error or compensate such injustice" (quoting Roth v. United States, 378 F.3d 1371, 1381 (Fed. Cir. 2004)).

6.3 Other Federal Causes of Action

In addition to the traditional causes of action that veterans use to challenge the decisions of the military review boards (i.e., the Administrative Procedure Act and Tucker Act), other federal statutes or the United States Constitution may provide a cause of action. This Manual will not cover these other potential claims in depth, because they are not used frequently, case law is sparse, and the relief that they offer may be duplicative of that offered by the APA and Tucker Act. However, advocates may wish to conduct further research to determine whether there is a reason to incorporate them into any potential action for judicial review.

6.3.1 Privacy Act

The Privacy Act governs how the federal government creates and maintains records on individuals. Among other things, the Privacy Act mandates that an agency must maintain records that it uses to make determinations about individuals "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in determination."[116] Furthermore, an agency must maintain a "system of records" that permits an individual to request amendment of any record that is not accurate.[117] If any agency violates the Privacy Act, an individual may be able to recover damages and obtain other relief, including correction of the inaccurate record.[118] A two-year statute of limitations period applies,[119] which accrues at the time that the affected individual knows or should have known of the violation.[120]

6.3.2 Declaratory Judgment Act

The Declaratory Judgment Act is a mechanism to obtain declaratory and injunctive relief to remedy statutory or constitutional violations.[121] The Declaratory Judgment Act does not confer jurisdiction[122] and remains subject to the usual "case or controversy" and standing requirements. However, it may provide additional forms of relief to certain individuals. The statute of limitations period depends on the nature of the underlying claim.

6.3.3 Freedom of Information Act

The Freedom of Information Act (FOIA) is the federal public records law that allows individuals and organizations to obtain copies of government records,

116. 5 U.S.C. § 552a(e)(5).
117. *Id.* § 552a(d)(2)(B)(i)). *See* Henke v. U.S. Dep't of Commerce, 83 F.3d 1453, 1459 (D.C. Cir. 1996).
118. 5 U.S.C. §§ 552a(g), 552a(i).
119. *Id.* § 552a(g)(5).
120. Tijerna v. Walters, 821 F.2d 789, 798 (D.C. Cir. 1987).
121. 28 U.S.C. §§ 2201–2202.
122. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950).

unless a specific exemption precluding disclosure applies.[123] FOIA applies to executive branch agencies, including the Department of Defense. Each agency has its own FOIA regulations and standards that set forth the requirements for submitting a FOIA request.[124] The statute sets forth deadlines for agencies to respond to FOIA requests,[125] and an agency's failure to comply with the act can be administratively appealed within the agency and then be a cause of action for a lawsuit.

FOIA is not an independent ground for challenging a military separation or military review board decision. However, FOIA is a powerful tool in a discharge upgrade advocate's toolbox. FOIA may be used in an individual veteran's case to gain valuable information and context, and FOIA can provide access to statistics, data, reports, and other records about the service branches and military review boards in a way that informs discharge upgrade advocacy writ large.[126]

Many resources on how to draft and pursue a Freedom of Information Act request exist, including from such organizations as the Reporters Committee for Freedom of the Press and the National Security Archive.[127] The government FOIA website, FOIA.gov, also provides useful direction on where and how to submit a FOIA request.

6.3.4 United States Constitution

A veteran can also challenge separation from the armed forces and a decision of the military review boards under the U.S. Constitution.[128] Veterans in the past have relied on the First and Fifth Amendments in seeking court review.[129] Although the *Feres* Doctrine and cases in that line impose some boundaries on court challenges to military actions,[130] courts have nevertheless entertained such actions on the merits. If a veteran alleges both statutory and constitutional claims, a court may

123. 5 U.S.C. § 552.

124. Department of Defense FOIA regulations are at 32 C.F.R., pt. 285, and further guidance is set forth in DoD Directive 5400.07.

125. 5 U.S.C. § 552(a)(6).

126. *See, e.g.*, Protect Our Defenders v. Dep't of Def., __ F. Supp. 3d __, 2019 WL 306420 (D. Conn. July 12, 2019).

127. *See* Reporters Committee for Freedom of the Press, FOIA and Federal Open Government, www.rcfp.org/foia (last visited Sept. 23, 2019); National Security Archive, Freedom of Information Act, https://nsarchive.gwu.edu/project/foia (last visited Feb. 27, 2021).

128. *See, e.g.*, Watson v. Perry, 918 F. Supp. 1403, 1411 (W.D. Wash. 1996), *aff'd sub nom.* Holmes v. Cal. Nat'l Guard, 124 F.3d. 1126 (9th Cir. 1997) (challenging involuntary separation under Don't Ask, Don't Tell policy in part on the basis of First Amendment rights to freedom of speech and freedom of association and Fifth Amendment rights to due process and equal protection).

129. *See, e.g.*, Lipsman v. Sec'y of the Army, 335 F. Supp. 2d 48 (D.C.D.C. 2004) (Fifth Amendment challenge to ABCMR reconsideration procedures); Adair v. England, 183 F. Supp. 2d 31 (D.C.D.C. 2002) (First and Fifth Amendment challenge to Navy chaplaincy program standards); *Watson*, 918 F. Supp. at 1411 (First Amendment challenge to Don't Ask, Don't Tell policy); Dahl v. Sec'y of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993) (First and Fifth Amendment challenge to Don't Ask, Don't Tell policy).

130. *See* Feres v. United States, 340 U.S. 135 (1950); *see also* United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace 462 U.S. 296 (1983).

award relief on statutory grounds rather than constitutional grounds under the doctrine of constitutional avoidance.[131]

7.0 Class Actions

Class actions are used sparingly in the discharge upgrade context, but they have created some of the most important advances and established some of the most fundamental principles that benefit veterans seeking an upgrade or records correction. This section is not intended to provide a comprehensive study of class action law or all discharge upgrade-related class actions; rather, this section offers a brief overview of the basic principles of class actions in federal court and reviews recent class action litigation directed at the military review boards. The primary purpose is to ensure that advocates are aware that the class action mechanism is an available tool for seeking relief for veteran clients and other similarly situated veterans and to acquaint advocates of key recent precedents that could impact their clients and their work.

7.1 Basic Principles of Class Actions

A class action is a well-established form of lawsuit that allows one or more plaintiffs to pursue a legal ruling on behalf of a larger group or "class" after a certification procedure by a court. The genesis of the modern class action was the promulgation in 1966 of revised Federal Rule of Civil Procedure 23. Since then, class actions have creatively evolved in ways likely unforeseen by Rule 23's drafters.

Parties often favor class actions as a vehicle to efficiently adjudicate a wide range of complex claims, when numerous persons seek relief for injuries originating from a common source or practice.

Class actions permit the court to hear the claims of an otherwise impracticable number of claimants as one lawsuit, so long as the claims have certain key characteristics in common, and the named plaintiff's claims and injuries are representative of those of unnamed class members. The requirements of Rule 23 are essential, because any injunction or judgment that binds the named plaintiff will likely also bind absent class members.[132]

7.1.1 Rule 23 Requirements and Timing for Class Action Certification

To be certified as a class action, plaintiffs must satisfy the four threshold requirements of Rule 23(a), and present claims that constitute at least one of the three types of class actions authorized by Rule 23(b).

131. *See, e.g.*, *Dahl*, 830 F. Supp. at 1319 (granting claim under the Administrative Procedure Act and therefore declining to reach the constitutional claims).

132. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011).

Under Rule 23(a), the district court must make the following findings:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.[133]

Of the three types of class actions available under Rule 23(b), claims for relief under Rule 23(b)(2) are most relevant for challenges to the actions of military review boards.

To satisfy Rule 23(b)(2), the plaintiff must show that:

> the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.[134]

"Rule 23 is to be given a liberal rather than a restrictive interpretation," in determining whether its requirements have been met.[135]

Finally, the court must decide to certify a class "[a]t an early practicable time after a person sues or is sued as a class representative."[136]

Advocacy Tip: Pressing for an early class certification decision is essential for both case management and leveraging settlement prospects.

7.1.2 Rule 23(a) Numerosity, Commonality, Typicality, and Adequacy

First, numerosity may be easier to satisfy in a veterans discharge upgrade class action context given that claims are usually based on board procedures or standards that apply to many petitioners, even if the precise number are unknown.[137]

Advocacy Tip: A good faith estimate of class size is sufficient when the precise number of class members cannot be readily determined.

133. Fed. R. Civ. P. 23(a)(1)–(4).
134. Fed. R. Civ. P. 23(b)(2).
135. Marisol A. v. Giuliani, 126 F. 3d 372, 377 (2d Cir. 1997).
136. Fed. R. Civ. P. 23(c)(1)(A).
137. *See* Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993) ("Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement."); 1 Newberg on Class Actions § 3:12 ("As a general guideline . . . a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone").

Second, as for commonality, determining whether questions of law or fact common to the class exist "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[138] The commonality requirement is satisfied if the question "is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[139]

Advocacy Tip: Rule 23(a)(2) can be satisfied with a single common question, if resolving that question also resolves the issue central to the validity of each of the other claims.[140] The Supreme Court standard, commonly referred to as the "one-stroke" test, presents a useful frame for an advocate's argument.

Commonality is frequently present in military review board litigation, because what is being challenged—action or inaction by review boards—is broadly applicable to veteran petitioners.[141] On the other hand, it is harder to establish commonality when the predominant issues are the damages or injuries suffered by particular veterans.

Third, typicality is present when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."[142] As a practical matter, typicality is not demanding and will usually be met if the class claims satisfy the commonality requirement.[143] The central inquiry is whether the class representative's claims generally share the essential characteristics of the putative class as a whole.[144]

Fourth, Rule 23's adequacy requirement applies to both the named plaintiffs and the attorneys aspiring to be class counsel.

Named plaintiffs must be judged capable of fairly and adequately representing the absent class members. To ensure vigorous prosecution of the proposed class action, the class representative must show (1) an adequate incentive to pursue the class's claims and (2) the absence of any difference (or conflicts of interest) between the class representative and some class members that might undermine

138. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (quoting Gen. Tele. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

139. *Wal-Mart*, 564 U.S. at 350.

140. *Id*. *But see* M.D. *ex rel*. Stukenberg v. Perry 675 F.3d 832, 844 (5th Cir. 2012) (applying *Wal-Mart* but finding that even systemic or widespread misconduct by the defendant insufficient commonality).

141. Fed. R. Civ. P. 23(a)(2). *See, e.g.*, Parsons v. Ryan, 754 F.3d 657 (9th Cir. 2014) ("The policies and practices were the glue that held together the putative class.").

142. *In re* Drexel Burnham Lambert Grp., Inc., 960 F.2d 285, 291 (2d Cir. 1992).

143. Indeed, the Supreme Court has observed that Rule 23's typicality, adequacy of representation, and commonality requirements "tend[] to merge." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20 (1997).

144. Moore's Federal Practice § 23.24; see General Tele. Co. of the Northwest, Inc. v. Equal Emp't Opportunity Comm'n, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980).

that incentive.[145] Conflicts between the named plaintiffs and the absent class members will defeat class certification only if they are "fundamental to the suit" and go "to the heart of the litigation."[146]

Class counsel must satisfy the requirements of Rule 23(g), which directs that the court appoint class counsel at the time of certification and make findings regarding (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) the resources that counsel will commit to representing the class."[147]

7.1.3 Rule 23(b) Types of Class Actions

In addition to the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a), the district court must make findings under at least one of the subparts of Rule 23 (b)(1)–(3). Class actions against the military review boards are usually prosecuted under Rule 23(b)(2), because the board is normally alleged to have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[148]

7.2 Evolution of Veterans Discharge Upgrade Class Actions

Class actions have developed more slowly in the veterans law arena than in other areas of the law,[149] but not for any lack of effort by plaintiff veterans and their litigation counsel. As discussed in the Preface, organizations and advocacy groups in the 1970s and 1980s brought groundbreaking class actions that established key principles of discharge upgrade law and obtained remedies on behalf of thousands of veterans. But, from the 1990s through the 2000s, very little federal court class action litigation occurred that addressed the military review boards.

More recently, there has been a resurgence of attention to the military review boards, including in the form of class action litigation seeking to reform

145. *See In re* Payment Card Interchange Fee & Merch. Discount Antitrust Litig., 827 F.3d 223, 231 (2d Cir. 2016); Berger v. Compaq Computer Corp., 257 F.3d 475, 480 (5th Cir. 2001).

146. Online DVD-Rental Antitrust Litig., 779 F.3d 934, 942 (9th Cir. 2015).

147. Fed. R. Civ. P. 23(g)(1)(A)(i)–(iv); 3 Newberg on Class Actions ¶ 8.

148. Fed. R. Civ. P. 23(b)(2).

149. By contrast, class actions were certified regularly in disputes with branches of the armed forces over pay and employment *See, e.g.*, Berkeley v. United States, 287 F.3d 1076 (Fed. Cir. 2002) (certifying a class of junior officers challenging a decision of the Air Force Reduction in Funding (RIF) Board under the Equal Protection Clause); Larionoff v. United States, 365 F. Supp. 140 (D.D.C. 1973) (certifying a class of Navy personnel claiming entitlement to a reenlistment bonus despite the Navy's argument that the case should be before the BCNR); *see also* Sabo v. United States, 102 Fed. Cl. 619 (2011) (certifying a class of servicemembers challenging determinations by the military's Physical Evaluation Boards that they were unfit to serve due to PTSD); Chisolm v. United States, 49 Fed. Cl. 619 (2001) (certifying a class of officers challenging their forced retirement by the Air Force Early Retirement Board).

the practices and procedures of those boards. Of the four discharge board class actions discussed next, each had its own procedural context, substantive issues, and individual and organizational plaintiffs. But what is consistent across the cases is the effective use of Rule 23, in pleadings, motions, and the framing of remedies, as demonstrated by the class-wide results achieved.

In *Shepherd v. McHugh*, a Vietnam Army combat veteran and the veterans service organization Vietnam Veterans of America pursued a class action lawsuit seeking equitable relief under Rule 23(b)(2) for the many thousands of veterans who had deployed to Vietnam and developed Post-Traumatic Stress Disorder (PTSD) during their service. The proposed class included veterans who had received Other Than Honorable discharges based on conduct related to PTSD.[150] These plaintiffs challenged the systemic denial of their discharge upgrade applications by the Records Correction Boards, particularly the failure of the boards to properly consider evidence of PTSD diagnoses as a trigger for any performance issues or misconduct. They charged that the review boards "have failed to utilize consistent and medically appropriate standards when assessing how service-related PTSD impacted class members' ability to perform their duties when considering whether to upgrade their discharge statuses."[151] Plaintiffs further alleged that, since 2003, of approximately 145 applications for upgrades of OTH discharges submitted by Vietnam veterans claiming PTSD, the Army Board for Correction of Military Records had approved two—a 1.4 percent approval rate.[152] Plaintiffs brought claims under the Administrative Procedure Act, the Rehabilitation Act of 1973, and Procedural Due Process under the Fifth Amendment.[153] Ultimately, the case settled prior to a decision on class certification with relief for the individual plaintiff.[154]

However, shortly thereafter, similar claims were brought in *Monk v. Mabus*.[155] There, multiple Vietnam era veterans and veterans organizations proposed a class of all veterans of the Army, Navy, Air Force, and Marine Corps who were discharged under Other Than Honorable conditions, had been diagnosed with PTSD attributable to their service, and had not received discharge upgrades.[156] Bringing claims under the Administrative Procedure Act, Rehabilitation Act, and Fifth Amendment Due Process Clause, they sought injunctive and declaratory relief

150. Shepherd v. McHugh, No. 3:11-cv-641 (D. Conn. filed Apr. 21, 2011). Many of the key case filings are available online at https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/shepherd-v-mchugh.

151. Proposed Second Amended Complaint at 15-16, Shepherd v. McHugh, No. 3:11-cv-641 (D. Conn. Dec. 3, 2012), ECF No. 57-2.

152. *Id.* at 12.

153. *Id.* at 17–20.

154. Settlement Agreement, Shepherd v. McHugh, No. 3:11-cv-641 (D. Conn. Oct. 3, 2013), *available at* https://law.yale.edu/sites/default/files/documents/pdf/Clinics/Shepherd_Agreement_10-4-13.pdf.

155. Monk v. Mabus, No. 3:14-cv-260 (D. Conn. filed Mar. 3, 2014). Many of the key case filings are available online at https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/monk-v-mabus.

156. Complaint at 1–3, 28, Monk v. Mabus, No. 3:14-cv-260 (D. Conn. Mar. 3, 2014), ECF No. 1.

requiring the Records Correction Boards to adopt suitable procedures, including the application of medically appropriate standards, for their review of discharge status upgrade petitions submitted by class members.[157] The court ultimately remanded the individual plaintiffs' claims to the agency for re-adjudication and dismissed the case without prejudice prior to a decision on class certification.[158]

Although neither *Shepherd* nor *Monk* achieved class certification and court-ordered relief, they not only obtained relief for the individual plaintiffs but also contributed to policy reforms at DoD. The pressure of litigation significantly contributed to the issuance of the Hagel Memorandum, discussed in subsection 2.7.6, which was the first of the key DoD memoranda regarding the boards' adjudication of applications based on in-service mental health conditions. These class actions thus service as important examples of the power of class action litigation to attain systemic reform.

Then, in 2017 and 2018, two additional class actions were filed, this time by post-9/11 veterans with less-than-honorable discharges, who contended that the Discharge Review Boards failed to properly adjudicate their applications in light of their in-service mental health conditions and to adequately implement the Hagel, Kurta, and related memoranda.

The first case, *Kennedy v. Whitley*, was brought by two Army veterans and focused on the Army Discharge Review Board.[159] The complaint alleged class claims under the Administrative Procedure Act and Due Process Clause of the Fifth Amendment.[160] Plaintiffs sought a class-wide injunction ordering the Army Discharge Review Board, in its review of less-than-honorable discharges, to give "liberal consideration" to diagnoses and experiences of PTSD, traumatic brain injury (TBI), military sexual trauma (MST), and related conditions, and to records evidencing those conditions, in line with the principles of the Hagel Memorandum.[161]

The court certified a class in *Kennedy* that included:

> All Army, Army Reserve, and Army National Guard veterans of the Iraq and Afghanistan era—the period between October 7, 2001 to present—who:
>
> (a) were discharged with a less-than Honorable service characterization (this includes General and Other than Honorable discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges);
>
> (b) have not received discharge upgrades to Honorable; and

157. *Id.* at 30–33, 36–37.

158. Order on Motion for a Voluntary Remand at 1–2, Monk v. Mabus, No. 3:14-cv-260 (D. Conn. Nov. 14, 2014), ECF No. 48.

159. Amended Complaint, Kennedy v. Whitley, No. 3:16-cv-2010 (D. Conn. Apr. 17, 2017), ECF No. 11. For more information about the case, including key case filings, visit https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-esper.

160. Amended Complaint at 27–29, Kennedy v. Whitley, No. 3:16-cv-2010 (D. Conn. Apr. 17, 2017), ECF No. 11.

161. *Id.* at 2–3.

(c) have diagnoses of PTSD or PTSD-related conditions or record documenting one or more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.[162]

The court also denied defendant's motion to dismiss the case.[163] After further litigation, which included the court granting some extra-record discovery such as depositions of DoD and Army officials and production of Army records, the parties eventually agreed to settle the class action.[164] In November 2020, a settlement agreement was filed with the court that included requirements that the Army reconsider, either automatically or upon application, the applications of class members whose applications were previously denied, to revise its internal procedures and training, and to offer the option for a telephonic appearance, among other changes.[165] The court granted final approval to the settlement in April 2021.[166] For future updates on the status of the *Kennedy* class action, advocates are encouraged to check the court docket and to visit class counsel's website.[167]

The second case, *Manker v. Harker*, was brought by a Marine Corps veteran and the veterans advocacy organization National Veterans Council for Legal Redress and focused on the alleged legal violations of the Naval Discharge Review Board.[168] Plaintiffs asserted a class action on behalf of Navy and Marine Corps veterans that the NDRB failed to properly consider in-service PTSD, TBI, MST, or other mental health conditions contrary to the Hagel Memorandum and in violation of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment.[169]

As in *Kennedy*, the district court granted class certification and denied the government's motions to dismiss.[170] The certified class included:

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162. Memorandum of Decision on Motion for Class Certification at 16, Kennedy v. Whitley, No. 3:16-cv-2010 (D. Conn. Dec. 21, 2018), ECF No. 74.

163. Ruling Denying Motion to Dismiss, Kennedy v. Whitley, No. 3:16-cv-2010 (D. Conn. Jan. 9, 2019), ECF No. 75.

164. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Class Action Settlement at 8–9, Kennedy v. Whitley, No. 3:16-cv-2010 (D. Conn. Nov. 17, 2020), ECF No. 198-1.

165. Joint Motion for Preliminary Settlement Approval, Kennedy v. Whitley, No. 3:16-cv-2020 (D. Conn. Nov. 17, 2020), ECF No. 198.

166. Ruling and Order Approving Class Action Settlement, Kennedy v. McCarthy, No. 3:16-cv-2010 (D. Conn. filed Dec. 8, 2016), ECF No. 223; https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-mccarthy (last visited May 3, 2021).

167. Kennedy v. Whitley, No. 3:16-cv-2010 (D. Conn. filed Dec. 8, 2016); Kennedy v. Whitley, https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-mccarthy (last visited Dec. 11, 2020).

168. Complaint at 1–3, Manker v. Harker, No. 3:18-cv-372 (D. Conn. Mar. 2, 2018), ECF No. 1. For more information about the case, including key case filings, visit https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/manker-v-spencer.

169. *Id.* at 34–39.

170. Ruling on Plaintiffs' Motion for Class Certification, Manker v. Harker, No. 3:18-cv-372 (D. Conn. Nov. 15, 2018), ECF No. 33; Rulings on Defendant's Motion to Dismiss or Remand and on Cross-Motions for Discovery, Manker v. Harker, No. 3:18-cv-372 (D. Conn. Nov. 7, 2019), ECF No. 79.

> Veterans who served during the Iraq and Afghanistan Era—defined as the period between October 7, 2001, and the present—who:
>
> (a) were discharged from the Navy, Navy Reserves, Marine Corps, or Marine Corps Reserve with less-than-Honorable statuses, including General and Other-than-Honorable discharges but excluding Bad Conduct or Dishonorable discharges;
>
> (b) have not received upgrades of their discharge statuses to Honorable from the NDRB; and
>
> (c) have diagnoses of PTSD, TBI, or other related mental health conditions, or records documenting one or more symptoms of PTSD, TBI, or other related mental health conditions at the time of discharge, attributable to their military service under the Hagel Memo standards of liberal or special consideration.[171]

The court then granted limited extra-record discovery, to include records production and depositions.[172] At the time of publishing this Manual, the case remains pending before the district court with no ruling on the merits.[173]

Because the *Kennedy* and *Manker* class actions are ongoing, it is important for advocates to identify whether any veterans with whom they are working are members of the classes and to update themselves on the current status of the cases.

Advocacy Tip: Given that district courts have endorsed class actions in challenges to military review board procedures, advocates should regularly evaluate, as a threshold matter, whether Rule 23's requirements are met in their discharge upgrade claims.

In sum, class action lawsuits provide an efficient mechanism for combining an impracticable number of cases that turn on a common question. They also can prompt systemic change in ways that a single victory will not. In the discharge upgrade context, class actions have proved a powerful tool to advance individual and community rights, and they are an available—but sparingly used—tool. When a veteran is harmed by a policy or practice (formal or informal) that may be contrary to law, advocates should evaluate the appropriateness of seeking class certification to achieve broader relief for similarly situated veterans.

171. Ruling on Plaintiffs' Motion for Class Certification at 21, Manker v. Harker, No. 3:18-cv-372 (D. Conn. Nov. 15, 2018), ECF No. 33.

172. Rulings on Defendant's Motion to Dismiss or Remand and on Cross-Motions for Discovery, Manker v. Harker, No. 3:18-cv-372 (D. Conn. Nov. 7, 2019), ECF No. 79; Discovery Order, Manker v. Harker, No. 3:18-cv-372 (D. Conn. Dec. 18, 2019), ECF No. 93.

173. To learn more about the current status of these matters, information is available at https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-mccarthy (Kennedy v. Whitley) and https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/manker-v-spencer (Manker v. Harker).

8.0 Equal Access to Justice Act and Other Fee-Shifting Statutes

Under what is known as the "American Rule," parties are responsible for their own attorney's fees and costs in litigation unless a source of legal authority permits otherwise. In the context of representing veterans in discharge upgrade cases, the potential for recovering attorney's fees, expenses, and costs from the government only arises when federal court litigation has been commenced. The Equal Access to Justice Act (EAJA) is the primary mechanism for the recovery of attorney's fees, expenses, and costs when a federal court reviews a discharge upgrade decision of the military review boards. Other fee-shifting statutes can also become relevant in a narrower subset of cases in federal court. No legal authority exists to permit the recovery of attorney fees, expenses, and costs against the government for legal work performed exclusively before the military review boards.[174]

It is important for advocates to be familiar with the potential availability of attorney's fees, expenses, and costs and the requirements for their recovery. As an initial matter, the limited contexts in which they can be recovered from the government in discharge upgrade and related cases underscore the critical need for expanding pro bono representation before the military review boards. A great many of the veterans who need representation in discharge upgrade cases and related cases cannot afford to pay an attorney to represent them. More generally, that attorney's fees, expenses, and costs are potentially available in federal court litigation should serve as encouragement for advocates to consider bringing actions in federal court to challenge adverse discharge upgrade decisions and related decisions. Furthermore, the potential availability of attorney's fees, expenses, and costs from the government can provide an important form of leverage during federal court litigation by incentivizing government attorneys to more carefully assess the economic risks of protracted litigation.

8.1 Equal Access to Justice Act

By enacting the Equal Access to Justice Act (EAJA),[175] Congress waived the government's sovereign immunity and general statutory immunity from fee awards when the requirements of the EAJA statute are met. The purpose of EAJA is to help ensure that a party's financial limitations do not serve as a barrier to retaining counsel for the purpose of challenging unreasonable government action.[176] EAJA applies to lawsuits brought in federal court to challenge discharge upgrade deci-

174. However, as discussed later, in certain circumstances attorney's fees, expenses, and costs may be available under EAJA for representation before military review boards following a remand from federal court.

175. 28 U.S.C. § 2412(a)–(d).

176. Comm'r of I.N.S. v. Jean, 496 U.S. 154, 163 (1990) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.").

sions and record correct decisions, whether brought under the APA or the Tucker Act or both.[177] That EAJA applies to federal court challenges to discharge upgrade decisions and related decisions does not mean there is an automatic entitlement to attorney's fees, expenses, and costs. Attorney's fees, expenses, and costs under EAJA are only available when the statutory requirements are satisfied. There are four main statutory requirements: (1) the party must meet the financial asset test; (2) the party must be a prevailing party; (3) the government's position must not have been substantially justified; and (4) the party must timely submit an application to the court for fees and expenses that includes itemized statements of those fees and expenses.[178] Each of these requirements is briefly discussed next.

8.1.1 Party's Net Worth

To be eligible for an EAJA award, an individual must be someone "whose net worth did not exceed $2,000,000 at the time the civil action was filed."[179] The net worth eligibility requirement can ordinarily be met through a party's declaration or a similar statement regarding the party's net worth. Such declaration or statement would be submitted to the court at the conclusion of the case as part of the party's application for attorney's fees, expenses, and costs under EAJA. Advocates should remain mindful that the determination of a party's net worth is tied to "the time the civil action was filed," not to the time at which the party might later seek an EAJA award in the case.

8.1.2 Prevailing Party Status

The party seeking an EAJA award must also be "the prevailing party."[180] In interpreting an identical provision in a parallel fee-shifting statute, the Supreme Court has held that "a prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought[,]"[181] and that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute."[182]

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177. *See, e.g.*, Weber v. Weinberger, 651 F. Supp. 1379, 1382 (W.D. Mich. 1987) (awarding attorney's fees based on EAJA in case that successfully challenged Air Force general discharge where suit was brought under the APA); Prochazka v. United States, 116 Fed. Cl. 444, 447 (Fed. Cl. 2014) (awarding attorney's fees based on EAJA in case that successfully challenged date Navy assigned to servicemember's retirement where suit was brought under Tucker Act, among other statutes). Neither the APA nor the Tucker Act contain their own fee-shifting provisions.

178. 28 U.S.C. § 2412(a)–(d).

179. *Id.* § 2412(d)(2)(B)(i). A party that is a corporation, association, or certain other types of organizations may also meet the eligibility requirement for an EAJA award. *Id.* Such eligibility statuses are not discussed here.

180. 28 U.S.C. § 2412(a)–(d).

181. Texas State Teachers Ass'n v. Garland Independent School Dist., 389 U.S. 782, 791 (1989) (discussing meaning of "prevailing party" status in the context of civil rights fee-shifting statute).

182. *Id.* at 792. Garland's discussion of the meaning of prevailing party status was cited approvingly by the Supreme Court in an EAJA case. Shalala v. Schaefer, 509 U.S. 292, 302 (1993). Courts interpreting EAJA often look not only to precedent that interprets EAJA, but also regularly look to precedent that interprets identical or similar language in other fee-shifting statutes.

In addition, the success the party achieves must come by way of a court order in some form, not through a voluntary settlement agreement or capitulation by the government that lacked the court's imprimatur and was merely catalyzed by the litigation.[183] The party seeking an EAJA award need not have succeeded on all the claims the party presented to the court. It is enough that the party received relief from the court on any significant claim in the party's suit.[184] The party seeking an EAJA award has the burden of establishing prevailing party status.[185] If a party does not establish prevailing party status, the court will not reach the succeeding questions regarding whether the government's position was substantially justified and the reasonableness of the attorney's fees and expenses claimed.

The individual federal district courts and circuit courts of appeals have further clarified the meaning of prevailing party status under EAJA, including in the specific context of judicial review of agency action and as applied to discharge upgrade cases and record correction cases.[186] One recurring question is whether a court order remanding a case back to a military review board for further proceedings confers prevailing party status. While various courts analyze that question somewhat differently and there has been some change over time in the legal standards certain circuits employ, the consensus is that a court's remand order can confer prevailing party status if the remand is predicated on agency error.[187] Whether the court has retained jurisdiction of the case post-remand and when during the litigation the application for an EAJA award is submitted can be important factors in determining prevailing party status.[188]

183. Buckhannon Bd. & Home Care, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598 (2001).

184. *See, e.g.*, Lynom v. Widnall, 222 F. Supp. 2d 1, 5 (D.D.C. 2002) (concluding that veteran was a prevailing party under EAJA where veteran prevailed on some of her claims and others were dismissed); Weber v. Weinberger, 651 F. Supp. 1379, 1385 (W.D. Mich. 1987) (concluding that veteran was a prevailing party under EAJA where veteran received partial summary judgment on the merits of the suit); Doe v. Sec'y of the Air Force, 587 F. Supp. 1540, 1543 (D.D.C. 1984) (concluding that veteran was a prevailing party under EAJA where some of the veteran's claims were rejected by the court and where court order granted general discharge under honorable conditions instead of the fully honorable discharge veteran sought).

185. *See, e.g.*, Davis v. Nicholson, 475 F.3d 1360, 1366 (Fed. Cir. 2007).

186. *See, e.g.*, Gonzalez v. United States, 44 Fed. Cl. 764 (Fed. Cl. 1999).

187. *See, e.g.*, Lynom v. Widnall, 222 F. Supp. 2d 1, 4–5 (D.D.C. 2002) (concluding that veteran was a prevailing party under EAJA where case remanded to the AFBCMR based on administrative error); Motorola Ceramic Products v. United States, 336 F.3d 1360, 1363–66 (Fed. Cir. 2003) (discussing prevailing party status under EAJA where case remanded to agency and role that court's retention or non-retention of jurisdiction post-remand has on analysis); SecurityPoint Holdings, Inc. v. Transp. Sec. Admin., 836 F.3d 32 (D.C. Cir. 2016) (overruling circuit precedent to hold that a party who obtains a remand to an agency based on administrative error is a prevailing party under EAJA irrespective of the outcome on remand if court does not retain jurisdiction post-remand). For further discussion of prevailing party status under EAJA and remands to military review boards, *see, e.g.*, Small v. United States, 130 Fed. Cl. 88, 101–08 (2016).

188. *Id.*

8.1.3 Government's Position Not Substantially Justified

Once a party establishes prevailing party status, the burden shifts to the government to establish that its position was substantially justified.[189] The government's position encompasses both the position taken in the federal court litigation and the position reflected in the underlying agency decision at issue in the litigation.[190] To determine whether the government's position was substantially justified, courts look to a number of factors, including the novelty, complexity, and difficulty of the legal issues presented and the reasonableness of the government's position, notwithstanding that the government necessarily lost all or a portion of the claims in the case.[191]

8.1.4 Application for Fees and Costs and Reasonableness Standard

A party seeking an EAJA award must file an application to the court "within 30 days of final judgment in the action."[192] The EAJA application must include "an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed."[193] EAJA defines what can constitute "fees and expenses" within the meaning of the statute.[194] EAJA states that

> the amount of fees awarded . . . shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee[.][195]

In addition to determining the appropriate hourly rate for attorney's fees, courts must also determine whether the number of hours claimed is in fact reasonable.[196] In assessing whether the number of hours claimed is reasonable, courts

189. *See, e.g.*, White v. Nicholson, 412 F.3d 1314, 1315 (Fed. Cir. 2005). While the government bears the burden of establishing that its position was substantially justified, the party seeking an EAJA award must "allege" in the EAJA application "that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). By the terms of EAJA, the defense of substantial justification applies to claims for attorney's fees and expenses, but not to claims for a party's costs. *Compare* 28 U.S.C. § 2412(d)(1)(A) *with* 28 U.S.C. § 2412(a)(1).

190. 28 U.S.C. § 2412(d)(2)(D); Comm'r of I.N.S. v. Jean, 496 U.S. 154, 159 (1990).

191. For discussion of EAJA eligibility and whether the government's position was substantially justified in cases involving challenges to the decisions of the military review boards, *see* Prochazka v. United States, 116 Fed. Cl. 444, 454–57 (Fed. Cl. 2014); Lynom v. Widnall, 222 F. Supp. 2d 1, 5–6 (D.D.C. 2002); Gonzalez v. United States, 44 Fed. Cl. 764, 769–70 (Fed. Cl. 1999); Weber v. Weinberger, 651 F. Supp. 1379, 1386–89 (W.D. Mich. 1987).

192. 28 U.S.C. § 2412(d)(1)(B).

193. *Id.*

194. *Id.* § 2412(d)(2)(A).

195. *Id.* Based on a comparison of prevailing market rates and calculating cost of living adjustments from the $125 per hour cap using a predetermined formula, courts routinely award hourly fees in excess of $125 per hour. *See, e.g.*, Haselwander v. McHugh, 797 F.3d 1 (D.C. Cir. 2015). For discussion of what can constitute "a special factor" separately justifying fees in excess of $125 per hour, *see* Pierce v. Underwood, 487 U.S. 552, 571–74 (1988).

196. 28 U.S.C. § 2412(d)(2)(A).

look to a number of factors, including the extent of the success achieved by the party in the litigation,[197] which is the primary consideration, and the clarity of the itemized time-keeping records.[198] Fees under EAJA may, in certain limited circumstances, be available for representing a party on remand from the court where the court has retained jurisdiction of the case and the remanded administrative proceedings are intimately connected to the judicial proceeding.[199] The time devoted to a case by paralegals or clinical law students may be included in an EAJA award.[200] Fees may also be available under EAJA for preparing and litigating the EAJA application itself.[201] That an attorney is representing a party pro bono does not bar an award of fees under EAJA.[202] The party seeking an EAJA award has the burden of establishing that the number of hours claimed is reasonable.[203] Fees awarded under EAJA are the property of the party, not the attorney.[204]

8.1.5 Other Considerations

The EAJA also states that even if the other requirements for an award are satisfied, the court shall not award fees and expenses where "the court finds . . . that special circumstances make an award unjust."[205] The "special circumstances" exception to an EAJA award has been characterized as a "safety valve" to permit a court to deny an EAJA award where equitable considerations exist and has rarely been invoked to deny an EAJA application.[206]

This Manual's coverage of EAJA is by necessity brief. When EAJA may be implicated in the representation of a veteran, advocates are encouraged to consult attorney's fees treatises and other dedicated secondary sources and to conduct thorough legal research about the EAJA case law in the specific court or circuit where the litigation will occur.

197. *See, e.g.*, Hubbard v. United States, 480 F.3d 1327, 1331–35 (Fed. Cir. 2007); Hensley v. Eckerhart, 461 U.S. 424, 436 (1983).

198. *See, e.g.*, Am. Petroleum Inst. v. EPA, 72 F.3d 907, 915 (D.C. Cir. 1996).

199. *See, e.g.*, Sullivan v. Hudson, 490 U.S. 877, 887–90 (1989); Castaneda-Castillo, 723 F.3d 48, 69–71 (1st Cir.).

200. *See, e.g.*, Froio v. McDonald, 27 Vet. App. 32 (2015).

201. Comm'r of I.N.S. v. Jean, 496 U.S. 154, 160–62 (1990); Scarborough v. Principi, 541 U.S. 401, 419 n.6 (2004).

202. Blum v. Stenson, 465 U.S. 886, 895–96 (1984); Cornella v. Schweiker, 728 F.2d 978, 985–87 (8th Cir. 1984).

203. *See, e.g.*, Am. Petroleum Inst. v. EPA, 72 F.3d 907, 915 (D.C. Cir. 1996).

204. Astrue v. Ratliff, 60 U.S. 586, 596–98 (2010). As a consequence, attorneys should be mindful of the possibility of federal offsets if the party has qualifying federal debts and the necessity of the party's express assignment of the right to receive the fee to the attorney. *Id.*; Sabo v. United States, 127 Fed. Cl. 606, 611 (Fed. Cl. 2016).

205. 28 U.S.C. § 2412(d)(1)(A).

206. *See, e.g.*, Scarborough v. Principi, 541 U.S. 401, 423 (2004); Weber v. Weinberger, 651 F. Supp. 1379, 1389 (W.D. Mich. 1987).

8.2 Attorney's Fees under the Privacy Act and the Freedom of Information Act

As noted earlier, although the APA and Tucker Act are traditionally the most common pathways for advocates to challenge in federal court the decisions of the military review boards, other federal statutes may provide complementary avenues for advocating for veterans who received less-than-honorable discharges or other stigmatizing discharges. These statutes in turn may provide an independent basis for an award of attorney's fees, expenses, and costs.

Advocates may bring suit in federal court for violations of the Privacy Act. Such suits might challenge the government's failure to properly maintain a veteran's records or the government's failure to properly amend a veteran's records.[207] The Privacy Act contains its own fee-shifting provision.[208] Similarly, advocates may bring suit in federal court for violations of the Freedom of Information Act (FOIA). Such suits might challenge the government's failure to provide records in response to a FOIA request. A FOIA request might have been made as part of an effort to gather evidence in support of law reform efforts on behalf of veterans who received less-than-honorable discharges or other stigmatizing discharges. Or a FOIA request might have been made as part of an effort to gather evidence for the representation in an individual veteran's case. Like the Privacy Act, FOIA contains its own fee-shifting provision.[209] Because both of these fee-shifting provisions fall outside EAJA, advocates are encouraged to consult the particular statutes and case law that apply to claims for attorney's fees, expenses, and costs in those contexts.

9.0 The Alternative or Complementary Path of a VA Character of Discharge Determination

Chapter 19 discusses in depth the standards and processes for less-than-honorably discharged veterans to attempt to access federal Department of Veterans Affairs (VA) benefits through the Character of Discharge (COD) determination process. COD review is a process entirely distinct from the discharge review and records correction application to the military review boards. An application to VA may be a faster, easier, or more successful way to achieve a veteran's goal of gaining access to veteran benefits and services, depending on the circumstances of the veteran's service and discharge. Many advocates choose to pursue a VA COD review in parallel

207. 5 U.S.C. § 552a(e)(5); *id.* § 552a(d)(2)(B)(i). *See* Henke v. U.S. Dep't of Commerce, 83 F.3d 1453, 1459 (D.C. Cir. 1996); R.R. v. Dep't of the Army, 482 F. Supp. 770 (D.D.C. 1980); ADDLESTONE, MILITARY DISCHARGE UPGRADING ¶ 25.1-4.

208. 5 U.S.C. § 552a(g)(3)(B) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.").

209. *Id.* § 552(a)(4)(E)(i) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.").

with seeking a discharge upgrade. This alternative or complementary path should be considered in all cases. Consult Chapter 19 for more information.

10.0 Discharge Appeal Review Board

In April 2021, as this Manual was being prepared for publication, the Department of Defense established a new military review board: the Discharge Appeal Review Board (DARB).[210] Former servicemembers who served in any branch (or the surviving spouses, next of kin, or legal representatives of deceased former servicemembers) can apply to the DARB for a discharge upgrade, with certain limitations.

By statute, the DARB will adjudicate cases only after the applicant has exhausted any right to review before the Discharge Review Boards and Boards for Correction of Military/Naval Records. In establishing the Board, DOD further limited the DARB's review in certain respects not set forth in statute.[211] DARB will adjudicate applications based only on the existing case record. Applicants cannot submit new evidence to the DARB; any applicant with new evidence should apply to a DRB or BCM/NR for reconsideration before seeking DARB review. DARB will not hold personal appearance hearings. Also, only servicemembers separated on or after December 20, 2019, can apply to the DARB. DOD imposed a deadline of 365 calendar days after a BCM/NR decision to apply to the DARB.

Although applying to the DARB requires administrative exhaustion before the other military review boards, the statute does not expressly impose an administrative exhaustion requirement before seeking judicial review of other boards' decisions in federal court, as discussed in Section 6.0. Furthermore, decisions of the DARB should constitute final agency action that can be reviewed in federal court.

Very little information is known about this new board at the time of publication, so advocates should look out for new guidance, regulations, and developments. Information about the DARB and how to apply is available online at https://afrba-portal.cce.af.mil/#board-info/darb/.

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210. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 523 (2019). *See* 10 U.S.C. § 1553a; *see also* Press Release, U.S. Dep't of Defense, DOD Announces New Discharge Appeal Review Board Option (Apr. 7, 2021), *available at* https://www.defense.gov/Newsroom/Releases/Release/Article/2564345/dod-announces-new-discharge-appeal-review-board-option/.

211. *See* Air Force Review Boards Agency, Department of Defense (DoD) Discharge Appeal Review Board (DARB), https://afrba-portal.cce.af.mil/#board-info/darb/ (last visited Apr. 15, 2021); Press Release, U.S. Dep't of Defense, DOD Announces New Discharge Appeal Review Board Option (Apr. 7, 2021), *available at* https://www.defense.gov/Newsroom/Releases/Release/Article/2564345/dod-announces-new-discharge-appeal-review-board-option/.

Appendix A: Applicable Regulations

32 C.F.R. Part 70, Discharge Review Board (DRB) Procedures and Standards

32 C.F.R. Part 581, Personnel Review Board (Army)

32 C.F.R. Part 723, Board for Correction of Naval Records (Navy)

32 C.F.R. Part 865, Personnel Review Boards (Air Force)

33 C.F.R. Part 51, Coast Guard Discharge Review Board

33 C.F.R. Part 52, Board for Correction of Military Records of the Coast Guard

Department of Defense Instruction 1332.28, Discharge Review Board (DRB) Procedures and Standards (Apr. 4, 2004), *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133228p.pdf.

Army Regulation 15-185, Army Board for Correction of Military Records (Mar. 31, 2006), *available at* https://arba.army.pentagon.mil/documents/ArmyRegulation15-185.pdf.

Air Force Instruction 36-2603, Air Force Board for Correction of Military Records (Mar. 5, 2012), *available at* https://www.afpc.af.mil/Portals/70/documents/06_CAREER%20MANAGEMENT/01_Military%20Personnel%20Records/Air%20Force%20Instruction%2036-2603.pdf?ver=2018-10-04-111436-453.

Appendix B: Applicable Department of Defense Memoranda

Appendix B.1 Brotzman Memorandum

DEPARTMENT OF THE ARMY

OFFICE OF THE ASSISTANT

SECRETARY WASHINGTON,

D.C. 20310

MEMORANDUM FOR: PRESIDENT, ARMY DISCHARGE REVIEW BOARD

SUBJECT: Litigation Involving the Army's System for Discharging Individuals with Personality Disorders

In connection with the civil lawsuit entitled *Lipsman v. Brown* certain changes were made to Army Regulations 635-200. By memorandum dated January 14, 1977, former Assistant Secretary Brotzman transmitted these changes to you and requested that you apply them retroactively. He also requested that you dispatch letters to certain unsuccessful ADRB applicants for relief informing them of the regulation changes and advising that they may qualify for discharge upgrades upon application. By memorandum of this date I have directed the Director of the Army Staff to make an additional change to paragraph 13-31b or AR 635-200.

To permit completion of settlement of the lawsuit, it is requested that you undertake the following additional actions. First, send copies of the attached letter to each person to whom you sent a letter pursuant to Mr. Brotzman's instructions (except to those persons whose letters were returned undeliverable). Any recommendations for changes to the letter will be made only with the concurrence of the General Counsel. Second, upon application for relief by persons discharged for unsuitability due to personality disorders, you shall undertake reconsideration of their discharges. Third, in reviewing the applications for relief from persons discharged for unsuitability due to personality dis orders, apply the regulation changes retroactively, except the change to paragraph 13-31b of AR 635-200. Applicants for relief who were not diagnosed by a medical doctor trained in psychiatry shall be entitled to have their discharges upgraed *[sic]* to honorable. (This provision is essential because there is no way to determine today the extent to which

more serious mental disorders might have affected the applicant's behavior while in service.) All applicants for relief should be reviewed with compassion and considering the complete record. In reviewing applications for relief, the presence of a personality disorder diagnosis should be considered as a mitigating factor that justifies relief except in cases where there are clear and demonstrable reasons why a fully honorable discharge should not be given. It is requested that letters be dispatched and the review of requests for relief from persons with personality disorders be completed as soon as reasonably possible.

Robert L. Nelson
Assistant Secretary of the Army
(Manpower & Reserve Affairs)

Appendix B.2 Laird Memorandum

Federal Register / Vol. 44, No. 83 / Friday, April 27, 1979 / Notices 25111

DEPARTMENT OF DEFENSE

Department of the Army

Discharge Review; Memoranda on Recharacterization of Discharges for Drug Use or Possession

Memoranda provide service wide guidance to discharge review boards for review of punitive discharges and administrative discharges under other than honorable conditions issued solely for personal use or possession of drugs prior to July 7, 1971. Former service members may find the guidance contained in the memoranda helpful in preparing for discharge review. The Army Discharge Review Board has been requested under the provisions of paragraph D.3, DOD Directive 1332.28, to effect publication for the Department of Defense.

Dated; April 20, 1979.

William E. Weber,

Colonel, IN, President, Army Discharge Review Board.

Memorandum for; The Secretaries of the Military Departments The Chairman, Joint Chiefs of Staff

Subject: Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users

August 13, 1971.

Consistent with Department of Defense Directive 1300.11, October 23, 1970, and my memorandum of July 7, 1971, concerning rehabilitation and treatment of drug users, administrative discharges under other than honorable conditions issued solely on the basis of personal use of drugs or possession of drugs for the purpose of such use will be reviewed for recharacterization.

Accordingly, each Secretary of a Military Department, acting through his Discharge Review Board, will consider applications for such review from former service members. Each Secretary is authorized to issue a discharge under honorable conditions upon establishment of facts consistent with this policy. Former service members will be notified of the results of the review. The Veterans' Administration will also be notified of the names of former service members whose discharges are recharacterized.

The statute of limitations for review of discharges within the scope of this policy will be in accordance with 10 United States Code 1553.

This policy shall apply to those service members whose cases are finalized or in process on or before July 7, 1971.

Melvin R. Laird

Memorandum for; The Director, Army Council of Review Boards

Subject: Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users

September 17, 1971.

The following guidance is provided for the implementation of policy contained in the Secretary of Defense memorandum, above subject, 13 August 1971:

The policy is limited to former members separated, or in the process of being separated. administratively on or before 7 July 1971 solely for drug use or drug possession for personal use, with an Undesirable Discharge (DD Form 258A) or Other Than Honorable Discharge (DD Form 794A).

Drug use pertains to the personal use of those controlled substances as defined by 21 U.S.C. Section 812 and applicable regulations without regard to the number of occasions of such use or the circumstances surrounding such use unless the user sold, transferred, distributed, or intended to sell, transfer, or distribute drugs.

Drug possession for personal use implies the possession of a quantity of one or more of the drugs mentioned above without the intent to sell, introduce, transfer, or distribute such drugs to another person or persons. No specific amount of drugs will be used in making a determination that the possession of drugs was for personal use. The determination is dependent upon the circumstances of each case taken in their totality. Such factors include the number of drugs, the amount of drugs, the frequency with which drugs could be obtained, the likely intake of a user given the particular drug and its potency and the degree of his prior use, the individual's previous history of drug use or association with drugs, the possession, if any, of drug packaging or related equipment, and any other relevant factors which may establish or disprove his intent to possess drugs for his own use.

The term "solely" should not be construed to bar the favorable recharacterization of a discharge where only minor offenses, especially those related to or caused by drug abuse, may have been a contributing factor in the granting of an Undesirable Discharge or Other Than Honorable Discharge.

Thaddeus R. Beal,

Under Secretary of the Army.

Memorandum for: The Deputy Secretary of Defense

Subject: Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users

September 24, 1971.

The policy announced in Mr. Laird's August 13, 1971 memorandum on the above subject requires the military departments to review the applications, subject to certain limitations, of those who received administrative discharges under other than honorable conditions issued solely on the basis of the personal use of drugs or possession of drugs for the purpose of such use. Pursuant to the authority of 10 U.S.C. 1552, absent your instructions to the contrary, the Army Board for the Corrections of Military Records will apply this policy to those individuals separated or in the process of being separated on or before July 7, 1971 with punitive discharges for the offense of wrongful use of drugs or wrongful possession of drugs, but in the latter case only where it can be established that possession was for the individual's own use.

The application of this policy will ensure some degree of equal treatment to Army personnel who have received discharges under other than honorable circumstances because of drug use or the possession for such use. The nature of the military justice system entrusts a significant amount of discretion to the commander and the court-martial convening authority. In some cases, the individual who has used or possessed drugs may not have been charged with an offense under the Uniform Code of Military Justice but, instead, may have been processed for administrative separation. In other cases, the individual may have been charged but then granted the opportunity to request a discharge in lieu of court-martial, generally receiving an undesirable discharge. Not only has there been a variation among commanders and convening authorities in the disposition of drug offenders, but also it appears that the overall attitude of commanders and convening authorities has changed over the past several years, with relatively less reliance on the use of courts-martial for the offenses of drug use or possession. Because of these variations in the disposition of drug offender cases, it is unfair to limit the opportunity for a recharacterized discharge solely to instances where the individual received an administrative discharge rather than a punitive discharge.

For Army personnel now confined at the U.S. Disciplinary Barracks following conviction for drug use or possession for such use, I intend to take similar action through the Clemency and Parole Board.

Kenneth E. Belieu,

Under Secretary of the Army.

Memorandum for: Secretaries of the Military Departments, Chairman, Joint Chiefs of Staff

Subject: Review of Punitive Discharges Issued to Drug Users

April 28, 1972.

Reference is made to Secretary Packard's memorandum of July 7, 1971, concerning rehabilitation and treatment of drug users, and my memorandum of August 13, 971, subject: "Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users,"

My August 13, 1971 memorandum established the current Departmental policy that administrative discharges under other than honorable conditions issued solely on the basis of personal use of drugs or possession of drugs for the purpose of such use will be reviewed for recharacterization to under honorable conditions.

It is my desire that this policy be expanded to include punitive discharges and dismissals resulting from approved sentences of courts-martial issued solely for conviction of personal use of drugs or possession of drugs for the purpose of such use.

Review and recharacterization are to be effected, upon the application of former service members, utilizing the procedures and authority set forth in Title 10, United States Code, Sections 874(b), 1552 and 1553.

This policy is applicable only to discharges which have been executed on or before July 7, 1971, or issued as a result of a case in process on or before July 7, 1971.

Former service members requesting a review will be notified of the results of the review. The Veterans' Administration will also be notified of the names of former service members whose discharges are recharacterized.

Melvin R. Laird

[FR Doc. 79-12724 Filed 4-25-79; 8:45 am]

BILLING CODE 3710-08-M

Appendix B.3 Stanley Memorandum

PERSONNEL AND READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

SEP 20 2011

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code

Pursuant to the Don't Ask, Don't Tell Repeal Act of 2010, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have certified that the Department of Defense is prepared for the repeal of section 654 of title 10, United States Code, commonly referred to as Don't Ask, Don't Tell (DADT). Repeal will take effect on September 20, 2011. Upon repeal, some former Service members discharged under DADT or prior policies may request a correction of their military records from either their Service Discharge Review Board (DRB) or their Service Board for Correction of Military/Naval Records (BCM/NR). To help ensure consistency across the Services and to address what may be a large number of similar applications arising from the repeal of DADT, this memorandum provides supplemental policy guidance for DRB and BCM/NR action on such applications. As an initial matter, the repeal of DADT will be considered a sufficient basis to support reconsideration of such requests for applicants who have previously filed with either their Service DRB or BCM/NR.

The Service DRBs, provided for in section 1553 of title 10, United States Code, and governed by Department of Defense Directive (DoDD) 1332.41 and Department of Defense Instruction (DoDI) 1332.28, have a relatively limited scope of review and are authorized to provide only specified remedies. In general, if a DRB finds either an inequity or impropriety in a discharge action, it may change the narrative reason for the discharge, upgrade the character of discharge, or take both actions.

Effective September 20, 2011, Service DRBs should normally grant requests to change the narrative reason for a discharge (the change should be to "Secretarial Authority" (Separation program Designator Code (SPD) code JFF)), requests to re-characterize the discharge to honorable, and/or requests to change the reentry code to an immediately-eligible-to-reenter category (the new RE code should be RE code 1J) when both of the following conditions are met: (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and (2) there were no aggravating factors in the record, such as misconduct. Although each request must be evaluated on a case-by-case basis, the award of an honorable or general discharge should normally be considered to indicate the absence of aggravating factors.

Also effective September 20, 2011, with respect to requests in cases where there were multiple reasons for separation including DADT, Service DRBs normally should apply the policy in the previous paragraph to the DADT reason for separation and apply existing DRB policy to the remaining reason(s).

In contrast to the DRBs, the Service BCM/NRs, provided for in section 1552 of title 10, United States Code, and also governed by DoDD 1332.41, have a significantly broader scope of review and are authorized to provide much more comprehensive remedies than are available from the DRBs. Upon finding an error or injustice, BCM/NRs may fashion the remedy they find necessary and appropriate within applicable legal limits. Although the correction boards have wide latitude in determining what constitutes an error or injustice, it is DoD policy that broad, retroactive corrections of records from applicants discharged under DADT are not warranted. Although DADT is repealed effective September 20, 2011, it was the law and reflected the view of Congress during the period it was the law.

Similarly, DoD regulations implementing various aspects of DADT were valid regulations during that same period. Thus, consistent with what we understand is past board practice on changing standards, DADT's repeal may be a relevant factor in evaluating an application (such as requests to change the narrative reason for a discharge, requests to re-characterize the discharge to honorable, and/or requests to change the reentry code to an immediately-eligible-to reenter category) but the issuance of a discharge under DADT or the taking of an action pursuant to DoD regulations related to a discharge under DADT should not by itself be considered to constitute an error or injustice that would invalidate an otherwise proper action taken pursuant to DADT and applicable DoD policy. Thus, remedies such as correcting a record to reflect continued service with no discharge, restoration to a previous grade or position, credit for time lost, or an increase from no separation pay to half or full separation pay or from half separation to full separation pay, would not normally be appropriate.

This policy does not address situations where a correction board determines that DADT (or other prior policy) as applied under the circumstances of a particular case constituted an error or injustice. Under those circumstances, the BCMR would craft an appropriate remedy. Additionally, the Boards should also consider the guidance provided in my Repeal of DADT and Future Impact on Policy memorandum, dated January 28, 2011, (attached) in determining whether a specific requested record correction is necessary or appropriate.

Clifford L. Stanley

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
Coast Guard, Commandant (CG1)
General Counsel of the Department of Defense

Appendix B.4 Hagel Memorandum

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

SEP 03 2014

MEMORANDUM FOR 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

Recent attention has been focused upon the petitions of Vietnam veterans to Military Department Boards for Correction of Military/Naval Records (BCM/NR) for the purposes of upgrading their discharges based on claims of previously unrecognized Post Traumatic Stress Disorder (PTSD). In these cases, PTSD was not recognized as a diagnosis at the time of service and, in many cases, diagnoses were not made until decades after service was completed. To help ensure consistency across the Services, this memorandum provides supplemental policy guidance for BCMR/NRs on these applications.

BCM/NRs will fully and carefully consider every petition based on PTSD brought by each veteran. This includes a comprehensive review of all materials and evidence provided by the petitioner. Quite often, however, the records of Service members who served before PTSD was recognized, including those who served in the Vietnam theater, do not contain substantive information concerning medical conditions in either Service treatment records or personnel records. It has therefore been extremely difficult to document conditions that form a basis for mitigation in punitive, administrative, or other legal actions or to establish a nexus between PTSD and the misconduct underlying the Service member's discharge with a characterization of service of under other than honorable conditions.

BCM/NRs are not courts, nor are they investigative agencies. To assist the BCM/NRs in the review of records and to ensure fidelity of the review protocol in these cases, the supplemental policy guidance which details medical considerations, mitigating factors, and procedures for review is provided (Attachment). This guidance is not intended to interfere with or impede the Boards' statutory independence to correct errors or remove injustices through the correction of military records.

This policy guidance, which is intended to ease the application process for veterans who are seeking redress and assist the Boards in reaching fair and consistent results in these difficult cases, shall be accompanied by a public messaging campaign by the Services throughout 2014 and 2015 that is targeted toward veterans groups and leverages existing relationships with the Department of Veterans Affairs.

OSD009883-14

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days.

Thank you.

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Personnel and Readiness
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment
Supplemental Guidance to Military Boards for Correction of Military/Naval Records
Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder

Medical Guidance

Liberal consideration will be given in petitions for changes in characterization of service to Service treatment record entries which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions.

Special consideration will be given to Department of Veterans Affairs (VA) determinations which document PTSD or PTSD-related conditions connected to military service.

In cases where Service records or any document from the period of service substantiate the existence of one or more symptoms of what is now recognized as PTSD or a PTSD-related condition during the time of service, liberal consideration will be given to finding that PTSD existed at the time of service.

Liberal consideration will also be given in cases where civilian providers confer diagnoses of PTSD or PTSD-related conditions, when case records contain narratives that support symptomatology at the time of service, or when any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct that caused the under other than honorable conditions characterization of service.

This guidance is not applicable to cases involving pre-existing conditions which are determined not to have been incurred or aggravated while in military service.

Consideration of Mitigating Factors

Conditions documented in the record that can reasonably be determined to have existed at the time of discharge will be considered to have existed at the time of discharge.

In cases in which PTSD or PTSD-related conditions may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.

Corrections Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a characterization of service of under other than

honorable conditions. Potentially mitigating evidence of the existence of undiagnosed combat-related PTSD or PTSD-related conditions as a causative factor in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct.

PTSD is not a likely cause of premeditated misconduct. Corrections Boards will also exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.

Procedures

1. Time limits to reconsider decisions will be liberally waived for applications covered by this guidance.
2. Cases covered by this guidance will receive timely consideration, consistent with statutory timeliness standards.
3. Boards for Correction of Military Records (BCMRs) may obtain advisory opinions from Department of Defense mental health care professionals or otherwise use Department of Defense mental health care professionals or physicians in their consideration of cases to advise them on assessing the presence of PTSD and its potentially mitigating effects relating to the misconduct that formed the basis for the under other than honorable characterization of service.
4. The outreach and messaging plan conditions executed by the Military Departments will include detailed information on the BCMR's guidelines and procedures for handling these cases.

Appendix B.5 Carson Memorandum

PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

PERSONNEL AND READINESS

FEB 24 2016

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)

On September 3, 2014, the Secretary of Defense issued Supplemental Guidance to Military Boards of Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD or related conditions, such as TBI. The Department has implemented this robust guidance in comprehensive and coordinated fashion, thereby easing the burden on Veterans seeking redress while simultaneously ensuring fair and consistent results in these difficult cases.

This guidance remains exceptionally important, and we must renew and re-double our efforts to ensure that all Veterans who have sacrificed so much in service to our great Nation receive all of the benefits that the Supplemental Guidance may afford. Accordingly, the BCMRs/BCNR will waive, if it is applicable and bars consideration of cases, the imposition of the statutue of limitation. Fairness and equity demand, in cases of such magnitude, that a Veteran's petition receives full and fair review, even if brought outside of the time limit.

Similarly, cases considered previously, either by Discharge Review Boards, or by BCMRs or the BCNR, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

The Department remains committed to serving our Troops, Veterans, and their families, with justice, equity and compassion.

Brad Carson
Acting

Appendix B.6 Kurta Memorandum

PERSONNEL AND READINESS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

AUG 25 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment

In December 2016, the Department announced a renewed effort to ensure veterans were aware of the opportunity to have their discharges and military records reviewed. As part of that effort, we noted the Department was currently reviewing our policies for the Boards for Correction of Military/Naval Records (BCM/NRs) and Discharge Review Boards (DRBs) and considering whether further guidance was needed. We also invited feedback from the public on our policies and how we could improve the discharge review process.

As a result of that feedback and our internal review, we have determined that clarifications are needed regarding mental health conditions, sexual assault, and sexual harassment. To resolve lingering questions and potential ambiguities, clarifying guidance is attached to this memorandum. This guidance is not intended to interfere with or impede the Boards' statutory independence. Through this guidance, however, there should be greater uniformity amongst the review boards and veterans will be better informed about how to achieve relief in these types of cases.

To be sure, the BCM/NRs and DRBs are tasked with tremendous responsibility and they perform their tasks with remarkable professionalism. Invisible wounds, however, are some of the most difficult cases they review and there are frequently limited records for the boards to consider, often through no fault of the veteran, in resolving appeals for relief. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. This clarifying guidance ensures fair and consistent standards of review for veterans with mental health conditions, or who experienced sexual assault or sexual harassment regardless of when they served or in which Military Department they served.

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days. My point of contact is Lieutenant Colonel Reggie Yager, Office of Legal Policy, (703) 571-9301 or reggie.d.yager.mil@mail.mil.

A. M. Kurta
Performing the Duties of the Under Secretary of Defense for Personnel and Readiness

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment

Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment

Generally

1. This document provides clarifying guidance to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault; or sexual harassment.

2. Requests for discharge relief typically involve four questions:

   a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
   b. Did that condition exist/ experience occur during military service?
   c. Does that condition or experience actually excuse or mitigate the discharge?
   d. Does that condition or experience outweigh the discharge?

3. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

4. Evidence may come from sources other than a veteran's service record and may include records from the DoD Sexual Assault Prevention and Response Program (DD Form 2910, *Victim Reporting Preference Statement*) and/or DD Form 2911, *DoD Sexual Assault Forensic Examination [SAFE] Report*), law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, physicians, pregnancy tests, tests for sexually transmitted diseases, and statements from family members, friends, roommates, co-workers, fellow servicemembers, or clergy.

5. Evidence may also include changes in behavior; requests for transfer to another military duty assignment; deterioration in work performance; inability of the individual to conform their behavior to the expectations of a military environment; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; unexplained economic or social behavior changes; relationship issues; or sexual dysfunction.

6. Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.

7. The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.

8. Cases falling under this guidance will receive timely consideration consistent with statutory requirements.

Was there a condition or experience?

9. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge.

10. Evidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge.

11. A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.

12. Review Boards are not required to find that a crime of sexual assault or an incident of sexual harassment occurred in order to grant liberal consideration to a veteran that the experience happened during military service, was aggravated by military service, or that it excuses or mitigates the discharge.

Did it exist/occur during military service?

13. A diagnosis made by a licensed psychiatrist or psychologist that the condition existed during military service will receive liberal consideration.

14. A determination made by the Department of Veterans Affairs (VA) that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the Department of Defense, is persuasive evidence that the condition existed or experience occurred during military service.

15. Liberal consideration is not required for cases involving pre-existing conditions which are determined not to have been aggravated by military service.

Does the condition/experience excuse or mitigate the discharge?

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.

17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally

construed as warranting a change in narrative reason to "Secretarial Authority," "Condition not a disability," or another appropriate basis.

Does the condition/experience outweigh the discharge?

18. In some cases, the severity of misconduct may outweigh any mitigation from mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

19. Premeditated misconduct is not generally excused by mental health conditions, including PTSD; TBI; or by a sexual assault or sexual harassment experience. However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.

Additional Clarifications

20. Unless otherwise indicated, the term "discharge" includes the characterization, narrative reason, separation code, and re-enlistment code.

21. This guidance applies to both the BCM/NRs and DRBs.

22. The supplemental guidance provided by then-Secretary Hagel on September 3, 2014, as clarified in this guidance, also applies to both BCM/NRs and DRBs.

23. The guidance memorandum provided by then-Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness Brad Carson on February 24, 2016, applies in full to BCM/NRs but also applies to DRBs with regards to de novo reconsideration of petitions previously decided without the benefit of all applicable supplemental guidance.

24. These guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations.

25. Unless otherwise indicated, liberal consideration applies to applications based in whole or in part on matters related to diagnosed conditions, undiagnosed conditions, and misdiagnosed TBI or mental health conditions, including PTSD, as well as reported and unreported sexual assault and sexual harassment experiences asserted as justification or supporting rationale for discharge relief.

26. Liberal consideration includes but is not limited to the following concepts:

a. Some circumstances require greater leniency and excusal from normal evidentiary burdens.

b. It is unreasonable to expect the same level of proof for injustices committed years ago when TBI; mental health conditions, such as PTSD; and victimology were far less understood than they are today.

c. It is unreasonable to expect the same level of proof for injustices committed years ago when there is now restricted reporting, heightened protections for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment than ever before.

d. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported.

e. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected.

f. Reviews involving diagnosed, undiagnosed, or misdiagnosed TBI or mental health conditions, such as PTSD, or reported or unreported sexual assault or sexual harassment experiences should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.

g. Veterans with mental health conditions, including PTSD; TBI; or who experienced sexual assault or sexual harassment may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran's life.

h. An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

i. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case. For example, marijuana use is still unlawful in the military but it is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.

j. Service members diagnosed with mental health conditions, including PTSD; TBI; or who reported sexual assault or sexual harassment receive heightened screening today to ensure the causal relationship of possible symptoms and discharge basis is fully considered, and characterization of service is appropriate. Veterans discharged under prior procedures, or before verifiable diagnosis, may not have suffered an error because the separation authority was unaware of their condition or experience at the time of discharge. However, when compared to similarly situated individuals under today's standards, they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care.

k. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Appendix B.7 Wilkie Memorandum

PERSONNEL AND READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

JUL 25 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations

The Department has evaluated numerous aspects of the Service Discharge Review Boards (DRBs) and Boards for Correction of Military / Naval Records (BCM/NRs) over the last two years. We have redoubled our efforts to ensure veterans are aware of their opportunities to request review of their discharges and other military records. We have initiated several outreach efforts to spread the word and invite feedback from veterans and organizations that assist veterans and active duty members, and issued substantive clarifying guidance on Board consideration of mental health conditions and sexual assault or sexual harassment experiences. And, we have partnered with the Department of Veterans Affairs to develop a web-based tool that provides customized guidance for veterans who want to upgrade their discharges. But our work is not yet done.

Increasing attention is being paid to pardons for criminal convictions and the circumstances under which citizens should be considered for second chances and the restoration of rights forfeited as a result of such convictions. Many states have developed processes for restoring basic civil rights to felons, such as the right to vote, hold office, or sit on a jury, and many states have developed veterans' courts to consider special circumstances associated with military service. States do not have authority, however, to correct military records or discharges.

The Military Departments, operating through DRBs and BCM/NRs, have the authority to upgrade discharges or correct military records to ensure fundamental fairness. DRBs and BCM/NRs have tremendous responsibility and perform their tasks with remarkable professionalism, but further guidance to inform Board decisions on applications based on pardons for criminal convictions is required.

The attached guidance closes this gap and sets clear standards. While not everyone should be pardoned, forgiven, or upgraded, in some cases, fairness dictates that relief should be granted. We trust our Boards to apply this guidance and give appropriate consideration to every application for relief.

Military Department Secretaries will ensure that Board members are familiar with and appropriately trained on this guidance within 90 days. My point of contact is Monica Trucco, Director, Office of Legal Policy, who may be reached at (703) 697-3387 or monica.a.trucco.civ@mail.mil.

Robert L. Wilkie

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary to the Defense for Public Affairs

Attachment

Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations

Generally

1. This document provides standards for Discharge Review Boards (DRBs) and Boards for Correction of Military / Naval Records (BCM/NRs) in determining whether relief is warranted on the basis of equity, injustice, or clemency.

2. DRBs are authorized to grant relief on the basis of issues of equity or propriety. BCM/NRs are authorized to grant relief for errors or injustices. These standards, specifically equity for DRBs and relief for injustice for BCM/NRs, authorize both boards to grant relief in order to ensure fundamental fairness.

3. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority that DRBs and BCM/NRs have to ensure fundamental fairness. BCM/NRs may grant clemency regardless of the court-martial forum; however, DRBs are limited in their exercise of clemency in that they may not exercise clemency for discharges or dismissals issued at a general court-martial.

4. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

5. This guidance does not mandate relief, but rather provides standards and principles to guide DRBs and BCM/NRs in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each board.

6. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DRBs and BCM/NRs shall consider the following:

a. It is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds.

b. Relief should not be reserved only for those with exceptional aptitude; rather character and rehabilitation should weigh more heavily than achievement alone. An applicant need not, for example, attain high academic or professional achievement in order to demonstrate sufficient rehabilitation to support relief.

c. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

d. Evidence in support of relief may come from sources other than a veteran's service record.

e. A veteran or Service member's sworn testimony alone, oral or written, may establish the existence of a fact supportive of relief.

f. Changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received, may be grounds for relief.

g. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct in the case of the mitigating evidence in a case. For example, marijuana use is still unlawful in the military, but it is now legal under state law in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.

h. Requests for relief based in whole or in part on a mental health condition, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety.

i. Evidence submitted by a government official with oversight or responsibility for the matter at issue and that acknowledges a relevant error or injustice was committed, provided that it is submitted in his or her official capacity, should be favorably considered as establishing a grounds for relief.

j. Similarly situated Service members sometimes receive disparate punishments. A Service member in one location could face court-martial for an offense that routinely is handled administratively across the Service. This can happen for a variety of lawful reasons, for example, when a unit or command finds it necessary to step up disciplinary efforts to address a string of alcohol- or drug-related incidents, or because attitudes about a particular offense vary between different career fields, units, installations, or organizations. While a court-martial or a command would be within its authority to choose a specific disposition forum or issue a certain punishment, DRBs and BCM/NRs should nevertheless consider uniformity and unfair disparities in punishments as a basis for relief.

k. Relief is generally more appropriate for nonviolent offenses than for violent offenses.

l. Changes to the narrative reason for a discharge and/or an upgraded character of discharge granted solely on equity, injustice, or clemency grounds normally should not result in

separation pay, retroactive promotions, the payment of past medical expenses, or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded character.

7. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DRBs and BCM/NRs should also consider the following, as applicable:

a. An applicant's candor

b. Whether the punishment, including any collateral consequences, was too harsh

c. The aggravating and mitigating facts related to the record or punishment from which the veteran or Service member wants relief

d. Positive or negative post-conviction conduct, including any arrests, criminal charges, or any convictions since the incident at issue

e. Severity of misconduct

f. Length of time since misconduct

g. Acceptance of responsibility, remorse, or atonement for misconduct

h. The degree to which the requested relief is necessary for the applicant

i. Character and reputation of applicant

j. Critical illness or old age

k. Meritorious service in government or other endeavors

l. Evidence of rehabilitation

m. Availability of other remedies

n. Job history

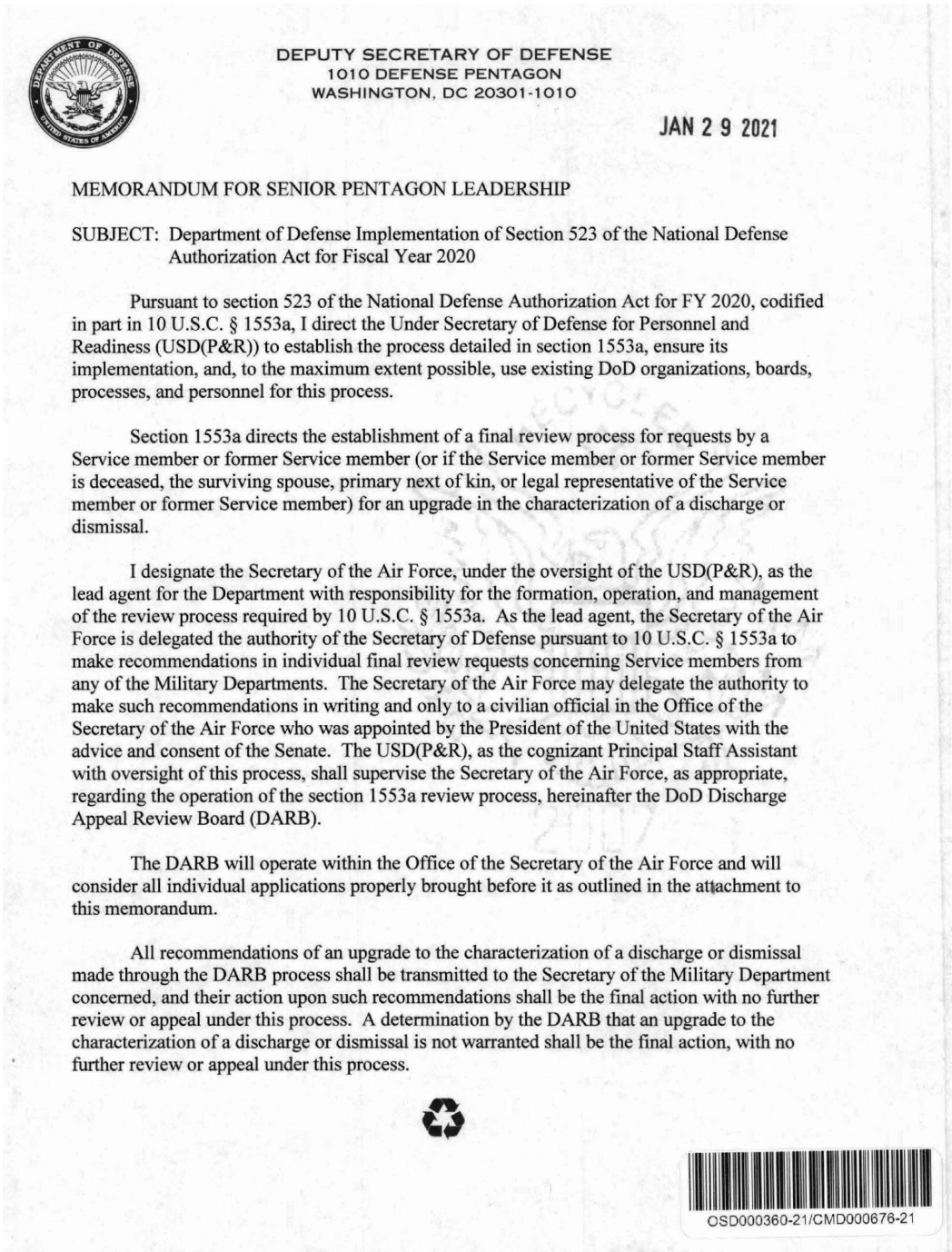
o. Whether misconduct may have been youthful indiscretion

p. Character references

q. Letters of recommendation

r. Victim support for, or opposition to relief, and any reasons provided

Appendix B.8 Governing Instructions for Discharge Appeal Review Board



DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

JAN 2 9 2021

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP

SUBJECT: Department of Defense Implementation of Section 523 of the National Defense Authorization Act for Fiscal Year 2020

Pursuant to section 523 of the National Defense Authorization Act for FY 2020, codified in part in 10 U.S.C. § 1553a, I direct the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) to establish the process detailed in section 1553a, ensure its implementation, and, to the maximum extent possible, use existing DoD organizations, boards, processes, and personnel for this process.

Section 1553a directs the establishment of a final review process for requests by a Service member or former Service member (or if the Service member or former Service member is deceased, the surviving spouse, primary next of kin, or legal representative of the Service member or former Service member) for an upgrade in the characterization of a discharge or dismissal.

I designate the Secretary of the Air Force, under the oversight of the USD(P&R), as the lead agent for the Department with responsibility for the formation, operation, and management of the review process required by 10 U.S.C. § 1553a. As the lead agent, the Secretary of the Air Force is delegated the authority of the Secretary of Defense pursuant to 10 U.S.C. § 1553a to make recommendations in individual final review requests concerning Service members from any of the Military Departments. The Secretary of the Air Force may delegate the authority to make such recommendations in writing and only to a civilian official in the Office of the Secretary of the Air Force who was appointed by the President of the United States with the advice and consent of the Senate. The USD(P&R), as the cognizant Principal Staff Assistant with oversight of this process, shall supervise the Secretary of the Air Force, as appropriate, regarding the operation of the section 1553a review process, hereinafter the DoD Discharge Appeal Review Board (DARB).

The DARB will operate within the Office of the Secretary of the Air Force and will consider all individual applications properly brought before it as outlined in the attachment to this memorandum.

All recommendations of an upgrade to the characterization of a discharge or dismissal made through the DARB process shall be transmitted to the Secretary of the Military Department concerned, and their action upon such recommendations shall be the final action with no further review or appeal under this process. A determination by the DARB that an upgrade to the characterization of a discharge or dismissal is not warranted shall be the final action, with no further review or appeal under this process.

OSD000360-21/CMD000676-21

The policy and procedures outlined in this memorandum and the attachment are effective as of January 15, 2021, and will be incorporated into an appropriate DoD issuance. For more information, my point of contact is Christa Specht, Director, Office of Legal Policy, at christa.a.specht.civ@mail.mil.

Attachment:
As stated

PROCEDURES

1. Discharge Appeal Review Board (DARB).

a. Consists of administrative support staff and Board members. Except for the DARB President appointed by Under Secretary of Defense for Personnel and Readiness, Board members are appointed by the Director of the Air Force Review Board Agency.

b. Will conduct a final review of a request for an upgrade in the characterization of discharge or dismissal for a Petitioner:

(1) With a discharge characterized as less than Honorable or a dismissal;

(2) Who has exhausted all available administrative remedies including the appropriate Military Department's Discharge Review Board and Board for Correction of Military Records/Board for Correction of Naval Records (BCMR/BCNR); and,

(a) Petitioner denied an upgrade of discharge characterization or dismissal by a BCMR/BCNR. Note: If a Petitioner has new information, in order to exhaust administrative remedies and qualify for DARB review, the Petitioner must first seek reconsideration from the appropriate Military Department's BCMR/BCNR. (New information is defined as material not previously presented to, or considered by, the appropriate Military Department's BCMR/BCNR.); or

(b) Petitioner request for an upgrade in discharge characterization or dismissal by a BCMR/BCNR partially granted. For example, Petitioner requested an upgrade to an Honorable discharge but received a General, Under Honorable Conditions discharge characterization.

(3) With a date of separation on or after December 20, 2019.

c. Establishes a panel consisting of at least three Board members to consider each request; one panel member serves as the Board Chair. The panel's determinations and recommendations constitute the actions of the Board.

d. Only members of the Board and Board staff are present during deliberations. However, the Board Chair may permit observers for training purposes or for purposes otherwise in furtherance of the functions of the Board.

e. A panel majority vote constitutes the action of the Board.

f. The DARB's review will be limited to the existing BCMR/BCNR case file records related to the matter for which the Petitioner is requesting an upgrade in discharge characterization or dismissal. The Petitioner will not be permitted to provide additional evidence not previously considered by the BCMR/BCNR. The DARB will conduct a *de novo* review.

g. Actions taken by the DARB.

(1) If the DARB recommends approving a change to a discharge characterization or dismissal, the DARB will provide a brief rationale for the recommendation to the Secretary of the Military Department concerned. The Secretary of the Military Department concerned retains the final authority to approve or reject any DARB recommendation to upgrade a discharge characterization or dismissal. This includes DARB recommendations for only partial relief such as a recommendation to upgrade a discharge but not to the level requested by the Petitioner (e.g., the Petitioner has a Bad Conduct Discharge and requests an Honorable discharge characterization but the DARB only recommends an upgrade to an Under Other Than Honorable Conditions discharge).

(2) If the DARB denies a request to upgrade a discharge characterization or dismissal, the denial is signed by the DARB President or DARB Deputy Director and forwarded to both the Petitioner and the Secretary of the Military Department concerned or their representative. This will be the final action with no further review or appeal under this process.

2. DARB Intake.

a. The DARB intake staff will conduct a thorough review of applications to ensure the Petitioner meets the requirements specified in paragraphs 1.b. and 3 of this memorandum for requesting relief from the DARB. Petitioners who do not meet eligibility criteria will be notified by the DARB and the case will be administratively closed.

(1) Intake staff will refer complete and valid requests to the DARB for action.

(2) Intake staff will return incomplete requests directly to the Petitioner without action and administratively close the request without referral to the DARB.

3. Petitioner.

a. Must have exhausted all available administrative remedies before applying to the DARB.

b. Must be a member or former member of the Armed Forces (or if the member or former member is deceased, the surviving spouse, primary next of kin, or legal representative of the member or former member) whose request for an upgrade to the characterization or a discharge or dismissal was not granted by the BCMR/BCNR concerned.

c. Must submit request electronically to: https://afrba-portal.cce.af.mil. Petitioners should complete all requested fields of portal to include, at a minimum:

(1) The name under which the member served;

(2) The Petitioner's (if Petitioner is not the member) or member's social security number; and

(3) The specific BCMR/BCNR case number for DARB review.

d. Must submit their request for review in a timely manner.

(1) For requests with a discharge or dismissal dated on or after December 20, 2019, through December 31, 2020, applications for relief must be submitted on or before January 1, 2022, or 365 calendar days of receipt of the BCMR/BCNR decision, whichever is later. A request filed later is untimely and may be denied by the DARB on that basis.

(2) For requests with a discharge or dismissal date on or after January 1, 2021, requests for relief must be submitted within 365 calendar days of the date of receipt of the BCMR/BCNR decision. Requests filed more than 365 calendar days after the date of the respective BCMR/BCNR decision is untimely and may be denied by the DARB on that basis.

4. Secretary of the Military Department concerned.

a. May delegate, in writing, the authority to take action on DARB recommendations no lower than:

(1) For the Department of the Army and the Department of the Air Force (including the Air Force and the Space Force), to the Director of their respective Review Boards Agencies;

(2) For the Department of the Navy (including the Marine Corps), to the Assistant Secretary of the Navy for Manpower and Reserve Affairs.

b. Will approve or disapprove a DARB recommendation for an upgrade in discharge characterization or dismissal.

(1) If a DARB recommendation for an upgrade in discharge characterization or dismissal is approved, any change will be effective as of the date of the original separation action and must be promulgated and distributed directly to Petitioner.

(2) If a DARB recommendation for an upgrade in discharge characterization or dismissal is disapproved, the Secretary of the Military Department concerned will provide a brief rationale for that decision to the Petitioner. In order to disapprove a DARB recommendation, the Secretary of the Military Department concerned must find the DARB abused its discretion.

5. Implementation timeline and reporting requirements.

a. DARB will be implemented no later than January 15, 2021.

b. A report will be provided to the Secretary of Defense no later than January 1, 2022, and will include:

(1) The number of requests considered;

(2) The number of upgrades to the characterization of a discharge or dismissal granted to include the most common reasons for such upgrade; and,

(3) The number of upgrades to the characterization of a discharge or dismissal declined to include the most common reasons for such declinations.

c. On October 1, 2022, and annually, thereafter, a report covering the preceding fiscal year will be published with the above information on a publically accessible DoD website.