Veterans Discharge Upgrade Manual

Connecticut Veterans Legal Center

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Veterans Discharge Upgrade Manual
Connecticut Veterans Legal Center, 2011

This manual was prepared on behalf of the Connecticut Veterans Legal Center by Laura Keay and Kathryn Cahoy, students in the Yale Law School Veterans Legal Services Clinic, working under the supervision of Professor Jeffrey Selbin.

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DISCLAIMER: This guide is intended as an introductory tool for attorneys and other advocates representing veterans in discharge upgrade cases. This guide does not purport to provide legal advice or to give an opinion as to the appropriate course of action in a particular case. Veterans’ advocates should always conduct their own research on the best course of action for their particular case and should always check any information contained in this guide against the relevant statute or regulation to ensure its accuracy.
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I. Introduction

Most of Connecticut’s 250,000 veterans received an “honorable” discharge when they left the military. However, thousands of veterans in the state received a less than honorable discharge, which can prevent them from obtaining educational, medical or pension benefits from the Department of Veterans Affairs and can limit their civilian employment opportunities. Post-traumatic stress disorder, traumatic brain injury, or other service-related injuries may have led to the unfavorable discharge. As a result, many otherwise deserving veterans are ineligible for the very benefits that would help them cope with their in-service trauma.

Veterans can upgrade their discharge status through administrative procedures established by the service branches and in federal court. However, these administrative and judicial processes are complicated, confusing, and time-consuming for many veterans. Fortunately, lawyers and other trained advocates can help veterans apply for discharge upgrades and receive critical services. This manual provides a basic overview of military discharges and how advocates can help veterans upgrade their discharges through administrative procedures:

Part II explains the types of military discharges and why veterans seek upgrades.

Part III describes Discharge Review Boards and Boards for Correction of Military Records, the two main administrative avenues of relief for veterans seeking discharge upgrades.

Part IV provides instruction for preparing applications to these boards.

Part V identifies other potential sources of judicial relief that may be appropriate in certain cases.

Part VI summarizes the information presented in the manual.

Part VII includes sample forms and other helpful materials.

Part VIII lists additional resources for advocates who want to learn more about discharge upgrades.
II. Military Discharge Overview

All servicemembers are discharged when their military term of service expires. A discharge may occur when a servicemember elects or is forced to leave the military as a result of a medical disability, punishment, administrative reason, or simply the end of a term of service. This section describes the paperwork veterans receive when they are discharged, the types of discharges, who administers discharges, and why veterans may want a discharge upgrade.

A. Discharge Documents (DD-214)

When veterans leave the service, they receive discharge documents, the most important of which is the DD-214. This document comes in a short form, which is edited to display only basic information, and a long form.\(^1\) Both forms contain general information including dates of entry and discharge, total time in service, rank, decorations, and military education. Additionally, the long form includes the characterization of service (e.g. honorable, dishonorable, etc.), reason for discharge (e.g. completion of term of service, medical disability, etc.), re-enlistment code (indicating the circumstances under which the veteran can reenter the service), and a code matching the reason for discharge.

Because the long form contains more detailed information, it is usually the one required by the Department of Veterans Affairs and employers who request to see the DD-214 of prospective employees. Therefore, the information that appears on this simple document can significantly affect many aspects of a veteran’s life, including the ability to find employment or obtain VA benefits. Veterans usually seek discharge upgrades to change the information that appears on their DD-214.

\(^1\) The military did not begin to issue a short form DD-214 until 1974.
B. Types of Discharges

Discharges before the end of term of service are classified as *administrative* or *punitive*.\(^2\) This point is often confused, but is central to understanding the discharge process.

1. **Administrative discharges** are less serious in nature and can only be given, as their name implies, administratively, and cannot be given by court-martial. In order of desirability, from most to least, administrative discharges are classified as follows:
   a. Honorable Discharge [HD];
   b. General Discharge (Under Honorable Conditions) [GD]; and
   c. Discharge Under Other Than Honorable Conditions [OTH] (referred to as Undesirable Discharge [UD] until the early 1980s).

Most servicemembers receive an honorable discharge. Today, only a few specifically defined categories warrant OTH; and in cases where commanders may issue an OTH, procedural rights are greater. Because of restrictions on issuing this type of discharge, opportunities for legal error in the discharge proceedings may be greater.

2. **Punitive discharges** are more serious and can only be given as a sentence from a court-martial with the requisite authority. Courts-martial can issue punitive discharges but do not have the authority to grant the less serious administrative discharges. In order of severity, from least to most, punitive discharges are classified as follows:
   a. Bad Conduct Discharge [BCD];
   b. Dishonorable Discharge [DD]; and
   c. Dismissal (for officers only).

Not all courts-martial have the authority to issue both of these discharges as punishment. A summary court-martial cannot issue any discharge, and a special court-martial [SPCM] may only issue a Bad Conduct Discharge. Only a general court-martial can issue a Dishonorable Discharge. Courts-martial do not have the power to discharge officers, so an officer may instead be sentenced to dismissal. A dismissal is considered the equivalent of a Dishonorable Discharge.

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\(^2\) There are exceptions to these two categories, including a medical discharge, which is not classified as administrative or punitive and is handled through another process.
Veterans are not only discharged due to misconduct. They may be discharged for a variety of other reasons, including medical disability. For example, when a veteran has been discharged after being diagnosed with a personality disorder, the diagnosis will appear on the DD-214. The diagnosis could be incorrect, contested, or unjustly stigmatizing for the veteran, and the veteran may want to remove such a reference. Veterans may also want to remove other stigmatizing reasons for discharge from the DD-214 including misconduct/drug abuse or unsatisfactory performance. Administrative agencies that handle discharge upgrade applications can also consider requests to change the reason for discharge.

C. Potential Consequences of Discharges

This section presents a few common reasons why a veteran may pursue a discharge upgrade. The specific reason for pursuing a discharge upgrade may be different for each veteran, and even the general categories presented below may affect each veteran in a different way. Thus, this section is meant to provide advocates with a general overview of common motivations for pursuing discharge upgrades and is not meant to be exhaustive.

1. VA Benefits

An important concern for veterans pursuing a discharge upgrade may be eligibility for benefits from the Department of Veterans Affairs (VA). A discharge upgrade may qualify a veteran for VA medical care, disability compensation benefits, educational benefits, home loans, or a pension. Advocates should be careful to understand what type of benefits the veteran wants, whether he/she may already be eligible for other benefits, and whether the reviewing body’s decision will affect the veteran’s eligibility for VA purposes. A discharge upgrade may not be the only way to

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obtain benefits; and, depending on the case, it may not qualify a veteran for the desired benefits. Therefore, understanding a client’s ultimate goal can be central to advising the client and making strategic decisions.

VA benefits law is complex and evolving, and we do not intend to review it comprehensively here. However, some generalizations on how discharges affect benefits may be beneficial to understanding why clients may be seeking upgrades. Please keep in mind that none of these rules are without exception.

Veterans with an HD or GD are almost always eligible for most VA benefits, even if the discharge characterization resulted from an upgrade. Those with an OTH can usually obtain VA medical care for disabilities incurred in the line of duty but must receive a favorable character of discharge determination from VA to receive any other benefits, including disability compensation benefits. If a BCD is issued by a special court-martial, the veteran may be eligible for some benefits if VA makes a favorable character of discharge determination. However, a BCD issued by a general court-martial or a DD makes the veteran ineligible for all benefits. VA has an adjudicatory process through which it can award benefits in some cases despite these rules, so veterans should also consider submitting an application to VA.

2. Stigma

Any less than honorable discharge can carry stigma. “Since about 90% of all discharges issued are Honorable, a discharge of that type is commonly regarded as indicating acceptable, rather than exemplary service. In consequence, anything less than an Honorable Discharge is viewed as derogatory, and inevitably stigmatizes the recipient.” This “unmistakable social stigma . . . greatly limits the opportunities for both public and private civilian employment." In addition to social stigma, many veterans feel the character of their discharge does not reflect the overall service and sacrifice they made for their country.

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3 Except in cases of insanity at the time of discharge. BARTON F. STICHMAN AND RONALD B. ABRAMS, VETERANS BENEFITS MANUAL 29 (2009).
4 See infra Part V.C.
5 DAVID ADDLESTONE ET AL., MILITARY DISCHARGE UPGRADE, AND INTRODUCTION TO VETERANS ADMINISTRATION LAW: A PRACTICE MANUAL DUP81-1.2 fn.6 (1982) (quoting Bland v. Connally, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961)).
Some discharges relate to stigmatizing medical conditions. As noted above, a veteran discharged for a personality disorder diagnosis will have a DD-214 that clearly displays “personality disorder.” Anyone who views the DD-214, including potential employers, will see that the veteran has been diagnosed with this disorder, regardless of whether the veteran wished to share that private health information. Some of these diagnoses are incorrect or inconclusive, and a veteran may not want her records to include such a diagnosis.

III. Choosing a Venue

Discharge upgrade cases can proceed through two main administrative avenues. First, each military branch has a Discharge Review Board (DRB). These boards specialize in reviewing discharge upgrade applications and applications for changes in reason for discharge, and they tend to be a more successful route to obtaining a discharge upgrade, although statistics vary depending on the service branch and the individual case. However, the DRBs have strict 15-year statutes of limitation, and veterans who were discharged or dismissed by general court-martial cannot apply to the DRBs.

Veterans applying after the DRB statute of limitations expires must proceed to the second option – applying for a discharge upgrade to their service department’s Board for Correction of Military Records (BCMR). BCMRs have a waivable 3-year time limit and the authority to upgrade discharges issued by general courts-martial or to change a discharge to or from disability discharge or retirement. BCMRs have authority to make other changes that DRBs cannot. However, if a veteran is eligible to apply to a DRB, the BCMR will require the veteran to apply to the DRB first.

Each service department has its own DRB and BCMR. Therefore, there are four DRBs and four BCMRs – one each for the Army, Navy, Air Force, and Coast Guard. Marine Corps veterans apply to the Navy boards. The following sections refer generally to the DRBs and BCMRs, though each service department’s standards and practices may differ slightly.

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6 Id. at 858.
Discharge Upgrade Boards

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A. The Discharge Review Board (DRB) Upgrade Process

1. Jurisdiction and Eligibility Requirements

DRBs have jurisdiction both to upgrade the character of a discharge (e.g. from General to Honorable) and to change the reason for discharge (e.g., to remove “homosexuality” from the DD-214 as the reason for discharge). Any former member of the Armed Forces may apply, but veterans who were discharged or dismissed by general court-martial (including all veterans with dishonorable discharges) are ineligible for DRB review. Veterans discharged by special court-martial may only request a change of characterization of their discharge, and they will only be granted discharge upgrades for clemency reasons: DRBs do not have the power to overturn the findings of a court-

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7 32 C.F.R. §70.8(a)(3).
martial. DRBs also do not have the power to lower discharges, change re-enlistment codes, make decisions regarding disability and retirement, reinstate veterans into military service, or recall any person to active duty.\textsuperscript{9}

Veterans must apply within 15 years of the date of discharge.\textsuperscript{10} Any requests for discharge upgrades after 15 years must go through the appropriate BCMR.

2. Standards of Review

Standards of review for the DRBs are codified in 32 C.F.R. § 70.9 and 10 U.S.C. § 1553. Generally, DRBs will only upgrade discharges on grounds of \textit{equity} or \textit{propriety}.\textsuperscript{11} However, if an applicant was discharged by special court-martial, the discharge may be upgraded only for purposes of clemency.\textsuperscript{12}

A DRB may upgrade a discharge on grounds of \textit{propriety} for two reasons:

(1) An error of fact, law, procedure, or discretion occurred, and the error was prejudicial to the veteran during the discharge process; or

(2) A change in policy has been enacted and the change is expressly made retroactive to the type of case.\textsuperscript{13}

A DRB may upgrade a discharge on grounds of \textit{equity} for three reasons:

(1) The current discharge policies and procedures are materially different than those that led to the applicant’s discharge.\textsuperscript{14} For example, a discharge may be deemed inequitable if “[t]here is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration;”\textsuperscript{15}

(2) The discharge was inconsistent with disciplinary standards at the time of discharge;\textsuperscript{16} or

(3) Based on evidence relating to quality of service or capability to serve.\textsuperscript{17} For determinations based on quality of service, DRBs may consider, but are not limited to considering, factors such as the applicant’s service history; military ranks, ratings, awards, and decorations; letters of commendation or reprimand; wounds received in action; acts of merit; length of service; prior military service; convictions by court-

\textsuperscript{8} Dep’t. of Def. Instruction 1332.28, April 4, 2004. at E2.1.1 [hereinafter DoDI 1332.28].
\textsuperscript{9} 32 C.F.R. § 70.9.
\textsuperscript{10} 32 C.F.R. § 70.8.
\textsuperscript{11} 32 C.F.R. § 70.9.
\textsuperscript{12} 10 U.S.C. § 1553(a).
\textsuperscript{13} 32 C.F.R. § 70.9(b).
\textsuperscript{14} 32 C.F.R. § 70.9(c)(1).
\textsuperscript{15} 32 C.F.R. § 70.9(c)(1)(ii); DoDI 1332.28, at E4.3.1.2.
\textsuperscript{16} 32 C.F.R. § 70.9(c)(2); DoDI 1332.28, at E4.3.2.
\textsuperscript{17} 32 C.F.R. § 70.9(c)(3); DoDI 1332.28, at E4.3.3.
martial; non-judicial punishments; civil convictions; records of unauthorized absence; and records relating to the discharge.\textsuperscript{18} Evidence relating to prior military service or outstanding post-service conduct (including character references) is applicable if it can help “provide a basis for a more thorough understanding of the performance of the applicant during the period of service that is the subject of the discharge review.”\textsuperscript{19}

Equitable relief based on capability to serve may take into account the applicant’s:

- “Total capabilities,” including age, education, and ability to adjust to military service;
- “Family and personal problems” that may have affected the applicant’s ability to serve;
- “Arbitrary or capricious action” by individuals in authority over the applicant; and
- “Discrimination” as documented by records or other evidence.\textsuperscript{20}

Equitable considerations based on quality of service or capability to serve suggest that the DRB will take into account mitigating circumstances surrounding any offenses that led to an unfavorable discharge. For example, a servicemember with undiagnosed PTSD could have committed offenses that were a result of the disease rather than intentional misconduct. Also, a servicemember who received news of a family emergency might have gone AWOL due to short-term loss of judgment rather than a desire to desert his or her fellow servicemembers. Consequently, a veteran should mention and explain any mitigating factors to the DRB.

Discharge Review Boards may reconsider previously denied applications that meet certain standards of review. According to 32 C.F.R. § 70.8(8), a board may reconsider an application when:

- Previous consideration was on the motion of the DRB, rather than the veteran;
- The applicant did not have a personal appearance hearing for the first application, but the applicant now requests a hearing;
- The relevant discharge policy has changed and has been made expressly retroactive;
- Current discharge policies and procedures are substantially more favorable to the applicant than the discharge policies and procedures under which the applicant was discharged;

\textsuperscript{18} 32 C.F.R. § 70.9(c)(3)(i); DoDI 1332.28, at E4.3.3.1.
\textsuperscript{19} DoDI 1332.28, at E4.3.3.1.10.
\textsuperscript{20} 32 C.F.R. § 70.9(c)(3)(ii); DoDI 1332.28, at E4.3.3.2.
The veteran was not represented by counsel or a representative in a previous application but will be for the reconsideration; or

The applicant presents new, substantial, and relevant evidence that was not available to the applicant at the time of original review by the DRB.

Discharge Review Boards operate with a “presumption of regularity in the conduct of governmental affairs.” This means that the DRBs function with legal presumptions that government officials act properly in carrying out their duties, that military records are correct, and that the statutes and regulations are constitutional. Where error is not apparent in the military record, the applicant carries the burden of proof to show “substantial credible evidence” that the discharge was inequitable or improper. Court opinions are binding on DRBs, but prior DRB decisions are merely persuasive and are not binding precedent.

3. Composition of Panels

In general, DRB panels consist of 5 military officers chosen by the Secretary of each military department. Three favorable votes are needed to change any aspect of the discharge.

Some special rules apply in certain situations. For example, if the veteran served during a period of war or contingency operation and was later diagnosed with post-traumatic stress disorder or traumatic brain injury, the review board must include a physician, clinical psychologist, or psychiatrist, and the case must be expedited. Also, Naval DRB panels that review either Navy or Marine Corps cases must include at least three panel members who belong to applicant’s service branch (Navy or Marine Corps).

4. Personal Appearances Before the DRB

DRB applicants can choose to apply for a records review, for a personal hearing in the Washington, D.C. area, or for a hearing before a traveling board (Army and Air Force only). Generally, applicants who have hearings have been more likely to receive

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21 32 C.F.R. § 70.8 (b)(12)(vi); DoDI 1332.28, at E3.2.12.
22 32 C.F.R. § 70.8 (b)(12)(vi); DoDI 1332.28, at E3.2.12.
23 32 C.F.R. § 70.8(e)(1)(iii)(D); DoDI 1332.28, at E3.5.1.3.
24 10 U.S.C. § 1553(a); 32 C.F.R. § 70.8(b)(1).
25 32 C.F.R. § 70.8(c)(8).
upgrades than applicants who only have records reviews. When deciding whether to apply for a records review or a hearing, an advocate should take into account the strength of arguments (and whether they can be presented well in a written application), the client’s personality and ability to present the case well before a board of officers, the costs of travel or ability to be seen by a traveling board, and the timing of the application (especially if the fifteen year statute of limitations is about to run and the applicant will not have another chance to personally appear before the Board).

If DRB applicants apply for a records review first and then are denied a discharge upgrade, they are entitled to apply again for a personal hearing (Army, Air Force, and Navy only). This effectively gives applicants two opportunities for review, but only if applicants apply for a records review first. The veteran will receive the decisional document explaining why the application was denied during the records review, and this document could be an advantage when preparing for the subsequent personal hearing because the veteran will know why the board made its initial denial and can tailor the personal hearing application to address those concerns. On the other hand, the Boards have all prior applications on file, so any flaws in the first application will still be available to the board the second time around. Since not all can be explained away in a second application, the prejudice of a prior denial could outweigh the benefit of two chances before the board.

5. Options for Reconsideration

In rare cases, DRB decisions might be automatically reviewed by the Secretary of the relevant military department, in which case the applicant either will be permitted to participate (in some Navy cases) or will be notified of the final decision after review (in Army, Air Force, and some Navy cases).

Applicants have the right to an entirely new DRB review if any of the conditions listed in 32 C.F.R. § 70.8(8) are met. Veterans may appeal DRB decisions in federal court under the Administrative Procedure Act, which carries a 6-year statute of limitations from the date of the DRB decision. Appeals may be brought in the district

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27 32 C.F.R. § 724.701(b).
28 See supra Part III.A.2.
where the veteran was discharged, where the veteran currently resides, or in Washington, D.C., where the Secretaries of the service departments are located. However, advocates should consult controlling case law in these districts because some circuit courts have required veterans to exhaust their administrative remedies, including application to the BCMR, before seeking review in federal district court.

B. The Board for Correction of Military Records (BCMR) Upgrade Process

1. Jurisdiction and Eligibility Requirements

BCMRs have more extensive authority to alter military discharges than DRBs. BCMRs can upgrade any discharge characterization and change any reason for discharge. In addition, they can void discharges; change them to or from medical retirement; change re-enlistment codes; change the date of issue of a discharge (which may result in back pay); remove inaccurate performance evaluations or other damaging documents from the record; and, under rare circumstances, reinstate veterans into military service. Discharge upgrade cases make up only a fraction of the extensive caseload of the BCMRs.

BCMRs cannot lower discharges, compel the attendance of witnesses, expunge a special or general court-martial conviction, or award payment to veterans for expenses incurred in preparing an application and presenting a case to the board. Veterans must apply to a BCMR within three years of “discover[ing] the error or injustice” for which they seek relief. Jurisdictions sometimes conflict about when this time period begins, but the Court of Appeals for the District of Columbia expressly held that an applicant must have actual knowledge of the error or injustice – constructive notice is not enough. This actual knowledge may occur on the date of discharge, the date of the most recent unsuccessful DRB application, or another date when the applicant discovered the error or injustice. The time period also cannot begin while the

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31 However, court-martial convictions that were issued before the Uniform Code of Military Justice (UCMJ) was enacted in May 31, 1951, may be expunged by BCMRs.
33 10 U.S.C. § 1552(b).
34 Ridgely v. Marsh, 866 F.2d 1526, 1529 (D.C. Cir. 1989); see also Dickson v. Sec’y of Def., 68 F.3d 1396, 1405 (D.C. Cir. 1995).
servicemember is on active duty.\textsuperscript{35} BCMRs can waive the three-year time limit “in the interest of justice,”\textsuperscript{36} so veterans should not hesitate to submit applications after the time limit has passed. The Boards are required to make at least a cursory review of the merits of the case before deciding whether to waive the three-year time limit.\textsuperscript{37}

2. Standards of Review

Unlike DRBs, BCMRs have not clearly codified or published their standards of review. Nevertheless, 10 U.S.C. § 1552 and the federal regulations corresponding to each branch of the military state that BCMRs may change military records of any member or former member of the armed forces to correct any “error or injustice.”\textsuperscript{38} Discharges issued by a special or general court-martial may only be upgraded on “clemency” grounds.\textsuperscript{39} As noted above, the three-year time limit may be waived by any BCMR if it is “in the interest of justice” to do so.\textsuperscript{40}

The terms “error,” “injustice,” “clemency,” and “in the interest of justice” are not clearly defined by statute. However, one expert has identified parallels between the BCMR’s “error” and the DRB’s “impropriety” standard and between the BCMR’s “injustice” and the DRB’s “inequity” standard.\textsuperscript{41} Others have noted that BCMRs consider post-service conduct to be very important when deciding whether to grant a discharge upgrade, especially when an applicant seeks to upgrade a discharge issued by a court-martial on “clemency” grounds.\textsuperscript{42} Mitigating circumstances surrounding offenses, evidence of subsequent rehabilitation, good post-service conduct, and evidence of exemplary citizenship and character are also taken very seriously by BCMRs in discharge

\textsuperscript{35} Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-96; Detweiler v. Peña, 38 F.3d 591 (D.C. Cir. 1994).
\textsuperscript{36} 10 U.S.C. § 1552(b).
\textsuperscript{38} 10 U.S.C. §1552(a)(1); 32 C.F.R. §§ 581.3(b)(4)(i), 723.1, 865.0; 33 C.F.R. § 52.12(a). See also Mudd v. White, 309 F.3d 819 (D.C. Cir. 2002), holding that applicants must be members or former members of the armed forces (or their heirs or legal representatives) to have standing under 10 U.S.C. § 1552(g).
\textsuperscript{39} 10 U.S.C. §1552(f)(2).
\textsuperscript{40} 10 U.S.C. §1552(b).
upgrade cases.\textsuperscript{43} Otherwise, BCMRs generally consider the same factors that are important to DRBs. Applicants seeking a waiver of the time limit “in the interest of justice” are generally advised to simply argue that the merits of the case warrant the waiver.\textsuperscript{44}

The presumptions and burdens of proof are the same in BCMR cases as they are in DRB cases. Boards presume the records are correct as issued, and applicants must provide material evidence showing that their records should be corrected.\textsuperscript{45}

3. Composition of Panels

Each branch of the military has from 40 to 115 BCMR members, and individual BCMR panels are comprised from these pools.\textsuperscript{46} By regulation, members of BCMR panels should be high-ranking civilians in the executive part of their military branch.\textsuperscript{47} Three members constitute a quorum for conducting reviews of applications, except in the Coast Guard where three members make up each board, but only two members are necessary to constitute a quorum.\textsuperscript{48} Although most applications must be reviewed by a panel of Board members, BCMR staff members may return applications without such review in the following cases:

- If the applicant does not complete and sign the application;
- If the applicant failed to exhaust all other administrative remedies (such as the DRB, if the fifteen-year DRB time limit has not expired);
- If the Board does not have jurisdiction; or
- If the application is a request for reconsideration but no new material evidence has been submitted.\textsuperscript{49}

4. BCMR Application Review

\textsuperscript{43} Survival Guide at 354.
\textsuperscript{44} See Discharge Upgrading at 2.
\textsuperscript{45} 32 C.F.R. §§ 581.3(e)(2), 723.3, 865.4; 33 C.F.R. § 52.24(b).
\textsuperscript{46} For 2009 data, see the following responses to Raymond J. Toney’s FOIA requests: Army – http://rjtlaw.net/ABCMR%20FOIA%20Responses.pdf
Navy – http://rjtlaw.net/BCNR%20FOIA%20Responses.pdf
Air Force – http://rjtlaw.net/Air%20Force%20FOIA%20Responses.pdf
Coast Guard – http://rjtlaw.net/CG%20BCMR%20FOIA.pdf
\textsuperscript{47} 32 C.F.R. §§ 581.3(c)(1), 723.2(a), 865.1; 33 C.F.R. § 52.11.
\textsuperscript{48} Id.
\textsuperscript{49} 32 C.F.R. § 581.3(e)(1).
Unlike DRBs, BCMRs rarely grant personal appearances. In fact, applications to BCMRs must pass through several stages of review before a board will even render a decision. According to the Army Review Board Agency’s website, after a DD Form 149 application is received, the Army BCMR will generally go through the following steps in order:

1. Attempt to obtain records. If records are unavailable (for example, if the records are checked out by another government agency), then the ABCMR might ask the veteran to produce records or return the application.
2. The ABCMR may obtain advisory opinions from other Army staff elements. If that happens, the advisory opinions will be sent to the applicant for comment before further consideration.
3. The ABCMR may make administrative corrections without the need for a Board decision.
4. Board staff members called examiners prepare a brief for the Board’s consideration, and the Board renders a decision that is “final and binding.”

Therefore, it is very important for an applicant to make sure that the records are complete and available so that the application will not be returned at the first stage. The applicant should request a copy of all records that the BCMR obtains, and the applicant should review those records to see if there are any documents the applicant did not already have. If the Board requests that the applicant provide a full record, then the applicant should include all materials that would be included in the official military personnel record. The applicant should carefully review and respond to advisory opinions issued by staff (item 2 above) so that any inaccuracies or unfairly prejudicial statements are noted before the Board makes a decision. Similarly, applicants should always ask for a copy of the examiner’s brief (item number 4 above) in advance of the Board decision so that they may have a chance to respond to inaccurate or unfair contentions raised by the examiner.

5. Options for Reconsideration

If an application has been denied by a BCMR, the applicant may request reconsideration. The Army BCMR has a one-year time limit for such requests for reconsideration, and there is conflicting information on whether the time limit can be
waived. Neither the controlling statute\(^51\) nor the controlling DOD Instruction\(^52\) provide information on the legality of time limits for requests for reconsideration to the BCMRs. Federal regulations state that if the request for reconsideration is received more than one-year after the ABCMR has issued a decision, then “the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction.”\(^53\) However, the Army Review Board Agency’s “Applicant’s Guide to Applying to the ABCMR” states that the time limit can be waived “if substantial relevant new evidence has been discovered.”\(^54\)

In any case, a request for reconsideration must contain new material evidence, and generally an applicant must show the evidence was not reasonably available at the time of the previous application.\(^55\) Technically, BCMR denials of applications without hearings are not considered final decisions, and applicants may submit new applications at any time.\(^56\) As long as such applications are submitted with substantial new material evidence and/or argument not previously considered by the board, the BCMRs should reconsider the veteran’s assertions. Advocates might also want to explain in the request for reconsideration why the evidence and/or arguments are new and material to ensure the boards do not classify the evidence or new documents as merely cumulative.

Veterans can also appeal BCMR decisions in federal court under the Administrative Procedure Act, which has a 6-year statute of limitations from the date of the board decision.\(^57\) Veterans may file suit in the district where the veteran was discharged, where the veteran currently resides, or in Washington, D.C., where the Secretaries of the service departments are located.


\(^{51}\) 10 U.S.C. § 1552.


IV. Preparing a Case

The Boards have a highly variable and in some cases quite low approval rate for
the tens of thousands of applications they process each year:

In the last several years, overall success rates in discharge upgrade cases at
the Navy Discharge Review Board have run around 4%. The Army DRB
success rate in upgrades is 41%. The Air Force rate is 19% (that breaks
down to 15% for upgrade applicants who don’t have a personal
appearance and 45% for those who have an appearance). The Coast Guard
DRB has a success rate of only 1%. The Board for Correction of Naval
Records upgrades approximately 15-20% of cases, while the Army Board
for Correction of Military Records (BCMR) upgrades 10-15% and the Air
Force BCMR upgrades 20%. Coast Guard BCMR rates are 15-20%.

According to the American Legion, there are two primary reasons for this high
denial rate. First, the “boards are required, by law, to review applications under the
presumption of the regularity in the conduct of government affairs.”
Second, applicants
often complete their application incorrectly, and, more importantly, they do not “fully
develop their cases and submit viable issues for review.” For example, many
applications consist of only a DD Form 149 or 293 plus a personal statement and a few
character references. Often, veterans or their advocates do not understand that applicants
bear the burden of proof before the Boards and must present material evidence to support
their claims. A successful application consists not only of the required forms but also of
accompanying evidence and arguments that convince a Board that a discharge upgrade is
warranted. Although the particular facts of a veteran’s case are important, anecdotal
evidence suggests that a trained attorney or advocate who can thoughtfully prepare the
application and synthesize evidence greatly increases a veteran’s likelihood of success.

A. Forms to Prepare

Veterans interested in pursuing a discharge upgrade should immediately obtain
their military personnel and medical records by submitting a Standard Form 180 (SF 180)

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58 Survival Guide at 349 (reporting statistics obtained by the National Veterans Legal Services Program).
59 The American Legion, Guide to Filing Military Discharge Review Board and Board for Correction of
Exec-Leadership/Resources--clinicians/dodguide.aspx.
60 Id.
or completing an online request at http://www.archives.gov/veterans/military-service-records/. Obtaining the records may take weeks, or even months in some cases. Practitioners also often make second requests for records because the military services (especially the Army and Navy) frequently provide more complete records in response to a second request. Practitioners may also want to include language referring to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, in any records requests from executive branch government agencies, such as the branches of the armed forces.

In addition to the first SF 180, veterans should submit another SF 180 form to the VA records center in St. Louis for any recent medical records. If the veteran has been treated at a VA Regional Office or Medical Center, additional SF 180s should be submitted to each of those facilities. Veterans should also try to obtain military inpatient medical records, rehabilitation records, brig or stockade records, trial records, and post-service criminal records if possible by tracking down their location and the method for requesting them. The Boards themselves will likely only order the personnel and outpatient medical records, so any additional records that are obtained by the veteran could be submitted as useful evidence to support the application. The Boards might also obtain the FBI criminal records sheet of the applicant, so it is important for an applicant to organize or acquire any criminal records.

After receiving and reviewing the records, applicants to the DRBs should submit a DD Form 293 and applicants to the BCMRs should submit a DD Form 149 to the appropriate military branch’s DRB or BCMR as indicated on the form. Generally, applications take several months to be reviewed, and supporting documents can be submitted for weeks after the application has been filed as long as the Board has not yet reviewed the application.

*If the 15-year DRB deadline is approaching, the applicant should consider submitting a DD Form 293 before obtaining military records or fully preparing the case.

*If the 3-year BCMR deadline is approaching and the applicant has already gone through the DRB process or is ineligible for DRB review, an applicant should consider quickly submitting a DD Form 149.
B. Additional Materials to Submit

Although the only document required for DRB or BCMR review is the DD Form 293 or DD Form 149, applicants increase their chances of obtaining a discharge upgrade if they submit additional materials, such as:

- A brief that emphasizes favorable aspects of the applicant’s military service, highlights factors that may mitigate disciplinary records, and explains the reasons why an upgrade should be given. The brief should be submitted at least one month before the hearing date, and the applicant should submit as many copies of the brief as there are Board members (5 for the DRBs, 3 for the BCMRs). The applicant should request in a cover letter that one copy be given to each Board member before review.

- A Statement of Material Contentions, which lays out the issues that the applicant wants the DRB or BCMR to address. The Board must respond to all issues raised by the applicant, so it is very important to clearly separate and explain all material issues. The Statement of Material Contentions may double as the Table of Contents for the brief.

- A statement by the veteran, which should be sworn or notarized if possible, to be used as evidence before the Board. The statement should explain discrepancies in the record, add or reaffirm facts supported by other evidence in the application, and dispute errors or prejudices in the record. If the veteran has criminal convictions, the personal declaration is a good place for the veteran to express remorse for their actions, explain how they have changed, and ask for clemency from the board.

- Evidence of in-service conduct, including:
  - Witness statements from fellow servicemembers or other persons;
  - Good performance reviews; and
  - Any evidence of misinformation from command officials that caused the servicemembers to waive important rights in disciplinary or discharge proceedings. For example, veterans might be able to obtain letters from others in command, or they might have email records, diary records, or friends or family who can attest to the fact that the servicemember waived important rights.

- Evidence of good post-service conduct, in the form of:
  - Character references from members of the community, which should always be submitted with an application;
  - Employment documents, including letters from employers;
  - Educational documents, including diplomas and transcripts;
  - Police clearance showing the absence of a criminal record, where applicable;
o Rehabilitation documents, where applicable;

o Family responsibility documents, including birth and marriage certificates;

o Awards and other documentation of personal and professional achievements, including newspaper articles, announcements in church bulletins, and letters recognizing achievements; and

o Similar evidence of involvement in charitable or civic activities, useful in all cases but particularly important in punitive discharge cases.

Gilberd offers the following example of how an advocate could argue a fact pattern to a DRB:

1. My discharge is inequitable, and should be upgraded to honorable and changed to discharge by reason of hardship/dependency in that serious family problems led to my A.W.O.L. and other than honorable discharge.

2. My discharge is improper in that I was denied the rights available to me in the administrative discharge proceedings.
   a. My command denied me the opportunity to submit a statement on my own behalf in the discharge proceedings, by forwarding the discharge recommendation prior to the time allowed to submit my statement.
   b. I was denied proper review of my discharge in that the separation authority was not provided a copy of my statement and my evidence of a severe family hardship, and was unaware of the facts warranting a more favorable discharge.  

In the example, the equity and propriety issues are clearly separated; and the propriety argument is subdivided further into two separate contentions for the Board to address. This clear separation of issues forces the Board to address each and provide separate analysis and reason for denial for each contention. The Board must respond to all arguments that are not facially frivolous. 

Advocates should use this example to form the Statement of Material Contentions in the brief accompanying a veteran’s discharge upgrade application. The DRBs and BCMRs for each military service department maintain searchable databases of past decisions, so advocates should also consult these to understand how the boards analyze applications and make decisions.

While there are no inherently easy cases, anecdotal evidence suggests that some interesting issues have developed in the discharge upgrade field that may cause boards to

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consider certain arguments more seriously than they have in the past. Some of these emerging issues include the following:

- Personality disorder discharges given to combat veterans (hazardous duty pay area veterans) with PTSD or TBI, particularly if the discharge occurred without a second opinion and service Surgeon General review as is currently required.
- Personality disorder discharges given on the basis of minimal psychiatric evaluation or in violation of rights during involuntary psychiatric evaluations when multiple, equally trained professionals have rejected the diagnosis soon after service.
- OTH discharges of combat area veterans for misconduct if the veteran suffers from PTSD or TBI and the misconduct appears related to the condition.
- OTH discharges for misconduct where servicemembers suffered from unrecognized HIV neurological problems or dementia (non-HIV dementia may similarly be used).
- Other designated physical or mental condition discharges where medical problems were determined to be insufficient for disability discharge/retirement but extensive medical evidence soon after discharge shows the condition warranted disability proceedings.

If any of these applies to a veteran’s case, advocates may consider emphasizing that issue and providing the board with as much supporting evidence as possible.

V. Alternate Avenues for Relief

A. Appeals to Federal Court

When the military discharges a veteran against her will, it has made a decision to separate the veteran from the service early. The veteran may bring claims for reinstatement and/or back pay in federal court. Early separation challenges with monetary claims can be brought in federal district court under the “Little” Tucker Act.\(^{65}\) For claims over $10,000, the Court of Federal Claims has exclusive jurisdiction under the Tucker Act (more below), but for claims under $10,000 the Court of Federal Claims and federal district courts have concurrent jurisdiction.

District courts can also hear challenges limited to the character or reason for discharge that do not involve a monetary claim. They may also hear challenges to DRB or BCMR decisions under the Administrative Procedure Act. District court may be more

accessible to many veterans because venue exists where the veteran was discharged, where the veteran currently resides, and in Washington, D.C. However, monetary claims must be limited to $10,000, so veterans may not be able to fully recover if their back pay claim would be more than that amount.

Some district courts have required veterans to exhaust administrative remedies before applying to federal court for relief; however, this seems improper in light of *Darby v. Cisneros*, a case holding that it is improper for courts to require exhaustion of administrative remedies when neither statute nor administrative rule specifically mandates exhaustion.\(^{66}\) District courts have a six-year statute of limitations, which runs from the date of denial from the reviewing board.\(^ {67}\)

### B. Litigation in the Court of Federal Claims

Veterans can bring early separation claims against the government in excess of $10,000 under the Tucker Act in the Court of Federal Claims.\(^ {68}\) The Court of Federal Claims has the power to reinstate the veteran into military service, award back pay, correct military records to remove any references to the illegal separation, and award accrual of active duty days.

Advantages of bringing an action in the Court of Federal Claims include that the court does not require a veteran to exhaust all administrative remedies and that it generally allows *de novo* review on issues of military pay. However, many veterans may be ineligible for relief. With rare exceptions, the six-year statute of limitations begins to run on the date of discharge, and it is not tolled by application to DRBs or BCMRs. Also, the court may apply the doctrine of laches to dismiss the case even before the six-year statute of limitations has run if the court finds unreasonable delay in the veteran’s claim. The court usually sits only in Washington, D.C.

### C. Veterans Benefits Application

VA has an adjudicatory process through which it can decide to award a veteran benefits despite the discharge characterization of the veteran’s service. So a veteran

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\(^{67}\) 28 U.S.C. § 2401.

\(^{68}\) 28 U.S.C. § 1491.
pursuing a discharge upgrade in order to obtain VA benefits should also look into submitting an application to VA. An application may be submitted concurrently with a discharge upgrade application. This may be advantageous because both processes can be time consuming, and a VA application may help the veteran receive benefits sooner.

However, advocates should be careful to check with the agencies before submitting concurrent applications because an application to one agency can preclude the other from obtaining the veteran’s official military records. This occurs because the Military Personnel Records office only keeps one copy of a veteran’s personnel file, which it loans out to agencies upon request. Consequently, if an agency insists on obtaining the veteran’s official military records before processing an application (as does the ABCMR), then the military records must not be out on loan to another agency.

Representing veterans before VA requires accreditation and veterans’ benefits is a complex body of law in itself, so we do not attempt to cover it here. However, if the ultimate goal is to help the veteran obtain VA benefits, advocates should actively explore this route themselves or with experts in their community.

VI. Summary

Advocates can improve the lives of veterans through the discharge upgrade process. Discharge upgrades can make veterans eligible for VA benefits, including medical and disability benefits, and may help reduce stigmatization of veterans with low discharge characterizations. Many veterans do not know how to navigate through the convoluted administrative and judicial procedures to obtain the relief they desire, so informed advocates are essential for them to obtain a favorable outcome.

Advocates can help veterans determine the appropriate avenue for relief, whether through the discharge upgrade procedures described in this manual or through VA benefits procedures covered thoroughly in other resources.69 If discharge upgrade procedures are appropriate, advocates can help veterans prepare and submit materials to the DRB, BCMR, or federal court.

### Avenues for Relief in Discharge Upgrade Cases

<table>
<thead>
<tr>
<th>Avenues for Relief in Discharge Upgrade Cases</th>
<th>Statute of Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discharge Review Boards (DRBs)</td>
<td>15 years Begins at the date of discharge.</td>
</tr>
<tr>
<td>Boards for Correction of Military Records (BCMRs)</td>
<td>3 years, waivable Begins at the date of discovery of error or injustice.</td>
</tr>
<tr>
<td>Appeals to Federal Courts</td>
<td>6 years Begins at the date of DRB or BCMR decision.</td>
</tr>
<tr>
<td>Court of Federal Claims</td>
<td>6 years Begins at the date of discharge.</td>
</tr>
</tbody>
</table>

**VII. Supplemental Material**

This section includes samples of Standard Form 180 (for requesting military service and medical records), DD Form 149 (for applying to the BCMRs for a discharge upgrade), and DD Form 293 (for applying to the DRBs for a discharge upgrade). Also included are charts summarizing material on preparing discharge upgrade requests. The charts cover (1) records requests and client intake, (2) choosing a venue, and (3) preparing the application.
A. Standard Form 180

REQUEST PERTAINING TO MILITARY RECORDS

The request for transcripts or documents related to a deceased veteran's service may be submitted online by using the query function at https://www.archives.gov/research/requests-form-180.html.

SECTION I - INFORMATION NEEDED TO CREATE RECORDS ( Furnish as much as possible.)

1. NAME USED DURING SERVICE (last, first, and middle)
2. SOCIAL SECURITY NO.
3. DATE OF BIRTH
4. PLACE OF BIRTH

5. SERVICE PAST AND PRESENT

For an effective records search, it is important that all service be shown below:

<table>
<thead>
<tr>
<th>BRANCH OF SERVICE</th>
<th>DATE ENTERED</th>
<th>DATE RELEASED</th>
<th>OFFICER</th>
<th>ENLISTED</th>
</tr>
</thead>
<tbody>
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6. ACTIVE COMPONENT

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<thead>
<tr>
<th>SERVICE NUMBER</th>
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7. RESERVE COMPONENT

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<th>SERVICE NUMBER</th>
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8. NATIONAL GUARD

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<th>SERVICE NUMBER</th>
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</tbody>
</table>

9. IS THIS PERSON DECEASED? If "YES" enter the date of death.

   [ ] NO  [ ] YES

10. IS (WAS) THIS PERSON RETIRED FROM MILITARY SERVICE?

    [ ] NO  [ ] YES

SECTION II - INFORMATION AND/OR DOCUMENTS REQUESTED

1. CHECK THE ITEM(S) YOU WOULD LIKE TO REQUEST A COPY OF:

   [ ] DD Form 214 or equivalent
   [ ] DD Form 216 or equivalent
   [ ] A copy may be sent to the veteran, the deceased veteran's next of kin, or other person or organization authorized in Section III, below. NOTE: If more than one period of service was performed, even in the same branch, there may be more than one DD214.

   [ ] UNDELETED: Obviously required to determine eligibility for benefits. Sensitive items such as, the character of separation, authority for separation, reasons for separation, reinstatement eligibility dates, separation (SP/SEP) codes, and dates of those last are usually known.

   [ ] DELETED: The following items are deleted: authority for separation, reason for separation, reinstatement eligibility dates, separation (SP/SEP) codes, and dates of those last are usually known.

   [ ] All Documents from Official Military Personnel File (OMPF)

   [ ] Medical Records (Includes Services Treatment Records (complaint), inpatient and outpatient records.)

   [ ] Hospitalized, the facility name and date for each admission must be provided:

   [ ] Other (Specify):

2. PURPOSE: (An explanation of the purpose of the request is strictly voluntary; however, such information may help to provide the best possible response and may exist in a later copy. Information provided will be no way be used to make a decision to deny the request.)

   [ ] Benefits
   [ ] Employment
   [ ] VA Loan Program
   [ ] Medical
   [ ] Service/Discharge
   [ ] Casualty
   [ ] Correction
   [ ] Other
   [ ] Other, explain:

SECTION III - RETURN ADDRESS AND SIGNATURE

1. REQUESTER'S NAME:

   (Signature Required.)

   [ ] Military service or veteran identified in Section I, above

   [ ] Next of kin of deceased veteran (Must provide proof of death)

   [ ] Other relationship

2. SEND INFORMATION/DOCUMENTS TO:

   (Please print or type. See item 6 above for an accompanying instructions.)

   Name

   Street  Zip Code  Email address

   City

   State  Age  Date of this request  Daytime phone____________________________

   This form is available at https://www.archives.gov/research/requests-form-180.html on the National Archives and Records Administration (NARA) web site.

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B. DD Form 149

APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552
(Please read instructions on reverse side BEFORE completing this application.)

CASE No. 07RA-0008

AUTHORITY: Title 10, U.S. Code 1562, Sec. 1507.
PRIVACY ACT STATEMENT

PRINCIPAL PURPOSE: To initiate an application for correction of military record. This form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record.

ROUTINE USE(S): None.

DISCLOSURE: Voluntary, however, failure to provide identifying information may delay processing of this application. The request for Social Security number is intended to assure proper identification of the individual and appropriate records.

1. APPLICANT DATA (The person whose record you are requesting to be corrected)
A. BRANCH OF SERVICE (If any) SERVICE NUMBER (If applicable)
B. NAME (Last, First, Middle Initial)
C. RANK OR LAST RANK GRADE
D. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY

2. PRESENT STATUS WITH RESPECT TO THE ARMED FORCES (Active Duty, Reserve, Retired, Retired Reserve, Dead)

3. TYPE OF DISCHARGE: (If proper classification is other than General or Other than Honorable)

4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Only required)

6. I BELIEVE THE RECORD TO BE IN ERROR OR INJUSTICE FOR THE FOLLOWING REASON(S): (Only required)

7. ORGANIZATION AND APPROXIMATE DATE AT WHICH THE ALLEGED ERROR OR INJUSTICE OCCURRED:

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE
A. DATE OF DISCOVERY
B. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD PROVIDE THE INTEREST IN JUSTICE TO CONSIDER THIS APPLICATION.

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENT: (Military documents and medical records are pertinent to your case. Please use each copy. If Veterans Affairs records are pertinent, give original copy or notification of claim number.)

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C., (All expenses to be paid by Government) (Do not appear unless, before

11. ATTORNEY, IF ANY NAME (Last First Middle Initial) ADDRESS (Street ZIP Code)
A. TELEPHONE (Include Area Code)
B. FAX NUMBER (Include Area Code)

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incapacitated person, LEGAL PROOF OF DEATH OR INCAPACITATION MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, include the name, title, and relationship by marking area below.

13. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 14 ABOVE. (Forward notification of all changes of address.)
A. TELEPHONE (Include Area Code)
B. FAX NUMBER (Include Area Code)

14. I MAKE THE FOLLOWING STATEMENT AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTY IMPOSED FOR WILLFUL MAINTAINING A FALSE STATEMENT OR CLAIM. U.S. Code; Title 10, Sections 807 and 1001, provides that an individual shall be fined under this title or imprisoned not more than 6 years, or both,

16. SIGNATURE Applicant must sign here.

DATE SIGNED

DD FORM 149, JUN 2010 PREVIOUS EDITION IS OBSOLETE

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C. DD Form 293

APPLICATION FOR THE REVIEW OF DISCHARGE
FROM THE ARMED FORCES OF THE UNITED STATES

Please read instruction on Pages 3 and 4 before completing this application.

The purpose of this form is to encourage competent and unbiased evaluation of the effects of discharge or separation on the individual applicant. This form is intended to provide guidance for the evaluation of discharge or separation in instances where the applicant is seeking a discharge or separation from the military.

PRIVACY ACT STATEMENT


PRINCIPAL PURPOSES: To apply for a change in the characterization or reason for military discharge issued to an individual.

ROUTINE USES: None.

DISCLOSURE: Voluntary; however, failure to provide identifying information may impact processing of this application. The request for Social Security Number is advisory to assure proper identification of the individual and appropriate records.

1. APPLICANT DATA: (This person whose discharge is to be reviewed. PLEASE PRINT OR TYPE INFORMATION.)

a. NAME (Last, First, Middle INITIAL)

b. NUMBER OF PREVIOUS DISCHARGE OR SEPARATION

c. REASONS FOR REQUEST

d. REASONS FOR DISCHARGE OR SEPARATION

2. DATE OF DISCHARGE OR SEPARATION

a. LAST NAME

b. FIRST NAME

c. MIDDLE INITIAL

d. SEX

3. UNIT AND LOCATION AT DISCHARGE OR SEPARATION

a. UNIT

b. LOCATION

4. DISCHARGE CHARACTERIZATION RECEIVED

a. DATE

b. REASON

c. CONDUCT

5. BOARD ACTION REQUESTED

a. DATE

b. REASON

6. ISSUE: WHY AN UPGRADE OR CHANGE IS REQUESTED AND JUSTIFICATION FOR THE REQUEST

7. If previously submitted an application was previously submitted on (yyyy/mm/dd)

8. Attach any additional evidence, documentation, or related materials that may be relevant to the issue presented in this application.

9. TYPE OF REVIEW REQUESTED

a. COURT

b. MEDICAL

10. ATTACHMENT

a. ATTACHMENT (Include all documents and evidence)

11. APPLICATION MUST BE IN ITEM 11 Below. If the record is requested in lieu of a deceased or incompetent person, LEGAL REPRESENTATIVE OF THE APPLICANT must accompany the application. If the application is signed by either the individual or the applicant, indicate the name (one) and relationship by marking a box below.

12. CERTIFICATION

a. SIGNATURE - REQUIRED (Initial or person to item 11 above)

b. DATE SIGNED - REQUIRED (yyyy/mm/dd)

PREVIOUS EDITION IS OBSOLETE.
D. Preparing a Discharge Upgrade Application

**Records Requests and Client Intake**

<table>
<thead>
<tr>
<th>Immediately send off request for military records (SF 180s). It may take months to receive the records, so this step should be taken as soon as a veteran comes to an advocate requesting an upgrade.</th>
</tr>
</thead>
<tbody>
<tr>
<td>If veteran has previously applied for a discharge upgrade, request records from the DRB or BCMR. These records are important to determine what procedural steps are available to the veteran. Requests can be made with a letter to the board or a letter formatted as a FOIA request. Letter should include the full name and social security number of the veteran. It can take a few weeks to receive these records, but if it takes longer than a month, you should call the board and check on the status of the request.</td>
</tr>
<tr>
<td>If the veteran has previously been seen at VA or applied for VA benefits, request VA records. Also, request any relevant records from other military agencies.</td>
</tr>
</tbody>
</table>

**Client Interview**

- Determine why veteran wants discharge upgrade – specifically whether veteran eventually wants to seek VA benefits.
- Explain the discharge upgrade process and the need for evidence to overcome the burden of proof.
- Determine potential character references: Friends, family, counselors, doctors, pastors, neighbors, people who knew vet before service, other members of veteran’s unit.
- Gather any records veteran already has.
- Where applicable, acquire rehabilitation, criminal, and trial records. Also, acquire all medical and psychological records or evaluations that might be helpful for the application.
Choosing a Venue

Other Venue

- Court of Federal Claims
- VA Benefits Application

DRB

- New application to DRB
  - Records review – 15 yr. strict time limit from date of discharge
  - Personal hearing – 15 yr. strict time limit
  - Request for reconsideration of previous DRB denial

- Second application to the DRB
  - Personal hearing request if first application was a records review – 15 yr. strict time limit from date of discharge

Federal District Court

- Review of DRB or BCMR decision
  - Claim for back pay

- Initial application when DRB does not have jurisdiction (e.g. over GCM discharges) or authority to grant requested relief (e.g. to change reenlistment code) – 3 yr. waivable time limit from date of discharge

BCMR

- New application to BCMR
  - Review of DRB decision – 3 yr. waivable time limit from adverse decision
  - Initial application when BCMR does not have jurisdiction (e.g. over GCM discharges) or authority to grant requested relief (e.g. to change reenlistment code) – 3 yr. waivable time limit from date of discharge

- Second application to BCMR
  - Reconsideration – 1 yr. time limit from adverse decision (Army)
  - New application with new material evidence
Preparing the Application

Fill out the application form and submit immediately if the statute of limitations is approaching

Prepare brief and statement of material contentions

- Research regulations to see if new regulations would have been more favorable to veteran
- Research court cases and old board decisions for similar cases
- Research and develop equitable arguments
- Research and develop propriety arguments. Check for common procedural errors.
- Research and develop clemency arguments

Acquire references and supporting evidence

- Military records
- Court-martial transcripts and other records
- Personal statement from veteran
- Witness statements
- Character references
- Letters from health care providers
- School records
- Employment records
- Proof of standing in community
- Proof of clean criminal record

Prepare for a hearing, if necessary

- Review records in possession of the board
- Review and respond to any advisory opinions written by board staff
- Explain board procedures to applicant and prepare applicant for hearing
VIII. Additional Resources

A. Forms

Records Request Form: Standard Form 180.  

BCMR Application: DD Form 149.  

DRB Application: DD Form 293.  

B. Statutes and Regulations

10 USC §1551 to 1559. General statutory authority for discharge upgrades and the correction of military records.

C. BCMR Statutes and Regulations

General


Army

32 C.F.R. § 581.3.  

Navy

32 C.F.R. Part 723.  
Secretary of the Navy (SECNAV) Instruction 5420.193. 19 November 1997. Department of the Navy.  
Air Force
32 C.F.R. § 865.0–.8.

Coast Guard
33 C.F.R. Part 52.

D. DRB Statutes and Regulations

General
32 C.F.R. Part 70.
DoD Instruction 1332.28. 4 April 2004.

Army
32 C.F.R. § 581.2.

Navy
32 C.F.R. Part 724.
Secretary of the Navy (SECNAV) Instruction 5420.174D. December 22 2004.

Air Force
32 C.F.R. § 865.100 – .126.

Coast Guard
33 C.F.R. Part 51.
E. Current Discharge Regulations

General

Army
Army Regulation 635–200. 19 December 2003 with rapid action changes.

Navy
Milpersman 1900 and 1910 series. 13 April 2005 with updates
Secretary of the Navy (SECNAV) Instruction 1910.4B.

Air Force
Air Force Instruction 36-3208 with updates. 9 July 2004.

F. Publications
Addlestone, David, National Veterans Law Center (U.S.), Veterans Education Project (Washington, D.C.), et al. Military Discharge Upgrading, and Introduction to Veterans Administration Law : a Practice Manual. Washington, D.C.: Veterans Education Project, 1982 with 1990 update. Print. 700+ pages. Comprehensive practice manual for attorneys with detailed chapters on military structure and the discharge review process, how to obtain and interpret military records, and how to prepare discharge upgrade cases for the DRB, BCMR, and federal court. The manual is very dated, and so parts of the manual are inaccurate (for example, the discharge upgrade regulations have since changed). However, the practice manual is still the most comprehensive resource to date, and it is still considered a very good starting point for attorneys to learn how to approach discharge upgrade cases.
<http://wearevirginiaveterans.org/images/About-Us--Exec-Leadership/Resources--clinicians/dodguide.aspx>. 18 pages. Condensed guidebook for veterans with information on which board to apply to (DRB or BCMR), which forms to use, and basic strategies for developing and presenting a case to the boards. Hypothetical cases and a discussion of case strategy, presented at the end, are substantial part of the guide.


<http://usmilitary.about.com/cs/generalinfo/a/dischargeupg.htm>. 5 pages. Compact overview of the process of discharge upgrades through the DRB written by Rod Powers, retired Air Force First Sergeant who is the author of several books and articles about military regulations and veterans benefits. Explains how to apply, how to get help, who decides discharge upgrade cases, and what to expect in a hearing, among other things.

<http://usmilitary.about.com/od/justicelawlegislation/l/aadischarge1.htm>. 5 pages. General information about discharges from the military, with a focus on administrative discharge processes (as opposed to punitive discharge processes via court martial). Includes information about voluntary and involuntary separations, with information about the Administrative Discharge Board and common reasons for involuntary separation.

<http://usmilitary.about.com/od/justicelawlegislation/l/aacmartial1.htm>. 5 pages. General information about court martials, largely focusing on the rules and procedures of the court martial process. There is also a broad overview of appellate review procedures.

manual for attorneys working with Veterans Benefits cases. Chapter 19 describes the BCMR process in detail and Chapter 20 describes the DRB discharge upgrade process.

Toney, Raymond J. “Texas State Bar Association, Military Law Committee Correction of Military Records and Judicial Review.” State Bar of Texas Military Law Section. Web. <http://www.militarylawsection.com/documents/toney.pdf>. 11 pages. Article for attorneys that focuses on applying to the BCMR. Includes statutory authorities, common types of claims brought to BCMRs, advice on submission of applications, and information on appellate procedures and DRB procedures. Contains links to recent FOIA data on BCMR practices and procedures in each military branch.


“The VVA Veteran.” Welcome To Vietnam Veterans of America. Web. 25 Mar. 2011. <http://www.vva.org/veteran.html>. Website for The VVA Veteran, a bimonthly publication for veterans. Vietnam era veterans and their attorneys can search for, and potentially contact, people with whom the veterans served through a locator service. Specifically, veterans may send a Locator request to The VVA Veteran, 8605 Cameron St., Suite 400, Silver Spring, MD 20910 or to the e-mail addresses mkeating@vva.org or veteranlocator@gmail.com. Veterans or attorneys may also use the search bar on the website to search for specific people or units that might have appeared in Locator ads in previous editions of The VVA Veteran.

G. BCMR Publications

General

Army


Navy


Air Force


Coast Guard


**H. DRB Publications**

Army

Reviews Board Agency, with many links relating to the DRB and ABCMR application processes.

Navy


Air Force