

CHAPTER 28

MISCELLANEOUS NON-VA BENEFITS RESULTING FROM UPGRADE OF LESS THAN HONORABLE DISCHARGES

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28.1 INTRODUCTION AND OVERVIEW

Less than honorable discharges include the following: Undesirable Discharges (UDs), Blue Discharges (the name for UD's in the 1940s), Other Than Honorable Discharges (the present name for UD's), Bad Conduct Discharges (BCDs), and Dishonorable Discharges (DDs). Upgrade of a less than honorable discharge may make a veteran eligible not only for VA benefits but for monetary benefits forfeited as a consequence of the original discharge.¹ Such eligibility is immediate and may entitle the veteran to pay-

¹ No federal benefits are lost as a result of a GD. Recipients of UD's (or BCDs from special courts-martial) are not automatically precluded from receiving VA benefits, but their cases must be adjudicated by the VA. See Ch. 26 *supra* (discussion of these adjudications and other VA issues relating to upgrades). Often, a surviving spouse is entitled to a pension if a veteran's discharge is upgraded.

On September 8, 1980, Congress enacted an amendment to 10 U.S.C. § 977, stating in part:

[A]ny person who originally enlists in a regular component of the armed forces on or after the date of the enactment of the Department of Defense Authorization Act, 1981, and who fails to complete at least twenty-four months of such person's period of original enlistment shall not be eligible for any right, privilege, or benefit for which persons become eligi-

ment, *without interest*, of one or all of the following forfeited benefits:

- "Mustering-out pay," a readjustment bonus paid to World War II and Korean War veterans;
- The value of unused (accrued) leave at the time of discharge;
- Reimbursement for the cost of returning home or relocating dependents after discharge;
- Back pay (if the decision to discharge is found within six years of the date of discharge to have been improper); and
- Reenlistment bonuses.

Damages and similar compensation are unavailable for an improper discharge except in an extreme case

¹ (continued)

ble under any Federal program by reason of serving on active duty in the armed forces in the claim for the eligibility of such person for such right, privilege or benefit is based upon any period of service performed by such person under such enlistment.

The VA amended 38 C.F.R. § 3.12a, as a result of the amended 10 U.S.C. § 977, and concluded that "the only effect of 10 U.S.C. 977 on payment of compensation is to provide an absolute bar to payment based on a disability incurred during a period of AWOL in the case of a veteran who did not serve the required 24 months." 46 Fed. Reg. 8,575 (1981). DoD officials had previously expressed the opinion that 10 U.S.C. § 977 applies only to servicemembers enlisting after September 8, 1980.

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in which a successful suit against a particular commander is possible.²

An upgrade from a UD (or from a General Discharge (GD) in the case of some state benefits) might permit eligibility for the following state or other incidental benefits:

- Previously denied unemployment benefits;
- Reemployment with seniority rights;
- Veterans preference in government hiring;
- Additional credit for time toward state and/or federal employees retirement pension;
- State veterans benefits, such as bonuses; and
- In the case of incarcerated veterans, a sentence correction or reduction (if the sentencing court relied on the original character of discharge).

When a discharge is upgraded, the appropriate service Finance Center is usually notified. The letter notifying the veteran of the upgrade will inform the veteran of this notification, if it has been given. If the letter is silent on the subject, or if the veteran believes (s)he is entitled to additional benefits, a claim can be filed by writing to the appropriate Finance Center.³

28.2 STATUTES OF LIMITATIONS

A claim for money due from the military⁴ as a result of an upgrade will be barred by the statute of limitations unless it is made:

- Within ten years of the upgrade if it occurred prior to July 2, 1975;⁵
- Within six years of the upgrade if it occurred after July 2, 1975;⁶ or

- Within six years of *discharge* if the claim is for back pay lost as a result of an *improper* decision to discharge.⁷

28.3 CLAIMS FOR MILITARY MONEY BENEFITS

A servicemember discharged with a UD, BCD, or DD normally forfeits all money due for unused leave, mustering out pay, and the cost of returning to his/her "home of record" (including expenses incurred by dependents). An upgrade to a GD or Honorable Discharge (HD) entitles the veteran to receive compensation for these forfeited benefits.⁸

28.3.1 ACCRUED LEAVE AND TRAVEL EXPENSES

Servicemembers receive 30 days paid leave a year and may only accumulate 60 days leave no matter how long they serve. Many servicemembers save leave time and are paid its cash equivalent upon discharge.⁹ Because pay records are normally destroyed after ten years, however, it is extremely difficult to prove the amount of leave forfeited, absent an entry in the military personnel records.¹⁰ The Comptroller General has held¹¹ that forfeited leave will not be recognized and repaid without such proof.

It is unclear whether the General Accounting Office would approve payment based solely on an affidavit from the veteran (or some other person). It may be that no one has tried this approach or challenged such a denial in court. A veteran whose forfeited leave is not reflected in military records may be able to overcome the presumption of non-accrued leave if, for example, (s)he was assigned to an overseas station where no leave was possible.¹²

Unpaid travel expenses incurred by veterans and dependents returning to their homes of record present similar problems of proof. The amount claimable by a veteran depends on the provisions of the military travel regulations in effect at the time of his/her separation.^{12a}

² See § 27.6 *supra*.

³ See App. 28A (DD Form 827). The information requested on that form should be sent to:

ARMY: Finance Center, U.S. Army Finance Support Agency, FINCS-A, Indianapolis, IN 46249.

NAVY: Finance Center, U.S. Navy, Cellegre Building, Cleveland, OH 44199.

AIR FORCE: Air Force Accounting and Finance Center, AFC, 3800 York Street, Denver, CO 80205.

MARINE CORPS: Finance Center, Examination Division, Kansas City, MO 64197.

COAST GUARD: Commandant, HQ, Coast Guard, G-FPA-2/71, Settlements and Records Division, Personnel Support Division, Washington, DC 20590.

Denials of relief are appealable to: Claims Division, U.S. General Accounting Office, Washington, DC 20548. The claimant (or agent who has a power of attorney) must sign the claim. No particular form is required. See 4 C.F.R. § 31 (claims against the United States; general procedure).

⁴ VA and state benefits (and money due) for which a veteran may be eligible following discharge upgrade are often subject to different time limitations. Time elapsed since discharge may not be the only criterion. See § 26.6.1 *supra* (discussion of common VA problems attendant to upgrades granted long after discharge).

⁵ 31 U.S.C. § 71(a). A 1975 amendment to this statute (Pub. L. No. 93-604, §§ 801, 802, tit. VIII, 88 Stat. 1965) reduced the ten-year statute of limitations to six years; the Comptroller General has held that the change does not apply to upgrades issued before July 2, 1975. Memorandum from J. A. Benoit, Comptroller General, to General Accounting Office (Jan. 27, 1976), "Retention Period for Site Audit Records and GAO Copies of Contracts."

⁶ 31 U.S.C. § 71(a).

⁷ 28 U.S.C. § 2401(a). See § 24.3.1.2 *supra* (discussion of the limitation when only an upgrade is sought and of the "half a loaf" doctrine's exception to the six-year rule).

⁸ 37 U.S.C. §§ 112, 501.

⁹ The value of accrued leave is based on the servicemember's last rank. Discharge with a UD, BCD, or DD usually results in a reduction to the lowest rank. An upgrade restores the rank held before discharge and entitles the claimant to any back benefits tied to the original rank. 41 Comp. Gen. 703 (1962).

¹⁰ The amount of forfeited leave sometimes appears on the separation document (DD Form 214). Millions of older veterans, whose personnel records were destroyed by the fire at the Military Personnel Records Center in 1973, are faced with an almost insurmountable burden of proof if their separation documents do not contain this information.

¹¹ Comp. Gen. Op. B-185145 (Jan. 21, 1976) (unpublished).

¹² This and similar arguments based on logical inferences may not yet have been used or rejected. The burden rests on the claimant. Comp. Gen. Op. B-189212 (July 5, 1977), *reprinted in* 5 MIL. L. REP. 2337 (1977) (unpublished).

^{12a} In recent years, the services have usually provided transportation home for all veterans; in such situations, veterans have no claim.

28.3.2 MUSTERING-OUT PAY

Veterans are eligible for mustering-out pay if their discharges are upgraded to HDs or GDs and they served between December 7, 1941, and June 30, 1947, or between June 27, 1950, and January 31, 1955.¹³ If *active duty* was served within one of these time frames, the amount due is:

- \$100, if less than 60 days were served;
- \$200, if 60 days or more were served within the continental United States; or
- \$300, if 60 days or more were served outside the continental United States or in Alaska.

If an eligible veteran is deceased, his/her surviving spouse may receive the mustering-out pay; if there is no surviving spouse, the veteran's children may receive the pay in equal shares.¹⁴

Although there is normally no problem of proof in these cases, Finance Centers may, for one of three reasons, refuse to pay claims for mustering-out pay automatically to apparently eligible claimants:

- The veteran's record shows "previous eligible service" (if it cannot be proved that the veteran was not paid the bonus during his/her previous eligibility for it, the government will assume that (s)he was paid, and will deny the claim);¹⁵
- The veteran served during the operative time frame (in part), but was discharged after the closing date of the period of eligibility;¹⁶ and
- The veteran's service records have been destroyed (denial for this reason indicates an erroneous reliance on the presumptions regarding accrued leave and travel expenses; a request for reconsideration should elicit the payment).¹⁷

28.3.3 MISCELLANEOUS MILITARY BENEFIT ISSUES

28.3.3.1 Back Pay Claims

Veterans may be entitled to back pay in two situations.¹⁸

¹³ See 38 U.S.C. §§ 691a-g (1952); 38 U.S.C. §§ 2101-2105 (1964); 32 C.F.R. § 536.70.

¹⁴ 32 C.F.R. § 536.77.

¹⁵ This usually occurs when a veteran, who was honorably discharged following service during one of the eligibility periods, re-enlisted after some time lapse but was still in the same eligibility period that covered his/her last discharge, and was then discharged (less than honorably) but not given mustering out pay for the second period of service.

¹⁶ The Army Finance Center has been asked by the authors of this manual to re-evaluate denials for this reason on the basis of language in Exec. Order No. 3,080, 20 Fed. Reg. 173 (1955) (implementing the Veterans' Readjustment Assistance Act of 1952 (38 U.S.C. § 1011)). The Comptroller General has held that payment in such a case is proper. Comp. Gen. Op. B-185145 (Jan. 21, 1976) (unpublished).

¹⁷ Documentary proof of nonpayment is not needed in the case of mustering out pay because it was not lawful to issue such pay to servicemembers who received less than honorable discharges (the law generally presumes that government agents perform their duties in accordance with regulatory requirements). The only factors relevant in determining eligibility for mustering out pay are character of service and time frame of service. See BCMR Index category 128.11 (mustering out pay cases).

¹⁸ See Ch. 24 *supra* (back pay litigation issues).

Veterans who are given bad discharges are often processed rapidly and inadvertently not given their final pay. Finance Centers normally reimburse such veterans when processing their cases after upgrades are granted. Veterans who are aware that back pay is owed to them should notify their Finance Centers of this as soon as they receive notification that the Centers have been sent word of their upgrades.¹⁹

Veterans may successfully claim back pay and allowances (less a setoff for their civilian earnings) for the period of time between their premature discharge and what would have been the end of their respective terms of enlistment, if the *decision to discharge* was improper due to legal error. Such claims must be made within six years of discharge.²⁰

The veteran has the burden of proving the amount of back pay due. Military records usually serve this purpose adequately, but if they are destroyed or missing, the veteran should contact the Internal Revenue Service and the Social Security Administration, both of which maintain wage history information.²¹

Occasionally, the military will defend against a back pay claim by alleging that it overpaid the claimant in other benefits; in such cases, it will attempt to offset the veteran's claim by the amount supposedly overpaid, and to recover any excess amount from the veteran.²²

28.3.3.2 Void Enlistment Problems

The Finance Center will not usually pay forfeited benefits if a servicemember was discharged for

¹⁹ Nearly a million veterans who served between October 1, 1972, and January 1, 1973, might be entitled to back pay in amounts between \$60 and \$400, as a result of National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974). The court held that a congressionally mandated pay raise was improperly withheld. Veterans discharged before 1974 did not receive automatic notification of back pay due under this case. See note 3 *supra* (addresses of the Finance Centers to which a claim should be addressed).

²⁰ See Ch. 24 *supra*. A Board finding of impropriety in the decision to discharge provides a substantial basis for a claim to back pay. Because the six-year statute of limitations begins to run on the *date of discharge*, suit may have to be filed before the discharge review process is over. Suit may be filed either in the Court of Claims or in the federal court in the district in which the veteran resides. 28 U.S.C. § 1346(a)(2). If filed in district court, the claim cannot exceed \$9,999.99; it may be possible to transfer the case to the Court of Claims, however, to seek the excess over \$10,000. See Glines v. Wade, 586 F.2d 675, 6 MIL. L. REP. 2458 (9th Cir. 1978), *rev'd on other grounds subnom.* Brown v. Glines, 100 S. Ct. 594, 8 MIL. L. REP. 2113 (1980). The Comptroller General has ruled that waiver of the excess over \$10,000 to obtain district court jurisdiction bars a subsequent administrative claim for the excess. 59 Comp. Gen. 624 (1980) (B-199060).

A BCMR or a federal court can order an illegally discharged veteran reinstated into the service, if so requested.

²¹ IRS Form 4506 and SSA Form L137, respectively, should be used. See App. 28B, 28C *infra*.

²² Generally, the veteran must repay this money even if (s)he was unaware of the overpayment at the time it was made. Such government counterclaims frequently occur when a person is issued a less than honorable discharge and is erroneously paid for accrued leave or when a person has accepted a re-enlistment bonus but is discharged before that enlistment is completed. With some exceptions, the government must sue within six years or the claim is barred. If a partial repayment or a written acknowledgement of overpayment is

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fraudulent enlistment or any other reason resulting in no credit for service (i.e., when the DD 214 shows zero time served).²³

Many changes in the law of void and voidable enlistments have had effects on discharge upgrade cases.²⁴

28.3.3.3 Reenlistment Bonus Problems

A servicemember sometimes qualifies for a substantial cash bonus by reenlisting; all or a substantial portion of the bonus is paid immediately upon reenlistment. When a servicemember is separated before completing the reenlistment term for which the bonus was paid, the government commonly asserts a right to a pro rata share of the bonus equal to the unexpended portion of the term of service.

A veteran's claim for back benefits due as a result of a discharge upgrade may provoke a government claim for "unearned" bonus money. It is unclear whether the government's claim would be barred by the six-year statute of limitations, or whether it would be renewed as an administrative setoff to the veteran's claim for back benefits.²⁵ Conversely, it is unclear whether a veteran whose reenlistment bonus was either partially withheld or reclaimed by the government following his/her premature less than honorable discharge can recover the withheld portion if (s)he was found (within six years of the date of discharge) to have been discharged improperly.²⁶

28.3.3.4 Claims Resulting From Overturned Court-Martial Convictions and Improperly Terminated Pay Following Unlawful Absences

Many combinations of problems that can occur in these areas are not addressed in this manual.²⁷

²² (continued)

made, the six-year statute of limitations will begin to run again. 28 U.S.C. § 2415(d).

The military can waive indebtedness up to \$500 if application is made within three years of discovery of the error. 10 U.S.C. § 2773. Normally, a waiver will be granted unless fraud or lack of good faith is indicated. If the overpayment has already been repaid by the veteran, application can be made to the appropriate Finance Center within two years for a refund. See note 3 *supra*.

See § 28.3.3.3 *infra* (discussion of recoupment as it relates to reenlistment bonuses).

²³ See Comp. Gen. Op. B-192210 (July 17, 1979), 7 MIL. L. REP. 2441 (1979) (unpublished). See also § 18.6 *supra* (correcting void enlistments).

²⁴ See e.g., § 12.6.3 *supra*. Many of these issues have been addressed in *Opinions of the Comptroller General*. See, e.g., 55 Comp. Gen. 1421 (1976) (B-163443). The opinions are frequently reported in the *Military Law Reporter*.

²⁵ See note 22 *supra*. If a decision to discharge has been found by a Board to be improper, the government's claim should be barred. In any case, a veteran's acknowledgement of a debt can rekindle an extinguished claim by the government for repayment.

²⁶ See 50 Comp. Gen. 280 (1960) (recoupment permitted if discharged voluntarily or due to own misconduct unless Review Board changes reason for discharge); *Dilley v. Alexander*, 627 F.2d 407, 8 MIL. L. REP. 2324 (D.C. Cir. 1980) (on motion for clarification) (expansive view of a veteran's right to be "made whole" following a finding of improper separation).

²⁷ See DoD Military Pay and Allowances Entitlements Manual; *Opinions of the Comptroller General*. See also Moore & Nyman, *Finances and the Convicted GI*, 11 THE ADVOCATE 122 (May-June 1979).

Some common events that can trigger an improper denial of a servicemember's pay are:

- Return to duties after an AWOL status;²⁸
- Release to duties after a period of confinement;²⁹
- Reversal of a court-martial conviction on appeal;³⁰ and
- Expiration of normal term of service while court-martial was pending.

28.4 CLAIMS FOR BENEFITS NOT ADMINISTERED BY THE MILITARY OR THE VA

Eligibility for many civilian benefit programs and other statutory entitlements is dependent upon the character of a veteran's military discharge. An upgrade, even many years after discharge, entitles the veteran to benefits or provides grounds for reconsideration. Entitlement is often based on state law and on a determination by the administering agency as to whether the upgrade is fully retroactive.³¹

28.4.1 UNEMPLOYMENT BENEFITS

Most states deny unemployment benefits to veterans who received less than GDs.³² When his/her discharge is upgraded, a veteran may be able to appeal the denial or have the case reopened, depending upon the relevant state procedures.

A veteran interested in obtaining previously denied unemployment compensation should contact the local Employment Service for information concerning appeal rights. It will probably be necessary to argue that the upgrade is fully retroactive, and that the case should be reopened, notwithstanding any state statutes of limitations or similar provisions. It may also be argued that an unemployment agency's failure to inform the claimant of discharge review rights constitutes an improper failure to inform him/her of all rights to appeal.³³

²⁸ The servicemember must be returned to full duty to be eligible for withheld pay. This occurs when "a member is assigned useful and productive duties which are considered by his commander to be consistent with his grade and years of service." 54 Comp. Gen. 862 (1975), Comp. Gen. Op. B-180768. See 10 U.S.C. § 972.

²⁹ See 54 Comp. Gen. 862 (1975), Comp. Gen. Op. B-180768; 10 U.S.C. § 972.

³⁰ All pay and allowances lost as a result of a court-martial conviction must be restored if the conviction is overturned on review. Art. 75(a), U.C.M.J., 10 U.S.C. § 875(a). This includes convictions overturned many years later under Art. 69, U.C.M.J., 10 U.S.C. § 869. If a conviction is overturned after a servicemember's term of service has expired (and the term expired while the servicemember was in confinement or on parole), (s)he is entitled to pay and allowances for the entire period. Comp. Gen. Op. B-194958 (Oct. 4, 1979), 7 MIL. L. REP. 2441 (1979) (unpublished).

³¹ Another important consideration may be whether the reason for the upgrade is impropriety or equity.

³² The state unemployment service refers cases to the VA, which determines whether the discharges were "under other than dishonorable conditions." The VA notifies veterans of its intention to adjudicate. See Ch. 26 *supra*. Servicemembers who enlist after October 1, 1980, must have served at least 365 days. See Pub. L. No. 96-364, 94 Stat. 1208 (1980); 10 U.S.C. § 977. See also note 1 *supra*.

³³ See App. 28D *infra* (sample appeal).

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28.4.2 REEMPLOYMENT RIGHTS

Only a few common issues in this extensive area of veterans rights are noted below.^{33a} Veterans generally are eligible to resume pre-service employment with no loss in seniority, status, or other benefits which would have accrued had they not enlisted,³⁴ provided that they:³⁵

- Received HDs or GDs;³⁶
- Made applications for reemployment within 90 days of discharge; and
- Left the military after less than four years of service.

Reemployment rights involve many variables, such as the changing nature of the job and the effect of a union contract and are often dependent on an interpretation of statutory terms such as "other benefits offered by the employer" and "restoration to the same status." The local United States Attorney's office must provide free representation to any veteran who reasonably appears entitled to the benefits in dispute.³⁷

Since a discharge upgrade always occurs more than 90 days after the original discharge, a veteran who has received an upgrade may face some difficulties establishing his/her entitlement to reemployment. Although no definitive rule governs this issue, the veteran is probably eligible for reemployment if (s)he:

- Applies for reemployment within 90 days of the discharge and only later receives the upgrade, provided there was no undue delay in seeking the upgrade;³⁸ or
- Applies for reemployment within 90 days of the upgrade, since the upgrade is retroactive to the date of discharge. This argument is most likely to succeed if there was no undue delay in applying for the upgrade and the Review Board found that the original disqualifying discharge was improper.³⁹

Employers may be willing to reemploy veterans with upgraded discharges but be unwilling to grant full retroactive seniority because of potential union objections. The extent of relief available to veterans may have to be negotiated with the union.

^{33a} See Bibliography *infra*.

³⁴ 38 U.S.C. § 2021. State, county, and city jobs were included on December 3, 1974, under Pub. L. No. 93-508, 88 Stat. 1594 (1974). Although the statute uses the term "inducted," its application is not limited to actual draftees. 38 U.S.C. § 2024. Appropriate state law should be consulted.

³⁵ Some exceptions to this are Reservists, National Guard members, and active duty servicemembers who were hospitalized or whose active duty was involuntarily extended.

³⁶ UDs and BCDs preclude reemployment rights and are not adjudicated by the VA to determine eligibility for such things as VA and unemployment benefits.

³⁷ 38 U.S.C. § 2022. Assistance is also available from the regional offices of the Labor-Management Services Administration of the Department of Labor.

³⁸ *Robertson v. Richmond, F. & P.R.R.*, 178 F. Supp. 734 (E.D. Va. 1959).

³⁹ The courts have liberally construed the 90-day rule although not on this exact issue. *Cf. Travis v. Schwartz Mfg. Co.*, 216 F.2d 448 (7th Cir. 1954); *Van Doren v. Van Doren Laundry Service, Inc.*, 162 F.2d 1007 (3d Cir. 1947). A pending case, when decided, may shed more light on this point. *Maliko v. U.S. Postal Service*, No. 80-2242 (D.C. Cir., appeal filed Oct. 8, 1980).

28.4.3 RETIREMENT CREDIT

If a veteran who is a Federal employee receives an upgrade to a GD or HD from a UD, BCD, or DD, his/her military service can be credited toward federal retirement. (S)he may also be entitled to other benefits, such as sick leave. Some state governments may also give the veteran employee increased retirement benefits as a result of such an upgrade.^{39a}

For former officers, this potential benefit is particularly significant. Once an officer attains career status, (s)he has no fixed term of service. Separation with less than a GD renders the entire period of service noncreditable for federal retirement purposes, even though the officer may have performed for many years in exemplary fashion before engaging in the conduct that led to his/her discharge.

28.4.4 STATE VETERANS BENEFITS

28.4.4.1 Variety of Benefits Available

All states provide benefits for veterans but under a wide variety of statutes.⁴⁰ Important benefits that may be available to veterans (and their dependents or survivors) include:

- Bonuses;
- Reemployment rights;
- Special tax exemptions for disabled veterans or for license fees;
- Tuition benefits at state schools;
- Job preference and employment services;
- Training and rehabilitation programs;
- Burial allowances; and
- Access to veterans homes.

28.4.4.2 The Definition of Veteran

State statutes define "veteran" and set eligibility requirements for particular benefits in many different ways. For example, "under honorable conditions . . . or who later received an upgraded discharge under honorable conditions,"⁴¹ "discharged under other than dishonorable conditions,"⁴² "a veteran . . . as defined by 38 U.S.C. § 101,"⁴³ "upon upgrading of discharge indicating honorable service,"⁴⁴ and "Honorable," "Honorably," or "Under Honorable Conditions" (without reference to upgrading).⁴⁵

^{39a} If a state or local government credits a retiring employee for past public service in other jobs, it may not exclude active duty military service. 10 U.S.C. §§ 1332, 1336; *Cantwell v. County of San Mateo*, 631 F.2d 641, 9 MIL. L. REP. 2094 (9th Cir. 1980). This is true even if the state statute purports to exclude time for which another pension is payable.

⁴⁰ See *Digests of State Law Regarding Rights, Benefits and Privileges of Veterans and Their Dependents* (Jan. 1979) (published by the Government Printing Office, Washington, DC 20402).

⁴¹ FLA. STAT. § 1.01(15). This would clearly include a GD.

⁴² IDAHO CODE § 65-509. This adopts 38 U.S.C. § 101, which is the definition used by the VA, and requires adjudication of anything less than a GD. See Ch. 26 *supra*.

⁴³ VT. STAT. ANN., tit. 32, § 3802(10), (11). See note 42 *supra*.

⁴⁴ MICH. COMP. LAWS ANN. § 35.1027 (referring to refiling for a bonus).

⁴⁵ If the statute(s) do not elaborate on these phrases, one may argue that GDs should be included under them, as is the case under federal law. An upgraded discharge should also be included because it is normally accorded retroactive effect for federal benefit programs.

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Many disputes over statutory definitions involve eligibility for bonuses or other time-limited programs (such as tuition benefits). Problems are increased when a statute that expressly fixes a filing date by which time all applications must be submitted is silent as to the effect of an upgrade on the time limit. In these situations, applicants may be able to use one or more of the following arguments:

- The statute should be construed liberally, as federal statutes are;
- Veterans who applied for the benefit prior to the statutory deadline, but were turned down because of their less than honorable discharges, should be accepted upon upgrade;⁴⁶ and
- Upgrades should be made fully retroactive, thereby providing veterans who receive them with rights that have not already partially expired.

28.5 REDUCTION OF PRISON SENTENCE

A copy of a veteran's military records is often obtained by prosecutors and probation officers for use in pre-sentence evaluation. If a bad discharge recorded there is reported to the sentencing judge, it may have some effect on the severity of sentence imposed. A later upgrade of the discharge might enable the veteran to persuade the sentencing judge (or a parole board) that the original sentence was based on erroneous information⁴⁷ or that changed circumstances warrant a reduction of the sentence.⁴⁸ Pre-sentence reports are often unavailable to a defendant;⁴⁹ the extent of reliance by the sentencing judge on the bad discharge may be difficult to establish.

Because case law in this area is extremely limited, it is unclear whether a court would make distinctions based on the reason for a particular upgrade.⁵⁰

⁴⁷ 28 U.S.C. § 2255 should be used for federal prisoners. See *United States v. DeLutro*, 617 F.2d 315, 8 MIL. L. REP. 2331 (2d Cir. 1980).

⁴⁸ See FED. R. CRIM. P. 35 (motion can be filed within 120 days of final appeal).

⁴⁹ A court has recently held pre-sentence reports in the possession of the United States Parole Commission might not be exempt from disclosure under the Freedom of Information or Privacy Acts. *Carson v. United States Dep't of Justice*, 631 F.2d 1008 (D.C. Cir. 1980).

⁵⁰ In *DeLutro*, 617 F.2d 315, the court seemingly wanted more than the DRB letter announcing upgrade. The reason for upgrade should be irrelevant to a determination of whether the veteran's original sentence (which was based on his/her total record) should be reconsidered.

⁴⁶ Cf. notes 38, 39 *supra*.

APPENDIX 28A

APPLICATION FOR ARREARS IN PAY (DD FORM 827)

APPLICATION FOR ARREARS IN PAY (FOR SERVICE IN THE ARMED FORCES OF THE UNITED STATES)		SUBMIT IN TRIPLICATE. TYPE OR PRINT. Form for use of service members, former service members, or legal representatives of incompetent members, in claiming arrears of pay, etc., believed to be due.
Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, will be fined not more than \$10,000 or imprisoned not more than five years, or both. (62 Stat. 698) (18 U. S. Code 287)		
DATE:	SIGNATURE OF CLAIMANT:	
GRADE/RATE OR RANK, NAME, COMPLETE MAILING ADDRESS	(File/Service No.)	PERIOD FOR WHICH ARREARS ARE BELIEVED TO BE DUE FROM THE U. S.
<div style="border: 1px solid black; width: 100%; height: 100%; display: flex; align-items: center; justify-content: center;"> <div style="border: 1px solid black; width: 40%; height: 40%; margin: 20px;"></div> <div style="border: 1px solid black; width: 40%; height: 40%; margin: 20px;"></div> </div>		FROM: TO: FOR SERVICE IN <input type="checkbox"/> ARMY <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> NAVY <input type="checkbox"/> COAST GUARD <input type="checkbox"/> AIR FORCE
(Social Security No.)		
LAST ENLISTED/ENTERED ON ACTIVE DUTY (Date)	LAST DISCHARGED/RELEASED FROM ACTIVE DUTY (Date and place of discharge)	
FACTS AND CIRCUMSTANCES ON WHICH CLAIM IS BASED (State in sufficient detail to give a clear understanding)		
IF CLAIMANT IS SERVING ON ACTIVE DUTY, THE FOLLOWING CERTIFICATE SHOULD BE FURNISHED BY THE DISBURSING/FINANCE OFFICER CONCERNED		ATTACH ALL AVAILABLE DOCUMENTARY EVIDENCE IN SUPPORT OF CLAIM AND MAIL TO
STATION	DATE	
I hereby certify that I have not and will not pay any portion of this claim for these reasons:		ARMY Finance Center U. S. Army Indianapolis 49, Indiana
		NAVY Finance Center U. S. Navy Cleveland 14, Ohio
		AIR FORCE Accounting and Finance Center, U. S. Air Force Denver, Colorado
		MARINE CORPS Headquarters U. S. Marine Corps (Code CDB) Washington 25, D. C.
		COAST GUARD Headquarters U. S. Coast Guard Washington 25, D. C.
SIGNATURE:	SYMBOL NO:	

DD FORM 827 1 SEP 58 S/N 0102-LF-008-2300 REPLACES EDITION OF 1 FEB 1955 WHICH MAY BE USED UNTIL EXHAUSTED Form approved by Comptroller General, U. S. February 7, 1955
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Social Security Request for Detailed Earnings Information

Decide on the information you need. Complete the request form provided below and mail it to the address shown.

FOR YOUR INFORMATION

TYPE I - EARNINGS, PERIOD OF EMPLOYMENT OR SELF-EMPLOYMENT (Includes names and addresses of reporting employers.)

TYPE II - YEARLY TOTALS ONLY (Does not include names and addresses of reporting employers.)

Failure to give complete and correct information will delay your request. Please be sure to copy your social security number as it appears on your social security card and sign your name on the signature line. Clearly show the calendar quarter(s) and/or year(s) requested and the person who is to receive the information. (It is important that you read the other side of this form before you complete the request.)

There usually is a charge when information from a person's (social security number holder) record is to be released to someone else. However, do not send any payment at this time. We will send a bill to the party shown below. Charges of \$5.00 or less will be waived.

----- (cut along this line) -----

REQUEST FOR DETAILED EARNINGS INFORMATION

Name _____

Social Security Administration
Office of Central Records Operations
Baltimore, Maryland 21235

SOCIAL SECURITY NUMBER			
	MONTH	DAY	YEAR
DATE OF BIRTH			

Please send the information for the block(s) checked below to the following address:

MR _____
WSS _____
MRS _____
(Name and address to whom the information is to be sent)

- Type I for the calendar quarter(s) and/or year(s) _____ through _____
- Type II for the calendar year(s) _____ through _____

If information from your record is being sent to someone else, there usually is a charge. Please show the name and address of the party to whom the bill should be sent, if different from that shown above: _____

Sign your name here (do not print) _____ Date _____

WARNING: This signature must be that of the person whose social security number is shown above. Any false representation to obtain information from social security records is punishable by a fine of not more than \$5,000 or one year in prison.

INFORMATION ABOUT SIGNATURES

Information in the social security records is confidential. We can give you information from your record only if you sign your request, or from another person's record only if that person authorizes us in writing to do so.

NOTE: The signature should be the written signature of the social security number holder. We cannot accept printed, typed or stamped signatures.

If a mark (usually an "X") is used instead of a signature, it must be witnessed by two disinterested persons who must include their addresses.

The social security number holder must initial ANY changes made on the authorization.

Earnings information from the record of a deceased individual may be disclosed upon receipt of an authorization from the administrator, executor, or trustee of the decedent's estate, if that representative provides proof of appointment. Proof of death also must be furnished with the authorization.

INFORMATION ABOUT SOCIAL SECURITY RECORDS

Our records do not contain earnings information for years before 1937. Exact dates of employment (month and day) cannot be given because employers are not required to show that information on their social security reports.

Quarterly information is available only for earnings reported for periods from 1938 through 1977. Our records do not show the amount of earnings in each quarter of 1937 because employers were required to report earnings semi-annually in that year. Employers are required to report earnings annually after December 31, 1977.

Because of the time required to receive and process reports, earnings information reported after 1977 may not be available from our records before February following the year the earnings were reported. For example, 1978 earnings may not be available before February 1980, and 1979 earnings not before February 1981.

Our records show the amount of earnings reported, not the amount of contributions paid. They do not necessarily show a person's total earnings for a given year. The maximum amount of earnings each employer is required to report for an employee in a year for social security purposes is \$3,000 for 1937-50; \$3,600 for 1951-54; \$4,200 for 1955-58; \$4,800 for 1959-65; \$6,600 for 1966-67; \$7,800 for 1968-71; \$9,000 for 1972; \$10,800 for 1973; \$13,200 for 1974; \$14,100 for 1975; \$15,300 for 1976; \$16,500 for 1977; \$17,700 for 1978; \$22,900 for 1979; and \$25,900 for 1980. The same maximum amounts apply to earnings reported by self-employed persons beginning with 1951. (Self-employment was not covered before that time.)

APPENDIX 28C

REQUEST FOR COPY OF TAX FORM (IRS FORM 4506)

Service Center Addresses

Alabama—Atlanta, GA 31101
 Alaska—Ogden, UT 84201
 Arizona—Ogden, UT 84201
 Arkansas—Austin, TX 73301
 California—Fresno, CA 93888
 Colorado—Ogden, UT 84201
 Connecticut—Andover, MA 05501
 Delaware—Philadelphia, PA 19255
 District of Columbia—Philadelphia, PA 19255
 Florida—Atlanta, GA 31101
 Georgia—Atlanta, GA 31101
 Hawaii—Fresno, CA 93888
 Idaho—Ogden, UT 84201
 Illinois—Kansas City, MO 64999
 Indiana—Memphis, TN 37501
 Iowa—Kansas City, MO 64999
 Kansas—Austin, TX 73301
 Kentucky—Memphis, TN 37501
 Louisiana—Austin, TX 73301
 Maine—Andover, MA 05501
 Maryland—Philadelphia, PA 19255
 Massachusetts—Andover, MA 05501
 Michigan—Cincinnati, OH 45999
 Minnesota—Ogden, UT 84201
 Mississippi—Atlanta, GA 31101
 Missouri—Kansas City, MO 64999
 Montana—Ogden, UT 84201
 Nebraska—Ogden, UT 84201
 Nevada—Ogden, UT 84201
 New Hampshire—Andover, MA 05501
 New Jersey—Holtzville, NY 00501
 New Mexico—Austin, TX 73301
 New York
 New York City and Counties of Nassau, Rockland, Suffolk and Westchester—Holtzville, NY 00501
 All Other Counties—Andover, MA 05501
 North Carolina—Memphis, TN 37501
 North Dakota—Ogden, UT 84201
 Ohio—Cincinnati, OH 45999
 Oklahoma—Austin, TX 73301
 Oregon—Ogden, UT 84201
 Pennsylvania—Philadelphia, PA 19255
 Rhode Island—Andover, MA 05501
 South Carolina—Atlanta, GA 31101
 South Dakota—Ogden, UT 84201
 Tennessee—Memphis, TN 37501
 Texas—Austin, TX 73301
 Utah—Ogden, UT 84201
 Vermont—Andover, MA 05501
 Virginia—Memphis, TN 37501
 Washington—Ogden, UT 84201
 West Virginia—Memphis, TN 37501
 Wisconsin—Kansas City, MO 64999
 Wyoming—Ogden, UT 84201

Form 4506 (Rev. 2-78)

Instructions

Please prepare a separate Form 4506 for each request and send to the Internal Revenue Service office where the tax form was filed. The service center addresses appear on this page.

If you are not the taxpayer named on the copy of the tax form requested, please enclose a copy of your authorization to receive this material; this will be a power of attorney, tax information authorization or, if the taxpayer is deceased, a certified copy of your letters of administration or testamentary. If more than a year has passed since the letters of administration or testamentary were issued, you must also send a certification by the clerk of the court stating that the letters are still in effect.

If you request a copy of a corporation return, the request must be signed by a principal officer and witnessed by another officer or the secretary, under corporate seal if any.

A corporation return may be inspected by or disclosed to any of the following:

- (1) a person designated by the corporation's board of directors;
- (2) any officer or employee of the corporation who presents a written request signed by any principal officer and witnessed by the secretary;
- (3) any bona fide shareholder who owns 1 percent or more of the outstanding stock of the corporation;
- (4) if the corporation was a foreign personal holding company under section 552, any person who was a shareholder during any part of a period covered by the return if for any part of that period the shareholder was required under section 551 to include in gross income undistributed foreign personal holding company income from the corporation;
- (5) if the corporation was an electing small business corporation under subchapter S of Chapter 1, any person who was a shareholder during any part of the period covered by the return during which an election was in effect; or
- (6) if the corporation has been dissolved, any person authorized by applicable State law to act for the corporation or any person who the Secretary finds to have a material interest which will be affected by information contained on the return.

The basic rate for reproduction of a completed tax form or other document is \$1 for one page and 10 cents for each additional page. Unless certification is requested, only pages on which an entry appears will be copied.

If you request copies for judicial or administrative proceedings and if it is necessary that the form be formally certified under seal, the cost of certification is \$1 regardless of the number of pages.

Please do not attach payment to this request—a bill will be enclosed with the copies sent to you.

GPO 228 050

Form 4506 <small>(Rev. February 1978)</small>	Department of the Treasury -- Internal Revenue Service Request for Copy of Tax Form <small>(Please read the instructions on the back of this form before you complete it.)</small>		
Name and address of taxpayer as shown on tax form			
Current address, if different from above			
Mail copies to:			
Do you want copies of all pages and attachments?		How many copies of each page requested do you want?	
<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Page 1 only? <input type="checkbox"/> Schedules only? <input type="checkbox"/> Other?	
If you check "Other," please specify what copies you want.			
If you are requesting certification, please check here. <input type="checkbox"/> <i>(See instructions on back.)</i>			
Signature of taxpayer <i>(as requested)</i>		Signature of person attesting, if corporate return <i>(See instructions on back.)</i>	
Date		Date	

Form 4506 (Rev. 2-78)

APPENDIX 28D
SAMPLE APPEAL FROM DENIAL OF UNEMPLOYMENT BENEFITS

I wish to appeal the denial of unemployment benefits to me by the Virginia Employment Commission in May of 1976.

On January 30, 1975, I became an active member of the United States Army. I remained in the Army until February 12, 1976, when I was discharged with an undesirable discharge certificate. Thereafter, on February 19, 1976, I applied for unemployment benefits at your office based upon my active duty time in the Army. By letter of March 22, 1976, the Veterans Administration informed me that they would make a determination as to the nature of my service, which would essentially control the decision on eligibility for unemployment benefits. By letter of May 17, 1976, the Veterans Administration informed me that their determination was unfavorable, thereby disqualifying me for unemployment compensation. Copies of these letters are enclosed. Subsequent to the VA determination, your office denied my claim. I did not file any appeal at that time with your office because there was no point in doing so, the VA determination being conclusive.

Subsequently, I applied to the Army Discharge Review Board for a change in my discharge. Lawyers representing me at that time researched the relevant regulations and found that I had been illegally discharged. As shown by the enclosed Army Discharge Review Board Case Report and Directive, the Board agreed that I was improperly separated and should receive an honorable discharge. Thereafter, the Secretary of the Army approved the findings of the Army Discharge Review Board and I was granted an honorable discharge certificate along with a corrected DD Form 214, copies of which are enclosed.

Since the original discharge, which formed the basis for the determination of ineligibility for benefits, was in fact in violation of regulations, and since that error has now been corrected, it seems to me that there should be some remedy for the prior denial of unemployment benefits. Therefore, I respectfully request that my unemployment claim be reopened so that the original error by the Army will not continue to deprive me of my rightful benefits.

Thank you for your cooperation in this matter.

Sincerely,