MILITARY DISCHARGE UPGRADING

and

Introduction to Veterans Administration Law

1990 Supplement with Cumulative Index and Case List

by
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FOREWORD

The original book was designed to be a desk reference and issue-oriented guide for attorneys, paralegals, veterans advocates, and veterans with discharge upgrading cases. It was an attempt to pull together, for the first time, all of the resources and recent developments in this area of the law. We tried to provide a systematic analysis of the issues confronting advocates and veterans and the strategies available to them. Some of our approaches have proven successful; some have not. The federal courts have accepted some of our theories; however, litigation in this area of the law has remained minimal.

Review Board decision making appears to move in trends, sometimes paralleling staff changes; therefore, what we report as an apparently successful approach to a certain type of case might become obsolete. Sometimes Board decisions are not models of clarity; however, we have tried to give fair interpretations to those that we report. For these reasons, THE VETERANS ADVOCATE (published by the National Veterans Legal Services Project) will provide regular supplementary information. Other sources of current information are the MILITARY LAW REPORTER (published by the Public Law Education Institute, 1601 Connecticut Avenue, NW, Suite 450, Washington, DC 20009) and the VETERANS LAW REPORTER (published by The Veterans Education Project, P. O. Box 42130, Washington, DC 20015).

We would appreciate readers' comments concerning accuracy, recent decisions of note, or any other suggestions for improving this work.

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ACKNOWLEDGEMENTS

There have been many hands involved in the revision of the original *Military Discharge Upgrading and Introduction to Veterans Law* manual. The work of dozens of students, law clerks, and attorneys was compiled and assigned to Michael Ettlinger, a former NVLSP employee, to synthesize in some rational manner. In addition, Michael was asked to produce a subject matter index for the original manual. This required him to swim through the thousands of footnotes where the original authors had placed many treasures from their files or their pet theories.

Michael wrote the supplement which was reviewed and edited by me. Throughout the lengthy writing process Michael consulted original authors Barton Stichman, Keith Snyder and me. We provided assistance and suggestions. Rita Tucker, formerly a paralegal with NVLSP, provided valuable research assistance.

As always the final product was massaged, proofed, fiddled with and finally deadlines pulled down the curtain. A special thanks goes to Georgyne Johnson-Walters for typing assistance which must have created flashbacks to her typing of the original manual. Andy Reynolds, Heather McCay and Sharon Rapport worked for hundreds of boring hours seeking obscure citations, proofing and performing assorted seemingly meaningless tasks for me. We think the final product has been worth it. The Public Law Education Institute, the publisher of the *Military Law Reporter,* assisted with layout and design ideas and the final production. To them we owe a hearty thanks.

A special word of thanks goes to Marlene Fridley, NVLSP's Controller/Office Manager, who steered the project from the authors through the typists, proofreaders, and researchers; from computer system to computer system and to the production firm—often having to help out in each task and shielding me from much of it.

Late in the process we drafted the Managing Editor of *The Veterans Advocate,* Barbara "mad dog" (now "blind dog") Bruce, to proof and edit what we thought was final copy. She saved our sanity and vastly improved the project.

David F. Addlestone
December 7, 1990

DESCRIPTION OF PROGRAM

The National Veterans Legal Services Project (NVLSP) is a non-profit law firm which serves as a national support center in the area of veterans law. The services of the NVLSP are available to veterans service organizations, state and county veterans offices, community-based veterans organizations, volunteer attorneys, private bar attorneys, Legal Services Corporation-funded programs, programs funded by the Agent Orange Class Assistance Program and other veterans' advocates.

NVLSP was established in 1981 following a Legal Services Corporation study on the unmet legal needs of low-income veterans and their dependents. The Legal Services Corporation responded by providing annualized funding to NVLSP to provide support services on a national scale to advocates for these individuals.

In 1989, the Vietnam Veterans of America contracted with NVLSP to operate its legal services program. That program includes maintaining and training a network of accredited Service Representatives, providing representation before the VA Board of Veterans Appeals and the U.S. Court of Veterans Appeals.

Also in 1989, NVLSP received funding from the Agent Orange Class Assistance Program ("AOCAP") to expand and focus its services on Vietnam veterans and their families who were the litigants in the lawsuit brought against the manufacturers of the herbicide Agent Orange. That litigation led to the creation in 1984 of a $180 million settlement fund. Following extended appeals, the distribution plan prepared by Federal District Judge Jack B. Weinstein was implemented in 1989 with the bulk of the settlement fund to be disseminated to Vietnam veterans or their survivors. A portion of the fund was set aside for programs to assist the class. NVLSP is one such program.

The services of NVLSP are primarily:

(1) to augment and enhance the work of the existing network of veterans service advocates;

(2) to increase the pool of effective lawyer and non-lawyer advocates that are available to veterans and their dependents through training and other support services;

(3) to assist this network of advocates in taking advantage of the new opportunities created by the Veterans Judicial Review Act of 1988; and

(4) to advocate for those Vietnam veterans and their families who are members of the Agent Orange Class Action Settlement.

AVAILABLE RESOURCES

The following is a list of services currently available from NVLSP. We invite you to contact us regarding your need for assistance with the following matters relating to the rights of veterans and their families.

Requests for Assistance. The NVLSP staff is available to veterans' advocates to discuss cases on the telephone or in response to letters. We welcome requests about individual cases or routine matters as well as requests involving more complex issues.

In response to requests for assistance, we often provide a description of various possible approaches to a client's problem, an assessment of the likelihood of success on the merits, as well as strategic and procedural considerations that may be useful in providing effective representation. We also provide draft pleadings and briefs, copies of unpublished agency guidelines, regulations and court or agency opinions, and analyses of various legal issues that frequently arise in certain kinds of cases. We have access to several research tools that are not widely available.

Publications. NVLSP publishes THE VETERANS ADVOCATE, a monthly veterans law and advocacy newsletter. This monthly is the successor publication to the VETERANS LAW REPORTER and the VETERANS RIGHTS NEWSLETTER, to which NVLSP previously contributed. THE VETERANS ADVOCATE is distributed free of charge to service representatives of veterans organizations or state or county governments, Legal Services Corporation-funded projects, VA Vet Centers, veterans employment representatives, AOCAP-funded programs, homeless shelter operators and other professionals operating programs that serve Vietnam veterans and their families. A small subscription fee is charged to attorneys, government agencies and all others.

In 1982, NVLSP produced MILITARY DISCHARGE UPGRADING and INTRODUCTION TO VETERANS ADMINISTRATION LAW. A supplement and index are currently being prepared. In 1985, NVLSP wrote OVERPAYMENTS OF VETERANS ADMINISTRATION BENEFITS, a manual published by the National Clearinghouse for Legal Services with 1989 supplementary materials.

NVLSP staff cooperated with staff of the Vietnam Veterans of America to write a detailed manual on VA benefits. That 1985 manual, the GUIDE TO VETERANS BENEFITS, is available through NVLSP's publications department. An entirely new manual—to take into account, among other changes, the Veterans' Judicial Review Act of 1988—is planned for completion in mid-1990. THE VETERANS ADVOCATE updates these manuals.

NVLSP offers a series of self-help guides that are designed for use by veterans and their dependents. Each guide is devoted to a particular problem, such as post-traumatic stress disorder or discharge upgrading. Guides on the VA compensation program, VA housing, VA debt collection, education programs, VA health care, and benefits for dependents are planned. Other guides will be developed depending on the demand.

Training. NVLSP provides a variety of training programs on veterans benefits issues. Basic orientation seminars or more intensive sessions on specific topics are available. These sessions typically range in length from three hours to two days. A detailed training packet is prepared for each session. Sample outlines of training sessions are available upon request. Organizations interested in NVLSP conducting a training program should contact NVLSP's Director of Legal Publications and Training.

Litigation Assistance. In 1988, with passage of the Veterans Judicial Review Act, Pub. L. No. 100-687, veterans obtained for the first time the opportunity to contest in a court individual benefits determinations made by the VA. Under the Act, an Article I court, the U.S. Court of Veterans Appeals, was established with subsequent appeals to the U.S. Court of Appeals for the Federal Circuit. NVLSP is focusing its litigation efforts in these two courts. Feel free to discuss cases with us which you feel might warrant our representation in these courts. NVLSP is also available for consultation and to serve as co-counsel in federal court litigation, resources permitting. NVLSP serves as lead counsel for veterans and their dependents in cases having a significant impact, such as *Nehmer v. U.S. Veterans Administration,* 712 F. Supp. 1404 (N.D. Cal. 1989), a class action resulting in the invalidation of the rules the VA had been using to deny claims for benefits based on exposure to Agent Orange.

Referrals. NVLSP maintains a list of community-based advocacy groups, veterans organizations, private bar attorneys, pro bono attorneys, and others who may be available to assist the individual with his or her problem.

Access to Specialized Materials. In the area of veterans' law, important directives, regulations, circulars, General Counsel opinions and agency decisions sometimes are not published, indexed or available in regional locations. NVLSP can assist veterans' advocates in obtaining access to these materials by either supplying the requested materials directly or providing information on how to obtain the materials.

Special Projects. Depending upon available resources, NVLSP will consider requests for other projects as well.

COMMON TOPICS OF ASSISTANCE

The following is a list of common topics of requests for assistance received by NVLSP.

- Generally, the appellate process at the VA and attendant deadlines;
- Obtaining effective judicial review of VA decision-making;
- Attorney fee limitations in VA and court proceedings;
- Service-connected disability compensation issues;
- Agent Orange benefits (from the VA or the Class Action Payment Program);
- VA pension eligibility issues and their relationship to Social Security Administration programs;
- VA debt collection activities;
- Foreclosure of VA-guaranteed housing;
- Homeless veterans' access to VA benefits;
- Eligibility for VA medical care and issues involving reimbursement for medical expenses;
- Eligibility for family members to obtain direct payments of veterans' benefits for child or spousal support;
- Access to, or correction of, military or VA records;
- Military discharge upgrading;
- Judicial review of decisions of Discharge Review Boards and Boards for Correction of Military Records;
- All aspects of post-traumatic stress disorder issues such as VA claims and criminal law-related issues;
- Medical malpractice claims.

SERVICE REQUEST POLICY

Requests for service by advocates can be called in or submitted by mail. Where materials need to be reviewed quickly, they can be sent via FAX by calling 202-328-0063. Letters are generally handled within a week.

STAFF

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Our board meets at least four times each year. The members serve one-year terms. The chair is:

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INSTRUCTIONS FOR THE USE OF THIS SUPPLEMENT

Organization of Supplement

This supplement (Supp.) to the 1982 manual *Military Discharge Upgrading* (MDU) is organized around the chapters of the original manual. Each chapter update is divided into three parts.

The first part is the "Overview" section. It is a general overview of what has changed in the area discussed in that chapter.

The second part of each chapter is the "Chapter Supplement." This part lists changes which affect the entire original chapter but is more specific than the "Overview" Section.

The third part of each chapter is the "Section Supplement." This part lists specific changes by the sections of the original manual. The outline of the original manual is recreated within this part.

Page References in Supplement

Page references follow the scheme of the original manual, *i.e.,* Chapter/Page (*e.g.,* "5/6"—meaning Page 6 of Chapter 5). Also, following each page number is an "L" or "R" indicating the left or right column in the original text. Paragraph references are numerical from the first paragraph of the column whether complete or not. *E.g.,* "P.4/6L, ¶3" means Chapter 4, Page 6, Third paragraph in left column counting the one continued from the previous page. Where there is a list in the original text it is considered to be part of the preceding paragraph. "N." refers to a footnote.

Citation to Service Regulations

In several instances the regulations of one service department are referenced as an example. Be certain to consult the regulations relevant to the veteran's former service if the cited regulation is not applicable.

Index and Case List

The MDU contained no case list or index. Both are included in this supplement. Particular attention should be paid to the index because many obscure topics are included in footnotes in MDU and often similar topics are covered in more than one chapter.

Bibliography

The bibliography has not been updated.

Telephone Numbers

As we went to press, the Pentagon switched from the "202" area code to "703." We have tried to correct as many references in the supplement text as we could locate at this late date. We may have missed some.

TABLE OF CONTENTS

CHAPTER 1
Overview of Discharge Upgrading

A. Overview

Discharge upgrading has changed greatly since *Military Discharge Upgrading* (MDU) was published in 1982. The original publication occurred on the heels of a great opening up of the upgrade process partially as a result of reforms spawned by the settlement in *Urban Law Institute of Antioch College v. Secretary of Defense,* No. 76-0530 (D.D.C. Jan. 31, 1977).

Also, at that time, the military was in a general liberalizing trend which began after the Vietnam war. Many of the problems of the soldiers who served during the Vietnam era were being looked at more sympathetically. Examples are drug abuse and AWOLs which were being viewed with an eye to the era in which they occurred and the unusual pressures on those who served. The more accepting approach toward these sorts of offenses, the opening up of the system, and the general liberalization of the military had, by 1981, found its way into discharge upgrading. In 1981 the discharge upgrade rates were at historically high levels and there were a wide variety of equitable and legal arguments which were effective with the different upgrading agencies.

Since 1981, much has changed. Many of the arguments that were viable at that time now fall on deaf ears. In general, it has become harder to get a discharge upgraded.[1]

In the broadest sense, the big change in the discharge upgrading agencies is that they are much more prone to assume that the veteran's command's actions were legally proper and that it exercised its discretionary powers correctly in characterizing the veteran's discharge.

This supplement discusses how this deference to command decisions has changed the effectiveness of the arguments which are suggested in the 1982 manual and how these arguments should now be made. Also explained are the substantial changes in the discharge regulations and other areas of military law affecting discharge upgrading. However, some recent federal court decisions are particularly encouraging.

Familiarity with the "special cases" created since 1982 and with what arguments to make (or not to make) will maximize the veteran's opportunity for a discharge upgrade. The days when there were many good arguments that made an upgrade all but certain, however, are gone.

B. Chapter Supplement

1. National Veterans Law Center

The National Veterans Law Center (NVLC), mentioned in many places in this chapter, no longer exists. NVLC's functions have been largely assumed by the National Veterans Legal Services Project (NVLSP). NVLSP's address is: Suite 610, 2001 S Street, N.W., Washington, D.C. 20009.

2. Army Discharge Review Board Standard Operating Procedure (ADRB SOP)

On December 17, 1982, the Army Discharge Review Board (DRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. The regulations which remain are much less specific than the SOP. The other boards have never had an SOP or equivalent guidelines.

C. Section Supplement

1.1 Introduction

• P.1/1L, n.1:

"Discharge" means a complete severance of military connection, as stated in MDU. "Separation," while including release from active duty to the reserves or retirement, as stated in MDU, is much broader. "Separation" includes discharge, dismissal, death, etc.[2]

1.2 Discharge Review: A Historical Overview

a. P.1/3L, ¶ 2, line 12:

DRBs have only the power to upgrade discharges. They do not have the authority to correct "any error or injustice contained in a military record" as stated in MDU. The BCMRs, however, do have this power.

b. P.1/3L, n.12:

Vietnam Veterans of America, which received its congressional charter in 1986, accepts any Vietnam era veteran as a member regardless of type of discharge.

[1] *See* statistics at Supp. Appendices 1A and 1C and Supp. § 9.2.7.5.1.

[2] *See* definitions in MDU Chapter 3.

c. P.1/3L, ¶ 3:

The upgrade rate in recent years has been between five and ten percent for DRBs. No reliable BCMR upgrade statistics are available for the Army Board. The Air Force BCMR (AFBCMR) rate has been about 18%[3]. The Board for Correction of Naval Records (BCNR) upgrade rate has been estimated to be 20%.

1.3 The Role of the Amnesty Movement

1.4 Beyond Amnesty

1.4.1 Political Actions

1.4.2 Court Actions and Internal Reform

• P.1/5L, n.28:

With processing of most Vietnam era cases complete, the backlogs have substantially decreased at the DRBs to about 7,000 a year.

1.5 Outreach

• P.1/5R, n.32:

The referral list is now maintained by:

National Veterans Legal Services Project
2001 S Street, N.W., Suite 610
Washington, D.C. 20009

1.6 The Future of Discharge Review

• P.1/6L, Text at n.34, and n.34:

The Unsuitability category of discharge has been eliminated as have some Misconduct categories. Other categories have been added or redefined. There are now three types of ungraded, uncharacterized discharges authorized by Department of Defense.[4]

1.7 Legal Services Involvement in Discharge Upgrading

• P.1/6L, ¶ 3:

The National Veterans Law Center no longer exists. The National Veterans Legal Services Project (NVLSP) provides national support in all areas of veterans law, including Veterans Administration benefits. This support is provided through various manuals, the monthly *Veterans Advocate* and other publications, including the *Veterans Benefits Manual.* Training programs are also available.

1.8 The Purpose of This Manual

APPENDIX 1A

Discharge Review Data

BCMR Upgrades

The ABCMR currently grants some relief to 20 to 30% of its applicants, but most of these cases are not discharge upgrade cases. Approximately 10 to 30% of the BCMRs' cases are discharge upgrade cases. The ABCMR and the BCNR do not break down their statistics by category. These boards estimate their upgrade rates at 20%. The upgrade rates for the AFBCMR have been as follows:

AFBCMR Upgrades

Reviewed/Upgraded/%

YEAR	ADMINISTRATIVE	COURT-MARTIAL
1982	998/244/24%	356/75/21%
1983	758/155/20%	126/27/21%
1984	914/172/19%	135/18/13%
1985	503/84/17%	61/10/16%

Statistics were not kept after 1985; however, the AFBCMR estimates their current upgrade rate to be around 20%.

See also Supp. § 9.2.7.5.1.

APPENDIX 1B

Honorable Discharges by Service

Service	FY83	FY84	FY85	FY86	FY87	FY88	FY89
DoD	84%	82%	84%	76%	76%	79%	75%
Army	86%	81%	86%	74%	77%	78%	77%
Air Force	88%	85%	87%	77%	72%	82%	76%
Navy	80%	79%	80%	77%	79%	79%	74%

[3]*See* Supp. § 9.2.7.5.2.

[4]*See* Supp. Chapter 4.

APPENDIX 1C

DISCHARGE REVIEW BOARDS

	NON-PERSONAL APPEARANCE			PERSONAL APPEARANCE			TOTAL		
FY	APPLICATIONS	APPROVED	PERCENT	APPLICATION	APPROVED	PERCENT	APPLICATIONS	APPROVED	PERCENT
AIR FORCE									
80	1482	400	27.0	615	388	63.1	2097	788	37.6
81	1019	252	24.7	514	255	49.6	1533	507	33.1
82	2631	318	12.1	822	248	30.2	3453	566	16.4
83	728	78	10.7	516	191	37.0	1244	269	21.6
84	579	30	5.2	473	105	22.2	1052	135	12.8
85	622	56	9.0	324	93	28.7	946	149	15.8
86	891	66	7.4	260	80	30.8	1151	146	12.7
87	1434	108	7.5	235	54	23.0	1669	162	9.7
88	1195	90	7.5	355	82	23.1	1550	172	11.1
ARMY									
80	9095	3030	33.3	2387	1234	51.7	11482	4264	37.1
81	11242	3187	28.3	3180	1694	53.3	14422	4881	33.8
82	10922	1725	15.8	2680	1116	41.6	13602	2841	20.9
83	4380	431	9.8	1848	413	22.3	6228	844	13.6
84	2698	314	11.6	1185	234	19.7	3883	548	14.1
85	2808	364	13.0	1067	171	16.0	3875	535	13.8
86	2379	225	9.5	1039	68	6.5	3418	293	8.6
87	2569	177	6.9	1804	64	3.5	4373	241	5.5
88	1613	218	13.5	937	82	8.8	2550	300	11.8
NAVY\MARINE CORPS									
80	6276	881	14.0	1838	495	26.9	8114	1376	17.0
81	5064	975	19.3	1387	396	28.6	6451	1371	21.3
82	1883	187	9.9	747	225	30.1	2630	412	15.7
83	3814	184	4.8	1164	163	14.0	4978	347	7.0
84	3025	143	4.7	568	61	10.7	3593	204	5.7
85	2530	101	4.0	575	59	10.3	3105	160	5.2
86	2144	74	3.5	430	45	10.5	2574	119	4.6
87	1855	52	2.8	414	44	10.6	2269	96	4.2
88	2782	91	3.3	534	44	8.2	3316	135	4.1
DOD-WIDE									
80	16853	4311	25.6	4840	2117	43.7	21693	6428	29.6
81	17325	4414	25.5	5081	2345	46.2	22406	6759	30.2
82	15436	2230	14.4	4249	1589	37.4	19685	3819	19.4
83	8922	693	7.8	3528	767	21.7	12450	1460	11.7
84	6302	487	7.7	2226	400	18.0	8528	887	10.4
85	5960	521	8.7	1966	323	16.4	7926	844	10.6
86	5414	365	6.7	1729	193	11.2	7143	558	7.8
87	5858	337	5.8	2453	162	6.6	8311	499	6.0
88	5590	399	7.1	1826	208	11.4	7416	607	8.2

CHAPTER 2
How to Use This Manual and Case Checklists

A. Overview

When using MDU, cross-reference should be made to this supplement. The supplement "Overview" section for each chapter describes broadly the changes in the area covered by the chapter. The "Chapter Supplement" section describes in more detail changes from the original which affect the chapter as a whole. The "Section Supplement" part describes changes in the 1982 manual, section by section.

Liberal use of the new index is recommended since many subjects are covered in more than one place in the manual.

B. Chapter Supplement

1. "Easy" Cases.

The references in this chapter, and in the entire manual, to "easy" cases should be read with caution. There are very few "easy" cases today. Even in cases where the law is clear, favorable results at the DRBs and BCMRs are not a necessary result. The DRBs will often deny these cases, or grant relief on equitable ("fairness") grounds even though there is an impropriety ("illegality"). The BCMRs will often grant only partial relief in these formerly "easy" cases. Sometimes, the applicant will be informed by some BCMR personnel that if he or she amends his/her application to ask for less, the board will very likely view the case more favorably with respect to the relief still requested. Of course, if an applicant does this, a waiver to seek full relief in court is likely to occur—something of which the boards are well aware.

2. PL 95-126.

Much of PL 95-126, cited in several places in this chapter, is now codified at 38 U.S.C. § 3103.

C. Section Supplement

2.1 Introduction

2.2 Summary of the Discharge Review Process

• P. 2/2R, ¶ 1:

The overall upgrade rate is now much less than 40%.[1]

2.3 Road Map to Manual

2.3.1 Overview of Manual Structure

2.3.2 How to Use This Manual in a Typical Case

2.4 Checklists of Special Considerations and Easy Cases

As discussed above in the Chapter Supplement, under current conditions at the boards the term "easy case" must be qualified.

2.4.1 How to Use the Checklists

2.4.2 Special Problem Area Checklist

2.4.3 Checklists of Easy Cases to Upgrade Listed by Reason for Discharge

• P.2/4, "Drugs," Third category:

A discharge for drug use based on compelled urinalysis can no longer be considered easy to upgrade. The developments are discussed in detail in Supp. Chapter 15.

[1]*See* Supp. Appendix 1A and § 9.2.7.5.1.

2.4.4 Classes of Cases Specially Handled by Boards

a. P. 2/5, ¶ 3 of Section:

PL 95-126 is now codified at 38 U.S.C. § 3103.

b. P. 2/6, last ¶:

The *Giles* situation has changed substantially since the 1982 edition of MDU. *See* Supp. Chapter 15. In *Walters v. Secretary of Defense,*[2] the plaintiffs failed to have the Giles remedy extended to the other services. Thus, in the other services individual applications must be made to the discharge review agencies.[3]

Appendix 2A

Processes for Imposing and Reviewing Discharges for Adverse Reasons

• P. 2A/1, n.a:

The discharge category of Unsuitability no longer exists (see Supp. Chapter 16). Eligibility for hearings under current regulations is discussed in Supp. Chapter 4.

Appendix 2B

Case Preparation Flow Chart

• P. 2B/1L:

It is currently taking between six and ten weeks to receive military records after they are ordered.

[2]725 F.2d 107, 12 MIL. L. REP. 2178 (D.C. Cir. 1983), *reh'g denied,* 737 F.2d 1038 (1984).

[3]*See* Supp. Chapter 15 for current strategies.

CHAPTER 3
Glossary and Military Structure

A. Overview

Basic military terminology is unchanged since the 1982 edition of *Military Discharge Upgrading* (MDU). Minor modifications and additional terms which might be of use are listed below.

B. Chapter Supplement

In addition to the modified and added entries below, the following publications contain extensive glossaries:

Glossary of Military Terms, United States Government Printing Office.
Vietnam Order of Battle, by Shelby L. Stanton (U.S. News Books, 1981).

C. Section Supplement

3.1 Military Time and Dates

3.2 Glossary of Terms and Abbreviations[1]

AAM: Army Achievement Medal.
ABAVG: Above Average.
ADAPCP: Alcohol and Drug Abuse Prevention and Control Program of the Army.
Adjutant General: The chief administrative officer of the Army.
Adjutant: The officer in any unit having a general staff who is charged with the supervision of personnel records and management.
AFEM: Armed Forces Expeditionary Medal.
AFOSIR: Air Force Office of Special Investigations Regulation.
AFWALR: Air Force Wright Aeronautical Laboratories Regulation.
APR: Airman Performance Rating.
AR: (1) Army Regulation. (2) Arithmetic Reasoning. (3) Armor.
ASN: Army Service Number.
ASR: Army Service Ribbon.
ASVAB: Armed Forces Vocational Aptitude Battery.
ATTN: Attention.
AVG: Average.
BAVG: Below Average.
C/A: Certificate of Appreciation.
C/Ach: Certificate of Achievement.
C: (1) Chapter. (2) Change.
Casualty: Servicemember lost to a command due to death, wounds, capture, or missing in action.
CIB: Combat Infantry Badge. Award authorized for all Army personnel who engage in combat. As a practical matter, not awarded to all who are eligible.
CMB: Combat Medical Badge.
CMR: Court of Military Review.
CO: (1) Company. (2) Commanding Officer. (3) Conscientious Objector (or Objection). (4) Combat Aptitude Area.
Conf: Confinement.
CU: Confirmed Upgrade. Amnesty program upgrades later re-reviewed and confirmed.
DAJA: Department of the Army Judge Advocate opinion.
Discharge Review Board (Army, Navy (includes USMC), and Air Force): Board which will, on its own motion, or on request, review the type and nature of a discharge/dismissal of a former member of the respective branch of the service. The five-member board can change the character and reason for discharge/dismissal, but it cannot void a discharge, review discharges which resulted from a general court-martial, order reinstatement, or change a discharge to a separation for medical retirement.
EL: (1) Electronic Aptitude Area. (2) Entry Level.
ELS: Entry Level Separation.
F2d: Federal Reporter, Second Series: A reporter containing case opinions of the 13 United States Courts of Appeals, and the U.S. Claims Court (Cl. Ct., formerly U.S. Court of Claims, Ct. Cl.)
FA: Field Artillery Aptitude Area.
FAC: Forward Air Controller.
Frag: Fragment. Usually in relation to munitions as in "shell frag." Also used to describe killing of enemy or friendly personnel as in "We 'fragged' him."
GC: Gas Chromatograph: A form of urinalysis test. Only truly reliable if used in conjunction with Mass Spectrometry, but the results are usually considered by the military to be sufficiently reliable even if not.
GD: (1) General Discharge. The final separation of an enlisted person Under Honorable Conditions when his/her service has been satisfactory, but not sufficient for an Honorable Discharge. (2) Good.
GT: General Technical Aptitude Area.
I-A-O: One in I-A-O, non-combatant, status.
IDF: Installation Detention Facility.
IMC: Interim Message Change.
JSCOM, JSCM: Joint Service Commendation Medal.
KIA: Killed in Action.
Km: Kilometer.
L/A: Letter of Appreciation.
L/Ach: Letter of Achievement.
L/C: Letter of Commendation
L/R: Letter of Recognition.
LOM, LM: Legion of Merit.
MCR: (1) Marine Corps Reserve. (2) Medical Center Regulation.
MK/VE: Work Knowledge/Verbal.
Montagnard: Highland people inhabiting the western region of Vietnam who fought with US forces.
MR I, II, III, and IV: Military Regions in South Vietnam.

[1]Italicized entries are in the original MDU but are modified and replaced here. Entries which are not italicized are new entries not found in the original.

MR: Memorandum for the Record.
MS: Mass Spectrometry: a form of urinalysis testing. Considered relatively reliable.
MS/GC: Mass Spectrometry/Gas Chromatograph: a form of urinalysis testing. The most reliable method used by the military.
MSM: Meritorious Service Medal.
NC: (1) Prefix to case numbers. Navy cases before the Board for Correction of Naval Records. (2) No Change.
NE: Not Evaluated.
NMCMR: Navy - Marine Court of Military Review.
NMI: No Middle Initial. Seen in military records where a middle initial would be. E.g., "Fred (NMI) Smith."
NPDR: NCO Professional Development Ribbon.
NU: Non-confirmed Upgrade. Amnesty program upgrades not later confirmed.
NVA: North Vietnamese Army.
NVN: North Vietnam.
OAD: Ordered to Active Duty.
OF: Operators and Food Aptitude Area.
OSR: Overseas Service Ribbon.
OSTDG: Outstanding.
POLWAR: Political Warfare.
PP: (1) Physical Profile. (2) Presidential Proclamation.
PR: Poor.
Prcht Bdge: Parachute Badge.
PSYOPS: Psychological Operations.
PSYWAR: Psychological War.
Ranch Hand: Code name for herbicide operations in Southeast Asia.
REFRAD: Released From Active Duty.
Restriction: The "moral restraint" (as opposed to the "physical restraint" of being locked up) of an individual pursuant to Article 15 or the sentence of a court-martial. Under restriction, which generally lasts for no more than two months, one may be restricted to the company, post, or some other area, and normally will be required to perform military duty. (Manual for Courts-Martial (MCM) 126, 131.)
RVNCM: Republic of Vietnam Campaign Ribbon.
RXN: Reaction. Found in medical records.
s/s: Supersedes. Found frequently in military regulations.
SCREEN: Success Chances for Recruits Entering the Navy.
Selected Services: Units and individuals within the Ready Reserve which were designated by the respective services and approved by the Joint Chiefs of Staff as so essential to initial wartime missions as to require priority treatment and training over other reserves. This program ended on August 1, 1969, and the "Selected Reserve Forces" (SRFs) returned to normal reserve commitment.
SSM, SS: Silver Star Medal.
ST: Skilled Technical Aptitude Area.
Subj: Subject.
SVN: South Vietnam.
UNS: Unsatisfactory.
VEI: Void Enlistment or Induction.
VN: Vietnam.
w/V: With V device (for valor).
ZI: Zone of the Interior. Continental United States.

- For abbreviations in Military Law, see Appendix 4C.

3.3 Rank Structure and Chain of Command

3.3.1 Organizational Structure (Army Model)

3.3.2 Chain of Command

3.3.2.1 United States Army

3.3.2.2 United States Air Force

3.3.2.3 United States Marine Corps

3.3.2.4 United States Navy

3.4 Decorations Listed in Order of Precedence

CHAPTER 4
The Military Criminal and Administrative Discharge System

A. Overview

Although there have been substantial changes in discharge categories since the 1982 edition of MDU was published, the basic structures and relationship between the two avenues for discharge, criminal and administrative, remain unchanged.

B. Chapter Supplement

1. Uniform Code of Military Justice (U.C.M.J.)

The Military Justice Act of 1983 revised the Uniform Code of Military Justice (U.C.M.J.) in several ways. Note new § 4.3.3 below for current U.C.M.J. procedures. Subsequent changes not relevant to this manual are not discussed.

2. Manual for Courts-Martial

The MANUAL FOR COURTS-MARTIAL (MCM) is in a new edition implementing the Military Justice Act of 1983. The new MCM has changed Courts-Martial practice in a number of ways. These are discussed in new § 4.3.3 below. MANUAL FOR COURTS-MARTIAL, 1984 Ed.—effective August 1, 1984; Exec. Order 12473 (April 13, 1984); published at 49 Fed. Reg. 17,151 (April 23, 1984).

C. Section Supplement

4.1 Distinctions Between Military Criminal Law and the Administrative Discharge System

4.2 Types of Discharges

There are now three "uncharacterized" discharges: "Entry Level Separation," "Void Enlistment or Induction," and "Dropped From the Rolls."[1] Notwithstanding the descriptive sound of these new discharge categories, they are used in place of a characterization, not a reason, for discharge.[2] These discharges are given when the servicemember is separated shortly after entry,[3] where an enlistment is void, or under other circumstances prescribed by the different services. Their effect on VA benefit eligibility is as follows:

- Entry Level Separation Discharge: No impediment to VA benefits.[4]
- Void Enlistment or Induction Discharge: VA determines on a case by case basis whether the separation is "under conditions other than dishonorable." If it is, VA benefits may be paid.

The procedural rights provided those recommended for an ungraded discharge depend on the reason for the recommended discharge. In general, however, there is a right to counsel, a right to submit a statement, but no right to a hearing.[5]

4.3 History of the Military Disciplinary System

4.3.1 Procedures From 1940–1951

4.3.1.1 Nonjudicial Punishment

4.3.1.2 Summary Courts-Martial (SCM)

4.3.1.3 Special Courts-Martial (SPCM)

4.3.1.4 General Courts-Martial (GCM) and Court-Martial Proceedings Prior to the U.C.M.J.

- P.4/6L, ¶ 4:

This paragraph refers only to appeals. The original adjudicators, the court-martial panel members, could weigh evidence.

4.3.2 Procedures Under the Uniform Code of Military Justice, 1951–1981

4.3.2.1 Changes Wrought by the U.C.M.J.

- P.4/7R, n.42:

The full cite for *United States v. McPhail,* is 24 C.M.A. 304, 1 M.J. 457, 4 MIL. L. REP. 2478 (1976).

4.3.2.2 Structure and Procedures of the U.C.M.J.

4.3.3 Procedures Under the Uniform Code of Military Justice, post 1981

The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1293, amended the U.C.M.J. While the basic structure of military law remains the same, there were some important changes. Under the Act, decisions of the Court of Military Appeals can be reviewed by the Supreme Court, a new article specifically prohibiting drug use was created (10 U.S.C. § 912a, Art. 112a), and several changes relating to referral of charges and post-court-martial review were made.

A new edition of the Manual for Courts-Martial was issued to implement the Military Justice Act of 1983.[6] The new edition, the MANUAL FOR COURTS-MARTIAL, 1984, went into effect on August 1, 1984. The Manual provides procedures for appeals to the Supreme Court and provides for

[1] 32 C.F.R. Part 41, App. A, Part 2, § C, ¶ 3; AR 635-200, ¶ 3-9.

[2] *See generally* 32 C.F.R. Part 41, App. A.

[3] Usually within 180 days of entry onto Active Duty for Entry Level Separation. 32 C.F.R. Part 41, App. A, Part 2, § C, ¶ 3.a; 32 C.F.R. § 41.6(i).

[4] 38 C.F.R. § 3.12(k)(1). Many veterans with this type of discharge are, however, barred from VA benefits by the minimum active duty requirement. *See* 38 C.F.R. § 3.12a.

[5] 32 C.F.R. Part 41, App. A, Part 1 and Part 3, ¶ B.

[6] MANUAL FOR COURTS-MARTIAL, 1984 Ed.—effective August 1, 1984; Exec. Order 12473 (April 13, 1984); published at 49 Fed. Reg. 17,151 (April 23, 1984).

greater authority for the Judge Advocate General to modify or set aside findings or sentences. The extraordinary writ authority of military appellate courts is discussed, clarifying the possibility of appeal to these courts from various military proceedings.

Under the new Manual, a convening authority may only refer a case if (s)he personally finds, or is advised by a judge advocate, that there are reasonable grounds to believe that the charge states an offense triable by court-martial and that the accused committed it. Also, the prohibition in the previous edition of the Manual against referring major and minor offenses to the same court-martial is eliminated. Even if the charges are unrelated, they may now be tried jointly.

A number of changes in sentencing were made in the new Manual including allowing a Bad Conduct Discharge for simple assault and battery (as opposed to aggravated assault) and for AWOL to avoid field exercises or maneuvers. An element of drug offenses, that they be prejudicial to good order and discipline, or service discrediting, was removed to make conviction for these offenses simpler.

The rules for non-judicial punishment are clarified and amended to permit a second Article 15 for the same misconduct as long as the amount of punishment is not increased. Detention of pay is eliminated as an Article 15 punishment option. Finally, for a suspended punishment for an Article 15 to be vacated (*i.e.,* the punishment is reinstated), there must be a violation of the U.C.M.J., not just violation of a nonpunitive regulation.

In addition to these changes there are many other technical and substantive changes and several subsequent legislative changes which are beyond the scope of this manual.[7]

4.4 History of the Administrative Discharge System

4.5 Administrative Discharge Procedures:

a. P.4/12L, ¶¶ 4 and 5:

See § 12.5.5.

b. P.4/12L, ¶ 7:

(1) New DoD regulations adopted in 1982 have changed Administrative Discharge procedures.[8] Under the prior regulations, there were two different types of separation proceedings. The first type of proceeding was mandated if the member was facing separation under circumstances which might result in a discharge Under Other Than Honorable Conditions (UOTHC) or if the member had eight or more years of total active military service. In these instances, the member had the right to consideration of his or her case before an ADB. Procedural safeguards in an ADB proceeding included the right to appointed counsel, to request attendance of witnesses who were reasonably available and to appear personally before the ADB to testify.

The second type of proceeding under the old regulations applied in all other circumstances and did not provide an opportunity for a hearing. The only procedural safeguards were that the member was given notice of the reason for separation and an opportunity to submit statements in writing and to consult with military counsel. This non-hearing procedure was used for any member who had less than eight years of service (with some exceptions) if the proceeding could lead to no worse than a GD. As a matter of policy, however, the Army, since 1966, had provided servicemembers facing separation for Unsuitability with the opportunity for an ADB proceeding.

Under the new regulations, more members have a right to an ADB proceeding, and the non-hearing proceeding has been changed to provide greater safeguards. A member who has six or more years of total active and reserve military service has a right to an ADB proceeding under the new regulation,[9] as do those being processed under specified reasons for discharge.

The non-hearing procedure provides somewhat greater procedural safeguards. The major modification in the new rule is that the notice of initiation of separation proceedings is required to contain the "basis of the proposed separation, including the circumstances upon which the action is based."[10] This provides a member with more detailed information about the allegations. The new rule provides that the separation authority "shall determine whether there is sufficient evidence to verify the allegations set forth in the notification of the basis for separation. If an allegation is not supported by a preponderance of the evidence, it may not be used as a basis for separation."[11]

A related change in the new rule is that a member may no longer be separated for a reason for separation not specified in the notice of initiation of proceedings. Under the old rule, a servicemember could be separated for a reason for separation other than that specified in the notice of initiation of proceedings—a procedure of doubtful legality.[12] Under the new regulations, this is not allowed.

A member who is being separated under the non-hearing procedure should request a more definite statement of allegations against him or her. By forcing the authorities to be more specific as to the allegations, the member will receive the advantage of prohibiting a discharge grounded upon other, unspecified acts.

(2) *See Chilcott v. Orr,* 747 F.2d 29 (1st Cir. 1984) for a discussion of the requirements for hearings for discharges under AFR 39-10. This case also holds that AFR 39-10, ¶ 6-53 and 6-54, pertaining to timeliness of Air Force discharge actions following a civilian conviction, is not applicable where the discharge is based on the facts underlying a civilian arrest where there was not a conviction.[13]

c. P.4/12L, ¶ 7, 1st sentence:

A member with eight or more years of service had, in recent years, been entitled to an ADB, no matter what characterization of discharge was possible.[14] This was reduced to six years, in most cases, under the 1982 DoD regulations.[15]

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[7]*See The 1984 Manual for Courts-Martial: Significant Changes and Potential Issues,* THE ARMY LAWYER, July 1984, at page 1.

[8]32 C.F.R. Part 41, App. A.

[9]32 C.F.R. Part 41, App. A, Part 3, ¶ B.1.g; AR 635-200, ¶ 2-2(d).

[10]*See* 32 C.F.R. Part 41, App. A, part 3, ¶ B.1.a.

[11]*See* 32 C.F.R. Part 41, App. A, Part 3, ¶ B.4.c.

[12]See Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980); Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977); Mulvaney v. Stetson, 493 F. Supp. 1218, 1224-25, 8 MIL. L. REP. 2628 (N.D. Ill. 1980); White v. Secretary, 878 F.2d 501, 17 MIL. L. REP. 2593 (D.C. Cir. 1989).

[13]*See also* §§ 12.5.3.1 and 12.5.7.1; May v. Gray, 708 F. Supp. 716 (E.D.N.C. 1988).

[14]*See, e.g.,* BUPERSMAN 3420184.6, NAVMILPERSCOMINST 1910.1, § 3e, Dec. 30, 1980.

[15]32 C.F.R. Part 41, App. A, Part 3, ¶ B.1.g; AR 635-200, ¶ 2-2(d).

d. P.4/12L, ¶ 7, line 14:

A verbatim transcript has been authorized in the Navy where "it appears that a substantial number of witnesses will testify, that the testimony will be lengthy, or that other good reason exists for making a verbatim record."[16]

e. P.4/12L, ¶ 7, last sentence:

Under the new regulations, ADBs more frequently issue findings of fact. Under current regulations ADBs must make findings on "whether each allegation set forth in the notice of proposed separation is supported by a preponderance of the evidence."[17]

f. P.4/12R, ¶1:

The DA usually has the authority to suspend execution of an approved administrative discharge to afford the member a probationary period to demonstrate rehabilitation.[18]

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[16]BUPERSNOTE 1919, 3420187, 1.d, Mar. 24, 1981; *Cf.* DoD regulation at 32 C.F.R Part 41, App. A, Part 3, ¶ C.5.d ("The record of the proceedings shall be kept in summarized form unless a verbatim record is required by the Secretary concerned. In all cases, the findings and recommendations of the Board shall be in verbatim form."); *Compare,* AR 635-200, ¶ 2-10(f) ("The proceedings of the board will be summarized as fairly and accurately as possible. They will contain a verbatim record of the findings and recommendations."). DoD changed its regulation to permit dispensing with even the summarized record where the ADB recommends retention. 52 Fed. Reg. 46,997 (Dec. 11, 1987).

[17]32 C.F.R. Part 41, App. A, Part 3, ¶ C.5.g.

[18]*See, e.g.,* 32 C.F.R. Part 41, App. A, Part 2, ¶ B; AR 635-200, ¶ 1-20; BUPERSNOTE 1910, 3420181, 4.h, Mar. 24, 1981; BUPERSNOTE 1910, 3420188, 2, Mar. 24, 1981.

4.6 Researching Military Law

4.6.1 Military Regulatory Structure

• P.4/13, n.88:

(1) Note that Navy Regulations may take precedence over BUPERSMAN. *Amidon v. Lehman,* 677 F.2d 17 (4th Cir. 1982).

(2) BUPERSMAN has been superseded by the NAVAL MILITARY PERSONNEL COMMAND MANUAL.

4.6.2 Military Criminal Law

a. P.4/13R, ¶ 2, 3d:

MILITARY LAW REPORTER is now in its eighteenth volume.

b. P.4/13R, ¶ 2, last:

MILITARY JUSTICE REPORTS is now in its thirtieth volume. There is now a cumulative index and a SHEPARD's citation for it.

Appendix 4A

Relationship of Bases for Separation and Authorized Discharges

This table as originally published is valid until the 1982 DoD changes.

See the new Appendix 4A when handling post-1982 cases.

Appendix 4C

Abbreviations in Military Law

APPENDIX 4A

Post 1982 Table of RELATIONSHIP OF BASES OF ADMINISTRATIVE SEPARATION AND AUTHORIZED DISCHARGES:

PRINCIPAL BASES FOR SEPARATION	AUTHORIZED DISCHARGES
EXPIRATION OF SERVICE OBLIGATION (HD unless ELS or GD)	HONORABLE DISCHARGE "The Honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate."[b]
CONVENIENCE OF THE GOVERNMENT (HD unless ELS or GD) • Early release for further education • Early release to accept public office • Dependency or Hardship • Pregnancy or childbirth • Parenthood • Conscientious objection • Surviving family member • Other designated physical or mental conditions[a] • Other designated grounds [a]	GENERAL (Under Honorable Conditions) (GD) "If member's service has been honest and faithful, it is appropriate to characterize that service under honorable conditions. Characterization of service as General (under honorable conditions) is warranted when significant negative aspects of the member's conduct or performance of duty outweigh positive aspects of the member's military record."[b]
DISABILITY (HD unless ELS or GD)	
DEFECTIVE ENLISTMENT OR INDUCTION • Minority (VEI or ELS) • Erroneous (HD unless VEI or ELS) • Defective Enlistment Agreement (HD unless VEI or ELS) • Fraudulent Entry into military service (As appropriate, UD presumed if fraud was concealment of prior service not characterized as Honorable)	UNDER OTHER THAN HONORABLE CONDITIONS (UOTHC) "This characterization may be issued when the reason for separation is based on a pattern of behavior that constitutes a significant departure from the conduct expected of members of the Military Services or when the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected from members of the Military Services."[b]
ENTRY LEVEL PERFORMANCE AND CONDUCT (ELS)	
UNSATISFACTORY PERFORMANCE (HD or GD)	
HOMOSEXUALITY (As appropriate, UOTHC only for specified conduct)	ENTRY LEVEL SEPARATION (Uncharacterized) (ELS) "A separation shall be described as an Entry Level Separation if separation processing is initiated while a member is in entry level status,[c] except when a UOTHC discharge is authorized and warranted, or unusual circumstances warrant an HD."[b]
DRUG ABUSE REHABILITATION FAILURE (HD or GD, unless ELS)	
ALCOHOL REHABILITATION FAILURE (HD or GD, unless ELS)	VOID ENLISTMENTS OR INDUCTIONS (Uncharacterized) (VEI) Issued when an enlistment or induction is void except where a constructive enlistment arises. Described as "an order of release from custody or control of the Military Services."[b]
MISCONDUCT (UOTHC unless GD, or HD under exceptional circumstances. ELS only if UOTHC not warranted) • Minor Disciplinary Infractions • A Pattern of Misconduct • Commission of a Serious Offense • Civilian Conviction	DROPPED FROM ROLLS (Uncharacterized) (DFR) "A member may be dropped from the rolls of the Service when such action is authorized by the Military Department concerned and a characterization of service or other description of separation is not authorized or warranted."[b]
SEPARATION IN LIEU OF TRIAL BY COURT-MARTIAL (UOTHC unless GD, or HD under exceptional circumstances. ELS only if UOTHC not warranted)	

[a]Designated by Service.

[b]32 C.F.R. Part 41, App. A, Part 2, ¶ C.

[c]Usually the first 180 days of service.

CHAPTER 5
Regulatory Developments

A. Overview

There have been substantial changes in the structure and content of many military regulations since 1982. Changes in substance have been particularly significant in the enlisted administrative separation ("discharge") regulations. Some of these changes are listed and digested below. To get copies of the regulations themselves, follow the research procedures described in Chapter 10.

Where the changed regulations affect particular subject areas, they are described in the related chapter. For example, the new regulations pertaining to drug abuse are described in Chapter 15.

B. Chapter Supplement

1. Discharge Regulations

In 1982, DoD issued new discharge regulations. The services have implemented the DoD guidelines in their own regulations. These regulations are substantially changed from earlier discharge regulations. The reasons for discharge have been substantially restructured and there have been procedural changes as well. The significant changes have been digested below.

2. Cross References

In addition to updating some of the changes in the structure and substance of regulations, new cross-reference material is added below. The new Section 5.1.5.6 cross references selected Air Force regulations to 32 Code of Federal Regulations (C.F.R.). Except for DoD regulations, few discharge regulations are included in C.F.R.

C. Section Supplement

5.1 Lists of Regulations By Subject Matter

5.1.1 Introduction

5.1.2 Army Regulations

5.1.2.1 Discharge

• P.5/7L:

AR 635-200, C 5 June 1, 1982
AR 635-200 July 5, 1984
Personnel Separations: ENLISTED PERSONNEL
s/s AR 635-200 Feb. 1, 1978
AR 635-200, C 6 Apr. 15, 1986
AR 635-200 Dec. 1, 1988
(incorporating all previous changes)

5.1.2.2 Drug and Alcohol Rehabilitation

• P.5/8L:

AR 600-85 Jan. 1, 1982
ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM
s/s AR 600-85 May 1, 1976
AR 600-85, C 2 Feb. 11, 1983
AR 600-85, C 3 Apr. 29, 1983
AR 600-85, C 4 Jun. 28, 1983
AR 600-85, C 5 Aug. 11, 1983
AR 600-85, C 6 Feb. 1, 1984
AR 600-85, C 7 Sep. 10, 1984
AR 600-85, C 8 Feb. 4, 1985
AR 600-85, C 9 May 9, 1985
AR 600-85, C 10 Feb. 1, 1986
AR 600-85, C 11 Feb. 10, 1986
AR 600-85, C 12 Apr. 17, 1986
AR 635-85 Oct. 21, 1988
(incorporating all previous changes)

5.1.2.3 Entrance Standards

5.1.2.4 Investigative Boards

5.1.2.5 Evaluation Reports

5.1.3 Navy Regulations

5.1.3.1 Bureau of Naval Personnel Manual [BUPERSMAN], Oct. 1, 1942

5.1.3.2 Bureau of Naval Personnel Manual [BUPERSMAN], Jun. 11, 1948

5.1.3.3 Bureau of Naval Personnel Manual [BUPERSMAN], Apr. 14, 1959

5.1.3.4 Bureau of Naval Personnel Manual [BUPERSMAN], 1969

5.1.3.5 Bureau of Naval Personnel Manual [BUPERSMAN], 1969 Through Change 10/80 (Dec. 15, 1980)

5.1.3.6 Naval Military Personnel Command Manual (MILPERSMAN), 1982 s/s BUPERSMAN

C 7/82
C 10/82, Jan. 7, 1983
C 1/83, Jan. 1983

5.1.3.7 Naval Military Personnel Command Manual (MILPERSMAN), 1988

5.1.4 Marine Corps Regulations

5.1.4.1 Marine Corps Manual, Jun. 3, 1940

5.1.4.2 Marine Corps Manual, Apr. 11, 1949

5.1.4.3 Marine Corps Personnel Manual, Mar. 13, 1961

5.1.4.4 Marine Corps Separation and Retirement Manual [MARCORSEPMAN], Marine Corps Order P.1900.16 [MCO P.1900.16], Sep. 9, 1968

5.1.4.5 Marine Corps Separation and Retirement Manual [MARCORSEPMAN], Marine Corps Order P.1900.16A [MCO P.1900.16A], Jun. 28, 1972

5.1.4.6 Marine Corps Separation and Retirement Manual [MARCORSEPMAN], Marine Corps Order P.1900.16B [MCO P.1900.16B], Mar. 23, 1978

5.1.4.7 Marine Corps Separation and Retirement Manual [MARCORSEPMAN], Marine Corps Order P.1900.16B [MCO P.1900.16B], Feb. 19, 1980

5.1.4.8 Marine Corps Separation and Retirement Manual [MARCORSEPMAN], Marine Corps Order P.1900.16B [MCO P.1900.16B], Oct. 4, 1982

5.1.4.9 Marine Corps Separation and Retirement Manual [MARCORSEPMAN], Marine Corps Order P.1900.16B [MCO P.1900.16B], Apr. 6, 1983

5.1.5 Air Force Regulations

5.1.5.1 Discharge

5.1.5.2 Drug and Alcohol Rehabilitation

5.1.5.3 Entrance Standards

5.1.5.4 Investigative Boards

5.1.5.5 Evaluation Reports

5.1.5.6 Cross Reference to 32 Code of Federal Regulations for Selected Air Force Regulations

Regulation	C.F.R. Part	Description
		—Administration—
AFR 12-30	806	Disclosure of Air Force Records
AFR 12-35	806b	Air Force Privacy Act Program
AFM 7-1	807	Issuing Air Force publications and forms outside the Air Force
AFR 355-11	809(a)	Enforcement of order at Air Force installations, control of civil disturbances, support of disaster relief operations, and special consideration for overseas areas
		—Claims and Litigation—
AFR 110-5	840	Releasing information for litigation and appearance of witnesses before civilian courts and other tribunals
AFR 112-1	842	Administrative claims
USAFAR 110-3	844	Distribution of literature and protest and dissident activities
AFR 110-12	845	Counsel fees and other expenses in foreign tribunals
AFR 110-10	847	Authentication of official Air Force records for admission into evidence
AFR 110-18	848	Foreign tax relief program
		—Security—
AFR 205-1	850	Information security program
		—Organization and Mission-General—
AFR 31-3(A)	865	Personnel Review Boards
AFR 20-10(B)	865	Personnel Review Boards
		—Air Force Reserve Officers' Training Corps—
AFR 45-48	870	Air Force Reserve
AFR 45-31	875	Delay in active duty for AFROTC graduates
		—Military Personnel—
AFR 168-10(A)	880	Medical, dental, and veterinary care from civilian sources
MCR 168-10(B)	880	Medical, dental, and veterinary care from civilian sources
AFR 30-45	881	Determination of active military service and discharge for civilian or contractual personnel
AFR 111-1	883	Military Justice
AFR 111-11	884	Delivery of Air Force personnel to U.S. civilian authorities for trial
AFR 36-5	885	Appointment of officers in the Regular Air Force
AFR 35-96	887	Issuing certificates in lieu of lost or destroyed certificates of separation
AFR 33-3	888	Enlistment in the U.S. Air Force
AFR 45-14	888d	Enlistment and discharge of AFROTC cadets
AFR 35-24	888e	Disposition of conscientious objectors
AFR 30-24	888g	Organizational and representational activities of military personnel
AFR 35-6	888h	Separation documents and general separation procedures
AFR 35-73	889	Desertion and unauthorized absence
		—Military Training and Schools—
AFR 53-10	901	Appointment to the USAFA
AFR 53-27	902	Officer Training School, USAF (OTS)
		—Standards of Conduct—
AFR 30-30	920	Standards of conduct
		—Special Investigation—
AFR 124-9	950	Authority to administer oaths
AFR 124-2	951	Air Force office of special investigations special agents
AFR 124-4	952	Requesting AFOSI investigations and safeguarding, handling and releasing information from AFOSI reports
AFR 124-8	953	Fraud and violations of public trust in contract, acquisition, and other matters
AFR 124-13	954	Acquisition of information concerning persons and organizations not affiliated with the Department of Defense

AFOSIR 124-9 955 Obtaining financial data information

5.2 Digests of Selected Regulations

5.2.1 Introduction

5.2.2 Army

5.2.2.1 AR 15-6, July 25, 1955, Procedural Guide for Investigating Officers and Boards of Officers, supersedes SR 15-20-1, August 13, 1953

5.2.2.2 AR 15-6, November 3, 1960, Procedure for Investigating Officers and Boards of Officers, supersedes AR 15-6, July 25, 1955

5.2.2.3 AR 15-6, August 12, 1966, Procedure for Investigating Officers and Boards of Officers, supersedes AR 15-6, November 3, 1960

5.2.2.4 AR 15-20, July 30, 1951, boards of Officers for Conducting Investigations, supersedes AR 420-5, May 20, 1940

5.2.2.5 AR 15-20-1, August 13, 1953, Procedural Guide for Investigating Officers and Boards of Officers, supersedes AR 15-20, July 30, 1951

5.2.2.6 AR 615-368, October 27, 1948, Enlisted Personnel: Unfitness Discharge, supersedes AR 615-368, July 1, 1947

5.2.2.7 AR 615-369, October 27, 1948, Enlisted Personnel: Inaptitude or Unsuitability Discharge, supersedes AR 615-369, May 14, 1947

5.2.2.8 AR 635-200, December 6, 1955, Personnel Separations: General Provisions for Discharge and Release, supersedes AR 615-360, June 24, 1953

5.2.2.9 AR 635-200, April 14, 1959, Personnel Separations: General Provisions for Discharge and Release, supersedes AR 635-200, December 6, 1955

5.2.2.10 AR 635-200, July 15, 1966, Personnel Separations: Enlisted Personnel, supersedes, in part, AR 635-200, April 14, 1959 and AR 635-220, June 5, 1956.

5.2.2.11 AR 635-200, February 1, 1978, Personnel Separations: Enlisted Personnel, supersedes AR 635-200, July 15, 1966 and AR 635-206, July 16, 1966

a. P.5/27R:

Some of the effects of Change 5 to AR 635-200, effective June 1, 1982, were: (1) transfer to the Individual Ready Reserve is required for certain members discharged for unsuitability/apathy (even some who are issued General Discharges) or discharged from the Expeditious Discharge Program; (2) a mental status evaluation is not required before a GOS discharge (under Ch. 10) unless the member requests a physical exam.

b. P.5/27L:

5.2.2.11-a AR 635-200, July 5, 1984 (through change 12 of April 15,1986) Personnel Separations: ENLISTED PERSONNEL supersedes AR 635-200, February 1, 1978

There are 16 chapters in this regulation:

- Ch. 1, General Provisions;
- Ch. 2, Procedures for Separation;
- Ch. 3, Character of Service/Description of Separation;
- Ch. 4, Separation for Expiration of Service Obligation;
- Ch. 5, Separation for Convenience of the Government;
- Ch. 6, Separation because of Dependency or Hardship;
- Ch. 7, Defective Enlistments and Inductions;
- Ch. 8, Separation of Enlisted Women-Pregnancy;
- Ch. 9, Alcohol or Other Drug Abuse Rehabilitation Failure;
- Ch. 10, Discharge for the Good of the Service;
- Ch. 11, Entry Level Performance and Conduct;
- Ch. 12, Retirement for Length of Service;
- Ch. 13, Separation for Unsatisfactory Performance;
- Ch. 14, Separation for Misconduct;
- Ch. 15, Separation for Homosexuality; and
- Ch. 16, Selected Changes in Service Obligations.

Chapter 1: General Provisions

PROCESSING GOALS: Processing time when no ADB not normally to exceed 15 working days. Processing time when ADB normally not to exceed 50 days. Failure to meet time goals no bar to separation or characterization. [¶ 1-7.]

FBI RECORD: When member discharged with DD or BCD, or under Ch. 10 (GOS) or Ch. 14 (Misconduct), the FBI will be notified. [¶ 1-10.]

REDUCTION IN GRADE: If discharge UOTHC there is an immediate reduction to lowest enlisted grade. [¶ 1-14.]

COUNSELING AND REHABILITATIVE EFFORTS: Adequate counseling and rehabilitative measures must be taken before initiating separation action for:

(1) Parenthood
(2) Personality disorder
(3) Entry level performance and conduct
(4) Unsatisfactory performance
(5) Minor disciplinary infractions or a pattern of misconduct.

Must be at least one counseling before initiation of a separation action. For (3) through (5) above, one of the following rehabilitation measures shall be taken prior to initiation of separation action:

(1) Reassignment between training companies or, if not possible, between training platoons, at least once.

(2) Reassignment at least once, with at least 2 months duty in each unit. Reassignment between at least battalion-size units, but when considered necessary by local commander, by brigade or larger.

(3) Permanent change of station.

Rehabilitative transfer may be waived where further duty would:

(1) Create serious disciplinary problems or a hazard to the military mission or to the member, or

(2) The member is resisting rehabilitation attempts, or

(3) Rehabilitation would not be in the best interests of the Army as it would not produce a quality soldier. [¶ 1-18.]

PRIOR PROCEEDINGS: Separation should not normally be based on conduct which has already been considered

at administrative or judicial proceeding and disposed of in a manner indicating that separation not warranted. [¶ 1-19.]

SUSPENSION OF SEPARATION: Separation may be suspended for a probationary period. [¶ 1-20.]

MEDICAL EVALUATIONS: Medical examinations required for members being separated under ¶ 5-3 (COG, Secretarial Authority), ¶ 16-4 (Discharge of Members of Reserve Components on Active Duty), Ch. 8 (Pregnancy), Ch. 9 (Alcohol or Drug Abuse Rehabilitation Failure), Ch. 12 (Retirement for Length of Service), Ch. 13 (Unsatisfactory Performance), Ch. 14, § III when absentee returned to military control from AWOL or desertion (under Acts or Patterns of Misconduct), or as required in AR 40-501. ¶ 10-25. If member does not meet medical retention standards and is being considered for Ch. 13 (Unsatisfactory Performance), member will be processed through medical channels. If member does not meet medical retention standards and is being considered for Ch. 14 (Misconduct) or fraudulent entry, the member will be processed through medical channels if (1) the disability is the cause or substantial contributing cause of the misconduct; and (2) circumstances warrant disability processing instead of administrative processing.

MENTAL STATUS EVALUATION: MSE required for discharges under ¶ 5-13 (COG, Personality Disorder); Ch. 13 (Unsatisfactory Performance); Ch. 14, § III (Acts or Patterns of Misconduct); Ch. 15 (Homosexuality), Ch. 10 when the member requests a medical examination (Good of the Service). Only where separation is considered for ¶ 5-13 (COG, Personality Disorder) must the physician be trained in psychiatry.

TRANSFER TO INDIVIDUAL READY RESERVE (IRR): Those who have not completed their service obligation at time of discharge are transferred to IRR unless they have "no potential to meet mobilization requirements." [¶ 1-36.]

Chapter 2: Procedures for Separation

PREHEARING OR IF NO HEARING: Servicemember must receive written notice of recommendation for discharge, the "specific allegations," the applicable regulatory provisions, the least favorable characterization of discharge possible, and must be advised of the following rights:

- To counsel;
- To submit statements on own behalf;
- To obtain documents supporting proposed separation;
- To a hearing if member has served more than six years;
- To waive these rights (failure to respond within seven duty days shall constitute a waiver);
- If hearing authorized, right to withdraw waiver; and
- Other matters required under other chapters of AR 635-200.

Member may withdraw waiver at any time prior to order, direction, or approval of separation. [¶¶ 2-2, 2-4.]

HEARING: If government introduces limited use evidence (certain urinalysis results) at proceeding, discharge must be HD —but rehearing without introduction of such evidence may be instituted. Board to consist of at least three experienced commissioned, warrant, or noncommissioned officers (E-7 or above). If respondent is woman or minority, one board member to be a woman or minority (respectively) if available and requested. Written notice of hearing date must be provided at least 15 days before hearing. Servicemember may call witnesses and cross-examine witnesses. For member being processed for Misconduct, the board will (a) recommend discharge for Misconduct, characterized as HD, UHC, or UOTHC, (b) recommend discharge for Unsatisfactory Performance, if such was the stated provision in the initial letter of notification, characterized as HD or GD, or (c) recommend retention. For member processed for Unsatisfactory Performance, the board will recommend (a) separation for Unsatisfactory Performance (HD or GD) or (b) retention. The board may also recommend suspension of separation. [¶¶ 2-6, 2-10, 2-12.]

ACTION BY SEPARATION AUTHORITY: Separation Authority will determine if sufficient evidence to verify allegations. If sufficient basis, shall either (1) direct retention, (2) direct separation, or (3) suspend separation; if separation for Misconduct recommended, (a) direct separation for Misconduct, or (b) direct separation for Unsatisfactory Performance if such was the stated provision in the initial notification. If Board recommends UOTHC discharge, proceedings will be reviewed by JAG attorney. Cases of members who have 18 or more years federal service are referred to HQDA for final approval. Separation Authority may not direct discharge if board recommends retention, but may forward to Secretary of Army for possible separation. Member may be discharged for conviction by civil court while appeal pending where appropriate. [¶¶ 2-3, 2-6.]

Chapter 3: Character of Service/Description of Separation

CHARACTERIZATION OF DISCHARGE: Discharge characterizations are HD, UHC, UOTHC, Entry Level Separation (ELS), Void Enlistment or Induction (VEI), and Dropped From Rolls (DFR). ELS, VEI, and DFR are called "uncharacterized" discharges. Characterization based on quality of service during current enlistment. "Characterization may be based on conduct in the civilian community; the burden is on the member to demonstrate that such conduct did not adversely affect his or her service." Due consideration given to age, length of service, grade, aptitude, physical and mental condition. HD required at ETS. Discharge before ETS—no specific number of Article 15s or CMs will rule out HD. HDs may be furnished despite disqualifying entries if there is subsequent "honest and faithful service over a greater period of time." GD issued when record is satisfactory but does not warrant an HD. UOTHC may be issued for Misconduct, Fraudulent Entry, Homosexuality, security reasons, or for the Good of the Service, when the reason for discharge is a pattern or incident of behavior which is a significant departure from expected conduct. Right to hearing prior to UOTHC discharge, except where servicemember is AWOL, requests GOS discharge, or waives right. A MSE or similar medical evaluation given during period of service being characterized shall not be considered in determining the type of discharge. Certain evidence relating to drug and alcohol abuse may not be considered on issue of characterization of service. Entry Level Separation (ELS) required if processing initiated while member in entry level status except where UOTHC is authorized and appropriate or the Secretary of the Army determines HD is warranted by unusual circumstances. Void Enlistment or Induction discharge required if enlistment or induction void and no constructive enlistment.

Chapter 5: Convenience of the Government

COG discharge must be HD, UHC or ELS. COG used when discharge accomplished by Secretarial Authority; for reasons of sole surviving son, daughter, or family member; parenthood; court order of lack of jurisdiction over servicemember; discharge of aliens not lawfully admitted to U.S.; separation for failure to meet medical fitness standards; failure to qualify for flight training; separation because of personality disorder, concealment of arrest record, failure to meet Army weight control standards. No right to an ADB

attaches to COG discharge procedures, but ADB authorized when six or more years of service under some circumstances.

Chapter 9: Alcohol or Other Drug Abuse Rehabilitation Failure

Only entitled to ADB if six or more years service. Discharge is authorized where member is enrolled in ADAPCP and commander determines that further rehabilitative efforts are not practical. HD, UHC, or ELS required.

Chapter 10: Discharge for the Good of the Service

This chapter permits a person whose conduct could result in a trial by court-martial and sentencing of a BCD or DD to request an administrative discharge. The GOS request may be submitted after preferral of charges. A member who is under a suspended sentence of a punitive discharge may also submit a request for a GOS discharge. There must be no coercion and the servicemember must have at least 72 hours to consult with counsel. "Commanders must be selective in approving discharges for the good of the Service [*sic*]. The discharge authority should not be used when the nature, gravity, and circumstances surrounding an offense require a punitive discharge and confinement. Nor should it be used when the facts do not establish a serious offense, even though the punishment, under the [U.C.M.J.], may include a [BCD or DD]. Consideration should be given to the member's potential for rehabilitation and his or her entire record should be reviewed before taking action per to this chapter [*sic*]." Request for GOS may only be withdrawn with consent of commander. Medical exam not required, but may be requested. If requested, MSE must also be given. UOTHC is normal characterization, but UHC authorized and HD may be awarded in exceptional circumstances. ELS may also be awarded if UOTHC discharge not warranted.

Chapter 13: Separation for Unsatisfactory Performance

This reason to be used when it is clearly established that (1) member will not develop sufficiently to participate in further training and/or become a satisfactory soldier; (2) the seriousness of the circumstances is such that the member's retention would have an adverse impact on military discipline, good order, and morale; (3) it is likely that the member will be a disruptive influence in present or future duty assignments; (4) it is likely that the circumstances forming the basis for initiation of separation proceedings will continue or recur; (5) the ability of the member to perform duties effectively in the future, including potential for advancement or leadership, is unlikely; and (6) the member meets medical retention standards. Discharge is not authorized for those in entry level status. Characterization is HD or GD depending on military record. RE-3 code issued if member has less than 18 years service. RE-4 if 18 or more years service. ADB if six or more years service.

Chapter 14: Separation for Misconduct

Authorized for minor disciplinary infractions, pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave. UOTHC discharge normally appropriate. UHC authorized if merited by overall record. When sole basis is CM conviction where no punitive discharge, UOTHC can not be issued unless approved by HQDA. HD only authorized under exceptional circumstances. ELS authorized if UOTHC not warranted. ADB right applies unless characterization of service as UOTHC is not warranted. ADB also if six or more years service.

Chapter 15: Homosexuality

Basis for separation may include preservice, prior service, or current service conduct or statements. Member will be separated if one of the following findings is made:

(a) member engaged in, attempted to engage in, or solicited another to engage in a homosexual act, unless
(1) such conduct was a departure from the member's usual and customary behavior
(2) such conduct is unlikely to recur
(3) such conduct was not accomplished by force coercion, or intimidation by the member during a period of military service
(4) retention is in the best interests of the Army, and
(5) the member does not desire to engage in or intend to engage in homosexual acts.
(b) The member has stated that he or she is a homosexual or bisexual, unless there is a further finding that the member is not a homosexual or bisexual, or
(c) The member was married or attempted to marry someone known to be of the same biological sex unless there are further findings that the member is not a homosexual or bisexual. Characterization of service can only be UOTHC if the service record warrants such a characterization and, during the current term of service the member attempted, solicited, or committed a homosexual act—
(1) by using force, coercion, or intimidation
(2) with a person under 16 years of age
(3) ith a subordinate in circumstances that violate customary military superior-subordinate relationships
(4) openly in public view
(5) for compensation
(6) aboard a military vessel or aircraft
(7) in another location subject to military control
if the conduct had, or was likely to have had, an adverse impact on discipline, good order, or morale due to the close proximity of other members of the Armed Forces. Otherwise, character of discharge shall reflect character of service.

Hearing required, unless waived, if UOTHC discharge, or six or more years service.

5.2.2.12 AR 635-208, May 21, 1956
Personnel Separations: UNDESIRABLE HABITS AND TRAITS OF CHARACTER
supersedes AR 615-368, October 27, 1948

5.2.2.13 AR 635-209, March 17, 1955
Personnel Separation: INAPTITUDE OR UNSUITABILITY DISCHARGE
supersedes AR 615-369, November 15, 1951

5.2.2.14 AR 635-209, April 14, 1959
Personnel Separations: UNSUITABILITY DISCHARGE
supersedes AR 635-209, March 17, 1955

5.2.2.15 AR 635-212, July 15, 1966
Personnel Separations: UNFITNESS AND UNSUITABILITY DISCHARGE
supersedes AR 635-208 and AR 635-209, April 14, 1959

• P.5/32L, n.14:

For an explanation of regulatory supplements, see Supp. § 10.3.1.

5.2.3 Navy

Note that Navy Regulations may take precedence over BUPERSMAN. *Amidon v. Lehman,* 677 F.2d 17 (4th Cir. 1982).

5.2.3.1 BUPERSMAN, 1942

5.2.3.2 BUPERSMAN, 1948

5.2.3.3 BUPERSMAN, 1959

5.2.3.4 BUPERSMAN, 1969 (as of July 1, 1969)

5.2.3.5 BUPERSMAN, 1969 (as of December 31, 1980)

a. P.5/35, n.20:

The Naval Military Personnel Command's manual was issued during the summer of 1981 (no longer called "BUPERSMAN"). The effective date of the new manual is January 1, 1982.

b. P.5/36L, HEARING:

There is a right to ADB before UOTHC Discharge. See BUPERSNOTE 1910, ¶ 4.c., Mar. 24, 1981.

5.2.4 Marine Corps

5.2.5 Air Force

5.2.5.1 AFR 39-10, September 21, 1949
Enlisted Personnel: DISCHARGE—EXPIRATION OF ENLISTMENT OR REQUIRED SERVICE AND GENERAL PROVISIONS

5.2.5.2 AFR 39-10, October 27, 1953
Enlisted Personnel: DISCHARGE—EXPIRATION OF ENLISTMENT OR REQUIRED SERVICE AND GENERAL PROVISIONS
supersedes AFR 39-10, September 21, 1949 and AFL 39-12, June 5, 1951

5.2.5.3 AFR 39-10, April 14, 1959
Enlisted Personnel: EXPIRATION OF ENLISTMENT FOR REQUIRED SERVICE AND GENERAL PROVISIONS
supersedes AFR 39-10, October 27, 1953

5.2.5.4 AFM 39-10, August 22, 1966
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE, FOR THE CONVENIENCE OF THE GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
supersedes AFR 39-10, AFR 39-11, AFR 39-12, and AFR 39-15, April 14, 1959; AFR 39-14, March 1, 1960

5.2.5.5 AFM 39-10, October 20, 1970
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
supersedes AFM 39-10, August 22, 1966

5.2.5.6 AFM 39-10, May 18, 1972
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
supersedes AFM 39-10, October 20, 1970

5.2.5.7 AFR 39-10, January 3, 1977
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE, FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
supersedes AFM 39-10, May 18, 1972

• P.5/37R, 1:

See Chilcott v. Orr, 747 F.2d 29 (1st Cir. 1984) for a discussion of the requirements for hearings for discharges under AFR 39-10. This case also holds that AFR 39-10, ¶¶ 6-53 and 6-54, pertaining to timeliness of Air Force discharge actions following a civilian conviction, is not applicable where the discharge is based on the facts underlying civilian arrest, where there was no conviction.

5.2.5.8 AFM 39-12, September 1, 1966
Enlisted Personnel: SEPARATION FOR UNSUITABILITY, [UNFITNESS OR] MISCONDUCT; PERSONAL ABUSE OF DRUG; RESIGNATIONS OR REQUESTS FOR DISCHARGE FOR THE GOOD OF THE SERVICE; AND PROCEDURES FOR THE REHABILITATION PROGRAM
supersedes AFR 39-3, August 18, 1964; AFR 39-18, March 3, 1961; AFR 35-66 (in part), 39-15, 39-16, 39-17, 39-21, 39-22, and 39-23, March 17, 1959.

5.2.5.9 AFR 39-10, October 1984
Enlisted Personnel: ADMINISTRATIVE SEPARATION OF AIRMEN

5.2.5.10 AFR 39-10, 1988
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE, FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP

5.3 Standards for an Honorable Discharge at Expiration of Term of Service

5.3.1 Introduction

5.3.2 Army

Effective July 4, 1984: HD unless ELS warranted. AR 635-200, ¶ 3D7(a)(1).

5.3.3 Navy

5.3.4 Marine Corps

5.3.5 Air Force

CHAPTER 6
Intake and Obtaining Records

A. Overview

There have not been any substantial changes in the way one obtains records and conducts case intake. It must be noted, however, that the usefulness of many of the suggested questions and areas of exploration that relate to war time experiences are less significant today.

B. Chapter Supplement

1. The two to four week time period for receiving military records from the National Personnel Records Center (NPRC), which is referred to widely in this chapter, is now longer—from four to eight weeks is now typical. It is not unusual for it to take as long as ten weeks.

2. Note new section 6.6.3.4 on obtaining records of service in Vietnam.

C. Section Supplement

6.1 Introduction

• P.6/1L, n.1:

The ADRB SOP has been withdrawn. The directive in the SOP that "[i]n cases where there is any doubt as to whether the applicant's discharge should be upgraded, the vote should be resolved in favor of the applicant," has apparently not survived the SOP's demise.

6.2 Initial Client Interview

6.3 Intake Considerations

a. P. 6/2L, n.3:

(1) The CETA program is no longer in existence.
(2) There are now 196 Veterans Outreach Centers ("Vet Centers").
(3) The NVLSP now provides a referral service.
(4) The functions of NVLC have largely been taken over by NVLSP.[1]

b. P. 6/2L, 2nd •:

In the past, the Boards for Correction of Military Records (BCMRs) always addressed the merits of a case, even if brought outside the three year statute of limitations. If the Board found the merits compelling, it would waive the three year limit "in the interest of justice." If, however, the Board did not find the merits compelling, it would usually address them in its decision but also state that the case was being denied based on the statute of limitations. Some boards are now, however, denying cases based solely on the statute of limitations without addressing the merits in their written decision.[2]

c. P. 6/2R, n.6:

Care must be taken when filing simultaneously at the VA and a military board. Both agencies will be trying to get the veteran's records from the records center and confusion may ensue. It is advisable to take steps to ensure that the agency where you want the case to be adjudicated first (usually the military) gets the records first. This can be accomplished by filing with one agency slightly before the other, contacting both agencies and the records center, and trying to coordinate the filings.[3]

6.4 Obtaining the Veteran's Military and Personal History

6.5 Completing the Necessary Forms

a. P.6/3L:

Note that footnote 7e applies to the entire list in this section, not just the last •.

b. P.6/3L, 7th •:

A VA Form 23-22 should be used if the representative is an accredited service organization representative.

6.6 Obtaining Necessary Military Records

a. P. 6/3L, n.8:

(1) If a deadline for application to a board is approaching, the application should, of course, be filed before obtaining the records.
(2) Requesting records from the NPRC at the same time as applying to a board can cause confusion which can delay both getting of the records and the board application. One should be done distinctly before the other, unless some specific arrangement can be made with the NPRC or the board.
(3) 32 C.F.R. § 70.5(b)(9)(i) now provides that after a DRB application has been filed, copies of the military records may be requested without the applicant losing his or her place in line for consideration by the Board. Requesting records after applying is, however, discouraged on the grounds that the DRBs do not have copying facilities and the records must be sent elsewhere for copying. Thus, if the records are requested too late in the process, there may be a delay in consideration of the applicant's case. DRB personnel are not always aware that the agency is obligated to provide copies

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[1] *See* Supp., Ch. 1, Chapter Supplement "1."

[2] *See also* Supp. § 9.4.3.

[3] *See also* Supp. § 6.6(a), *infra.*

of the records and may, at first, be reluctant to arrange for their reproduction.

As a practical matter, it is usually possible to get copies of small numbers of pages of records from the DRB if one can go to their offices in Northern Virginia and identify in the file which documents are desired.

b. P.6/3R, n.9, line 5:

The cite to 38 C.F.R. § 26 is incorrect. It should be to 38 C.F.R. § 1.526(b). Also, see VA Manual, MP1, Part II, Ch. 21.

c. P.6/3R, n.10:

See also § 9.2.10.4.

6.6.1 Official Service Records

a. P.6/3R, n.12:

Records available from the NPRC include individual personnel and medical records; organization, unit and command-type reports of personnel actions (Navy and Coast Guard include ships and station files); clinicals, x-rays and other files pertaining to medical treatment at various medical facilities; pay records; historical files; and miscellaneous file groups. NPRC also maintains records that are not limited to any particular branch of the military. It is also possible to obtain the addresses and telephone numbers of federal records centers (including those for selective service records) and other records offices.

The NPRC publishes a *Directory of Military Personnel and Related Records.* It can be obtained from:

National Archives and Records Administration
National Personnel Records Center
(Military Personnel Records)
9700 Page Boulevard
St. Louis, MO 63132-5100

b. P.6/4L, n.14:

As records requests are now taking from six to ten weeks, it is more appropriate to make a second request after eight to ten weeks have passed.

The NPRC contact telephone numbers are:

Army:	314-263-7261
Navy, Marine, Coast Guard:	314-263-7141
Air Force:	314-263-7243

c. P.6/4L, ¶ 2:

The NPRC now sends complete copies of the OMPF, without charge, as a matter of routine. The NPRC claims that if the request is made under the Freedom of Information Act (FOIA), and not just the Privacy Act (PA), it takes extra time for processing. Nevertheless, making the request under both the FOIA and the PA does not seem to cause much delay. If, however, there is a rush to get the records, it may be better to omit the reference to FOIA. If FOIA is not mentioned in an initial request, and a problem develops in obtaining the records, a follow-up request under FOIA/PA should be made. This will ensure that if any dispute arises, the requester will be fully protected under the provisions of all applicable laws.

d. P.6/4L, ¶ 3:

The NPRC still provides paper copies of Navy service records. If, however, the former sailor is still in reserve status, and the records are being held at the USN Center in New Orleans, the records will be provided on microfiche. The Center, will, however, provide an inexpensive hand-held microfiche reader free of charge.

6.6.2 Medical Records

a. P.6/4L, ¶ 4, Sentence 1:

This sentence should read: "Sometimes, the only medical record produced by a request on the SF 180 for 'complete service and medical records' is the report of the final separation physical examination."

b. P.6/4R, ¶ 1:

The detailed information which is described as "necessary" in this paragraph, does make obtaining the medical records more likely. These medical records can, however, often be obtained without this level of specificity as to time and place of their creation (name of hospital visited, date of treatment, etc.). The more detail, the better: but if the information would be useful, even a vague request is worth trying.

c. P.6/4R, ¶ 2:

Recently the NPRC obtained magnetic tapes which contain information on admissions to Army hospitals from 1942 to 1945 and 1950 to 1954. If such a hospital admission is relevant, this data should be specifically requested with as much information as possible to assist the NPRC in locating the records.

6.6.3 Other Military Records

6.6.3.1 Court-Martial Records

6.6.3.2 Investigative Records

• P.6/4, n.18:

Army CID records can be obtained with a SF 180 by addressing a request to the Office of the Staff Judge Advocate at the Army Criminal Investigation Command:

DA USACIC
5611 Columbia Pike
Falls Church, VA 22041

The request should provide as much information as possible concerning the investigation. This facilitates the Army's search for the records.

6.6.3.3 Miscellaneous Military Records

• P.6/5L, ¶ 2:

See OpJAGAF 1983/19, 18 March 1983 (PSC box numbers do not fall under the exemption for clear unwarranted invasion of personal privacy).

6.6.3.4 Vietnam Records

Records of events occurring in Vietnam can be obtained from the Army and Joint Services Environmental Support Group (ESG). The ESG has its origins as the DoD agency which collected data on military herbicide spray operations in Vietnam. It now principally uses its data base to provide military unit records and research in support of veterans claims for Veterans Administration benefits. ESG will, however, also provide records and research in response to requests in discharge upgrade cases.[4]

[4] Although the ESG will provide research and records, they may require the veteran to pay for copies of any document provided. Ask for a fee waiver.

The types of records available from ESG (in conjunction with the National Records Center in Suitland, Maryland) include daily journals, after action reports, and "lessons learned" reports of most units which served in Vietnam—often down to the company level. The records can often confirm such incidents as the deaths of individuals from particular units, engagements with enemy forces, non-combat accidents which resulted in deaths or injuries, enemy bombardments, and the loss of aircraft and vehicles. Virtually any event, however, is potentially verifiable by the ESG.

The ESG prefers to receive requests for records and research from a veteran's representative rather than directly from the veteran. All requests should be in writing with an indication of any existing deadlines for the research. Great care should be taken to provide as many details as possible of the events sought to be confirmed, including the military units involved, exact dates and locations of the events. ESG's records are first organized by units, then in chronological order.

If there is any question about how to phrase a request, or as to the sufficiency of the information in the request, the ESG urges that the veteran's representative call to discuss these kinds of problems.

The address and telephone number of the ESG are:

Army and Joint Services
Environmental Support Group
(JDPP-ESG)
1730 K Street, N.W.
Suite 210
Washington, D.C. 20006-3868
202-653-1828

If the veteran served in the Marine Corps, write "Attention: Marine Corps" on the envelope.

6.6.4 Other Nonmilitary Records

P. 6/5L, new ¶:

Selective Service records can be obtained from SSS, 1023 31st St., N.W., Washington, D.C. 20435.

6.7 Locating Military Personnel or Veterans

• P.6/5R, 1:

Note that some information which might be useful for locating or contacting a servicemember can be obtained through the Freedom of Information Act. See OpJAGAF 1983/19, 18 March 1983 (PSC box numbers do not fall under the exemption for clear unwarranted invasion of personal privacy); OpJAGAF 1983/42, 18 May 1983 (Future duty assignment location normally releasable but place, date, and time of port call is personal data, subject to exemption according to balancing test which weighs public interest in disclosure).

Lt. Col. Richard S. Johnson has recently published a directory entitled *How to Locate Anyone Who Is or Has Been in the Military: A Guide to Locating Present, Former and Retired Members of the Armed Forces, Reserves and National Guard,* which is a newly revised and updated version of the locator he first published in 1988.

As the author explains in his introduction, the purpose of the book is to provide the reader with information on how to locate present, former, and retired members of the armed forces, reserves, and National Guard. Though the book identifies the major service-related sources of information and lists all of the uniformed services facilities in the United States (as well as military post office numbers for military installations abroad), the author also cites many other resources which should not be overlooked, including federal agencies (for veterans or military retirees employed by the Federal Civil Service), local government records, Post Office services, state vital statistics offices (for records of births, marriages, divorces, and deaths), and motor vehicle registration bureaus.

A secondary purpose of the book, in the author's words, is "to help [the reader] locate former comrades. . . ." Advocates whose clients need to contact others who served with them who can supply or verify information about events which occurred during service may find the author's lists of veterans organizations and military service associations particularly useful.

The cost of this directory is $15.00, including postage and handling. Orders may be addressed to Military Information Enterprises, Post Office Box 340081, Fort Sam Houston, Texas 78234.

6.8 Initial Interview Checklist

a. P. 6/5R, 1st •:

A 23-22 should be obtained if the representative is an accredited service organization representative.

b. P. 6/5R, 2nd •:

While it is generally better to request records before filing a 293 or 149 application form, if a deadline is imminent, the application should be filed immediately.

c. P. 6/5R, 9th •:

Four weeks is not currently enough time to allow for review of military records due to the time it now takes to get the records. Six to ten weeks is presently a more reasonable estimate.

Appendix 6A

Discharge Upgrade Questionnaire

P. 6A/1—[See new questionnaire on page 6S/5]

Appendix 6B

Personal Statement Guideline

Appendix 6C

Sample Letter Requesting Character Statement

Appendix 6D

Retainer Privacy Act Waiver

Appendix 6E

Sample Forms

a. P. 6E/1—[See new Form 180 at page 6S/11]

Before completing the 180 with the FOIA/PA notation, the factors discussed at Supp. § 6.6.1 above should be considered.

b. P. 6E/3—[See new Form 293 at page 6S/13]

c. P. 6E/5—[See new Form 149 at page 6S/17]

d. P .6E/5—[See new Form 70-3288 at page 6S/19]

e. P. 6E/5—[See new Form 21-526 at page 6S/20]

Appendix 6F

Case Processing Checklist

Appendix 6G

Case Monitoring and Control Mechanism

• P. 6G/1:

Legal Services Corporation requirements have changed significantly in recent years and the control number described for the Case Log may no longer be sufficient for LSC-funded offices.

Appendix 6H

Obtaining Court-Martial Records

Army (32 C.F.R. Part 518, App. B, ¶ 2.b.5):

Legal Records. Submit requests involving records of trial by court-martial as follows:

(1) Requests for records of general courts-martial and those special courts-martial in which a bad conduct discharge has been approved by the convening authority. Send the request to the staff judge advocate of the command with jurisdiction over the case, if the case has not yet been forwarded for appellate review. Send requests for cases already forwarded for appellate review, including old cases, to the US Army Legal Service Agency, JALS-CC, Nassif Building, Falls Church, VA 22041 or (202) 756-1888.

(2) The records of special courts-martial that do not involve bad conduct discharge. These records are kept for ten years after completion of the case. Send requests as follows:

(a) For up to three years after completion of the case, to the staff judge advocate of the headquarters where the case was reviewed.

(b) From three to ten years after completion of the case, to the National Personnel Records Center (Military Records), 9700 Page Boulevard, St. Louis, MO 63132.

(c) Over ten years after completion of the case—after ten years, the only evidence of a special court-martial conviction is the special court-martial order maintained in the person's permanent records.

(3) The locally maintained records of summary courts-martial are retired three years after action of the supervisory authority. Until that time, send requests for such records to the staff judge advocate of the headquarters where the case was reviewed. After ten years, the only evidence of a summary court-martial conviction is the summary court-martial order in the person's permanent records.

If you are having difficulty locating courts-martial records contact the Judge Advocate General, HQDA (DAJA-CL), Washington, D.C. 20310. The telephone number is 202-695-1891.

Navy/Marine Corps (32 C.F.R. § 701.31(e)):

Courts-Martial Records. (1) Send requests for records of trial by general courts-martial, or special courts-martial which resulted in a bad conduct discharge, or involving commissioned officers to the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332.

(2) Send requests for records of trial by summary courts-martial or special courts-martial not involving a bad conduct discharge to the officer having supervisory authority in the review process.

If you are having difficulty locating courts-martial records, contact the Chief of Naval Operations, (Code 09B30), Pentagon, Washington, D.C. 20350-2000 or the Commandant of the Marine Corps, HQMC, Navy Department, Washington, D.C. 20380, as appropriate.[5]

Air Force (Current cite is: 32 C.F.R. § 806.18)

Appendix 6I

Obtaining Investigative Records

Army (32 C.F.R. Part 518, App. B, ¶ 2.b.9):

Criminal Investigation files. Send requests involving criminal investigation files to the Commander, US Army Criminal Investigation Command, ATTN: CIJA, 5611 Columbia Pike, Falls Church, VA 22041. (Telephone (703) 756-2266.) Only the Commanding General, USACIDC, can release any CIDC originated criminal investigation file.

Navy/Marine Corps (32 C.F.R. § 701.31(g)):

Investigative records. (1) Send requests for NIS investigatory records and related matters to the Commander, Naval Security and Investigative Command, Washington, D.C. 20388.

(2) Send requests for JAG Manual investigative reports to the Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA 22332.

(3) Send requests for mishap investigative reports to the Commander, Naval Safety Center, Naval Air Station, Norfolk, VA 23511.

If you are having difficulty locating investigative records, contact the Chief of Naval Operations, (Code 09B30), Pentagon, Washington, D.C. 20350-2000 or the Commandant of the Marine Corps, HQMC, Navy Department, Washington, D.C. 20380, as appropriate.[6]

Air Force (32 C.F.R §§ 806.16, 806.17):

§ 806.16 Submitting FOIA requests. Requests must be in writing, giving such information as is reasonably required to identify and locate records. To speed up processing, requesters should address their requests as shown in § 806.17 and § 806.18.[7] Unless otherwise shown in § 806.17 and § 806.18, requesters should use the office symbol DADF when addressing correspondence about their request for records to any Air Force activity. The symbol DADF is the standard Air Force-wide functional address symbol used to identify all forms of communication about requests for records under the Freedom of Information Act. (The DADF symbol must not be used on regular correspondence.)

§ 806.17 Where to send FOIA requests. Records of investigation compiled by the Air Force OSI: HQ AFOSI/DADF, Bolling A.F.B., D.C. 20332. Records of personnel security investigations: Defense Investigative Service, Ass't for Information, 1900 Half Street, N.W., Washington, D.C. 20324. Records where the location is not known: 1947 ASG/DADF, Washington D.C. 20330.

[5] 32 C.F.R. § 701.31.

[6] 32 C.F.R. § 701.31.

[7] *See* Appendix H in MDU.

NATIONAL VETERANS LEGAL SERVICES PROJECT

NVLSP

2001 S STREET NW
SUITE 610
WASHINGTON DC 20009-1125
TEL (202) 265-8305
FAX (202) 328-0063

NVLSP DISCHARGE UPGRADE QUESTIONNAIRE

This questionnaire is designed to assist a service representative, attorney or paralegal in deciding whether (s)he can help you upgrade your discharge.

Try to answer as many questions as you can. Many of the questions will not be applicable to you. Put "N/A" if it is not applicable. Put "?" if you do not remember. Do not worry if you cannot remember many details. Many answers will be in your military records which we will obtain. In addition to carefully completing this questionnaire, please send us copies of:

1. your DD-214 separation document,
2. any documents or correspondence you may h ave pertaining to your military service and your discharge, and
3. any additional information or documentation which will aid us in evaluating your case.

If you need additional space to answer any question, write on the back of the page. Please print all information legibly.

THIS INFORMATION WILL BE KEPT CONFIDENTIAL

6S/5

NVLSP DISCHARGE UPGRADE QUESTIONNAIRE

Date completing questionnaire: _____

A. PERSONAL

1. Full Name:

_____

a. If you used another name in service, indicate that name:

_____

2. Current Address:

_____

_____

_____

3. Telephone Numbers:

a. Home: (___) _____

b. Work: (___) _____

c. Other: If possible, specify a person and a number where messages can be left for you (for example: "Sister's phone, (xxx) xxx-xxxx):

(___) _____

d. Other: If possible, specify the name and address of someone who will always know where you are:

_____

_____

_____

4. Former Branch of Service: _____
5. Service Number: _____
6. Social Security Number: _____
7. Date and Place of Birth: _____

8. Dates of Service:

a. Entry Date _____

b. Separation Date _____

9. Where did you serve your active duty?

_____

_____

10. Indicate Type of Discharge:

____ Honorable

____ General (Honorable Conditions)

____ Undesirable (Under other than Honorable Conditions)

____ Dishonorable (Dismissal if a former officer)

____ Clemency (Under 1974-75 Clemency Program)

B. PROCEDURAL STATUS

****

Questions 1, 2 and 3, below, refer to recently filed applications which are currently pending before a military board.

****

1. Has a recently filed application for a discharge upgrade been sent to the:

a. Discharge Review Board? Yes ____ No ____

b. Board for Correction of Military/ Naval Records? Yes ____ No ____

2. If you have filed an application, when did you file it?

_____

3. If you have filed an application, have you had a hearing scheduled? Yes ____ No ____

a. If yes, indicate the date of the hearing: _____

4. If you have recently filed a currently pending application, and if you have a copy of the application, please send a copy when you return this questionnaire.

****

Questions 5 and 6, below, refer to PAST hearings which you may have had, which are not currently pending before a board.

****

5. Have you ever previously applied to a Discharge Review Board for a discharge upgrade? Yes ____ No ____

a. If yes:

(1) Did you have a hearing? Yes ____ No ____

(2) Did you appear at the hearing? Yes ____ No ____

(3) Did you have counsel? Yes ____ No ____

(a) If you had counsel, who or what organization represented you? _____

(4) What was the result of the application for an upgrade?

Accepted _____ Partially Upgraded _____ Denied _____

6. Have you ever previously applied to a Board for Correction of Military/Naval Records? Yes ____ No ____

a. If yes:

(1) What correction(s) did you request the Board to make? (for example: recharacterization of discharge)

_____

_____

(2) Did you have a hearing? Yes ____ No ____

(3) Did you appear at the hearing? Yes ____ No ____

(4) Did you have counsel? Yes ____ No ____

(a) If you had counsel, who or what organization represented you?

_____

(b) If you had counsel, did your counsel submit a brief or written statement on your behalf? Yes ____ No ____

(5) What was the result of the application for a correction of records?

Accepted _____ Partially Accepted _____ Denied _____

Explain further if necessary: _____

_____

_____

7. Have you ever applied to the US Department of Labor for an exemplary rehabilitation certificate?
Yes ____ No ____

a. If yes, were you successful? Yes ____ No ____

8. Did you apply for a Clemency Discharge under President Ford's Program for Vietnam Veterans (September 1974 - February 1975)?
Yes ____ No ____

9. Did you apply to President Carter's Special Discharge Review Program (April 1977 - October 1977)?
Yes ____ No ____

a. If Yes on questions 8 or 9 above, what was the result?

_____

_____

_____

10. You may only be represented by one counsel or service organization at a time. If you are presently being represented by another person or organization, please indicate who they are:

_____

_____

****

Please return the SF-180 "Request Pertaining to Military Records" that accompanied this questionnaire, signed, as soon as possible. Your military and medical records will provide important information necessary to evaluate your case.

If you have copies of your military and medical records, and prior board decisions if any, you can speed up our case evaluation process by sending copies of these documents to NVLSP. (Note: You must still return the SF-180.)

C. **BACKGROUND INFORMATION FOR ENLISTERS ONLY**

1. Did you enlist under any particular option or program?
Yes ____ No ____

2. Did the recruiter promise you anything? Yes ____ No ____

a. If yes, in writing? Yes ____ No ____

b. If yes, what where the promises or guarantees? _____

_____

_____

c. If yes, did the service carry out its promises?
Yes ____ No ____

Explain: _____

_____

d. If the service failed to carry out its promises, did you complain? Yes ____ No ____

(a) If you did complain, when did you complain and to whom?

_____

_____

_____

(2) If you did complain, what was the result? _____

_____

_____

3. Were you forced to enlist by anyone? (Examples: courts, police, parents, no job, pressure of the draft)
Yes ____ No ____

a. If yes, describe in detail events leading to your enlistment:

_____

_____

_____

4. Were you under 18 when you enlisted? Yes ____ No ____

a. If yes, did both of your living parents or guardian(s) sign for you? Yes ____ No ____

D. **BACKGROUND INFORMATION FOR DRAFTEES ONLY**

1. Before your induction, were you:

a. a student? Yes ____ No ____

b. an apprentice? Yes ____ No ____

c. a ministerial student or minister? Yes ____ No ____

d. a conscientious objector? Yes ____ No ____

2. Was any of your family missing, captured or killed due to military service? Yes ____ No ____

3. Was there any hardship in your family? Yes ____ No ____

4. If "yes" to any of the above, please give details: _____

_____

_____

5. Did you apply to your local board for deferment or exemption from the draft? Yes ____ No ____

a. If yes, when and what result: _____

_____

b. If you were turned down and given reasons, what were they?

_____

_____

E. **BACKGROUND INFORMATION FOR ENLISTEES AND DRAFTEES**

The following questions cover subject areas not likely to be found in your military records. Consider each question carefully. Put "N/A" for questions which are not applicable to your case.

1. Did you have any physical, mental or medical problems prior to you entry in the military? Yes ____ No ____

a. If yes, please explain: _____

_____

_____

2. Did you ever fail a military entry physical and take another one? Yes ____ No ____

a. If yes, please give details: _____

_____

_____

3. Did you have a drug or alcohol problem while in the military? Yes ____ No ____

a. If yes, explain if the problem caused your discharge: ____

_____

_____

_____

4. If you had drug or alcohol problems in service, did you participate in any treatment or amnesty program? Yes ____ No ____

a. If yes, explain: _____

_____

_____

5. Did you give any urine samples in service that detected drug use? Yes ____ No ____

6. Did you have any family or hardship problems while in the military? Yes ____ No ____

a. If yes, describe: _____

_____

_____

7. Did you see a psychiatrist while in the military? Yes ____ No ____

a. If yes, who, where and for what reason? _____

_____

8. Did you have any other medical problems while on active duty? Yes ____ No ____

a. If yes, describe, including their effect on your duty performance:

_____

_____

_____

b. If yes, at which military hospitals were you treated (give dates):

_____

_____

9. Did you ever have a medical profile? Yes ____ No ____

a. If yes, for what? _____

10. Do you think there is any reason you should have had a medical discharge? Yes ____ No ____

a. If yes, explain: _____

_____

_____

F. POST MILITARY ACTIVITIES

1. Since your discharge, have you had any additional schooling or training? Yes ____ No ____

a. If yes, please describe: _____

_____

_____

2. Have you had any arrests or convictions other than traffic violations since discharge? Yes ____ No ____

a. If yes, please describe: _____

_____

_____

3. Since you discharge, do you have any activities, awards, etc., that would reflect favorably on your character? Describe: _____

_____

_____

_____

4. Have you ever applied for Veterans Administration benefits? Yes ____ No ____

a. If yes, what happened: _____

_____

b. If you were denied benefits by the VA, when you were denied?

_____

(1) What reason did the VA give for denying you benefits? ___

_____

(2) Did you appeal your denial? Yes ____ No ____

When did you appeal your denial? _____

(3) Is your appeal pending? Yes ____ No ____

5. Did you have VA benefits denied after an upgrade by President Carter's Special Discharge Review Program? Yes ____ No ____

6. Have you ever applied for unemployment compensation since your discharge? Yes ____ No ____

a. If yes, what were the results: _____

_____

****

For the following questions, use the space provided, the back of the page and separate paper if necessary.

****

1. Please explain as specifically as possible your immediate reason for discharge (for example: extended AWOLs, drug use, etc.)

_____

_____

_____

_____

_____

_____

_____

_____

Appendix 6E

REQUEST PERTAINING TO MILITARY RECORDS

Please read instructions on the reverse. If more space is needed, use plain paper.

PRIVACY ACT OF 1974 COMPLIANCE INFORMATION. The following information is provided in accordance with 5 U.S.C. 552a(e)(3) and applies to this form. Authority for collection of the information is 44 U.S.C. 2907, 3101, and 3103, and E.O. 9397 of November 22, 1943. Disclosure of the information is voluntary. The principal purpose of the information is to assist the facility servicing the records in locating and verifying the correctness of the requested records or information to answer your inquiry. Routine uses of the information as established and published in accordance with 5 U.S.C.a(e)(4)(D) include the transfer of relevant information to appropriate Federal, State, local, or foreign agencies for use in civil, criminal, or regulatory investigations or prosecution. In addition, this form will be filed with the appropriate military records and may be transferred along with the record to another agency in accordance with the routine uses established by the agency which maintains the record. If the requested information is not provided, it may not be possible to service your inquiry.

SECTION I—INFORMATION NEEDED TO LOCATE 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. ACTIVE SERVICE, PAST AND PRESENT (For an effective records search, it is important that ALL service be shown below)

BRANCH OF SERVICE *(Also, show last organization, if known)*	DATES OF ACTIVE SERVICE		Check one		SERVICE NUMBER DURING THIS PERIOD
	DATE ENTERED	DATE RELEASED	OFFICER	ENLISTED	

6. RESERVE SERVICE, PAST OR PRESENT *If "none," check here* ▶ ☐

a. BRANCH OF SERVICE	b. DATES OF MEMBERSHIP		c. Check one		d. SERVICE NUMBER DURING THIS PERIOD
	FROM	TO	OFFICER	ENLISTED	
			☐	☐	

7. NATIONAL GUARD MEMBERSHIP *(Check one):* ☐ a. ARMY ☐ b. AIR FORCE ☐ c. NONE

d. STATE	e. ORGANIZATION	f. DATES OF MEMBERSHIP		g. Check one		h. SERVICE NUMBER DURING THIS PERIOD
		FROM	TO	OFFICER	ENLISTED	
				☐	☐	

8. IS SERVICE PERSON DECEASED ☐ YES ☐ NO *If "yes," enter date of death.*

9. IS (WAS) INDIVIDUAL A MILITARY RETIREE OR FLEET RESERVIST ☐ YES ☐ NO

SECTION II—REQUEST

1. EXPLAIN WHAT INFORMATION OR DOCUMENTS YOU NEED; OR, CHECK ITEM 2; OR, COMPLETE ITEM 3 _____

2. IF YOU ONLY NEED A STATEMENT OF SERVICE *check here* ☐

3. *LOST SEPARATION DOCUMENT REPLACEMENT REQUEST* *(Complete a or b, and c.)*

☐ a. REPORT OF SEPARATION *(DD Form 214 or equivalent)*	YEAR ISSUED	*This contains information normally needed to determine eligibility for benefits. It may be furnished only to the veteran, the surviving next of kin, or to a representative with veteran's signed release (item 5 of this form).*
☐ b. DISCHARGE CERTIFICATE	YEAR ISSUED	*This shows only the date and character at discharge. It is of little value in determining eligibility for benefits. It may be issued only to veterans discharged honorably or under honorable conditions; or, if deceased, to the surviving spouse.*

c. EXPLAIN HOW SEPARATION DOCUMENT WAS LOST

4. EXPLAIN PURPOSE FOR WHICH INFORMATION OR DOCUMENTS ARE NEEDED

6. REQUESTER

a. IDENTIFICATION *(check appropriate box)*

☐ Same person identified in Section I ☐ Surviving spouse

☐ Next of kin (relationship) _____

☐ Other (specify)

b. SIGNATURE *(see instruction 3 on reverse side)* | DATE OF REQUEST

5. RELEASE AUTHORIZATION, IF REQUIRED *(Read instruction 3 on reverse side)*

I hereby authorize release of the requested information/documents to the person indicated at right (item 7).

VETERAN SIGN HERE ▶ _____

(If signed by other than veteran show relationship to veteran.)

7. *Please type or print clearly* — COMPLETE RETURN ADDRESS

Name, number and street, city, State and ZIP code _____

TELEPHONE NO. *(include area code)* ▶

180-106 NSN 7540-00-142-9360 STANDARD FORM 180 (Rev. 7-86) Prescribed by NARA (36 CFR 1228.162(a))

Intake and Obtaining Records

INSTRUCTIONS

1. Information needed to locate records. Certain identifying information is necessary to determine the location of an individual's record of military service. Please give careful consideration to and answer each item on this form. If you do not have and cannot obtain the information for an item, show "NA," meaning the information is "not available." Include as much of the requested information as you can. This will help us to give you the best possible service.

2. Charges for service. A nominal fee is charged for certain types of service. In most instances service fees cannot be determined in advance. If your request involves a service fee you will be notified as soon as that determination is made.

3. Restrictions on release of information. Information from records of military personnel is released subject to restrictions imposed by the military departments consistent with the provisions of the Freedom of Information Act of 1967 (as amended in 1974) and the Privacy Act of 1974. A service person has access to almost any information contained in his own record. The next of kin, if the veteran is deceased, and Federal officers for official purposes, are authorized to receive information from a military service or medical record only as specified in the above cited Acts. Other requesters must have the release authorization, in item 5 of the form, signed by the veteran or, if deceased, by the next of kin. Employers and others needing proof of military service are expected to accept the information shown on documents issued by the Armed Forces at the time a service person is separated.

4. Location of military personnel records. The various categories of military personnel records are described in the chart below. For each category there is a code number which indicates the address at the bottom of the page to which this request should be sent. For each military service there is a note explaining approximately how long the records are held by the military service before they are transferred to the National Personnel Records Center, St. Louis. Please read these notes carefully and make sure you send your inquiry to the right address. Please note especially that the record is not sent to the National Personnel Records Center as long as the person retains any sort of reserve obligation, whether drilling or non-drilling.

(If the person has two or more periods of service within the same branch, send your request to the office having the record for the last period of service.)

5. Definitions for abbreviations used below:
NPRC—National Personnel Records Center
TDRL—Temporary Disability Retirement List
PERS—Personnel Records
MED—Medical Records

SERVICE	NOTE: (See paragraph 4 above.)	CATEGORY OF RECORDS — WHERE TO WRITE ADDRESS CODE		▼
AIR FORCE (USAF)	*Except for TDRL and general officers retired with pay, Air Force records are transferred to NPRC from Code 1, 90 days after separation and from Code 2, 150 days after separation.*	Active members (includes National Guard on active duty in the Air Force), TDRL, and general officers retired with pay.		1
		Reserve, retired reservist in nonpay status, current National Guard officers not on active duty in Air Force, and National Guard released from active duty in Air Force.		2
		Current National Guard enlisted not on active duty in Air Force.		13
		Discharged, deceased, and retired with pay.		14
COAST GUARD (USCG)	*Coast Guard officer and enlisted records are transferred to NPRC 7 months after separation.*	Active, reserve, and TDRL members.		3
		Discharged, deceased, and retired members *(see next item).*		14
		Officers separated before 1/1/29 and enlisted personnel separated before 1/1/15.		6
MARINE CORPS (USMC)	*Marine Corps records are transferred to NPRC between 6 and 9 months after separation.*	Active, TDRL, and Selected Marine Corps Reserve members.		4
		Individual Ready Reserve and Fleet Marine Corps Reserve members.		5
		Discharged, deceased, and retired members *(see next item).*		14
		Members separated before 1/1/1905.		6
ARMY (USA)	*Army records are transferred to NPRC as follows: Active Army and Individual Ready Reserve Control Groups: About 60 days after separation. U.S. Army Reserve Troop Unit personnel: About 120 to 180 days after separation.*	Reserve, living retired members, retired general officers, and active duty records of current National Guard members who performed service in the U.S. Army before 7/1/72.*		7
		Active officers (including National Guard on active duty in the U.S. Army).		8
		Active enlisted (including National Guard on active duty in the U.S. Army) and enlisted TDRL.		9
		Current National Guard officers not on active duty in the U.S. Army.		12
		Current National Guard enlisted not on active duty in the U.S. Army.		13
		Discharged and deceased members *(see next item).*		14
		Officers separated before 7/1/17 and enlisted separated before 11/1/12.		6
		Officers and warrant officers TDRL.		8
NAVY (USN)	*Navy records are transferred to NPRC 6 months after retirement or complete separation.*	Active members (including reservists on duty)—PERS and MED		10
		Discharged, deceased, retired (with and without pay) less than six months, TDRL, drilling and nondrilling reservists	PERS ONLY	10
			MED ONLY	11
		Discharged, deceased, retired (with and without pay) more than six months *(see next item)*—PERS & MED		14
		Officers separated before 1/1/03 and enlisted separated before 1/1/1886—PERS and MED		6

**Code 12 applies to active duty records of current National Guard officers who performed service in the U.S. Army after 6/30/72.*
Code 13 applies to active duty records of current National Guard enlisted members who performed service in the U.S. Army after 6/30/72.

ADDRESS LIST OF CUSTODIANS (BY CODE NUMBERS SHOWN ABOVE)—Where to write / send this form for each category of records

1	Air Force Manpower and Personnel Center Military Personnel Records Division Randolph AFB, TX 78150-6001	**5**	Marine Corps Reserve Support Center 10950 El Monte Overland Park, KS 66211-1408	**8**	USA MILPERCEN ATTN: DAPC-MSR 200 Stoval Street Alexandria, VA 22332-0400	**12**	Army National Guard Personnel Center Columbia Pike Office Building 5600 Columbia Pike Falls Church, VA 22041
2	Air Reserve Personnel Center Denver, CO 80280-5000	**6**	Military Archives Division National Archives and Records Administration Washington, DC 20408	**9**	Commander U.S. Army Enlisted Records and Evaluation Center Ft. Benjamin Harrison, IN 46249-5301	**13**	The Adjutant General *(of the appropriate State, DC, or Puerto Rico)*
3	Commandant U.S. Coast Guard Washington, DC 20593-0001	**7**	Commander U.S. Army Reserve Personnel Center ATTN: DARP-PAS 9700 Page Boulevard St. Louis, MO 63132-5200	**10**	Commander Naval Military Personnel Command ATTN: NMPC-036 Washington, DC 20370-5036	**14**	National Personnel Records Center (Military Personnel Records) 9700 Page Boulevard St. Louis, MO 63132
4	Commandant of the Marine Corps (Code MMRB-10) Headquarters, U.S. Marine Corps Washington, DC 20380-0001			**11**	Naval Reserve Personnel Center New Orleans, LA 70146-5000		

★U.S. Government Printing Office: 1989-241-638/05970

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

Form Approved
OMB No. 0704-0004
Expires Oct 31, 1990

Privacy Act Statement

AUTHORITY: 10 U.S.C. 1553, 3013(g), Executive Order 9397, 22 Nov 43 (SSN).

PRINCIPAL PURPOSES: To apply for a change in the type of discharge issued.

ROUTINE USES: Placed in applicant's file. Used in applicant's case to determine the relief sought and to compare facts presented with evidence on record.

DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the board.

REQUESTING COPIES OF MILITARY RECORDS

Prior to applying for discharge review, potential applicants or their designated representatives may obtain copies of their military personnel records by submitting a Standard Form (SF) 180, Request Pertaining to Military Records, to the National Personnel Records Center (NPRC), 9700 Page Boulevard, St. Louis, MO 63132-5200.

PLEASE READ ATTACHED INSTRUCTIONS BEFORE COMPLETING THIS FORM

1. DATA PERTAINING TO INDIVIDUAL (APPLICANT) TO BE REVIEWED

a. NAME *(Last, First, Middle Initial)*	c. SOCIAL SECURITY NUMBER
b. ADDRESS *(Street, City, State, ZIP Code)*	d. SERVICE NO. *(If different from SSN)*
	e. TELEPHONE NUMBER *(Include Area Code)*

f. BRANCH OF ARMED SERVICE *(X one)*		g. DISCHARGE RECEIVED: *(X one)*	
	(1) ARMY		(1) HONORABLE
	(2) NAVY		(2) GENERAL / UNDER HONORABLE CONDITIONS
	(3) AIR FORCE		(3) UNDESIRABLE / UNDER OTHER THAN HONORABLE CONDITIONS
	(4) MARINE CORPS		(4) BAD CONDUCT *(Special court martial only)*
	(5) COAST GUARD		(5) UNCHARACTERIZED
h. DATE OF DISCHARGE *(YYMMDD)*			(6) OTHER *(Explain)*

2. APPEAL FILED IN BEHALF OF INDIVIDUAL TO BE REVIEWED *(If the reviewee is deceased or incompetent, complete this section. Appropriate evidence must accompany this form.)*

a. RELATIONSHIP OF INDIVIDUAL SUBMITTING THIS APPLICATION TO APPLICANT *(X one)*

	(1) NEXT OF KIN		(2) SURVIVING SPOUSE		(3) LEGAL REPRESENTATIVE

b. NAME *(Last, First, Middle Initial)*

3. BOARD ACTION REQUESTED *(X as applicable)*

	a. CHANGE DISCHARGE TO HONORABLE
	b. CHANGE DISCHARGE TO GENERAL / UNDER HONORABLE CONDITIONS
	c. CHANGE REASON FOR DISCHARGE TO:

4. TYPE OF REVIEW REQUESTED *(X one)*

	a. I and/or *(counsel/representative)* wish to appear at a hearing at no expense to the Government before the Board in the Washington National Capital Region.
	b. I and/or *(counsel/representative)* wish to appear at a hearing at no expense to the Government before a Traveling Panel closest to *(Enter city and state)*
	c. Conduct a RECORD REVIEW of my discharge based on my military personnel file and any additional documentation submitted by me. I and/or *(counsel/representative)* will not appear before the Board.

5. I HAVE ARRANGED TO BE REPRESENTED BY AND AUTHORIZE THE RELEASE OF RECORDS TO *(Complete if applicable)*

a. NAME OF COUNSEL / REPRESENTATIVE *(Last, First, Middle Initial)*	b. ORGANIZATION
c. ADDRESS *(Street, City, State, ZIP Code)*	d. TELEPHONE NUMBER *(Include Area Code)*

6. WAIVER OF COUNSEL *(X if applicable)*

	I have read Item 6 of the instructions pertaining to the AVAILABILITY of counsel and elect NOT to be represented by counsel/representative *(leave Item 5 blank)*

DD Form 293, FEB 89 *Previous editions are obsolete.* 2550/041

7. SUPPORTING DOCUMENTS *(X as applicable) (Please print name and social security number on each document.)*	
	a. Will not be submitted. Please complete review based on available service records.
	b. Will be submitted within **60** days.
	c. Will be submitted within days.
	d. Are listed below and are attached to this application: ***(Continue on a plain sheet of paper if more space is needed.)***
(1) DOCUMENT 1:	
(2) DOCUMENT 2:	
(3) DOCUMENT 3:	

8. **ISSUES**. The Board will consider any issue submitted by you prior to closing the case for deliberation. The Board also will review the case to determine whether there are any issues which provide a basis for upgrading your discharge. However, the Board is not required to respond in writing to issues of concern to you unless those issues are listed or incorporated by specific reference below. Read the instructions carefully that pertain to block 8 prior to completing this part of the application. If you need more space, submit additional issues on an attachment.

ISSUE 1:	
ISSUE 2:	
ISSUE 3:	
ISSUE 4:	
	a. Mark this block if you have listed additional issues as an attachment to this application.
	b. I previously submitted an application on *(Enter date)* and I am completing this form in order to submit additional issues.
	c. The above issues supersede all previously submitted.

9. CERTIFICATION

I make the foregoing statements as part of my application with full knowledge of the penalties involved for willfully making a false statement. *(U.S.Code, Title 18, Section 1001, provides a penalty as follows: A maximum fine of $10,000 or maximum imprisonment of 5 years, or both)*

a. DATE *(Year, Month, Day)*	b. SIGNATURE

UPON COMPLETION, MAIL THIS APPLICATION TO APPLICABLE ADDRESS BELOW

ARMY	NAVY & MARINE CORPS	AIR FORCE	COAST GUARD
CO, USARCPAC 9700 Page Blvd St Louis, MO 63132-5200	NAVAL Discharge Review 801 No. Randolph St Arlington, VA 22203-1991	AFMPC/MPCDOA1 Randolph AFB, TX 78150-6001	Commandant (G-PE-1) U.S. Coast Guard Headq Washington, DC 20593-0001

Form 293 Reverse, FEB 89

INSTRUCTIONS FOR COMPLETION OF DD FORM 293

REQUESTING COPIES OF YOUR OFFICIAL MILITARY PERSONNEL FILE

Submission of a request for an applicant's military records (including a request pursuant to the Freedom of Information Act or Privacy Act) after the DD Form 293 has been submitted shall automatically result in the suspension of processing of the application for discharge review until the requested records are sent to an appropriate location for copying, are copied, and are returned to the possession of the headquarters of the Discharge Review Board. Processing of the application shall then be resumed at whatever stage of the discharge review process is practicable.

Applicants are strongly encouraged to submit any request for their military records prior to applying for discharge review rather than after submitting in a DD Form 293 in order to avoid substantial delays in processing of applications and scheduling of reviews. Applicants and their counsel also may examine their military personnel records at the site of their scheduled review prior to the review. The Board shall notify applicants of the date of availability of the records for examination in their standard scheduling information.

ITEM 1a. Use the name which you served under while in the Armed Forces. If your name has since changed, then also include your current name after adding the abbreviation "AKA". If the former member is deceased or incompetent, see Item 2.

ITEM 1b. Indicate the address to be used for all future correspondence regarding this application. If you change this address while this application is pending, you must notify the Discharge Review Board immediately. Failure to attend a hearing as a result of an unreported change in address may result in waiver of your right to a hearing.

ITEMS 1c, 1d, 1e, 1f. Self explanatory.

ITEM 1g. If you received more than one discharge, the information in this item should refer to the discharge that you want changed.

ITEM 1h. Self explanatory.

ITEM 2a. If the former member is deceased or incompetent, the application may be submitted by the next of kin, a surviving spouse or a legal representative. Legal proof of death or incompetency and satisfactory evidence of the relationship to the former member must accompany this application.

ITEM 2b. Name of person submitting application on behalf of the former member should be entered.

ITEM 3. Mark either Item a or b but not both. If you mark Item c you must list the specific reason for discharge that you believe to be appropriate. If you do not mark any of these items, the Board will presume you want to change discharge to Honorable. If you do not mark Item c the Board will presume that you do not want a change in reason for discharge.

If you were separated on or after 1 Oct 82 while in an entry level status (see DoD Directive 1332.14, Encl 3, Part 1-F) with an under other than honorable conditions discharge and less than 180 days of active service, you can request a change to "Entry Level Separation." To do this, write in block 7 "Change to Entry Level Separation."

ITEM 4. TYPE OF REVIEW REQUESTED

A. Discharge Review is conducted in two basic ways: (1) Hearing or (2) Records Review.

1. Hearing. You may appear personally (alone or assisted by a representative/counsel) before the Board in the Washington National Capital Region or before a Traveling Panel in selected locations throughout the U.S. Former members of the Army who do not reside close to the location of a Traveling Panel may be provided the opportunity for presentation by a video-taped hearing which upon completion will be presented to the Board in the Washington National Capital Region. Detailed notification and/or scheduling information for all personal appearances will be provided after the application has been processed. In addition, without appearing yourself, you may have your case presented in the Region or before a Traveling Panel by a representative/counsel of your choice.

2. Records Review. Without you and/or your counsel appearing, you may have the Board conduct a Review based solely on military records and any additional documentation that you provide.

B. Applicants participating in a personal appearance or hearing examination may make sworn or unsworn statements, introduce witnesses, documents, or other information on their behalf. Department of Defense is not responsible for, nor will it pay for, any costs incurred by the applicant. Applicants may make oral or written arguments personally and/or through representative/ counsel. Applicants and witnesses who present sworn or unsworn statements may be questioned by the Board.

C. FAILURE TO APPEAR AT A HEARING OR RESPOND TO A SCHEDULING NOTICE. If you do not appear at a scheduled hearing or respond as required to a scheduling notice, and you did not make a prior, timely request for a continuance, postponement, or withdrawal of the application, you will forfeit the right to a personal appearance and the Board shall complete its review of the discharge based upon the evidence of record.

ITEM 5. Omit if you do not have a representative/counsel. If you later obtain the services of either, inform the Board immediately.

(Detached from DD Form 293, FEB 89)

ITEM 6. With regard to reviews involving a representative/counsel, the military services do not provide counsel representation or evidence for you, nor do they pay the cost of such representation under any circumstance. The following organizations regularly furnish representation at no charge to you. Representatives may or may not be lawyers.

1. American Red Cross
2. American Legion
3. Disabled American Veterans
4. Jewish War Veterans of the USA
5. Veterans of Foreign Wars

In addition, there are other organizations willing to assist you in completing this application and to provide representation at no cost. It is to your advantage to coordinate with your counsel prior to submitting this application. This will insure that your counsel is able to appear at the location you listed in ITEM 4. Please note that some of the organizations listed above only represent applicants who appear before the Board in the Washington National Capital Region. Contact your local veterans affairs office, Veterans Administration Office or veterans service organization for further information.

ITEM 7. Evidence not in your official records should be submitted to the Board before the review date. It is to your advantage to submit such documentation with this application or within the following 60 days. This also applies to legal briefs or counsel submissions. However, you have the right to submit evidence until the time the DRB closes the Review Process for deliberation. Documents that are of the most benefit are those which substantiate or relate directly to your Issues (see ITEM 8). Other documents that may be helpful are character references, educational achievements, exemplary post-service conduct and medical reports. You should add your name and social security number to each document submitted. The Board will consider all documents submitted in your behalf, but will respond in writing only to those issues set forth in accordance with the instructions for ITEM 8.

ITEM 8. "Issues" are the reasons why you think your discharge should be changed. You are not required to submit any issues with your application. However, if you want the Board to respond in writing to the issues of concern, you must list your issues in accordance with those instructions and regulations governing the Board.

Issues must be stated clearly and specifically. Your issue should address the reasons why you believe that the discharge received was improper or inequitable. It is important to focus on matters that occurred while you served in the Armed Forces.

The following examples demonstrate one way in which issues may be stated. The example issues do not indicate, in any way, the only type of issue that should be submitted to the Board.

EXAMPLE 1. My Undesirable Discharge was inequitable because it was based on one isolated incident in 28 months of service with no other adverse action.

EXAMPLE 2. The Undesirable Discharge is improper because the applicant's preservice civilian conviction, properly listed on his enlistment documents, was used in the discharge proceedings for frequent involvement.

List Issues. In ITEM 8 list each of your issues that you want the Board to address. There is no limit to the number of issues that you may submit. If you need additional space, continue on a plain sheet of paper and attach it to this application.

NOTE: If an issue is not listed in ITEM 8, it may result in the Board not addressing the issue even if the issue is discussed in a legal brief or other written submissions or at the hearing. Changes or additions to the list may be made on the DD Form 293 anytime before the DRB closes the Review Process for deliberation. It is recommended that all issues be submitted within 60 days of the application submission.

Please be sure that your issues are consistent with the Board Action Requested (ITEM 3). If there is a conflict between what you say in your issues and what you requested in ITEM 3, the Board will respond to your issue in the context of the action requested in ITEM 3. For example, if you request a General Discharge in ITEM 3 but your issue in ITEM 8 indicated you want an Honorable Discharge, the Board will respond to the issue in terms of your request for a General Discharge. Therefore, if you are submitting issues for the purpose of obtaining an Honorable Discharge, be sure to mark the box for an Honorable Discharge in ITEM 3.

Incorporation by Reference. Issues that are listed on a legal brief or other written submissions may be incorporated by reference in ITEM 8. The reference must be specific enough for the Board to clearly identify the matter being submitted as an issue. At a minimum, it shall identify the page, paragraph, and sentence incorporated.

EXAMPLE: ISSUE 1. Use brief, page 2, paragraph 1, sentences one and two.

Applicants should be as specific as possible with all references so the Board can clearly distinguish the scope of the issue. Because it is to your benefit to bring such issues to the Board's attention as early as possible in the review, if you submit a brief, you are strongly urged to set forth all such issues as a separate item at the beginning of the brief.

ITEM 9. Self explanatory.

(Detached from DD Form 293, FEB 89)

*U.S. Government Printing Office: 1989-241-638/05812

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 application.)

Form Approved
OMB No. 0704-0003
Expires Dec 31, 1988

PRIVACY ACT STATEMENT

AUTHORITY: Title 10, U.S. Code 1552, Executive Order 9397, November 22, 1943.
PRINCIPAL PURPOSE: To apply for correction of a military record.
ROUTINE USES: To docket a case. Reviewed by board members to determine relief sought. To determine qualification to apply to board. To compare facts present with evidence in the record.
DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the Board.

1. APPLICANT DATA

a. BRANCH OF SERVICE *(X one)*
☐ (1) ARMY ☐ (2) NAVY ☐ (3) AIR FORCE ☐ (4) MARINE CORPS ☐ (5) COAST GUARD

b. NAME *(Last, First, Middle Initial) (Please print)*	c. PRESENT PAYGRADE	d. SERVICE NUMBER *(If applicable)*	e. SOCIAL SECURITY NUMBER

2. TYPE OF DISCHARGE *(If by court-martial, state type of court.)*	**3. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES** *(Active duty, Retired, Reserve, etc.)*	**4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY**

5. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD	**6. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C.** *(No expense to the Government)* *(X one)* ☐ a. YES ☐ b. NO

7. COUNSEL *(If any)*

a. NAME *(Last, First, Middle Initial)*	b. ADDRESS *(Street, City, State and Zip Code)*

8. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE:

9. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS:

10. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: *(If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)*

11. ALLEGED ERROR OR INJUSTICE DATA

a. DATE OF DISCOVERY

b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION.

12. APPLICANT MUST SIGN IN ITEM 16. IF THE RECORD IN QUESTION IS THAT OF A DECEASED OR INCOMPETENT PERSON, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY OTHER THAN APPLICANT, INDICATE RELATIONSHIP OR STATUS BY MARKING APPROPRIATE BOX.
☐ a. SPOUSE ☐ b. WIDOW ☐ c. WIDOWER ☐ d. NEXT OF KIN ☐ e. LEGAL REP ☐ f. OTHER *(Specify)*

13. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. *(U.S. Code, Title 18, Sec. 287, 1001, provides a penalty of not more than $10,000 fine or not more than 5 years imprisonment or both.)*

14. COMPLETE CURRENT ADDRESS, INCLUDING ZIP CODE *(Applicant should forward notification of all changes of address.)*	**DOCUMENT NUMBER** *(Do not write in this space.)*

15. DATE SIGNED	**16. SIGNATURE** *(Applicant must sign here.)*

DD Form 149, FEB 86 *Previous editions are obsolete.*

INSTRUCTIONS

(All data should be typed or printed)

1. For detailed information see:

   Air Force Regulation 31-3

   Army Regulation 15-185

   Coast Guard, Code of Federal Regulations Title 33, Part 52

   Navy, NAVEXOS P-473, as revised

2. Submit only original of this form.

3. Complete all items. If the question is not applicable, mark "None."

4. If space is insufficient, use "Remarks" or attach additional sheet.

5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.

6. List all attachments and enclosures.

7. ITEMS 6 AND 7. Personal appearance of you and your witnesses or representation by counsel is not required to insure full and impartial consideration of applications. Appearances and representations are permitted, at no expense to the Government, when a hearing is authorized.

8. ITEM 8. State the specific correction of record desired.

9. ITEM 9. In order to justify correction of a military record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.

10. ITEM 11. 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY	NAVY AND MARINE CORPS	COAST GUARD	AIR FORCE
(For Active Duty Personnel) Army Board for Correction of Military Records Department of the Army Washington, DC 20310-1803 **(For Other than Active Duty Personnel)** CO, USARPERCEN 9700 Page Blvd. St. Louis, MO 63132-5260	Board for Correction of Naval Records Department of the Navy Washington, DC 20370-5100	Chairman Board for Correction of Military Records (C-60) Department of Transportation 400 7th St., SW Washington, DC 20590	Board for Correction of Air Force Records AFMPC/DPMDOA1 Randolph AFB, TX 78150-6001

17. REMARKS *(Applicant has exhausted all administrative channels in seeking this correction and has been counseled by a representative of his/her servicing military personnel office. (Applicable only to active duty and reserve personnel.))*

DD Form 149 Reverse, FEB 86

☆ U.S.G.P.O.: 1987 -181-822/62978

Form Approved
OMB No. 2900-0028

Veterans Administration

REQUEST FOR AND CONSENT TO RELEASE OF INFORMATION FROM CLAIMANT'S RECORDS

NOTE: The execution of this form does not authorize the release of information other than that specifically described below. The information requested on this form is solicited under Title 38, United States Code, and will authorize release of the information you specify. The information may also be disclosed outside the VA as permitted by law to include disclosures as stated in the "Notices of Systems of VA Records" published in the Federal Register in accordance with the Privacy Act of 1974. Disclosure is voluntary. However, if the information is not furnished, we may not be able to comply with your request.

TO	Veterans Administration	NAME OF VETERAN *(Type or print)*	
		VA FILE NO. *(Include prefix)*	SOCIAL SECURITY NO.

NAME AND ADDRESS OF ORGANIZATION, AGENCY, OR INDIVIDUAL TO WHOM INFORMATION IS TO BE RELEASED

VETERAN'S REQUEST

I hereby request and authorize the Veterans Administration to release the following information, from the records identified above to the organization, agency, or individual named hereon:

INFORMATION REQUESTED *(Number each item requested and give the dates or approximate dates—period from and to—covered by each.)*

PURPOSES FOR WHICH THE INFORMATION IS TO BE USED

NOTE: Additional items of information desired may be listed on the reverse hereof.

DATE	SIGNATURE AND ADDRESS OF CLAIMANT, OR FIDUCIARY, IF CLAIMANT IS INCOMPETENT

VA FORM JAN 1984 **70-3288**

EXISTING STOCKS OF VA FORM 60-3288, AND 00-3288, DEC 1975, WILL BE USED.

U.S. GOVERNMENT PRINTING OFFICE : 1987 - 192-070 (40621)

OMB Approved No. 2900-0001
Respondent Burden: 1-1/3 hours

Department of Veterans Affairs

VETERAN'S APPLICATION FOR COMPENSATION OR PENSION

IMPORTANT: Read attached General and Specific Instructions before completing this form. Type, print, or write plainly.

(DO NOT WRITE IN THIS SPACE) VA DATE STAMP

1A. FIRST, MIDDLE, LAST NAME OF VETERAN

1B. TELEPHONE NO. *(Include Area Code)*

2. MAILING ADDRESS OF VETERAN *(Number and street or rural route, city or P.O., State and ZIP Code)*

3A. VETERAN'S SOCIAL SECURITY NO.

3B. SPOUSE'S SOCIAL SECURITY NO.

4. DATE OF BIRTH | 5. PLACE OF BIRTH | 6. SEX

7. RAILROAD RETIREMENT NO.

8. HAVE YOU EVER FILED A CLAIM FOR COMPENSATION FROM THE OFFICE OF WORKERS' COMPENSATION PROGRAMS? *(Formerly the U.S. Bureau of Employees Compensation)*

☐ YES ☐ NO

9A. VA FILE NUMBER

C-

9B. HAVE YOU PREVIOUSLY FILED A CLAIM FOR ANY BENEFIT WITH VA?

☐ NONE
☐ HOSPITALIZATION OR MEDICAL CARE
☐ WAIVER OF NSLI PREMIUMS
☐ DISABILITY COMPENSATION OR PENSION
☐ VOCATIONAL REHABILITATION *(Chapter 31)*
☐ VETERANS EDUCATIONAL ASSISTANCE *(Chapter 33 or 34)*
☐ DEPENDENTS EDUCATIONAL ASSIST. *(Chapter 35)*
☐ DENTAL OR OUTPATIENT TREATMENT
☐ OTHER *(Specify)*

9C. VA OFFICE HAVING YOUR RECORDS *(If known)*

SERVICE INFORMATION

NOTE: Enter complete information for each period of active duty including Reservist or National Guard Status. Attach Form DD 214 or other separation papers for all periods of active duty to expedite processing of your claim. If you do NOT have your DD 214 or other separation papers check (✓) here ☐

10A. ENTERED ACTIVE SERVICE		10B. SERVICE NO.	10C. SEPARATED FROM ACTIVE SERVICE		10D. GRADE, RANK OR RATING, ORGANIZATION OR BRANCH OF SERVICE
DATE	PLACE		DATE	PLACE	

10E. HAVE YOU EVER BEEN A PRISONER OF WAR? ☐ YES ☐ NO *(If "Yes," complete Items 10F and 10G)*

10F. NAME OF COUNTRY

10G. DATES OF CONFINEMENT

11. IF YOU SERVED UNDER ANOTHER NAME, GIVE NAME AND PERIOD DURING WHICH YOU SERVED AND SERVICE NO.

12. IF RESERVIST OR NATIONAL GUARDSMAN, GIVE BRANCH OF SERVICE AND PERIOD OF ACTIVE OR INACTIVE TRAINING DUTY DURING WHICH DISABILITY OCCURRED

13A. IF YOU ARE NOW A MEMBER OF THE RESERVE FORCES OR NATIONAL GUARD GIVE THE BRANCH OF SERVICE

13B. RESERVE STATUS
☐ ACTIVE ☐ RESERVE OBLIGATION
☐ INACTIVE

13C. RESERVE OR NATIONAL GUARD UNIT ADDRESS

14A. ARE YOU NOW RECEIVING OR WILL YOU RECEIVE RETIREMENT OR RETAINER PAY FROM THE ARMED FORCES?
☐ YES ☐ NO *(If "Yes," complete Item 14B, 14C, and 14D)*

14B. BRANCH OF SERVICE

14C. MONTHLY AMOUNT
$

14D. RETIRED STATUS
☐ PERMANENT
☐ TEMPORARY DISABILITY RETIRED LIST

15A. HAVE YOU EVER APPLIED FOR OR RECEIVED DISABILITY SEVERANCE PAY FROM THE ARMED FORCES?
☐ YES ☐ NO *(If "Yes," complete Item 15B)*

15B. AMOUNT
$

16A. HAVE YOU RECEIVED LUMP SUM READJUSTMENT OR SEPARATION PAY FROM THE ARMED FORCES?
☐ YES ☐ NO *(If "Yes," complete Item 16B)*

16B. AMOUNT
$

MARITAL AND DEPENDENCY INFORMATION

17A. MARITAL STATUS
☐ MARRIED ☐ WIDOWED ☐ DIVORCED ☐ NEVER MARRIED *(If so, do not complete Items 17B through 21D)*

17B. SPOUSE'S BIRTHDATE

17C. NUMBER OF TIMES YOU HAVE BEEN MARRIED

17D. NUMBER OF TIMES YOUR PRESENT SPOUSE HAS BEEN MARRIED

17E. IS YOUR SPOUSE ALSO A VETERAN?
☐ YES ☐ NO *(If "Yes," complete Item 17F, if known)*

17F. SPOUSE'S VA FILE NO.
C-

18A. DO YOU LIVE TOGETHER?
☐ YES ☐ NO *(If "No," complete Items 18B through 18D)*

18B. REASON FOR SEPARATION

18C. PRESENT ADDRESS OF SPOUSE

18D. AMOUNT YOU CONTRIBUTE TO YOUR SPOUSE'S SUPPORT MONTHLY
$

19. CHECK (✓) WHETHER YOUR CURRENT MARRIAGE WAS PERFORMED BY:
☐ CLERGYMAN OR AUTHORIZED PUBLIC OFFICIAL
☐ OTHER *(Explain)*

VA FORM 21-526 JUN 1989

EXISTING STOCKS OF VA FORM 21-526, SEP 1984, WILL BE USED.

NOTE: Furnish the following information about each of your marriages. A certified copy of the public or church record of your CURRENT marriage is required.

20A. DATE AND PLACE OF MARRIAGE	20B. TO WHOM MARRIED	20C. TERMINATED *(Death, Divorce)*	20D. DATE AND PLACE TERMINATED

FURNISH THE FOLLOWING INFORMATION ABOUT EACH PREVIOUS MARRIAGE OF YOUR PRESENT SPOUSE

21A. DATE AND PLACE OF MARRIAGE	21B. TO WHOM MARRIED	21C. TERMINATED *(Death, Divorce)*	21D. DATE AND PLACE TERMINATED

IDENTIFICATION OF CHILDREN AND INFORMATION RELATIVE TO CUSTODY

NOTE: Furnish the following information for each of your unmarried children. A certified copy of the public or church record of birth or court record of adoption is required.

22A. NAME OF CHILD *(First, middle initial, last)*	22B. DATE OF BIRTH *(Month, day, year)*	22C. SOCIAL SECURITY NUMBER OF CHILD	22D. CHECK EACH APPLICABLE CATEGORY				
			MARRIED PREVIOUSLY	STEPCHILD OR ADOPTED	ILLEGITIMATE	OVER 18 ATTENDING SCHOOL	SERIOUSLY DISABLED

22E. NAME(S) OF ANY CHILD(REN) NOT IN YOUR CUSTODY	22F. NAME AND ADDRESS OF PERSON HAVING CUSTODY	22G. MONTHLY AMOUNT YOU CONTRIBUTE TO CHILD'S SUPPORT
		$

23A. IS YOUR FATHER DEPENDENT UPON YOU FOR SUPPORT? ☐ YES ☐ NO *(If "Yes," complete Item 23B)*	23B. NAME AND ADDRESS OF DEPENDENT FATHER	23C. IS YOUR MOTHER DEPENDENT UPON YOU FOR SUPPORT? ☐ YES ☐ NO *(If "Yes," complete Item 23D)*

23D. NAME AND ADDRESS OF DEPENDENT MOTHER	23E. NAME AND ADDRESS OF NEAREST RELATIVE	23F. RELATIONSHIP OF NEAREST RELATIVE

NATURE AND HISTORY OF DISABILITIES

24. NATURE OF SICKNESS, DISEASE OR INJURIES FOR WHICH THIS CLAIM IS MADE AND DATE EACH BEGAN

25A. ARE YOU NOW OR HAVE YOU BEEN HOSPITALIZED OR FURNISHED DOMICILIARY CARE WITHIN THE PAST 3 MONTHS? ☐ YES ☐ NO *(If "Yes," complete Items 25B and 25C)*	25B. DATES OF HOSPITALIZATION OR DOMICILIARY CARE	25C. NAME AND ADDRESS OF INSTITUTION

NOTE: Items 26, 27, and 28 need NOT be completed unless you are now claiming compensation for a disability incurred in service.

IF YOU RECEIVED ANY TREATMENT WHILE IN SERVICE, COMPLETE THE FOLLOWING INFORMATION

26A. NATURE OF SICKNESS, DISEASE, OR INJURY	26B. DATES OF TREATMENT	26C. NAME, NUMBER OR LOCATION OF HOSPITAL, FIRST-AID STATION, DRESSING STATION, OR INFIRMARY	26D. ORGANIZATION AT TIME SICKNESS, DISEASE, OR INJURY WAS INCURRED

27. LIST CIVILIAN PHYSICIANS AND HOSPITALS WHERE YOU WERE TREATED FOR ANY SICKNESS, INJURY, OR DISEASE SHOWN IN ITEM 26, BEFORE, DURING, OR SINCE YOUR SERVICE, AND ANY MILITARY HOSPITALS SINCE YOUR LAST DISCHARGE.

A. NAME	B. PRESENT ADDRESS	C. DISABILITY	D. DATE

28. LIST PERSONS OTHER THAN PHYSICIANS WHO KNOW ANY FACTS ABOUT SICKNESS, DISEASE, OR INJURY SHOWN IN ITEM 26A, WHICH YOU HAD BEFORE, DURING, OR SINCE YOUR SERVICE.

A. NAME	B. PRESENT ADDRESS	C. DISABILITY	D. DATE

IF YOU CLAIM TO BE TOTALLY DISABLED *(Complete Items 29A through 32E)*

29A. ARE YOU NOW EMPLOYED? ☐ YES ☐ NO	29B. IF YOU WERE SELF-EMPLOYED BEFORE BECOMING TOTALLY DISABLED, WHAT PART OF THE WORK DID YOU DO?
29C. DATE YOU LAST WORKED	29D. IF YOU ARE STILL SELF-EMPLOYED WHAT PART OF THE WORK DO YOU DO NOW?

30A. EDUCATION *(Circle highest year completed)*	30B. NATURE OF AND TIME SPENT IN OTHER EDUCATION AND TRAINING
1 2 3 4 5 6 7 8 (GRADE SCHOOL) 1 2 3 4 (HIGH SCHOOL) 1 2 3 4 (COLLEGE)	

LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, FOR ONE YEAR BEFORE YOU BECAME TOTALLY DISABLED

31A. NAME AND ADDRESS OF EMPLOYER	31B. KIND OF WORK	31C. MONTHS WORKED	31D. TIME LOST FROM ILLNESS	31E. TOTAL EARNINGS

LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, SINCE YOU BECAME TOTALLY DISABLED

32A. NAME AND ADDRESS OF EMPLOYER	32B. KIND OF WORK	32C. MONTHS WORKED	32D. TIME LOST FROM ILLNESS	32E. TOTAL EARNINGS

NET WORTH OF VETERANS AND DEPENDENTS *(See attached Instructions for Items 33A through 33D inclusive)*

NOTE: Items 33A through 33D should be completed ONLY if you are applying for nonservice-connected pension.

ITEM NO.	SOURCE	AMOUNTS				
		VETERAN	SPOUSE	NAME OF CHILD(REN)		
33A	STOCKS, BONDS, BANK DEPOSITS	$	$	$	$	$
33B	REAL ESTATE *(Do not include residence)*					
33C	OTHER PROPERTY					
33D	TOTAL NET WORTH	$	$	$	$	$

PAGE 3

INCOME RECEIVED AND EXPECTED FROM ALL SOURCES

NOTE: Items 34A through 39B should be completed ONLY if you are applying for nonservice-connected pension.

34A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANY BENEFITS FROM THE SOCIAL SECURITY ADMINISTRATION (OTHER THAN SSI) OR RAILROAD RETIREMENT BOARD? *(If "Yes," complete Items 34B thru 34F, as applicable)* ☐ YES ☐ NO	34B. MONTHLY AMOUNT *(Include Medicare Deduction)*	34C. BEGINNING DATE	34D. DATE YOU EXPECT BENEFITS TO BEGIN
	VETERAN $		
	SPOUSE $		
	34E. WILL YOU OR YOUR SPOUSE APPLY FOR EITHER BENEFIT DURING THE NEXT 12 MONTHS? ☐ YES ☐ NO	34F. DATE OF INTENTION TO APPLY	
		VETERAN	SPOUSE

35A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANNUITY OR RETIREMENT BENEFITS OR ENDOWMENT INSURANCE FROM ANY OTHER SOURCE?

☐ YES ☐ NO *(If "Yes," complete Items 35B thru 35E, as applicable)*

	35B. MONTHLY AMOUNT	35C. BEGINNING DATE	35D. DATE OF INTENTION TO APPLY	35E. SOURCE OF BENEFITS
VETERAN	$			
SPOUSE	$			

VETERAN'S AND DEPENDENTS' MONTHLY INCOME

NOTE: For each source report gross monthly amount, including deductions, for each family member.

ITEM NO.	SOURCE OF MONTHLY INCOME	AMOUNTS *(If none, write "NONE" or "0")*				
		VETERAN	SPOUSE	NAME OF CHILD/REN		
36A	SOCIAL SECURITY	$	$	$	$	$
36B	U.S. CIVIL SERVICE					
36C	U.S. RAILROAD RETIREMENT					
36D	MILITARY RETIREMENT					
36E	BLACK LUNG BENEFIT					
36F	SUPPLEMENTAL SECURITY/PUBLIC ASSIST.					
36G	ALL OTHER MONTHLY INCOME *(Specify Source)*					

VETERAN'S AND DEPENDENTS' OTHER INCOME *(If none, write "NONE" or "0")*

NOTE: Please provide the amount of annual income or one-time nonrecurring income (specify source) for the 12 month period preceding the date the claim is filed with the Department of Veterans Affairs.

37A	TOTAL WAGES					
37B	TOTAL INTEREST AND DIVIDENDS					
37C	ALL OTHER INCOME *(Specify Source)*					

NOTE: Please provide the amount of expected annual income or one-time nonrecurring income (specify source) for the 12 month period following the date the claim is filed with the Department of Veterans Affairs.

38A	TOTAL WAGES					
38B	TOTAL INTEREST AND DIVIDENDS					
38C	ALL OTHER INCOME *(Specify Source)*					

39A. GROSS AMOUNT OF FINAL PAY RECEIVED	40. REMARKS *(Identify your statements by their applicable item number. If additional space is required, attach separate sheet and identify your statements by their item numbers)*
39B. DATE FINAL PAY WAS RECEIVED	

NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled. See instructions for Items 14A thru 14D inclusive, Retired Pay.

CERTIFICATION AND AUTHORIZATION FOR RELEASE OF INFORMATION - I CERTIFY THAT the foregoing statements are true and complete to the best of my knowledge and belief. I CONSENT THAT any physician, surgeon, dentist, or hospital that has treated or examined me for any purpose, or that I have consulted professionally, may furnish to the Department of Veterans Affairs any information about myself, and I waive any privilege which renders such information confidential.

41. SIGNATURE OR CLAIMANT SIGN HERE	42. DATE SIGNED

WITNESSES TO SIGNATURES OF CLAIMANT IF MADE BY "X" MARK

NOTE: A signature by mark must be witnessed by two persons to whom the person making the statement is personally known. The witnesses must sign their names in Items 43A and 44A and type or print their names and addresses in Items 43B and 44B.

43A. SIGNATURE OF WITNESS	44A. SIGNATURE OF WITNESS
43B. NAME AND ADDRESS OF WITNESS *(Type or print)*	44B. NAME AND ADDRESS OF WITNESS *(Type or print)*

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false, or for the fraudulent acceptance of any payment to which you are not entitled.

(Detach and retain Instructions for future reference)

INSTRUCTIONS FOR COMPLETING APPLICATION FOR COMPENSATION OR PENSION

PRIVACY ACT INFORMATION: No allowance of compensation or pension may be granted unless this form is completed fully as required by existing law (38 U.S.C. Chapters 11 and 15). The information requested by this form is considered relevant and necessary to determine maximun benefits provided under law. The information submitted may be disclosed outside VA only if the disclosure is authorized under the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22, Compensation, Pension, Education, and Rehabilitation Records - VA, published in the Federal Register.

Disclosure of Social Security number(s) of those for whom benefits are claimed is requested under the authority of Title 38, U.S.C. and is mandatory as a condition to receipt of pension (38 CFR 1.575). Social Security numbers will be used in the administration of veterans' benefits, in the identification of veterans or persons claiming or receiving Department of Veterans Affairs benefits and their records and may be used to verify Social Security benefit entitlement (including amounts payable) with the Social Security Administration and, for other purposes where authorized by both Title 38, U.S.C. and the Privacy Act of 1974 (5 U.S.C. 552a) or, where required by another statute. Income information is subject to verification by means of Computer Matching Programs with other agencies.

RESPONDENT BURDEN: Public reporting burden for this collection of information is estimated to average 1-1/3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to VA Clearance Officer (732), 810 Vermont Ave., NW, Washington, DC 20420; and to the Office of Management and Budget, Paperwork Reduction Project (2900-0001), Washington, DC 20503.

GENERAL INSTRUCTIONS

NOTE: PLEASE READ VERY CAREFULLY.

If you need information about the meaning of any question, contact your nearest VA regional office. If additional space is needed for any item, use Item 40, "Remarks," page 4 or number a separate sheet of paper to correspond to the items you are answering and attach the sheet to the application.

A. DISABILITY COMPENSATION is paid for disability resulting from service in the armed forces. An additional amount of compensation may be payable for a spouse, child, and/or dependent parent when a veteran is entitled to compensation based on disability(ies) evaluated as 30 percent or more disabling. The additional benefit for a spouse is payable in a higher amount when he/she is a patient in a nursing home or is so disabled as to require the regular aid and attendance of another person.

DISABILITY PENSION is paid for permanent and total disability not resulting from service in the armed forces. If the veteran is 65 years of age or older and is not substantially gainfully employed, permanent and total disability is presumed. Pension is paid only to veterans of wartime service, or, of service on or after June 27, 1950, and prior to February 1, 1955, or, during the period between August 5, 1964, and May 7, 1975.

Benefits may only be paid from the date of receipt of your application in VA unless you were incapacitated because of a disability which prevented you from filing a claim for a period of at least 30 days beginning with the date you became permanently and totally disabled. If you want this claim considered as a claim for retroactive payment, indicate so in Item 40, "Remarks," and identify the specific disability which prevented you from filing.

B. REPRESENTATION. You may be represented, without charge, by an accredited representative of a veterans organization or other service organization recognized by the Secretary of the Department of Veterans Affairs. You may also be represented by an agent or an attorney, for example, an attorney in private practice or a legal aid attorney. However, under 38 U.S.C. 3404(c), an agent or attorney is allowed to charge only for services performed after you receive a final decision by the Board of Veterans Appeals. If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action on your part is required.

C. HEARINGS. You have the right to a personal hearing at any stage of claims processing, either before or after a decision is made. All you need do is inform the nearest VA office and we will arrange a time and place for the hearing. You may bring witnesses and their testimony will be entered in the record. VA will furnish the hearing room, provide hearing officials, and prepare the transcript of the proceedings. VA cannot pay any of your expenses in connection with the hearing.

D. EVIDENCE - GENERAL. If you have not previously filed a claim, furnish the separation forms you received from the armed forces. If you are a pension applicant, 65 years of age or older, no medical evidence is necessary. A statement from your doctor showing the extent of your disabilities should be furnished with your application if you are under 65, if you are housebound, or if you require the aid and attendance of another person and are not a patient in a nursing home. If you are a nursing home patient, you should furnish a statement signed by an official of the nursing home showing the date of your admission and patient status. Also, indicate in Item 40, "Remarks," that you are a nursing home patient and give the name and address of the nursing home.

E. REPORTING NET WORTH FOR PENSION FOR DISABILITY NOT RESULTING FROM SERVICE. Pension cannot be paid if net worth is sizeable. Net worth is the market value of all interest or rights in any kind of property except ordinary personal effects necessary for daily living such as automobile, clothing or furniture and the dwelling (single family unit) used as your principal residence. Therefore, all other assets must be reported so that we may determine whether net worth prevents you from receiving pension benefits.

F. INCOME LIMITS AND RATES OF PENSION. The rate of pension paid to a veteran depends upon the amount of family income and the number of dependents, according to a formula provided by law. Because benefit rates and income limits are frequently changed, it is not feasible to keep such information current in these instructions. Information regarding current income limitations and rates of benefits may be obtained by contacting your nearest VA office.

(1) A higher rate of pension is payable to a veteran who is a patient in a nursing home or otherwise determined to be in need of regular aid and attendance or who is permanently housebound due to disability.

(2) Pension rates are also increased for a veteran who served during the Mexican Border Period or World War I.

IMPORTANT

THERE ARE CERTAIN TYPES OF INCOME WHICH MAY BE EXCLUDED IN DETERMINING THE INCOME COUNTABLE FOR VA PURPOSES. HOWEVER, YOU MUST REPORT THE SOURCES AND AMOUNTS OF ALL INCOME BEFORE DEDUCTIONS FOR YOURSELF, SPOUSE, AND DEPENDENT CHILDREN. WE WILL DETERMINE ANY AMOUNT WHICH DOES NOT COUNT. INCLUDE ALL SEVERANCE PAY OR OTHER ACCRUED PAYMENTS OF ANY KIND OR FROM ANY SOURCE. WHEN NO INCOME IS RECEIVED OR EXPECTED FROM A SPECIFIED SOURCE, WRITE "NONE" IN THE APPROPRIATE BLOCK (ITEMS 36A THROUGH 39A). IF INCOME FROM ANY SOURCE IS ANTICIPATED BUT THE AMOUNT IS NOT YET DETERMINED, WRITE "UNKNOWN" IN THE APPROPRIATE BLOCK. ATTACH SEPARATE SHEETS IF ADDITIONAL SPACE IS NEEDED.

GENERAL INSTRUCTIONS (Continued)

G. FAMILY MEDICAL EXPENSES are amounts actually paid by you for which you are not reimbursed by insurance or otherwise. We can reduce your income for VA purposes (and increase your rate of pension) if your medical expenses qualify for exclusion under the formula provided by law. If you are awarded pension, an Eligibility Verification Report (EVR) will be mailed to you approximately a year after the effective date of your award. You should keep a record of all medical expenses you pay after you become entitled to pension and report them in the space provided on the EVR. Normally, an adjustment for medical expenses is made at the end of the income reporting year and results in a retroactive payment to you. However, if your income is static and you have a consistently high level of medical expenses (such as nursing home fees), make a statement to that effect in Item 40, "Remarks," and it may be possible to increase your rate without waiting until the end of the year.

H. LAST ILLNESS AND BURIAL EXPENSES. Your countable income may be reduced by the amount of expenses of the last illness and burial of a spouse or child paid by you. Use Item 40, "Remarks," to report such expenses.

I. EDUCATIONAL OR VOCATIONAL REHABILITATION EXPENSES are amounts paid for courses of education, including tuition, fees, and materials and may be deducted from the respective incomes of a veteran and the earned income of a child if the child is pursuing a course of postsecondary education or vocational rehabilitation or training. If you or your child(ren) paid these expenses, keep a record of the payments and report them in the space provided on your EVR form (see par. G above).

SPECIFIC INSTRUCTIONS

IMPORTANT: These instructions are numbered to correspond with the items on the application. If additional space is required, attach a separate sheet and identify your statements by their item numbers.

ITEMS 3A AND 3B - The number entered in Item 3A, Veteran's Social Security Number, should be your own Social Security number. In Item 3B enter your spouse's Social Security number. These Social Security numbers are necessary for identification purposes.

ITEMS 14A and 14D inclusive - Retired Pay - A veteran may not receive full service retired pay and VA compensation at the same time. In the absence of a request to the contrary, filing of this application will constitute an election to receive VA compensation in lieu of the total amount of retired pay, or a waiver of that portion of retired pay equal in amount to the VA compensation. If you do NOT want to receive VA compensation in lieu of military retired pay, make a statement to that effect in Item 40, "Remarks." If you are found entitled to VA compensation, we will notify the retired pay division that you have waived your retired pay (unless you specifically negate the waiver of military retired pay by making a statement in Item 40). If you think that you have a service-connected disability, you should file for VA compensation (even if you don't plan to waive your retired pay) in order to establish your survivors' entitlement to VA benefits in the event you should die from a service-connected condition.

ITEMS 15A and 15B - Disability Severance Pay - The full amount of disability severance pay received for the disability or disabilities for which VA compensation is payable will be recouped from that benefit.

ITEMS 16A and 16B - Lump Sum Readjustment Pay or Separation Pay - Recoupment of 75 percent of readjustment pay you received will be made from any VA compensation payable. The full amount of separation pay will be recouped from the gross disability compensation payable for all disability(ies).

ITEMS 17A to 21D inclusive - Marital Information - Complete information concerning all marriages entered into by both you and your spouse and the termination of such marriages must be furnished. Specific details as to the date, place, and manner of dissolution of marriage must be included. If your spouse is also a veteran, include his/her VA file number (if known) in Item 17F.

ITEMS 31C and 32C - Months Worked - The time actually worked should be stated. For example: If you worked full time for 2, 4, 6, 8, or 10 months, you should so state. If you did not work full time each month you should state the months or parts of months you actually worked. For example: 2 months, 1 week, 2 days.

ITEM 33A - Include market value of stocks, checking accounts, bank deposits, savings accounts, and cash. If such assets are held jointly by you and your spouse, one-half of the total value of these holdings should be reported for each of you.

ITEM 33B - Do not include the value of the single dwelling unit or that portion of real property used solely as your principal residence. On all other real estate reduce the market value by amount of the indebtedness thereon.

ITEM 33C - Report the total market value of your rights and interest in all other property not included in Items 33A and 33B. Do not include value of ordinary personal effects necessary for your daily living such as an automobile, clothing, and furniture. Include gifts, bequests, and inheritances of all property other than cash.

ITEM 33D - Report the total of Items 33A through 33C. This should be your NET WORTH.

ITEMS 34A to 35E - If you or your spouse have applied for Social Security, unemployment or workmen's compensation, or any disability benefit, show the expected payment in the appropriate column. If the amount or date of payment is not yet determined, enter the word "unknown."

ITEMS 36, 37, and 38 inclusive - You should report under these items your expected total income for the periods covered. You must report total income of yourself and your dependents from all sources. When reporting income, report the total amount to which you are entitled before any deductions, not the amount you actually receive. Include as income all amounts received or expected as severance pay or accrued payments of any kind or from any source. If you and your spouse receive income from dividends, interest, rents, investments or operation of a business, profession or farm, which you own jointly, report one-half of the income as yours and one-half as your spouse's. Report Social Security benefits in Item 36A, and Supplemental Security Income (SSI) benefits in Item 36F. If you report income in foreign currency, we will convert it into dollars based on the average exchange rate for the preceding four quarters (as provided by the Department of the Treasury). We can exclude all or part of a dependent child's income if it is not reasonably available to you, or if it would cause hardship to consider this income in determining your rate of pension. If you feel that your child's income should be excluded, make a statement to that effect in Item 40, "Remarks."

ITEMS 39A and 39B - You should report under these items the total amount of your final pay at termination of employment, not the amount you actually received, and the date you received this pay.

NOTE: If you furnish a copy of your latest award letter from Social Security stating the type and gross amount of your benefit, it will help us in our initial determination of the amount of VA benefits to be paid.

☆ GPO : 1989 0 - 239-206

CHAPTER 7
Interpreting Military Records

A. Overview

There have been no significant changes in how military records are interpreted since the 1982 manual.

B. Chapter Supplement

There have been no changes in interpreting military records which affect the entire chapter.

C. Section Supplement

7.1 Introduction

7.2 Records of Entry Into The Service

7.2.1 General Remarks

7.2.2 Mental Eligibility

7.2.3 Medical Eligibility

7.2.4 Moral Eligibility

7.2.5 Age Eligibility

7.2.6 Citizenship

7.2.7 The Enlistment Contract

7.3 Performance and Conduct Records

7.3.1 Performance Evaluations

7.3.1.1 Army

7.3.1.2 Air Force

7.3.1.3 Navy

• P.7/6L, ¶ 1:

Currently, to receive an Honorable Discharge, the sailor generally must have a final average in performance and conduct marks of not less than 2.8 and an average of not less than 3.0 in military behavior.[1]

7.3.1.4 Marines

• P.7/6L, ¶ 2:

Currently, a General Discharge may be issued when a Marine's average proficiency and conduct marks are below 3.0 and 4.0 respectively.[2]

7.3.2 Records of Nonjudicial Punishment Under Article 15, U.C.M.J. (10 U.S.C. § 815)

7.3.3 Court-Martial Records

7.3.4 Letters of Reprimand or Admonitions

7.4 Miscellaneous Records

7.4.1 Awards and Decorations

7.4.2 Overseas and Combat Assignments

7.4.3 Counseling and Rehabilitation

7.4.4 Military Occupational Specialty

7.4.5 Medical Records

• P.7/7R, ¶ 2:

The military physical profile system is based on the functional ability of an individual to perform military duties. The human system is divided into six categories and a rating from one to four is assigned each.[3] The six categories are:

P: Physical capacity or stamina.
U: Upper Extremities.
L: Lower Extremities.
H: Hearing and Ear.
E: Eyes.
S: Psychiatric.

The meanings of the numerical ratings are:

1: High level of medical fitness.

2: Individual meets entry standards but possesses some medical condition.

3: Individual has medical condition(s) or defect(s) which requires certain restrictions in assignment.

4: Individual has a medical condition or physical defect which is below retention level.

A physical profile of a servicemember with a physical defect which would limit his or her running or marching for prolonged periods might be as follows:

P	U	L	H	E	S
1	1	3	1	1	1

7.5 Records Pertaining to Separation From the Military

7.5.1 General

7.5.2 Summary of Involuntary Separation Documents

7.5.2.1 Letter of Notification

7.5.2.2 Election of Rights

7.5.2.3 Medical and Psychiatric Evaluation

7.5.2.4 Commanding Officer's Report

7.5.2.5 Board Proceedings

7.5.2.6 Discharge Authority Action

7.6 Checklist of Records in a Military Personnel File

7.7 Adverse Information and Codes on Discharge Certificates

7.7.1 General

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[1]NAVPERSMAN 3610300.3.a(1).

[2]MARCORSEPMAN, 1004.2.b(2).

[3]AR 40-501.

7.7.2 Discharge and Reenlistment Codes

7.7.2.1 General

7.7.2.2 Removing Codes and Other Information

a. P.7/9R, ¶ 3:

The process described in this paragraph has not always been successful. Application to the appropriate BCMR may be necessary.

b. P.7/9, ¶ 3, n. 52:

The new address for the Navy is: NPRC (Military Personnel Records), Navy Reference Branch, 9700 Page Blvd., St. Louis, MO 63132.

c. P.7/10, n. 57:

The ADRB SOP has been withdrawn.

Appendix 7A

Table of Forms

Appendix 7B

Common Reenlistment Codes

Appendix 7C

SPN Codes (All Services)

Some SPN codes (pronounced "spin" codes) have been changed a number of times. It is now DoD policy not to release the meanings of SPN codes. The stated reason for this is that, because some codes have had different meanings over time, any list would serve to fuel the confusion which already exists in interpreting the codes.

CHAPTER 8
General Case Preparation Techniques

A. Overview

The general case preparation techniques described in the 1982 manual are still appropriate today.

B. Chapter Supplement

The "contentions" referred to in this chapter are now called "issues" by the review boards.

C. Section Supplement

8.1 Introduction

8.2 Receipt of Military Records

8.3 Which Form to File

• P.8/2R, 3:

The other services now also follow this "tender letter" procedure. Since actual occurrences are rare, however, the possibility of a "tender letter" should not influence the decision of whether to ask for a hearing.[1]

8.4 Development of Case Theory

• P.8/2R, n.9:

This reference should read: "See § 12.10, *infra* (legal errors checklist); Ch. 5, *supra* (summary of the procedural rights available under the discharge regulations)."

8.5 Filing a Brief and the Contentions of Fact and Law

a. P.8/3R, ¶ 1:

It is no longer wise to assume the outcome in any case as the boards can be unpredictable and often find innovative ways to deny what seems to be a simple case.

b. P.8/3R, ¶ 2:

Only the DRBs must respond to these contentions (now called "issues" by the boards). A list of contentions (or "issues"), however, can be useful in BCMR cases as a simple, concise, summation of the logic of the argument presented.

c. P.8/4L, ¶ 5:

The wording of the first sentence of this paragraph is misleading. In almost all cases, both legal and equitable arguments should be made.

d. P.8/4R, ¶ 2:

Citation to past board decisions (DRB or BCMR) can be useful to show the board that one is not asking it to look at your case in some extraordinary way, or asking for some extraordinary relief. Past decisions can be used to give an argument credibility by positioning the case within the mainstream of cases where relief has been granted.

8.6 Preparation for and Conduct of the Hearing

a. P. 8/4, n.15:

The videotape hearing is only one method employed by the Army DRB. Hearings are also conducted in person at travelling locations and in Washington, D.C.

b. P. 8/5R, 3rd •:

It has been reported by some advocates that questioning by some board members has, at times, been sarcastic and hostile. Counsel may need to gently intervene. In extreme cases, a brief break may be requested to enable the counsel to complain to the President of the DRB.

c. P.8/5R, 4th •:

Note that this step may not occur automatically. But if, after the board has finished cross-examining the witness, counsel asks permission to ask some clarifying questions, the board will permit it.

d. P.8/5R, 6th •:

The boards are now inconsistent on whether they require witnesses to be outside the hearing room when they are not testifying. It is, nevertheless, often good to follow this practice. Corroborating testimony will generally appear more credible if the witness was not in the room to hear a prior witness who described the same events.

e. P.8/6L, 3rd •:

The boards now rarely ask counsel and applicant to remain to answer further questions which may arise.

8.7 Case Preparation Checklist

a. P.8/6R, 3rd •:

The application must be filed first if the statute of limitations is running out soon. See Supp. §§ 6.6 and 9.2.4.

b. P 8/6R, 8th •:

As discussed at Supp. § 9.4.3, the three-year BCMR statute of limitation must now be considered as well.

Appendix 8A

Sample Case Chronology

Appendix 8B

Typical DRB Opening Rites

Appendix 8C

Sample Discharge Upgrading Brief

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[1] *See also* § 9.2.7.5.5.

CHAPTER 9
The Discharge Review System

A. Overview

The discharge review system's structure has not fundamentally changed since MDU was published. As described in Chapter 1, however, the philosophical underpinning of discharge review has changed greatly. For instance, the rule of thumb that an upgrade is more likely from a DRB than a BCMR is no longer valid. Rarely is the veteran given the benefit of the doubt. Also, in a case argued on the basis of a legal error (an "impropriety"), the BCMRs are more likely to upgrade than the DRBs. Likely DoD budget restraints in succeeding years might make discharge review processing a more difficult process.

B. Chapter Supplement

1. The functions of the National Veterans Law Center (NVLC), mentioned in this chapter, have largely been assumed by the National Veterans Legal Services Project (NVLSP).[1]

2. The DRBs now use the term "issues" instead of the term "contentions," which is used in this chapter and throughout MDU.

3. § 9.2.11.1, entitled "Advance Notice of the Hearing Date" deals primarily with notice where a hearing has been requested, but also contains information relevant to the notices where a records only review has been requested.

4. On December 17, 1982, the Army Discharge Review Board (ADRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the SOP. The other boards have never had an SOP or equivalent guidelines. All the DRBs do, however, at times have internal guidelines and regulations they follow. They are difficult to obtain, generally not very useful, and of uncertain significance.

5. The jurisdiction and powers of the BCMRs were changed by the Military Justice Act of 1983. The BCMRs can no longer modify the findings or sentence of a court-martial that was conducted after May 31, 1951, except by taking "action on the sentence of a court-martial for purposes of clemency."[2]

6. There is an exhaustion requirement at the BCMRs. Other administrative channels (DRBs being the most relevant here) must be exhausted before the BCMR will consider a claim.[3]

7. The BCNR is organized into sections, at least at the staff level. There are, for example, a "Discharge Review Section" and a "Performance Section."

C. Section Supplement

9.1 General Overview of the Discharge Review System

a. P.9/3L, n.2:

(1) The DRBs have jurisdiction to review an application that requests either a change in reason for, or the character of, a discharge—or both.

(2) *See also* § 9.2.3.

b. P.9/3L, n.3:

(1) Add after first sentence: *See Sherengos v. Seamans,* 449 F.2d 333, 334 (4th Cir. 1971).

(2) *See also* § 9.4.2.

c. P.9/3L, n.4:

Cite is now 32 C.F.R. § 70.3(e).

9.1.1 Statutes Governing DRBs and BCMRs

a. P.9/3R, ¶ 2, 3rd •:

See § 9.4.4.1.

b. P.9/3, n.7:

See also Kalista v. Secretary of the Navy, 560 F. Supp. 608, 616 (D. Colo. 1983) ("Proceedings before the [Board for Correction of Naval Records] are matters of legislative grace and, therefore, do not have to provide the same standards of 'fairness' required at the time the discharge occurs.").

9.1.2 Limits on the Military's Statutory Authority to Grade Discharges

9.1.3 Historical Development of the Discharge Review Process

9.1.3.1 The Urban Law Institute Case

9.1.3.2 The Department of Defense's Special Discharge Review Program

9.1.3.3 Public Law 95-126

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[1]For more information on NVLSP, *see* Supp. Chap. 1, Chap. Supplement, ¶ 1.

[2]*See Supp.* § 9.4.2., ¶ a.

[3]*See, e.g.,* AR 15-185, § III, ¶ 8 and 32 C.F.R. § 865.9(b). *See also* Supp. § 9.4.3., ¶ b.

9.1.3.4 The Department of Defense's Uniform Discharge Review Standards and Procedures

9.1.3.5 The Reopening of the Urban Law Institute Case

9.2 DRB Procedures

9.2.1 Regulations and Guidelines Governing DRB Proceedings

9.2.2 Jurisdiction and Powers of the DRBs

a. P.9/7R, ¶ 2:

The DRBs have the authority to change discharges to Honorable, General (Under Honorable Conditions), or to one of the new uncharacterized discharges such as Entry Level Separation. With respect to Entry Level Separation, however, the board may only make the change if the discharge occurred after the effective date for uncharacterized discharges, October 1, 1982.[4]

b. P.9/7R, n.24:

Cites are now 32 C.F.R. §§ 70.8(a)(3), 70.8(c)(6), 70.8(h)(4), 70.8(h)(5)(i).

c. P.9/7R, n.25:

Cite is now 32 C.F.R. § 70.8(b)(4).

9.2.3 Eligibility to Apply

a. P.9/8L, ¶ 1:

A veteran can apply to a DRB even if (s)he does not have one of the types of discharges listed if (s)he is seeking only to have the reason for discharge changed.

b. P.9/8L, 4th •:

As a result of the Military Justice Act of 1983, DRBs may only upgrade SPCM Bad Conduct Discharges issued after 1951 on the basis of clemency.

c. P.9/8L, n.27:

Cite is now 32 C.F.R. § 70.3(a).

9.2.4 How to Apply

a. P.9/8R:

Even though it is good to file the 293 immediately, always get the military records using the form SF 180 first, unless the deadline for filing the 293 is close. Filing the 180 after the 293 can create difficulties in obtaining the military records (*see* Supp. § 6.6).

b. P.9/8R, n.28:

New addresses and telephone numbers, if any, are:

ARMY: (703) 692-4570
NAVY: (703) 696-4881
AIR FORCE: AFMPC/MPCDOA1, Randolph AFB TX 78150-6001; (703) 692-4751
COAST GUARD: Commandant (G-PE-1), U.S. Coast Guard, Washington, D.C. 20593-0001; (202) 267-1640

9.2.4.1 Type of Corrective Action Requested

9.2.4.2 Type of Proceeding the Applicant Desires

9.2.4.3 Reason for Review and Supporting Documents

• P.9/9L, ¶ 1:

The DD 293 no longer asks for the "Reason for Review," but asks for "Issues" (formerly called "Contentions"). It is appropriate to indicate that the "Issues" will be submitted later.

9.2.4.4 Applicant's Counsel/Representative

9.2.5 Reviews Conducted on a DRB's Own Motion Without an Application Being Filed

• P.9/9L, n.30:

Cite is now 32 C.F.R. §§ 70.1(b), 70.8(b)(8)(i).

9.2.6 Access to Documents that the DRB Will Review

9.2.6.1 Applicant's Military Personnel/Medical Records

• P.9/9R, ¶ 4:

If the deadline for filing a DRB application is close, file the application before requesting the military records (*see* Supp. § 6.6).

9.2.6.2 Military Administrative Discharge Regulations

• P.9/9R, n.33:

Cite is now 32 C.F.R. § 70.9(c)(1).

9.2.6.3 Predecisional Documents and Evidence Developed or Gathered by the DRB

9.2.6.3.1 The DRB's brief of the Case

a. P.9/10L, n.34:

Cite is now 32 C.F.R. § 865.109(d).

b. P.9/10L, n.35:

Cite should be to the definition of "Recorder" at 32 C.F.R. § 724.122, which states:

> Recorder, NDRB Panel.
> A panel member responsible for briefing an applicant's case from the documentary evidence available prior to a discharge review, presenting the brief to the panel considering the application, performing other designated functions during personal appearance discharge hearings, and drafting the decisional document subsequent to the hearing.

c. P.9/10L, n.36:

The Army DRB's SOP has been withdrawn.

9.2.6.3.2 Advisory Opinions

a. P.9/10, n.37, ¶ 1:

(1) Cite 32 C.F.R. § 70.5(c)(10) is now 32 C.F.R. § 70.8(c)(10).
(2) The Army DRB's SOP has been withdrawn.

b. P.9/10, n.37, ¶ 2:

The NDRB regulation now provides:

> Legal Counsel
> Normally the NDRB shall function without the immediate attendance of legal counsel. In the event that a legal advisory opinion is deemed appropriate by the NDRB such opinion shall be obtained routinely by reference to the senior Judge Advocate assigned to the Office of the Director, Naval Council of Personnel Boards. In addition, the NDRB may request advisory

[4] 32 C.F.R. § 70.8(a)(3)(i).

opinions from staff offices of the Department of the Navy, including, but not limited to the General Counsel and the Judge Advocate General.[5]

The provision allowing NDRB traveling panels to request advice from the Officer in Charge of the nearest Naval Legal Services Office has been rescinded.

9.2.6.3.3 FBI Reports and Other Evidence Obtained by the DRB from Other Sources

a. P.9/10R, ¶ 2:

The ADRB requests criminal investigative files when other data in the file does not provide a basis for the discharge action and a copy of the investigative file is not already in the personnel file. Where an investigative file is requested by the ADRB, a copy is provided to the applicant. The applicant has 30 days to make comments to the panel. The NDRB requests criminal investigative files when they are considered important in a given case. The AFDRB requests criminal investigative files when the military records do not adequately explain the basis for the discharge action. If the specially requested files are used, the Board will prepare and provide a sanitized copy of the investigative file to the veteran prior to the hearing.

b. P.9/10R, n.38:

32 C.F.R. § 70.8(b)(9)(iv), which supersedes 32 C.F.R. § 70.5(b)(9)(iv), provides that a DRB:

> may take steps to obtain additional evidence that is relevant to the discharge under consideration beyond that found in the official military records or submitted by the applicant, if a review of available evidence suggests that it would be incomplete without the additional information, or when the applicant presents testimony or documents that require additional information to evaluate properly. Such information shall be made available to the applicant, upon request, with appropriate modifications regarding classified material.

9.2.7 Methods of Presenting A Case: Hearing versus Documentary Review

9.2.7.1 Hearing in Washington, D.C.

• P.9/11L, n.38a:

The Army DRB now conducts hearings at 1941 Jefferson Davis Highway, Room 218, Crystal Mall # 4, Arlington, VA. The Air Force DRB now conducts hearings at 1745 Jefferson Davis Highway, 2nd Floor, Crystal Square 4, Arlington, VA.

9.2.7.2 Hearing Before a Traveling/Regional Panel of the DRB

a. Army Traveling Panels

The ADRB has sent "Travel Panels" or hearing examiners to Boston, New York, Charlotte, Atlanta, San Juan, Tampa, Syracuse, New Orleans, St. Louis, Chicago, Cleveland, Detroit, Minneapolis, Cincinnati, Dallas, Houston, Phoenix, Albuquerque, Los Angeles, San Francisco, Seattle, Denver, and Helena. There is no continuing schedule for the panels to visit specific locations.

The criteria for selecting the locations are (1) central to home of the majority of applicants and (2) within a 250 mile radius for applicants to travel. The frequency of visits is determined by (a) number of applicants for each area, (b) length of time since last visit, (c) date applicant submitted his appeal, (d) personnel strength of the ADRB and (e) availability of travel money for ADRB panel members and hearing examiner teams.

Army travel panels will normally visit a location for four to ten duty days; hearing examiners for three to five duty days. Traveling panels hear seven to eight cases per day. Hearing examiners hear five to six per day.

The ADRB claims that there are normally no special delays in the issuance of decisions by travel panels or hearing examiners. Videotapes of hearing examinations are normally heard by a full panel within one month after the date of the hearing examination.

ADRB travel panels are only sent to prisons upon the written request of the warden. Otherwise, prisoner cases are administratively closed (without prejudice) until he/she is available for a hearing. The impact of this procedure on the 15-year deadline is unclear. It has been reported that the rate of relief obtained from in-prison hearings is low. This suggests that unless an inmate is close to a parole date or the 15-year deadline, it might be better to wait for a hearing.

b. Navy Travel Panels

The NDRB currently sends traveling panels to Chicago, Dallas, San Francisco, and San Diego. Each location is visited approximately every six months. Location and frequency of regional hearings are predicated on the number of requests pending within a region and the availability of the resources to send the panel. The Navy now schedules seven to eight hearings per day. A notice of intent to schedule is sent approximately 80 days prior to the hearing date. The NDRB claims that there are no special delays in the issuance of decisions by traveling panels.

c. Air Force Travel Panels

The AFDRB sends traveling panels to New York, Dallas, Denver, Chicago, Los Angeles, San Francisco, Tampa, Atlanta, and St. Louis. Panel hearing locations are normally visited once a year and several are visited twice if there are sufficient cases to justify the second trips. Visit locations are selected based on the number of applicants from regional geographic areas and the proximity of a hearing location central to the majority of the applicants. Air Force traveling panels normally stay at a visit location for five days and have four to eight hearings per day. The AFDRB claims that there are no special delays in the issuance of decisions by traveling panels. AFDRB panels do not visit prisons. The Board says that there is insufficient demand.

9.2.7.3 Hearing Examination (Army Only)

a. P.9/11R, ¶ 2:

Army hearing examiners typically visit a location for three to five days. Hearing examiners may be sent to any of the travel panel locations. The number of cases to be heard and the cost are the primary considerations.[6]

b. P.9/11R, n.44:

Cite is now 32 C.F.R. § 70.3(j).

9.2.7.4 Documentary or Record Review

9.2.7.5 Selecting a Method of Case Presentation

[5] 32 C.F.R. § 724.703.

[6] *See Supp.* § 9.2.7.2.a.

9.2.7.5.1 The Upgrade Rates

• P. 9/12R, n.47:

Upgrade rates for recent years are as follows. Note the low rates in recent years:[7]

FISCAL YEAR 1988 (Half Year)

Total Applications/% Upgraded

DRB	No-Hearing	Hearing	Traveling
Army	871/13%	446/9%	
Navy	927/4%	198/10%	
Air Force	615/9%	256/21%	

FISCAL YEAR 1987

Total Applications/% Upgraded

DRB	No-Hearing	Hearing	Traveling
Army	2569/7%	1804/4%	
Navy	1855/3%	414/11%	
Air Force	1434/8%	235/23%	

FISCAL YEAR 1986

Total Applications/% Upgraded

DRB	No-Hearing	Hearing	Traveling
Army	2379/10%	1039/7%	9.6%
Navy	2144/4%	430/11%	10.9%
Air Force	891/7%	260/31%	36%

FISCAL YEAR 1985

Total Applications/% Upgraded

DRB	No-Hearing	Hearing	Traveling
Army	2808/13%	1067/16%	13.8%
Navy	2530/4%	575/10.3%	10.3%
Air Force	622/9%	324/28.7%	28%

FISCAL YEAR 1984

Total Applications/% Upgraded

DRB	No-Hearing	Hearing	Traveling
Army	2698/12%	1185/20%	14.4%
Navy	3025/5%	568/11%	9.9%
Air Force	579/5%	473/22%	23%

FISCAL YEAR 1981

Total Applications/% Upgraded

DRB	No-Hearing	Hearing	Traveling
Army	11242/28%	3180/53%	
Navy	5064/19%	1387/28%	
Air Force	689/29%	514/46%	

9.2.7.5.2 The Length of Time the DRB Will Need to Decide the Case

• P. 9/12R, ¶ 3:

It currently takes the NDRB an average of 167 days from receipt of application to mailing of a decision. The average when a hearing is requested in Washington is 177 days, and when a records review only is requested, it is 106 days. There are no special delays when a traveling panel is requested other than the possible delay in the panel arriving at the travel location.

It takes the ADRB an average of 327 days for all cases, 220 days when a hearing in Washington is requested, 241 days for a records review, and 571 days when a travel panel is requested. Unofficial notification takes another 30 to 45 days and official notification can take as long as six more months.

The AFDRB takes an average of 320 days for all cases, 240 days when a hearing in Washington is requested, 410 days when a records review is requested, and 375 days when a personal appearance is requested (including both Washington hearings and Travel Panels).

Thus, the statement in the 1981 edition that a records review is faster than requesting a hearing in Washington is no longer necessarily correct for the AFDRB or the ADRB.

9.2.7.5.3 Prospects for Reconsideration

a. P.9/13L, n.49:

Change cite to 32 C.F.R. § 70.8(b)(8)(ii).

b. P.9/13L, ¶ 1:

(1) The regulations allow a second hearing if the applicant "is to be represented by a counsel or representative, and was not so represented in any previous consideration of the case by the DRB." 32 C.F.R. § 70.8(b)(8)(v).

(2) Any new application must still be within the 15-year deadline.

9.2.7.5.4 Choosing the Best Method of Case Presentation

• P.9/13L, ¶ 3:

If the 15-year deadline is approaching, however, the veteran may not have the opportunity of making more than one application. Thus, the veteran should take his or her best shot—usually a hearing with counsel.

9.2.7.5.5 Tender Letters

a. P.9/13L, ¶ 4:

The ADRB and AFDRB now also make tender offers. All three services only make tender offers when there has been a request for a personal appearance hearing. The boards make tender offers infrequently.

b. P.9/13R, ¶ 1:

If the time loss involved takes the veteran beyond the 15-year deadline for applications further DRB review, of course, is barred.

9.2.8 Composition of DRB Panels

a. P.9/13R, ¶ 2:

The uniform discharge review procedures no longer provide that all board members be military officers, although those actually serving continue to be career military officers.

b. P.9/13R, n.53:

Cite should be 32 C.F.R. § 724.701.

c. P.9/13R, n.54:

Cite is now 32 C.F.R. § 724.701(c).

d. P.9/13R, n.55:

Cite is now 32 C.F.R. § 70.8(b)(1).

e. P.9/13R, n.56:

The first cite is now 32 C.F.R. § 581.2(c)(3).

f. P.9/13R, n.57:

The cite is now 32 C.F.R. § 70.8(c)(2).

g. P.9/13R, ¶ 5:

The Army DRB SOP has been withdrawn.

[7] *See also* Supp. Chapter 1, Appendix 1A.

h. P.9/13R, last ¶:

These guidelines have been withdrawn as part of the withdrawal of the Army DRB SOP.

i. P.9/14L, n.60:

Cite is now 32 C.F.R. § 70.8(b)(10).

j. P.9/14L, n.62:

Cite is now 32 C.F.R. § 724.122.

k. P.9/14L, ¶ 4:

Unlike the other boards, the Coast Guard DRB does not have full-time panels. With only about 40 hearings per year, a full-time panel is not considered warranted. The panel members are Coast Guard officers temporarily taken from their regular jobs, for a few days, to conduct hearings.

9.2.9 Counsel/Representative

a. P.9/14L, n.62b:

Cite is now 32 C.F.R. § 70.3(c).

b. P.9/14R, ¶ 3:

The provision described in this paragraph is in the current codification of the uniform discharge review procedures. 32 C.F.R. § 70.8(b)(8)(v).[8]

9.2.10 Documents that the Applicant Should Submit

• P.9/15L, 2nd:

The boards have changed the term "contentions" to "issues."

9.2.10.1 A Brief

• P.9/15, ¶ 2:

The ADRB has stated that briefs should be submitted at least 90 days prior to a scheduled hearing date. The NDRB has indicated that briefs should be submitted with the application to ensure being included in the pre-review summary. The AFDRB recommends that the brief be received within 30 days of the case being forwarded to the Board for it to be considered in preparation of the pre-review summary (DRB staff will know when the case has been, or is likely to be, forwarded). The boards acknowledge, however, that matters may be submitted at any time up until the conduct of the review.

Having the brief included in the pre-review summary is a double-edged sword. It may help the case if the preparing officer uses it. On the other hand, it is advantageous to see the pre-review summary before writing the brief to get a feel for how the board may approach the case. On balance, it is probably more important to get the brief in early to ensure that it receives the attention it deserves. If an important new matter appears in the pre-review summary, a supplement to the brief or rebuttal should be submitted.

9.2.10.2 A Statement of Material Contentions

a. P.9/15L:

The term "contentions" is no longer in use by the boards. The current term is "issues." The board's treatment of issues is now discussed in DRB regulations.[9]

b. P.9/15R, ¶ 1:

The words "clearly and specifically" are no longer used in the regulations.[10]

9.2.10.3 Evidence of Good Postservice Conduct

9.2.10.4 Cases in Which the Applicant's Military Records Have Been Destroyed

a. P. 9/16L:

(1) The Discharge Review Boards have, at times, used form letters to tell applicants whose records were burned in the St. Louis fire in 1973, or whose records are missing for some other reason, that they are not likely to get an upgrade or even have their case considered unless records can be produced. The NDRB has sent notices to applicants whose records cannot be located stating: "In the event that service record information is not available for consideration, the board must assume that the discharge was proper and equitable as issued."

These letters have been sent even in cases where the applicant had obtained the records from the NPRC. Thus, a DRB statement that the records cannot be located or have been destroyed should not be taken as the final word.[11]

The NDRB also sends a form letter when service records are missing which states that consideration of the application has been delayed because the records are missing. The letter asks that:

> *If you have a copy of your signed Statement of Awareness, Waiver of Rights and Privileges, Recommendation for discharge from your Commanding Officer, your Discharge Certificate or other records and information relating to your discharge, please provide copies to this board.*
>
> In the event sufficient information cannot be obtained, the board may be unable to conduct a discharge review and the current file may be closed. (Emphasis in original.)

This letter is telling of the NDRB's current attitude toward discharge upgrading. They are most concerned about getting a "Statement of Awareness" (an acknowledgement of counseling that is a prerequisite for many discharge types), a waiver of rights, a recommendation for discharge which will assuredly say uncomplimentary things about the veteran, and a discharge certificate which will show a bad discharge. If the veteran is unable to produce these documents which will almost certainly support the issuance of the bad discharge, the board will not review the case. There appears to be a focus on amassing evidence to justify a decision to deny an upgrade.[12] There is no legal basis for refusing to review a case because records are missing.[13]

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[8] *See* Supp. § 9.2.7.5.3, ¶ b.

[9] *See, e.g.,* 32 C.F.R. § 70.8(d), *et seq.*

[10] *Id.*

[11] A denial based on records being unavailable should be challenged in court. There is no legal basis for a presumption of propriety and equity in the discharge process simply because records are missing. Such a presumption renders the testimony and other evidence which the veteran may produce moot. The board must consider this evidence and grant a hearing if requested. *Cf.* Kelly v. United States, 826 F.2d 1049 (Fed. Cir. 1987) (court will not assume benefit election was communicated to spouse when copy of notice required to be in file was absent), and Nethery v. Orr, 566 F. Supp. 804 (D.D.C. 1983) (laches does not apply when lost records were fault of the government).

[12] *See* P.9/16L, ¶ 4 for a discussion of what records the veteran should give the board if (s)he has them.

[13] *See supra* note 11.

If, in fact, no records can be found, an applicant should try to reconstruct every detail about his service—emphasizing training, performance record, circumstances surrounding discharge and post-service conduct. If at all possible, a personal appearance hearing should be arranged in these cases since personal testimony is often more convincing than written statements. All such evidence should be submitted under oath before a notary if no personal appearance is made.

(2) Destroyed records can have consequences in discharge upgrade litigation as well as at the administrative level. See *Nethery v. Orr,* 566 F. Supp. 804 (D.D.C. 1983) (no laches where plaintiff applied over the years and the Records Center Fire was not his fault).[14]

b. P. 9/16L, n.72:

The provision cited is now at 32 C.F.R. § 724.210(a)(2). 32 C.F.R. § 724.212(c), however, allows 60 days under the same circumstances. There is no explanation in the regulations for this contradiction. The period is 30 days in the Air Force regulation at 32 C.F.R. § 865.108(c). Note that these provisions are generally not critical as the evidence for the case will usually be amassed by the applicant and/or counsel well before the board is ready to consider the case.

c. P.9/16L, n.73:

Replace the first citation with 32 C.F.R. § 70.8(b)(12)(vi). Replace the second citation with 32 C.F.R. §§ 724.210(a)(3), 724.211.

d. P.9/16L, last ¶:

The Air Force DRB, in particular, often notes the "failure" of a veteran to avail himself of the opportunity to personally appear before the Board in missing records cases and thus seems to hold it against the veteran.[15]

e. P.9/16R, ¶ 1:

DRBs have also allowed claims based exclusively on sworn testimony before the DRB.[16]

9.2.10.5 Other Documents

• P.9/16R, n.74:

The AFDRB regulation no longer contains this information.

9.2.11 Hearing Procedures

9.2.11.1 Advance Notice of the Hearing Date

• P.9/16R, ¶ 5:

The NDRB mails the following sequence of notices:

1. Notice that the application has been accepted for review.
2. A request for additional information (if required).
3. For personal appearance hearings:
   a. Notice of Intent to Schedule a hearing (Scheduling Notice).
   —Sent 90 to 110 days before the hearing period.
   b. Notice of Hearing including location, date and time (Scheduling Letter).
   —Sent 30 to 60 days before the scheduled date to all applicants who respond to the Scheduling Notice reaffirming their desire for a personal appearance hearing.
4. Notice of decision of the Board.

9.2.11.2 Who Can Attend a Hearing

a. P.9/16R, ¶ 6:

Witnesses are now normally allowed to stay in the hearing room at the NDRB for the entire hearing. The presiding officer of an AFDRB hearing decides case-by-case in the Air Force. ADRB policy is unchanged. The testimony of corroborating witnesses may, however, be more convincing if they have not been present in the room to hear other witnesses' (including the applicant's) testimony. Thus, a request that witnesses remain outside may be advisable.

b. P.9/16R, n.74b:

Cite is now 32 C.F.R. § 70.8(b)(11).

c. P.9/17L, ¶ 2:

The Army DRB SOP has been withdrawn.

9.2.11.3 Prehearing Procedures

• P.9/17L, ¶ 3:

But see § 9.2.8, P.9/14L, ¶ 4.

9.2.11.4 Conduct of the Hearing

a. P.9/17L, n.77:

Cite is now 32 C.F.R. § 70.8(b)(12)(ii).

b. P.9/17L, n.78:

Cite is now 32 C.F.R. § 70.8(b)(12)(iii).

9.2.11.5 How the Hearing Is Recorded

a. P.9/17R, ¶ 1:

The ADRB now also tape-records its hearings and copies of the tapes are provided when requested. The tape becomes a permanent part of the applicant's personnel file. Videotapes of hearing examinations are, however, kept for only six months. A request for a copy of a recording of an NDRB hearing can be made orally at the hearing or in writing. A request for a copy of the recording of an AFDRB hearing can be made orally at the hearing, or in writing addressed to: AFMPC/DPMDOA1, Randolph AFB, TX 78150-6001. NDRB and AFDRB tapes are also made a permanent part of the applicant's personnel file.

b. P.9/17R, n.78b:

Cite is now 32 C.F.R. § 70.8(j).

c. P.9/17R, ¶ 2:

The equipment used by the boards is unreliable, and it is not uncommon for recordings of the hearing to be unintelligible or for the equipment to have failed part way through the proceedings without the problem being noticed. The DRBs allow applicants to make their own recordings of the proceeding.

9.2.12 Withdrawals, Postponements, and Continuances of an Application or Hearing

9.2.12.1 Withdrawals

a. P.9/18L, n.81:

Cite is now § 70.8(b)(7).

[14]*See* Supp. § 24.3.1.2, *infra; supra* note 11.

[15]Note, however, FD 80- 02104 (UD to HD; records missing but relied on testimony of applicant that no aggravating factors to applicant's homosexual conduct justified UD).

[16]*See* AD 81-00833; FD 80-02512; DF 80-02104; DF 80-01907; DF 80-01717-A.

b. P.9/18L, ¶ 2:

A subsequent application after a withdrawal must, however, still be within the 15-year deadline for DRB applications.

9.2.12.2 Postponements

a. P.9/18L, n.82:

Cite is now 32 C.F.R. § 70.8(b)(7)(ii).

b. P.9/18L, ¶ 4:

Current AFDRB policy is not to grant postponements. Exceptions due to emergency circumstances are considered on a case-by-case basis.

c. P.9/18L, ¶ 5:

The NDRB scheduling notice states that "[n]ormally unforeseen illness, validated by medical incapacitation and/or hospitalization verified by your doctor, is the only recognized excuse for rescheduling." If the applicant appears at the hearing site and decides not to proceed or asks for more time to collect evidence, the NDRB will proceed with the case and conduct a records only review, if one was not done before, or proceed and give the applicant a stated period of time to obtain and submit evidence. Rarely will another personal appearance be permitted in these situations.

d. P.9/18L, ¶ 6:

A request for a postponement of an ADRB hearing must be in writing and should be accompanied by documentary evidence to justify the postponement. The request must be received in Washington prior to the date of the scheduled hearing or date the travel panel departs.

9.2.12.3 Continuances

• P.9/18R, n.86:

Cite is now 32 C.F.R. § 70.8(b)(7).

9.2.13 Penalty for Failure to Appear at a Scheduled Hearing

• P.9/18R, n.87:

Cite is now 32 C.F.R. § 70.8(b)(6).

9.2.14 DRB's Decision and Possible Appeals From a Denial of an Upgrade

a. P.9/18R, ¶ 5:

It may be indicative of the NDRB's current approach to discharge cases that in response to an NVLSP request for all form letters routinely used by the board, the only decisional form letters were a denial and an upgrade to a General Discharge/ Convenience of the Government.

b. P.9/18R, n.88:

Cite is now 32 C.F.R. § 70.8(h).

9.2.15 Review of the DRB's Decision by the Secretarial Reviewing Authority

9.2.15.1 Secretarial Review of Naval DRB Decisions

a. P.9/19R, ¶ 1:

Current NDRB regulations provide that:

> The SRA [Secretarial Review Authority] may review the following types of cases before issuance of the final notification of decision:
>
> (i) Any specific case in which the SRA has an interest.
>
> (ii) Any specific case that the president of the NDRB believes is of significant interest to the SRA.[17]

b. P.9/20L, ¶ 3:

Current NDRB regulations state that:

> The applicant shall be provided with a reasonable period of time, but not less than 25 days, to submit a rebuttal to the SRA. Any issue in rebuttal consists of a clear and specific statement by the applicant in support of or in opposition to the statements of the NDRB or NDRB president on decisional issues and other clear and specific issues that were submitted by the applicant. The rebuttal shall be based solely on the matters in the record before the NDRB closed the case for deliberation or in the president's recommendation. [18]

c. P.9/20L, n.95:

Current cite is 32 C.F.R. § 724.814(b)(2).

9.2.15.2 Secretarial Review of Army DRB Decisions

a. P.9/20R, ¶ 2:

DoD Directive 1332.28, effective November 27, 1982, provides for an opportunity to submit matters in rebuttal when cases are forwarded to the Secretarial Review Authority. Failure to follow this directive has provided grounds for reopening of an ADRB case.

b. P.9/20L, last ¶:

Army DRB regulations no longer specify when Secretarial Review will occur.

9.2.15.3 Secretarial Review of Air Force DRB Decisions

a. P.9/20, ¶ 3:

Current regulations provide:

> The following categories of discharge review requests are subject to the review of the Secretary of the Air Force or the Secretary's designee.
>
> (1) Cases in which a minority of the DRB panel requests their submitted opinions be forwarded for consideration. . . .
>
> (2) Cases when required in order to provide information to the Secretary on specific aspects of the discharge review function which are of interest to the Secretary.
>
> (3) Any case which the Director, Air Force Personnel Council, believes is of significant interest to the Secretary.[19]

b. P.9/21L, ¶ 2:

Current Air Force regulations provide:

> Copies of the proposed decisional document on cases that have been forwarded to the SRA (except for cases reviewed on the DRB's own motion without the participation of the applicant or the applicant's counsel) shall be provided to the applicant and counsel or representative, if any. The document will include the Director's recommendation to the SRA, if any. Classified information shall be summarized. . . .
>
> The applicant shall be provided with a reasonable period of time, but not less than 25 days, to submit a rebuttal to the SRA. An issue in rebuttal consists

[17] 32 C.F.R. § 724.814.

[18] 32 C.F.R. § 724.814(b)(2)(ii).

[19] 32 C.F.R. § 865.113(b).

of a clear and specific statement by the applicant in support of or in opposition to the statements of the DRB or Director on decisional issues and other clear and specific issues that were submitted by the applicant. The rebuttal shall be based solely on matters in the record when the DRB closed the case for deliberation or in the Director's recommendation.[20]

9.2.15.4 What Should Be Done if the DRB's Decision Will Be Reviewed

• P.9/21L, ¶ 3:

Under Air Force regulations, there is now an opportunity for the applicant to participate in the Secretarial Review process.[21] DoD Directive 1332.28 requires this opportunity and is applicable to the ADRB.[22] Thus, this section is now applicable to all services.

9.2.15.4.1 Deciding Whether to Submit a Statement

9.2.15.4.2 Obtaining the Record of the Hearing

• P.9/21R, n.103b:

See § 9.2.11.5.

9.2.15.4.3 Requesting an Extension of Time to Submit a Statement

9.2.15.4.4 Preparing Applicant's Statement or Brief Advocating an Upgrade and Rebutting Adverse Board or Director Opinions

• P.9/22L, ¶ 2:

Current regulations provide that:

> An issue in rebuttal consists of a clear and specific statement by the applicant in support of or in opposition to the statements of the DRB or Director on decisional issues and other clear and specific issues that were submitted by the applicant. The rebuttal shall be based solely on matters in the record when the DRB closed the case for deliberation or in the Director's recommendation.[23]

The more specific guidance cited in MDU has been rescinded. The strategy outlined is, however, still valid.

9.2.15.4.5 Preparing Another Statement of Material Contentions

9.2.16 Reconsideration by a DRB

a. P. 9/22R, ¶ 1:

It is no longer clear that the DRBs have higher upgrade rates than the BCMRs. Reliable statistics for the BCMRs, however, are not available except for the Air Force (the AFBCMR upgrade rate has been about 18% in recent years). It is estimated that approximately 20% of the upgrade applications at the BCNR are successful.

b. P.9/22R, n.105:

Cite is now 32 C.F.R. § 70.8(b)(8).

c. P.9/22R, ¶ 2, add •:

The veteran is to be represented by a counsel or representative, and was not so represented in any previous consideration of the case by the DRB.[24]

d. P.9/22R, n.105a:

The DRBs all currently take the position that they will not reconsider a case beyond the 15-year limit except on a case-by-case basis as warranted by new, substantial, relevant evidence not available to the applicant at the time of the original review. Since the 15-year limit is statutory, it is unclear that a DRB panel would have jurisdiction to consider such a claim even if it were so inclined.

e. P.9/22R, last ¶:

The cite should be 32 C.F.R. § 70.8(b)(8).

9.3 DRB Standards of Review

a. P.9/23L, n.105b:

Cite is now 32 C.F.R. § 70.9.

b. P.9/23L, n.105c:

Cite is now 32 C.F.R. § 70.9(c)(3)(i).

c. P.9/23L, n.106:

Cite is now 32 C.F.R. § 70.9(a).

d. P.9/23R, n.107:

(1) 32 C.F.R. § 70.8(c)(6)(i) now provides:

> When a DRB determines that an applicant's discharge was improper . . . , the DRB will determine which reason for discharge should have been assigned based upon the facts and circumstances before the discharge authority, including the Service regulations governing the reasons for discharge at the time the applicant was discharged. Unless it is also determined that the discharge was inequitable . . . , the provisions as to characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

The regulation previously used the words "in view of" instead of the word "including" in the provision quoted above. This amendment appears to give the DRBs more flexibility in changing a reason for discharge. The appropriate discharge under the regulations in effect at the time of separation is now just a factor in the DRB's decision, not strictly controlling.

(2) The material cited at 32 C.F.R. § 70.5(c)(6)(ii) is now at 32 C.F.R. § 70.8(c)(6)(ii).

(3) In ¶ 4, add *White v. Secretary of the Army,* 878 F.2d 501 (D.C. Cir. 1989), *rev'g and remanding* 629 F. Supp. 64, 12 MIL. L. REP. 2449 (D.D.C. 1984).

e. P.9/24L, ¶ 1:

See Supp. § 9.3.2.2 for current guidance on discharge grading. It is more specific than it had been.

f. P.9/24L, ¶ 1:

See Chapter 4, Appendix A.

g. P.9/24L, ¶ 2, 1st sentence:

Since MDU was published, there are new "uncharacterized" discharges, including "Entry Level Separation" (ELS). The Discharge Review Boards can only change a discharge to an Entry Level Separation if the original

[20] 32 C.F.R. § 865.113(f), (g).

[21] *See* Supp. § 9.2.15.3.

[22] *See* Supp. § 9.2.15.2.

[23] 32 C.F.R. § 865.113(g) (AFDRB regulation); 32 C.F.R. § 724.814(b)(2)(ii) is the substantively identical provision for the NDRB.

[24] 32 C.F.R. § 70.8(b)(8)(v).

discharge was issued after the effective date for ELS discharges—October 1, 1982.[25]

h. P.9/24L, ¶ 2, 2nd sentence:

This proposition was rejected in *Strang v. Marsh,* 602 F. Supp. 1565 (D.R.I. 1985).

9.3.1 Propriety of the Discharge

• P.9/24, ¶ 3:

Cite is now 32 C.F.R. § 70.9(b).

9.3.1.1 Prejudicial Error in the Discharge

a. P.9/24L, n.110:

Cite should be 32 C.F.R. § 70.9(b)(1)(i).

b. P.9/24R, n.112, ¶ 2:

Cite is now 32 C.F.R. § 70.8(b)(12)(vi).

c. P.9/24R, n.112, ¶ 4:

The complete citation for *Mulvaney v. Stetson* is 493 F. Supp. 1218, 8 MIL. L. REP. 2628 (N.D. Ill. 1980).

d. P.9/24R, ¶ 2:

The Army DRB SOP has been withdrawn. If, however, any of the circumstances listed in this paragraph are found in an Army case, mention that the former Army DRB SOP found those circumstances to be prejudicial. This may lend credibility to the argument.

9.3.1.2 Favorable Current Standards That DRBs Are Required to Apply Retroactively

• P.9/25L, n.114:

Cite is now 32 C.F.R. § 70.9(b)(1)(ii).

9.3.2 Equity of the Discharge

• P.9/25L, ¶ 2:

Cite is now 32 C.F.R. § 70.9(c).

9.3.2.1 Retroactive Application of Favorable Current Standards

a. P.9/25, n.115:

Cite is now 32 C.F.R. § 70.9(c)(1).

b. P.9/25R, n.115a:

See Chapter 5 summaries of regulatory requirements at different times.

c. P.9/25R, n.116:

(1) Cite should be 32 C.F.R. § 70.9(c)(1).

(2) Introduction of the results of compelled urinalysis test no longer precludes a less than honorable discharge (see Chapter 15).

9.3.2.2 Type of Discharge Issued Is Lower Than Type Normally Issued for Particular Conduct

a. P.9/24R, n.117:

(1) Cite is now 32 C.F.R. § 70.9(c)(2).

(2) See MD 83-02913 (UD to GD; UD too harsh for three days UA and DOLO where servicemember was told to wait outside office, but left).

b. P.9/25R, n.118:

DoD guidelines provide general guidance on when types of discharges should be issued:

> *Honorable.* The Honorable Characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate. . . .
>
> *General (under honorable conditions).* If a member's service has been honest and faithful, it is appropriate to characterize that service under honorable conditions. Characterization of service as General (under honorable conditions) is warranted when significant negative aspects of the member's conduct or performance of duty outweigh positive aspects of the member's military record. . . .
>
> *Under Other Than Honorable Conditions.* This characterization may be issued in the following circumstances:
>
> 1. When the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of members of the Military Services.
>
> 2. When the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected of members of the Military Services. Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death, abuse of a special position of trust, disregard by a superior of customary superior-subordinate relationships, acts or omissions that endanger the security of the United States or the health and welfare of other members of the Military Services and deliberate acts or omissions that seriously endanger the health and safety of other persons.[26]

9.3.2.3 General Fairness in View of the Applicant's Overall Record

9.3.2.3.1 Quality of the Applicant's Service

• P.9/26R, n.119:

Cite is now 32 C.F.R. § 70.9(c)(3)(i).

9.3.2.3.2 Applicant's Ability to Serve Satisfactorily and to Adjust to Military Service

• P.9/26R, n.121:

Cite is now 32 C.F.R. § 70.9(c)(3)(ii)(A).

9.3.2.3.3 Family and Personal Problems

• P.9/26R, n.122:

Cite is now 32 C.F.R. § 70.6(c)(3)(ii)(B).

9.3.2.3.4 Abuse of Authority by Others Contributing to Discharge

a. P.9/27L, n.123:

Cite is now 32 C.F.R. § 70.9(c)(3)(ii)(C).

b. P.9/27L, ¶ 1:

The Army DRB SOP has been withdrawn. Citation to

[25] 32 C.F.R. § 70.8(a)(3)(i). *See also* Supp. § 4.2.

[26] 32 C.F.R. Part 41, App. A, Part 2, ¶ C.1. *See also* MD 83-02913 (NDRB restates these standards and applies them).

directly relevant provisions of it may, however, add credibility to an applicant's arguments.

9.3.2.3.5 Discrimination Against the Applicant

§ P.9/27L, n.124:

Cite is now 32 C.F.R. § 70.9(c)(3)(ii)(D).

9.3.3 Presumption of Administrative Regularity

a. P.9/27L, n.125:

Cite is now 32 C.F.R. § 70.8(b)(12)(vi).

b. P.9/27L, ¶ 3:

In *Fairchild v.* Lehman, 609 F. Supp. 287 (E.D. Va. 1985), *aff'd,* 814 F.2d 1555 (Fed. Cir. 1987), the court, in reviewing a BCNR which had before it an affidavit stating regulations had not been followed, and without mention of the presumption of regularity, ruled that the regulations had been violated.

c. P.9/27R, n.126a:

(1) *See United States v. Kline,* 14 M.J. 64, 10 MIL. L. REP. 2894 (C.M.A. 1982). Adverse statements (low ratings) were placed in servicemember's record. Navy regulations require that adverse matter not be placed in the servicemember's record without an opportunity to comment or a statement in writing that he or she does not wish to comment. No comment or signed statement that servicemember did not wish to comment was in the records. Only unsigned acknowledgements, with no indication of a refusal to sign, were in the record. The court held that the presumption of regularity did not give rise to a presumption that the service member had an opportunity to respond to the adverse statements in accordance with regulations because the unsigned acknowledgements dispelled the presumption.

(2) *See* Supp. § 12.1.2.

9.4 BCMR Procedures and Standards

P.9/27R, n.127:

No uniform regulations for BCMRs have been or are expected to be adopted by DoD.

9.4.1 Regulations and Guidelines Governing BCMR Proceedings

• P.9/28L, n.127a:

AR 15-185 is the Army Regulation designation for its BCMR regulations.

9.4.2 Jurisdiction and Powers of the BCMRs

a. P.9/28L, ¶ 3:

The jurisdiction and powers of the BCMRs were changed by the Military Justice Act of 1983. The BCMRs can no longer modify findings or sentence of a court-martial that was conducted after May 31, 1951, except by taking "action on the sentence of a court-martial for purposes of clemency." The 1983 amendments to 10 U.S.C. §§ 1552 and 1553 established that "the Secretary has no power to overturn a prior court-martial conviction by 'correcting records.'" *Stokes v. Orr,* 628 F. Supp. 1085, 1086 (D. Kan. 1985). It has been held that this change applies retroactively. *Id.*

b. P.9/28L, n.129:

Discharge upgrade applications now constitute only approximately 20% of BCMR decision-making.

c. P.9/28L, n.130:

The current version of the AFBCMR codification of this provision is at 32 C.F.R. § 865.9.

d. P.9/28R, n.131:

Before the Military Justice Act of 1983 (*see* a, this section, *supra*), the BCNR had begun to expunge some convictions by special courts-martial. *See* NC 0726-77.

e. P.9/28R, n.132a:

For the veteran seeking reenlistment there is the possibility of waiver of an RE code. This should be taken up with a recruiter.

f. P.9/28R, 7th •:

The BCMRs can take a variety of actions with respect to nonjudicial punishments. The boards can overturn them, expunge them, and restore any forfeiture or loss of rank which resulted from the NJP.

AR 27-10, as revised in November 1982, purports to limit the destruction of all copies of Article 15s even though the servicemember has been found to be "innocent" by the ABCMR. Table 3-2. This appears to be an impermissible limitation on the BCMR's powers.

9.4.3 Eligibility to Apply

a. P.9/29, ¶ 1:

(1) The BCMRs are now denying some cases for the sole stated reason that the application was filed after the three-year deadline. It is unclear whether these cases are considered on the merits.

The ABCMR, particularly, has denied applications where no explanation of the delay in filing has been given.[27] The Board is using boilerplate language in denying applications, focusing on when the error was discovered, *e.g.,* "[t]he alleged error or injustice was, or with reasonable diligence should have been, discovered on the date of discharge. The subject application was not submitted within the time required."

Explanations for delay which have been successful include ignorance of the existence of the BCMR, changes in standards, recent discovery of error, and discovery of the error only after counsel obtained and reviewed the records.[28] Introduction of new evidence in a previously denied claim, even if only a new character statement, can also provide grounds for waiver of the three-year limit. Making these arguments, however, does not guarantee success. Applicants who are rejected based on an "untimely filing" might consider appealing to the Secretary of the service for a review of the decision.

Even if the cases are being considered on their merits

[27] *Evans v. Marsh,* 835 F.2d 609 (5th Cir. 1988) (upholding ABCMR denial based on statute of limitations).

[28] *See, e.g.,* Ridgely v. Marsh, 866 F.2d 1526 (D.C. Cir. 1989) (Ridgely, a member of the Army Reserves, brought action for review of the decision of the ABCMR. Ridgely's application had included a challenge to the amount of active duty he had been credited with. He had discovered the error when the Army sent him a "Request for Verification of Active Federal Service." The BCMR had held that the statute of limitations had run with regard to certain periods of service, thus making his application untimely. The Court found the Board's decision regarding the statute of limitations was arbitrary and capricious, on the grounds that Ridgely had no reason to know of the crediting error prior to the time when the Army sent him the verification form. The BCMR decision was reversed and the case remanded to the BCMR). *See also Mullen v. United States,* 19 Cl. Ct. 50 (1990).

the lack of a written opinion reflecting that consideration can hurt an applicant's chances in court.[29]

The NVLSP plans to challenge these procedures in court. Contact NVLSP if similar cases are found.

(2) The Executive Secretary of the ABCMR has stated in an affidavit that when a BCMR applicant is seeking an upgrade in discharge in a case in which the ADRB denied full relief, the three-year period begins to run on the date of the DRB denial, nevertheless; the Board has been calculating the time period from date of discharge.

(3) In *Baxter v. Secretary of the Navy,* 652 F.2d 181 (D.C. Cir. 1981), the court suggests that where there is a favorable change in the law, the BCMRs must almost always waive the three-year deadline by finding it "in the interest of justice" to do so.

(4) In a disturbing opinion of the Judge Advocate General of the Air Force (OpJAGAF 1983/11, February 16, 1983), it was recommended that a late application be denied despite determining that the applicant's argument on the merits was "not unpersuasive." The basis for the recommendation was that a waiver of the three-year rule would "unfairly prejudice the Air Force" because relevant service and medical records had been destroyed, that the applicant's justification for late filing (ignorance of the procedure for correction of military records) was insufficient, and that the doctrine of laches barred the claim.

This analysis does not seem to derive from the statutory "interest of justice" standard. Whether the applicant has a good reason for the delay in filing would seem to be of much less importance in determining justice than the merits of his or her claim. In a non-adversarial proceeding where equitable relief is allowed and where the Air Force is the decision maker, "unfair prejudice to the Air Force" is a non-sequitur. The Air Force can simply deny the claim on the merits if important evidence has been destroyed.

The effective application of the equitable doctrine of laches begs the question. To apply the doctrine of laches there must be an unreasonable delay and the opposing party must have been prejudiced by the delay. This doctrine has no application in a non-adversarial equitable proceeding. Since the final decision on the merits is made by the Air Force, it is impossible for the late filing to be prejudicially unfair to the Air Force. Again, the Air Force can deny the case on the merits if evidence has been destroyed during the delay.[30]

Generally, the JAG opinion ignores the question of what is in the interest of justice. If the claim on the merits is persuasive, it is simply not in the interest of justice to deny because it is filed late.

b. P.9/29L, ¶ 1:

AR 27-10, Military Justice, now provides procedures to request transfer of Article 15 records, in the case of officers or E-6s and above, to a restricted file if requested by November 1, 1985 or three years after promotion to E-6, whichever is later (¶ 3-43). This procedure must be exhausted before an appeal to the Army BCMR requesting this relief.[31]

c. P.9/29R, n.135:

Cite for the Air Force is now 32 C.F.R. § 865.5(c).

9.4.4 How to Apply

a. P.9/29R, ¶ 3:

(1) Even though it is good to get the 149 filed immediately, always get the military records using the SF 180 first, unless the deadline for filing the 149 is close. Filing the 180 after the 149 can create difficulties in obtaining the military records. *See* Supp. § 6.6.

(2) The ABCMR policy is that all materials should be submitted with the application. This appears, however, to be a preference without legal significance. This is also the stated preference of the BCNR. AFBCMR policy is that briefs must be submitted at the time of the original application.

(3) It currently takes about six months from the date of application to the date of decision at the AFBCMR, taking about another two months when a personal appearance is granted. The ABCMR averages 225 days. This is approximately doubled if a hearing is granted. The BCNR takes approximately three months, taking six months when a personal appearance is granted. These times can vary by several months from year to year and can depend on the type of case. The discharge upgrade cases with which this manual is concerned generally take a little longer than the average of the full gamut of cases which the boards consider.

Note that as the process drags on, it is common not to receive any communication from the BCMR. ABCMR policy is to send an acknowledgement within six months of the application and, if the case has not been assigned to an examiner, an interim notice within four months. These notices are not, however, always sent.

b. P.9/29R, n.136:

New BCMR addresses and telephone numbers, if any, are:

ARMY: (703) 697-4254
AIR FORCE: (703) 692-4726
NAVY: Department of the Navy, Washington, D.C. 20370-5100; (703) 614-1765
COAST GUARD: Attn: Chairman, BCMR (C-60), Department of Transportation, Washington, D.C. 20590; (202) 366-9335

9.4.4.1 Whether or Not to Request a Hearing

• P.9/30L, ¶ 3:

(1) The hearing request is at Box 6 on the current version of the DD Form 149.

(2) The AFBCMR granted three hearings in 1982, three hearings in 1983, two hearings in 1984, and six hearings in 1985. The BCNR granted ten hearings from 1982 to 1985. The ABCMR grants about 50 hearings per year.

9.4.4.2 Type of Corrective Action Requested

• P.9/30L, ¶ 5:

The type of corrective action requested should be described in Box 8 of the current version of the DD Form 149.

9.4.4.3 Why There Is Error or Injustice

• P.9/30R, ¶ 1:

The box asking for the specifics of the error or injustice alleged is Box 9 of the current version of the DD Form 149.

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[29] *See Ballenger v. Marsh,* 708 F.2d 349 (8th Cir. 1983) (when BCMR acts within its discretion in not reviewing an untimely filing, even if a cursory consideration of the records is necessary to make decision, a new claim on the merits does not arise for review in court for the purposes of the statute of limitations). A challenge to the BCMR's decision that waiver of the three-year deadline was not in the interests of justice would appear, however, to be permissible. *See Baxter v. Secretary of the Navy,* discussed at (3), *infra.*

[30] *See supra* notes 28 and 29.

[31] *See also* 32 C.F.R. § 865.9(b), on exhaustion of remedies.

The box asking for a description of the evidence offered in support is now Box 10.

9.4.4.4 Date of Discovery of Error or Injustice

a. P.9/30R, ¶ 2:

(1) The box for stating the date of discovery of the error and why, if it has been more than three years since that date, there was a delay, is Box 11 of the current version of DD Form 149.

(2) *See* Supp § 9.4.3, ¶ a(1).

b. P.9/30R, n.138:

The Air Force cite is now 32 C.F.R. § 865.6.

9.4.4.5 Applicant's Counsel

• P.9/30R, ¶ 3:

Counsel should be identified in Box 7 of the current version of the DD Form 149.

9.4.4.6 Special Instructions for Applicants Who Have Previously Applied to the BCMR

9.4.5 Counsel to a BCMR Applicant

• P.9/30R, n.139:

The Air Force provision now reads:

> The term "counsel" will be construed to include members in good standing of the bar of any State, accredited representatives of veterans' organizations recognized by the Administrator of Veterans' Affairs under Title 38, United States Code, section 3402, or such other persons, who in the opinion of the Board, are considered to be competent to present equitably and comprehensively the request of the applicant for correction, unless barred by law.[32]

9.4.6 Documents That the Applicant Should Submit

a. P.9/31L, ¶ 1, sentence 2 should read:

> "As in the DRB process, however, an applicant's chances for an upgrade are greatly increased if the applicant submits a brief, a statement of material contentions (issues), and evidence of good postservice conduct or other positive aspects of the applicant."

b. P.9/31L, ¶ 3:

The ABCMR policy is that all materials should be submitted with the application. This appears, however, to be a preference without legal significance. This is also the stated preference of the BCNR. AFBCMR policy is that briefs must be submitted at the time of the original application and must be in compliance with ¶ 9, AFR 31-3 (32 C.F.R. § 865.8), which limits briefs to 25 double-spaced typewritten pages. Rebuttal comments to advisory opinions are allowed but may not exceed ten double-spaced typewritten pages. The AFBCMR may waive these limitations. Unlike the DRBs, there is no requirement that the BCMRs address the "issues" (formerly called "contentions") submitted. *Koster v. United States,* 685 F.2d 407, 414, 231 Ct. Cl. 301 (1982).

9.4.7 Composition of a BCMR Panel

• P.9/31L, ¶ 5:

(1) It has been held that it is appropriate for BCMR staff (i.e., "examiners") to "assist" the board in consideration of a case. *Koster v. United States,* 685 F.2d 407, 414, 231 Ct. Cl. 301 (1982)

(2) It has been held that the Secretary of the Navy's appointment of the Executive Director and Chief Counsel of the BCNR as alternate members of the Board, and their participation in a case as sitting members, is appropriate. *Viles v. Ball,* 872 F.2d 491 (D.C. Cir. 1989).

9.4.8 Access to Documents That the BCMR Will Review

a. P.9/32L, ¶ 1:

The court in *Koster v. United States,* 685 F.2d 407, 414, 231 Ct. Cl. 301 (1982), held that it was not a violation of due process for the ABCMR to consider, ex parte, an advisory opinion by the Office of the Judge Advocate General and a "memorandum of consideration" authored by a staff examiner at the board.

b. P.9/32L, ¶ 2:

It is ABCMR policy to request FBI reports and other records pertaining to possible criminal conduct where the applicant has claimed a crime-free post-service record. The BCNR decides whether to request such records on a case-by-case basis. The BCNR most frequently requests criminal records from civil authorities in cases where the veteran was discharged because of a civil court conviction or when the veteran contends that relief is warranted because of his or her post-military record. Criminal investigative files are normally requested by the AFBCMR in cases where post-service conduct is being considered.

c. P.9/32L, ¶ 2 and n.144:

The Air Force provision now states:

> During the course of review of the case when it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by testimony and other evidence before the Board, the Board may require the applicant to obtain, or the Board may obtain, such further information as it may consider essential to a complete and impartial determination of the facts and issues. The applicant will have access to evidence developed by the Board on its own motion . . . and may submit additional comment with regard to this evidence.[33]

Thus, at the AFBCMR, the applicant is explicitly given the right to review and comment on evidence gathered by the board.

9.4.9 How the BCMR Decides Applications: With or Without a Hearing

a. P.9/32L, ¶ 4:

(1) At the ABCMR, as a practical matter, hearings can be directed by the Secretary, the Executive Director, or a Board Panel. At the Coast Guard BCMR, the Chairman of the Board determines whether to grant a hearing when one is requested on an application. If the Chairman denies the request for a hearing, an applicant can appeal the decision to the Board within 45 days.

(2) Sometimes, the applicant will be informed by BCMR personnel that if s/he amends his/her application to ask for less, the board will very likely view his/her case more favorably with respect to the relief still requested. Of course, if an applicant does this, s/he may waive his/her right to seek full relief in court—something the boards are well aware

[32] 32 C.F.R. § 865.12.

[33] 32 C.F.R. § 865.18(b).

of. Usually, when this happens, the staff suggests that the application be changed so as not to cost the government any money. Since it is the BCMR which is deciding the case, BCMR personnel coercion to amend applications can be very effective. Such "deal making" is, however, inconsistent with the Board's mandate to justly determine the merits of applications and has been criticized by at least one Claims Court judge.[34]

b. P.9/32L, n.145:

The Air Force regulation is now at 32 C.F.R. § 865.9(a).

c. P.9/32L, n.146:

The Air Force regulation is now at 32 C.F.R. § 865.21.

9.4.10 BCMR Hearing Procedures

a. P.9/32L, n.147:

The Air Force regulation is now at 32 C.F.R. § 865.11(a).

b. P.9/32R, n.148:

The Air Force regulation is now at 32 C.F.R. § 865.11(b).

c. P.9/32R, n.149:

The Air Force regulation is now at 32 C.F.R. § 865.10.

d. P. 9/32R, n.150:

The Air Force regulation is now at 32 C.F.R. § 865.13.

e. P.9/32R, n.151:

The Air Force regulation is now at 32 C.F.R. § 865.16(a).

f. P.9/32R, n.152:

The Air Force regulation is now at 32 C.F.R. § 865.16(d)

g. P.9/32R, n.153:

The Air Force regulation is now at 32 C.F.R. § 865.16(c).

h. P.9/32R, n.154:

The Air Force regulation is now at 32 C.F.R. § 865.17.

9.4.11 Withdrawing an Application

a. P.9/33L, ¶ 5:

The Air Force regulation is now at 32 C.F.R. § 865.8.

9.4.12 BCMR Standards of Review

a. P.9/33L, ¶ 1:

Unlike DRBs, BCMRs are not expressly required to consider current standards.[35] Nevertheless, BCMRs have upgraded discharges based on current standards.[36]

b. P.9/33L, n.156:

The Air Force regulation now states:

> The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him or her, that effective relief cannot be granted, or that the applicant did not file his or her application within three years after he or she discovered or reasonably could have discovered the alleged error or injustice and insufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file within the prescribed three years. The Board will not deny an application on the sole ground that the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a board for correction of military or naval records. Denial of an application on the grounds of insufficient relevant evidence to demonstrate probable material error or injustice is without prejudice to further consideration if newly discovered relevant evidence is submitted. The applicant will be informed of his or her privilege to submit newly discovered relevant evidence for consideration.[37]

Note that inability to grant "effective relief" has been added as a basis for denial of a claim. The significance of this addition is unclear.

c. P.9/33L, n.157 after cite to *Proper v. United States:*

See Supp. App. 9D for a discussion of a series of Navy cases currently being reconsidered.

9.4.13 BCMR's and Secretarial Reviewing Authority's Decisional Document

9.4.13.1 Denial Without a Hearing

• P.9/33R, ¶ 2:

The Air Force regulation now requires:

> When the Board determines that the record should be corrected or that the application be denied, the determination will be made in writing. The writings (proceedings) will include, but not be limited to, all facts of record and statement of ground(s) upon which the Board's determination is based. Where the Board concludes that complete relief should not be granted, written proceedings will address applicant's claim(s) of constitutional, statutory, and/or regulatory violation rejected by the Board and/or reviewing authority. In those cases involving the characterization of an individual's discharge or dismissal from the military service, the factors required by Air Force regulations to be considered for determination of the character of and reason for discharge or dismissal in question will be included.[38]

9.4.13.2 Partial or Complete Relief Recommended Without a Hearing

9.4.13.3 BCMR Decision When a Hearing Is Granted

9.4.13.4 Secretarial Reviewing Authority's Denial of Compete Relief

9.4.13.5 Secretarial Reviewing Authority's Grant of Complete Relief

• P.9/34L, n.161:

The Air Force regulation is now at 32 C.F.R. §§ 865.14 and 865.21.

[34]Evans v. United States, No. 239-88C (Cl. Ct. Mar. 24, 1989). On file at NVLSP.

[35]See §§ 9.3.1.2, 9.3.2.1.

[36]FC 83-04076 (GD to HD; upgrade based on current AFR 39-10 discharge standards for "conditions that interfere with Military Service").

[37]32 C.F.R. § 865.9(b).

[38]32 C.F.R. § 865.9(d).

9.4.13.6 Requests for Further Consideration or Reconsideration

9.4.14 Lack of Opportunity to Participate in the Secretarial Review Process

9.4.15 Further Consideration and Reconsideration: Applications Filed After a Previous BCMR Denial

9.4.15.1 Subsequent Applications After a Denial of Relief Without Hearing

a. P.9/34R, n.163:

The cite should be 32 C.F.R. §§ 581.3(c)(5)(ii), 723.3(e)(2), 865.9(b).

The Air Force regulation is now worded slightly differently, but its meaning is unchanged.

b. P.9/34R, n.164:

(1) *See Marcotte v. Secretary of Defense,* 618 F. Supp. 756, 764 (D. Kan. 1985).

(2) The Air Force Correction Board's regulation now reads slightly differently than the Army and Navy regulations. The Air Force does not separately describe a process of "further consideration" but includes it in a process of "reconsideration" (*see* MDU § 9.4.15.2 for the distinction between "further consideration" and "reconsideration" at the Army and Navy correction boards):

> Requests for reconsideration shall provide newly discovered relevant evidence not reasonably available to the applicant at the time of a previous application. All requests for further consideration will be initially screened by the staff of the Board to determine whether any factual allegations or any arguments, or, any documentary evidence has been submitted by the applicant that was not of record at the time of any prior Board consideration. If no such allegations, arguments or evidence have been submitted, the applicant will be informed that the request was not considered by the Board because it did not contain any newly discovered evidence or other matter that was not of record at the time of any previous Board consideration. If such factual allegations, or documentary evidence have been submitted, the request shall be forwarded to the Board [for consideration under the normal process]. The Board will determine the relevance and weight of any evidence submitted; and, whether or not the evidence was reasonably discoverable by the applicant at the time of any previous application.
>
> 32 C.F.R. § 865.9(c).

The combining of the further consideration and reconsideration processes may be a by-product of the substantial grant of authority to the AFBCMR to act on behalf of the Secretary of the Air Force in taking final action on claims before it.[39] Since the Board acts for the Secretary in taking final action in most cases, there is little reason to distinguish between "further consideration" after the Board decision, and "reconsideration" after Secretarial action.

9.4.15.2 Subsequent Applications After a Denial of Relief by the Secretarial Reviewing Authority

• P.9/35L, ¶ 2:

Note that the AFBCMR "is authorized to take final action on behalf of the Secretary of the Air Force in approving the correction of military records, provided such action:

> (i) Has been recommended by the Air Staff;
> (ii) Is unanimously agreed to by the Board; and
> (iii) Falls into [one of 35 categories including changing the character and reason for discharge]."[40]

Appendix 9A

Discharge Review Boards' Enabling Statute (10 U.S.C. § 1553)

[*See* page 9S/15]

Appendix 9B

Board for Correction of Military Records' Enabling Statute (10 U.S.C. § 1552)

[*See* page 9S/16]

Appendix 9C

Discharge Review Boards' Procedures and Standards

[*See* page 9S/18]

Appendix 9D

Board for Correction of Naval Records Re-Review Cases

[*See* page 9S/13]

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[39]*See* Supp. § 9.4.15.2, *infra.*

[40]32 C.F.R. § 865.18(e).

APPENDIX 9A

UNITED STATES CODE ANNOTATED
TITLE 10. ARMED FORCES
SUBTITLE A—GENERAL MILITARY LAW
PART II—PERSONNEL
CHAPTER 79—CORRECTION OF MILITARY RECORDS

§ 1553. Review of discharge or dismissal

(a) The Secretary concerned shall, after consulting the Secretary of Veterans Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal. With respect to a discharge or dismissal adjudged by a court-martial case tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge for purposes of clemency.

(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Secretary of Veterans Affairs under chapter 59 of Title 38.

(Added Pub.L. 85-857, § 13(v)(2), Sept. 2, 1958, 72 Stat. 1267, and amended Pub.L. 87-651, Title I, § 110(a), Sept. 7, 1962, 76 Stat. 509.)

(As amended Pub.L. 98-209, § 11(b), Dec. 6, 1983, 97 Stat. 1407; Pub.L. 101-189, Div. A, Title XVI, § 1621(a)(2), Nov. 29, 1989, 103 Stat. 1603.)

APPENDIX 9B

UNITED STATES CODE ANNOTATED
TITLE 10. ARMED FORCES
SUBTITLE A—GENERAL MILITARY LAW
PART II—PERSONNEL
CHAPTER 79—CORRECTION OF MILITARY RECORDS

§ 1552. Correction of military records: claims incident thereto

(a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing a decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

(Aug. 10, 1956, c. 1041, 70A Stat. 116; June 29, 1960, Pub.L. 86-533, § 1(4), 74 Stat. 246; Dec. 12, 1980, Pub.L. 96-513, Title V, § 511(60), 94 Stat. 2925.)

(As amended Dec. 6, 1983, Pub. L. 98-209, § 11(a), 97 Stat. 1407; Sept. 29, 1988, Pub.L. 100-456, Div. A, Title XII, § 1233(a), 102 Stat. 2057; Nov. 29, 1989, Pub.L. 101-189, Div. A, Title V, § 514, Title XVI, § 1621(a)(2), 103 Stat. 1441, 1603.)

APPENDIX 9C

TITLE 32—NATIONAL DEFENSE
SUBTITLE A—Department of Defense
Chapter I—Office of the Secretary of Defense
Subchapter B—Personnel, Military and Civilian
Part 70—Discharge Review Boards (Drb) Procedures and Standards

§ 70.1 Reissuance and purpose.

This part is reissued and:

(a) Establishes uniform policies, procedures, and standards for the review of discharges or dismissals under 10 U.S.C. 1553.

(b) Provides guidelines for discharge review by application or on motion of a DRB, and the conduct of discharge reviews and standards to be applied in such reviews which are designed to ensure historically consistent uniformity in execution of this function, as required under Pub. L. 95-126.

(c) Assigns responsibility for administering the program.

(d) Makes provisions for public inspection, copying, and distribution of DRB documents through the Armed Forces Discharge Review/Correction Board Reading Room.

(e) Establishes procedures for the preparation of decisional documents and index entries.

(f) Provides guidance for processing complaints concerning decisional documents and index entries.

§ 70.2 Applicability.

The provisions of this Part 70 apply to the Office of the Secretary of Defense (OSD) and the Military Departments. The terms, "Military Services," and "Armed Forces," as used herein, refer to the Army, Navy, Air Force and Marine Corps.

§ 70.3 Definitions.

(a) *Applicant.* A former member of the Armed Forces who has been discharged or dismissed administratively in accordance with Military Department regulations or by sentence of a court-martial (other than a general court-martial) and under statutory regulatory provisions whose application is accepted by the DRB concerned or whose case is heard on the DRB's own motion. If the former member is deceased or incompetent, the term "applicant" includes the surviving spouse, next-of-kin, or legal representative who is acting on behalf of the former member. When the term "applicant" is used in §§ 70.8 through 70.10, it includes the applicant's counsel or representative, except that the counsel or representative may not submit an application for review, waive the applicant's right to be present at a hearing, or terminate a review without providing the DRB an appropriate power of attorney or other written consent of the applicant.

(b) *Complainant.* A former member of the Armed Forces (or the former member's counsel) who submits a complaint under § 70.10 with respect to the decisional document issued in the former member's own case; or a former member of the Armed Forces (or the former member's counsel) who submits a complaint under § 70.10 stating that correction of the decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(c) *Counsel or Representative.* An individual or agency designated by the applicant who agrees to represent the applicant in a case before the DRB. It includes, but is not limited to: a lawyer who is a member of the bar of a federal court or of the highest court of a state; an accredited representative designated by an organization recognized by the Administrator of Veterans Affairs; a representative from a state agency concerned with veterans affairs; and representatives from private organizations or local government agencies.

(d) *Discharge.* A general term used in this Directive that includes dismissal and separation or release from active or inactive military status, and actions that accomplish a complete severance of all military status. This term also includes the assignment of a reason for such discharge and characterization of service (32 CFR Part 41).

(e) *Discharge Review.* The process by which the reason for separation, the procedures followed in accomplishing separation, and the characterization of service are evaluated. This includes determinations made under the provisions of 38 U.S.C. 3103(e)(2).

(f) *Discharge Review Board (DRB).* An administrative board constituted by the Secretary of the Military Department concerned and vested with discretionary authority to review discharges and dismissals under the provisions of 10 U.S.C. 1553. It may be configured as one main element or two or more elements as designated by the Secretary concerned.

(g) *DRB Panel.* An element of a DRB, consisting of five members, authorized by the Secretary concerned to review discharges and dismissals.

(h) *DRB Traveling or Regional Panel.* A DRB panel that conducts discharge reviews in a location outside the National Capital Region (NCR).

(i) *Hearing.* A review involving an appearance before the DRB by the applicant or on the applicant's behalf by a counsel or representative.

(j) *Hearing Examination.* The process by which a designated officer of a DRB prepares a presentation for consideration by a DRB in accordance with regulations prescribed by the Secretary concerned.

(k) *National Capital Region (NCR).* The District of Columbia; Prince Georges and Montgomery Counties in Maryland; Arlington, Fairfax, Loudoun, and Prince William Counties in Virginia; and all cities and towns included within the outer boundaries of the foregoing counties.

(l) *President, DRB.* A person designated by the Secretary concerned and responsible for the supervision of the discharge review function and other duties as assigned.

§ 70.4 Responsibilities.

(a) The *Secretaries of the Military Departments* have the authority for final decision and the responsibility for the operation for their respective discharge review programs under 10 U.S.C. 1553.

(b) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* (ASD(MRA&L)) shall:

(1) Resolve all issues concerning DRBs that cannot be resolved among the Military Departments.

(2) Ensure uniformity among the Military Departments in the rights afforded applicants in discharge reviews.

(3) Modify or supplement the enclosures to this part.

(4) Maintain the index of decisions and provide for timely modification of index categories to reflect changes in discharge review policies, procedures, and standards issued by the OSD and the Military Departments.

(c) The *Secretary of the Army,* as the designated administrative focal point for DRB matters, shall:

(1) Effect necessary coordination with other governmental agencies regarding continuing applicability of this part and resolve administrative procedures relating thereto.

(2) Review suggested modifications to this part, including implementing documents; monitor the implementing documents of the Military Departments; resolve differences, when practicable; recommend specific changes; provide supporting rationale to the ASD(MRA&L) for decision; and include appropriate documentation through the Office of the ASD(MRA&L) and the OSD Federal Register liaison officer to effect publication in the FEDERAL REGISTER.

(3) Maintain the DD Form 293, "Application for Review of Discharge or Separation from the Armed Forces of the United States," and republish as necessary with appropriate coordination of the other Military Departments and the Office of Management and Budget.

(4) Respond to all inquiries from private individuals, organizations, or public officials with regard to DRB matters. When the specific Military Service can be identified, refer such correspondence to the appropriate DRB for response or designate an appropriate activity to perform this task.

(5) Provide overall guidance and supervision to the Armed Forces Discharge Review/Correction Board Reading Room with staff augmentation, as required, by the Departments of the Navy and Air Force.

(6) Ensure that notice of the location, hours of operation, and similar types of information regarding the Reading Room is published in the FEDERAL REGISTER.

§ 70.5 Procedures.

(a) Discharge review procedures are prescribed in § 70.8.

(b) Discharge Review Standards are prescribed in § 70.9 and constitute the basic guidelines for the determination whether to grant or deny relief in a discharge review.

(c) Complaint Procedures about decisional documents are prescribed in § 70.10.

§ 70.6 Information requirements.

(a) *Reporting requirements.* (1) The reporting requirement prescribed in § 70.8(n) is assigned Report Control Symbol DD-M(SA)1489.

(2) All reports must be consistent with DoD Directive 5000.11, "Data Elements and Data Codes Standardization Program," December 7, 1964.

(b) *Use of standard data elements.* The data requirements prescribed by this Part shall be consistent with DoD 5000.12-M, "DoD Manual for Standard Data Elements," December 1981. Any reference to a date should appear as (YYMMDD), while any name entry should appear as (Last name, first name, middle initial).

§ 70.7 Effective date and implementation.

This part is effective immediately for the purpose of preparing implementing documents. DoD Directive 1332.28, March 29, 1978, is officially canceled, effective November 27, 1982. This part applies to all discharge review proceedings conducted on or after November 27, 1982. § 70.10 applies to all complaint proceedings conducted on or after September 28, 1982. Final action on complaints shall not be taken until September 28, 1982, unless earlier corrective action is requested expressly by the applicant (or the applicant's counsel) whose case is the subject of the decisional document. If earlier corrective action is requested, it shall be taken in accordance with § 70.10.

§ 70.8 Discharge review procedures.

(a) *Application for review*—(1) *General.* Applications shall be submitted to the appropriate DRB on DD Form 293, "Application for Review of Discharge or Separation from the Armed Forces of the United States," with such other statements, affidavits, or documentation as desired. It is to the applicant's advantage to submit such documents with the application or within 60 days thereafter in order to permit a thorough screening of the case. The DD Form 293 is available at most DoD installations and regional offices of the Veterans Administration, or by writing to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(2) *Timing.* A motion or request for review must be made within 15 years after the date of discharge or dismissal.

(3) *Applicant's responsibilities.* An applicant may request a change in the character of or reason for discharge (or both).

(i) *Character of discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in character of discharge (for example, General Discharge to Honorable Discharge; Other than Honorable Discharge to General or Honorable Discharge). Only a person separated on or after 1 October 1982 while in an entry level status may request a change from Other than Honorable Discharge to Entry Level Separation. A request for review from an applicant who does not have an Honorable Discharge shall be treated as a request for a change to an Honorable Discharge unless the applicant requests a specific change to another character of discharge.

(ii) *Reason for discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in the reason for discharge. If an applicant does not request a specific change in the reason for discharge, the DRB shall presume that the request for review does not involve a request for change in the reason for discharge. Under its responsibility to examine the propriety and equity of an applicant's discharge, the DRB shall change the reason for discharge if such a change is warranted.

(iii) The applicant must ensure that issues submitted to the DRB are consistent with the request for change in discharge set forth in block 7 of the DD Form 293. If an ambiguity is created by a difference between an applicant's issue and the request in block 7, the DRB shall respond to the issue in the context of the action requested in block 7. In the case of a hearing, the DRB shall attempt to resolve the ambiguity under paragraph (a)(5) of this section.

(4) *Request for consideration of specific issues.* An applicant may request the DRB to consider specific issues which, in the opinion of the applicant, form a basis for changing the character of or reason for discharge, or both. In addition to the guidance set forth in this section, applicants should consult the other sections in this part (particularly paragraphs (c), (d), and (e) of this section and §§ 70.9 and 70.10 before submitting issues for consideration by the DRB.

(i) *Submission of issues on DD Form 293.* Issues must be provided to the DRB on DD Form 293 before the DRB closes the review process for deliberation.

(A) *Issues must be clear and specific.* An issue must be stated clearly and specifically in order to enable the DRB to understand the nature of the issue and its relationship to the applicant's discharge.

(B) *Separate listing of issues.* Each issue submitted by an applicant should be listed separately. Submission of a separate statement for each issue provides the best means of ensuring that the full import of the issue is conveyed to the DRB.

(C) *Use of DD Form 293.* DD Form 293 provides applicants with a standard format for submitting issues to the DRB, and its use:

(*1*) Provides a means for an applicant to set forth clearly and specifically those matters that, in the opinion of the applicant, provide a basis for changing the discharge;

(*2*) Assists the DRB in focusing on those matters considered to be important by an applicant;

(*3*) Assists the DRB in distinguishing between a matter submitted by an applicant in the expectation that it will be treated as a decisional issue under paragraph (e) of this section, and those matters submitted simply as background or supporting materials;

(*4*) Provides the applicant with greater rights in the event that the applicant later submits a complaint under § 70.10(d)(1)(iii) concerning the decisional document;

(*5*) Reduces the potential for disagreement as to the content of an applicant's issue.

(D) *Incorporation by reference.* If the applicant makes an additional written submission, such as a brief, in support of the application, the applicant may incorporate by reference specific issues set forth in the written submission in accordance with the guidance on DD Form 293. The reference shall be specific enough for the DRB to identify clearly the matter being submitted as an issue. At a minimum, it shall identify the page, paragraph, and sentence incorporated. Because it is to the applicant's benefit to bring such issues to the DRB's attention as early as possible in the review, applicants who submit a brief are strongly urged to set forth all such issues as a separate item at the beginning of the brief. If it reasonably appears that the applicant inadvertently has failed expressly to incorporate an issue which the applicant clearly identifies as an issue to be addressed by the DRB, the DRB shall respond to such an issue under paragraphs (d) and (e) of this section.

(E) *Effective date of the new Form DD 293.* With respect to applications received before November 27, 1982, the DRB shall consider issues clearly and specifically stated in accordance with the rules in effect at the time of submission. With respect to applications received on or after November 27, 1982, if the applicant submits an obsolete DD Form 293, the DRB shall accept the application, but shall provide the applicant with a copy of the new form and advise the applicant that it will only respond to issues submitted on the new form in accordance with this Part.

(ii) *Relationship of issues to character of or reason for discharge.* If the application applies to both character of and reason for discharge, the applicant is encouraged, but not required, to identify the issue as applying to the character of or reason for discharge (or both). Unless the issue is directed at the reason for discharge expressly or by necessary implication, the DRB

will presume that it applies solely to the character of discharge.

(iii) *Relationship of issues to the standards for discharge review.* The DRB reviews discharges on the basis of issues of propriety and equity. The standards used by the DRB are set forth in § 70.9. The applicant is encouraged to review those standards before submitting any issue upon which the applicant believes a change in discharge should be based.

(A) *Issues concerning the equity of the discharge.* An issue of equity is a matter that involves a determination whether a discharge should by changed under the equity standards of § 70.9. This includes any issue, submitted by the applicant in accordance with paragraph (a)(4)(i) of this section, that is addressed to the discretionary authority of the DRB.

(B) *Issues concerning the propriety of a discharge.* An issue of propriety is a matter that involves a determination whether a discharge should be changed under the propriety standards of § 70.9. This includes an applicant's issue, submitted in accordance with paragraph (a)(4)(i) of this section, in which the applicant's position is that the discharge must be changed because of an error in the discharge pertaining to a regulation, statute, constitutional provision, or other source of law (including a matter that requires a determination whether, under the circumstances of the case, action by military authorities was arbitrary, capricious, or an abuse of discretion). Although a numerical reference to the regulation or other sources of law alleged to have been violated is not necessarily required, the context of the regulation or a description of the procedures alleged to have been violated normally must be set forth in order to inform the DRB adequately of the basis for the applicant's position.

(C) *The applicant's identification of an issue.* The applicant is encouraged, but not required, to identify an issue as pertaining to the propriety or the equity to the discharge. This will assist the DRB in assessing the relationship of the issue to propriety or equity under paragraph (e)(1)(iii) of this section.

(iv) *Citation of matter from decisions.* The primary function of the DRB involves the exercise of dicretion on a case-by-case basis. See § 70.9(b)(3). Applicants are not required to cite prior decisions as the basis for a change in discharge. If the applicant wishes to bring the DRB's attention to a prior decision as background or illustrative material, the citation should be placed in a brief or other supporting documents. If, however, it is the applicant's intention to submit an issue that sets forth specific principles and facts from a specific cited decision, the following requirements apply with respect to applications received on or after November 27, 1982.

(A) The issue must be set forth or expressly incorporated in the "Applicant's Issue" portion of DD Form 293.

(B) If an applicant's issue cites a prior decision (of the DRB, another Board, an agency, or a court), the applicant shall describe the specific principles and facts that are contained in the prior decision and explain the relevance of cited matter to the applicant's case.

(C) To ensure timely consideration of principles cited from unpublished opinions (including decisions maintained by the Armed Forces Discharge Review Board/Corrective Board Reading Room), applicants must provide the DRB with copies of such decisions or of the relevant portion of the treatise, manual, or similar source in which the principles were discussed. At the applicant's request, such materials will be returned.

(D) If the applicant fails to comply with the requirements in paragraphs (a)(4)(iv) (A), (B), and (C), the decisional document shall note the defect, and shall respond to the issue without regard to the citation.

(5) *Identification by the DRB of issues submitted by an applicant.* The applicant's issues shall be identified in accordance with this section after a review of the materials noted under paragraph (c)(4), is made.

(i) *Issues on DD Form 293.* The DRB shall consider all items submitted as issues by an applicant on DD Form 293 (or incorporated therein) in accordance with paragraph (a)(4)(i). With respect to applications submitted before November 27, 1982, the DRB shall consider all issues clearly and specifically stated in accordance with the rules in effect at the time of the submission.

(ii) *Amendment of issues.* The DRB shall not request or instruct an applicant to amend or withdraw any matter submitted by the applicant. Any amendment or withdrawal of an issue by an applicant shall be confirmed in writing by the applicant. Nothing in this provision:

(A) Limits the DRB's authority to question an applicant as to the meaning of such matter;

(B) Precludes the DRB from developing decisional issues based upon such questions;

(C) Prevents the applicant from amending or withdrawing such matter any time before the DRB closes the review process for deliberation; or

(D) Prevents the DRB from presenting an applicant with a list of proposed decisional issues and written information concerning the right of the applicant to add to, amend, or withdraw the applicant's submission. The written information will state that the applicant's decision to take such action (or decline to do so) will not be used against the applicant in the consideration of the case.

(iii) *Additional issues identified during a hearing.* The following additional procedure shall be used during a hearing in order to promote the DRB's understanding of an applicant's presentation. If, before closing the case for deliberation, the DRB believes that an applicant has presented an issue not listed on DD Form 293, the DRB may so inform the applicant, and the applicant may submit the issue in writing or add additional written issues at that time. This does not preclude the DRB from developing its own decisional issues.

(6) *Notification of possible bar to benefits.* Written notification shall be made to each applicant whose record indicates a reason for discharge that bars receipt of benefits under 38 U.S.C. 3103(a). This notification will advise the applicant that separate action by the Board for Correction of Military or Naval Records or the Veterans Administration may confer eligibility for VA benefits. Regarding the bar to benefits based upon the 180 days consecutive unauthorized absence, the following applies:

(i) Such absence must have been included as part of the basis for the applicant's discharge under other than honorable conditions.

(ii) Such absence is computed without regard to the applicant's normal or adjusted expiration of term of service.

(b) *Conduct of reviews.* (1) *Members.* As designated by the Secretary concerned, the DRB and its panels, if any, shall consist of five members. One member of the DRB shall be designated as the president and may serve as a presiding officer. Other officers may be designated to serve as presiding officers for DRB panels under regulations prescribed by the Secretary concerned.

(2) *Locations.* Reviews by a DRB will be conducted in the NCR and such other locations as designated by the Secretary concerned.

(3) *Types of review.* An applicant, upon request, is entitled to:

(i) *Record review.* A review of the application, available service records, and additional documents (if any) submitted by the applicant.

(ii) *Hearing.* A review involving an appearance before the DRB by the applicant or counsel or representative (or both).

(4) *Applicant's expenses.* Unless otherwise specified by law or regulation, expenses incurred by the applicant, witnesses, counsel or representative will not be paid by the Department of Defense.

(5) *Withdrawal of application.* An applicant shall be permitted to withdraw an application without prejudice at any time before the scheduled review.

(6) *Failure to appear at a hearing or respond to a scheduling notice.* (i) Except as otherwise authorized by the Secretary concerned, further opportunity for a hearing shall not be made available in the following circumstances to an applicant who has requested a hearing:

(A) When the applicant has been sent a letter containing the month and location of a proposed hearing and fails to make a timely response; or

(B) When the applicant, after being notified by letter of the time and place of the hearing, fails to appear at the appointed time, either in person or by representative, without having made a prior, timely request for a continuation, postponement, or withdrawal.

(ii) In such cases, the applicant shall be deemed to have waived the right to a hearing, and the DRB shall complete its review of the discharge. Fur-

ther request for a hearing shall not be granted unless the applicant can demonstrate that the failure to appear or respond was due to circumstances beyond the applicant's control.

(7) *Continuance and postponements.* (i) A continuance of a discharge review hearing may be authorized by the president of the DRB or presiding officer of the panel concerned, provided that such continuance is of reasonable duration and is essential to achieving a full and fair hearing. When a proposal for continuance is indefinite, the pending application shall be returned to the applicant with the option to resubmit when the case is fully ready for review.

(ii) Postponements of scheduled reviews normally shall not be permitted other than for demonstrated good and sufficient reason set forth by the applicant in a timely manner, or for the convenience of the government.

(8) *Reconsideration.* A discharge review shall not be subject to reconsideration except:

(i) When the only previous consideration of the case was on the motion of the DRB;

(ii) When the original discharge review did not involve a hearing and a hearing is now desired, and the provisions of paragraph (b)(6) of this section do not apply;

(iii) When changes in discharge policy are announced after an earlier review of an applicant's discharge, and the new policy is made expressly retroactive;

(iv) When the DRB determines that policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that such changes in policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings;

(v) When an individual is to be represented by a counsel or representative, and was not so represented in any previous consideration of the case by the DRB;

(vi) When the case was not previously considered under uniform standards published pursuant to Pub. L. 95-126 and such application is made within 15 years after the date of discharge; or

(vii) On the basis of presentation of new, substantial, relevant evidence not available to the applicant at the time of the original review. The decision whether evidence offered by an applicant in support of a request for reconsideration is in fact new, substantial, relevant, and was not available to the applicant at the time of the original review will be based on a comparison of such evidence with the evidence considered in the previous discharge review. If this comparison shows that the evidence submitted would have had a probable effect on matters concerning the propriety or equity of the discharge, the request for reconsideration shall be granted.

(9) *Availability of records and documents.* (i) Before applying for discharge review, potential applicants or their designated representatives may obtain copies of their military personnel records by submitting a General Services Administration Standard Form 180, "Request Pertaining to Military Records," to the National Personnel Records Center (NPRC), 9700 Page Boulevard, St. Louis, MO 62132. Once the application for discharge review (DD Form 293) is submitted, an applicant's military records are forwarded to the DRBs where they cannot be reproduced. Submission of a request for an applicant's military records, including a request under the Freedom of Information Act (32 CFR Part 286) or Privacy Act (32 CFR Part 286a) after the DD Form 293 has been submitted, shall result automatically in the temporary suspension of processing of the application for discharge review until the requested records are sent to an appropriate location for copying, are copied, and are returned to the headquarters of the DRB. Processing of the application shall then be resumed at whatever stage of the discharge review process is practicable. Applicants are encouraged to submit any request for their military records before applying for discharge review rather than after submitting DD Form 293, to avoid delays in processing of applications and scheduling of reviews. Applicants and their counsel also may examine their military personnel records at the site of their scheduled review before the hearing. DRBs shall notify applicants of the dates the records are available for examination in their standard scheduling information.

(ii) If the DRB is not authorized to provide copies of documents that are under the cognizance of another government department, office, or activity, applications for such information must be made by the applicant to the cognizant authority. The DRB shall advise the applicant of the mailing address of the government department, office, or activity to which the request should be submitted.

(iii) If the official records relevant to the discharge review are not available at the agency having custody of the records, the applicant shall be so notified and requested to provide such information and documents as may be desired in support of the request for discharge review. A period of not less than 30 days shall be allowed for such documents to be submitted. At the expiration of this period, the review may be conducted with information available to the DRB.

(iv) A DRB may take steps to obtain additional evidence that is relevant to the discharge under consideration beyond that found in the official military records or submitted by the applicant, if a review of available evidence suggests that it would be incomplete without the additional information, or when the applicant presents testimony or documents that require additional information to evaluate properly. Such information shall be made available to the applicant, upon request, with appropriate modifications regarding classified material.

(A) In any case heard on request of an applicant, the DRB shall provide the applicant and counsel or representative, if any, at a reasonable time before initiating the decision process, a notice of the availability of all regulations and documents to be considered in the discharge review, except for documents in the official personnel or medical records and any documents submitted by the applicant. The DRB shall also notify the applicant or counsel or representative:

(*1*) Of the right to examine such documents or to be provided with copies of the documents upon request;

(*2*) Of the date by which such requests must be received; and

(*3*) Of the opportunity to respond within a reasonable period of time to be set by the DRB.

(B) When necessary to acquaint the applicant with the substance of a classified document, the classifying authority, on the request of the DRB, shall prepare a summary of or an extract from the document, deleting all references to sources of information and other matters, the disclosure of which, in the opinion of the classifying authority, would be detrimental to the national security interests of the United States. Should preparation of such summary be deemed impracticable by the classifying authority, information from the classified sources shall not be considered by the DRB in its review of the case.

(v) Regulations of a Military Department may be obtained at many installations under the jurisdiction of the Military Department concerned or by writing to the following address: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, Washington, DC 20310.

(10) *Recorder/Secretary or Assistant.* Such a person shall be designated to assist in the functioning of each DRB in accordance with the procedures prescribed by the Secretary of the Military Department concerned.

(11) *Hearings.* Hearings (including hearing examinations) that are conducted shall recognize the rights of the individual to privacy. Accordingly, presence at hearings of individuals other than those required shall be limited to persons authorized by the Secretary concerned or expressly requested by the applicant, subject to reasonable limitations based upon available space. If, in the opinion of the presiding officer, the presence of other individuals could be prejudicial to the interests of the applicant or the government, hearings may be held in closed session.

(12) *Evidence and testimony.* (i) The DRB may consider any evidence obtained in accordance with this part.

(ii) Formal rules of evidence shall not be applied in DRB proceedings. The presiding officer shall rule on matters of procedure and shall ensure that reasonable bounds of relevancy and materiality are maintained in the taking of evidence and presentation of witnesses.

(iii) Applicants undergoing hearings shall be permitted to make sworn or unsworn statements, if they so desire, or to introduce witnesses, documents, or other information on their behalf,

at no expense to the Department of Defense.

(iv) Applicants may also make oral or written arguments personally or through counsel or representatives.

(v) Applicants who present sworn or unsworn statements and witnesses may be questioned by the DRB. All testimony shall be taken under oath or affirmation unless the applicant specifically requests to make an unsworn statement.

(vi) There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.

(c) *Decision process.* (1) The DRB or the DRB panel, as appropriate, shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standards set forth in § 70.9.

(2) The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the DRB panel as appropriate and shall maintain an atmosphere of dignity and decorum at all times.

(3) Each DRB member shall act under oath or affirmation requiring careful, objective consideration of the application. DRB members are responsible for eliciting all facts necessary for a full and fair hearing. They shall consider all information presented to them by the applicant. In addition, they shall consider available Military Service and health records, together with other records that may be in the files of the Military Department concerned and relevant to the issues before the DRB, and any other evidence obtained in accordance with this part.

(4) The DRB shall identify and address issues after a review of the following material obtained and presented in accordance with this part and the implementing instructions of the DRB: Available official records, documentary evidence submitted by or on behalf of an applicant, presentation of a hearing examination, testimony by or on behalf of an applicant, oral or written arguments presented by or on behalf of an applicant, and any other relevant evidence.

(5) If an applicant who has requested a hearing does not respond to a notification letter or does not appear for a scheduled hearing, the DRB may complete the review on the basis of material previously submitted.

(6) *Application of standards.* (i) When a DRB determines that an applicant's discharge was improper (§ 70.9(b)), the DRB will determine which reason for discharge should have been assigned based upon the facts and circumstances before the discharge authority, including the Service regulations governing reasons for discharge at the time the applicant was discharged. Unless it is also determined that the discharge was inequitable (§ 70.9(c)), the provisions as to characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

(ii) When the DRB determines that an applicant's discharge was inequitable (see § 70.9(c)), any change will be based on the evaluation of the applicant's overall record of service and relevant regulations of the Military Service of which the applicant was a member.

(7) Voting shall be conducted in closed session, a majority of the five members' votes constituting the DRB decision. Voting procedures shall be prescribed by the Secretary of the Military Department concerned.

(8) Details of closed session deliberations of a DRB are privileged information and shall not be divulged.

(9) There is no requirement for a statement of minority views in the event of a split vote. The minority, however, may submit a brief statement of its views under procedures established by the Secretary concerned.

(10) DRBs may request advisory opinions from staff officers of their Military Departments. These opinions are advisory in nature and are not binding on the DRB in its decision-making process.

(11) The preliminary determinations required by 38 U.S.C. 3103(e) shall be made upon majority vote of the DRB concerned on an expedited basis. Such determination shall be based upon the standards set forth in § 70.9 of this part.

(12) *The DRB shall:* (i) Address items submitted as issues by the applicant under paragraph (d) of this section;

(ii) Address decisional issues under paragraph (e) of this section; and

(iii) Prepare a decisional document in accordance with paragraph (h) of this section.

(d) *Response to items submitted as issues by the applicant*—(1) *General guidance.* (i) If an issue submitted by an applicant contains two or more clearly separate issues, the DRB should respond to each issue under the guidance of this paragraph as if it had been set forth separately by the applicant.

(ii) If an applicant uses a "building block" approach (that is, setting forth a series of conclusions on issues that lead to a single conclusion purportedly warranting a change in the applicant's discharge), normally there should be a separate response to each issue.

(iii) Nothing in this paragraph precludes the DRB from making a single response to multiple issues when such action would enhance the clarity of the decisional document, but such response must reflect an adequate response to each separate issue.

(2) *Decisional issues.* An item submitted as an issue by an applicant in accordance with this part shall be addressed as a decisional issue under paragraph (e), in the following circumstances:

(i) When the DRB decides that a change in discharge should be granted, and the DRB bases its decision in whole or in part on the applicant's issue; or

(ii) When the DRB does not provide the applicant with the full change in discharge requested, and the decision is based in whole or in part on the DRB's disagreement on the merits with an issue submitted by the applicant.

(3) *Response to items not addressed as decisional issues.* (i) If the applicant receives the full change in discharge requested (or a more favorable change), that fact shall be noted and the basis shall be addressed as a decisional issue. No further response is required to other issues submitted by the applicant.

(ii) If the applicant does not receive the full change in discharge requested with respect to either the character of or reason for discharge (or both), the DRB shall address the items submitted by the applicant under paragraph (e) of this section (decisional issues) unless one of the following responses is applicable:

(A) *Duplicate issues.* The DRB may state that there is a full response to the issue submitted by the applicant under a specified decisional issue. This response may be used only when one issue clearly duplicates another or the issue clearly requires discussion in conjunction with another issue.

(B) *Citations without principles and facts.* The DRB may state that the applicant's issue, which consists of a citation to a decision without setting forth any principles and facts from the decision that the applicant states are relevant to the applicant's case, does not comply with the requirements of paragraph (a)(4)(iv)(A).

(C) *Unclear issues.* The DRB may state that it cannot respond to an item submitted by the applicant as an issue because the meaning of the item is unclear. An issue is unclear if it cannot be understood by a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph (c)(4) of this section.

(D) *Nonspecific issues.* The DRB may state that it cannot respond to an item submitted by the applicant as an issue because it is not specific. A submission is considered not specific if a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph (c)(4) of this section, cannot determine the relationship between the applicant's submission and the particular circumstances of the case. This response may be used only if the submission is expressed in such general terms that no other response is applicable. For example, if the DRB disagrees with the applicant as to the relevance of matters set forth in the submission, the DRB normally will set forth the nature of the disagreement under the guidance in paragraph (e) of this section, with respect to decisional issues, or it will reject the applicant's position on the basis of paragraphs (d)(3)(ii)(A) or (d)(3)(ii)(B) of this section. If the applicant's submission is so general that none of those provisions is applicable, then the DRB may state that it cannot respond because the item is not specific.

(e) *Decisional issues.* (1) *General.* Under the guidance in this section, the decisional document shall discuss the issues that provide a basis for the deci-

sion whether there should be a change in the character of or reason for discharge. In order to enhance clarity, the DRB should not address matters other than issues relied upon in the decision or raised by the applicant.

(i) *Partial change.* When the decision changes a discharge, but does not provide the applicant with the full change in discharge requested, the decisional document shall address both the issues upon which change is granted and the issues upon which the DRB denies the full change requested.

(ii) *Relationship of issue to character of or reason for discharge.* Generally, the decisional document should specify whether a decisional issue applies to the character of or reason for cant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not giving the full change requested shall be discussed under the guidance in paragraph (e)(6) of this section.

(6) *Denial of the full change in discharge requested: issues of equity.* (i) If the DRB rejects the applicant's position on an issue of equity, or if the decision otherwise provides less than the full change in discharge requested by the applicant, the decisional document shall note that conclusion.

(ii) The DRB shall list reasons for its conclusion on each issue of equity under the following guidance:

(A) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB shall cite the pertinent source of law and the facts in the record that demonstrate the relevance of the source of law to the exercise of discretion on the issue of equity in the applicant's case.

(B) If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Service regulations to be considered for determination of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

(*1*) For each such finding, the decisional document shall list the specific source of the information relied upon. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

(*2*) If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(C) If the DRB disagrees with the position of the applicant on an issue of equity, the following guidance applies in addition to the guidance in paragraphs (e)(6)(ii) (A) and (B) of this section:

(*1*) The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (a)(4)(iv) of this section).

(*2*) The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant) are not relevant to the applicant's case.

(*3*) The DRB may reject an applicant's position by explaining why the applicant's issue is not a matter upon which the DRB grants a change in discharge as a matter of equity. When the applicant indicates that the issue is to be considered in conjunction with other specified issues, the explanation will address all such specified issues.

(*4*) The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the DRB agreed with the applicant's position.

(*5*) If the applicant takes the position that the discharge should be changed as a matter of equity because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it will presume the validity of the record in the absence of such corrective action. However, the DRB will consider whether it should exercise its equitable powers to change the discharge on the basis of the alleged error. If it declines to do so, it shall explain why the applicant's position did not provide a sufficient basis for the change in the discharge requested by the applicant.

(D) When the DRB concludes that aggravating factors outweigh mitigating factors, the DRB must set forth reasons such as the seriousness of the offense, specific circumstances surrounding the offense, number of offenses, lack of mitigating circumstances, or similar factors. The DRB is not required, however, to explain why it relied on any such factors unless the applicability or weight of such a factor is expressly raised as an issue by the applicant.

(E) If the applicant has not submitted any issues and the DRB has not otherwise relied upon an issue of equity for a change in discharge, the decisional document shall contain a statement to that effect, and shall note that the major factors upon which the discharge was based are set forth in the service record portion of the decisional document.

(f) *The recommendation of the DRB President*—(1) *General.* The president of the DRB may forward cases for consideration by the Secretarial Reviewing Authority (SRA) under rules established by the Secretary concerned. There is no requirement that the President submit a recommendation when a case is forwarded to the SRA. If the president makes a recommendation with respect to the character of or reason for discharge, however, the recommendation shall be prepared under the guidance in paragraph (f)(2) of this section.

(2) *Format for recommendation.* If a recommendation is provided, it shall contain the president's views whether there should be a change in the character of or reason for discharge (or both). If the president recommends such a change, the particular change to be made shall be specified. The recommendation shall set forth the president's position on decisional issues and issues submitted by the applicant under the following guidance:

(i) *Adoption of the DRB's decisional document.* The recommendation may state that the president has adopted the decisional document prepared by the majority. The president shall ensure that the decisional document meets the requirements of this section.

(ii) *Adoption of the specific statements from the majority.* If the President adopts the views of the majority only in part, the recommendation shall cite the specific matter adopted from the majority. If the president modifies a statement submitted by the majority, the recommendation shall set forth the modification.

(iii) *Response to issues not included in matter adopted from the majority.* The recommendation shall set forth the following if not adopted in whole or in part from the majority:

(A) The issues on which the president's recommendation is based. Each such decisional issue shall be addressed by the president under paragraph (e) of this section,

(B) The president's response to items submitted as issues by the applicant under paragraph (d) of this section.

(C) Reasons for rejecting the conclusions of the majority with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in greater relief for the applicant than that afforded by the president's recommendation. Suh issues shall be addressed under the principles in paragraph (e) of this section.

(g) *Secretarial reviewing authority (SRA)*—(1) *Review by the SRA.* The Secretarial Reviewing Authority (SRA) is the Secretary concerned or the official to whom Secretary's discharge review authority has been delegated.

(i) The SRA may review the following types of cases before issuance of the final notification of a decision:

(A) Any specific case in which the SRA has an interest.

(B) Any specific case that the presi-

dent of the DRB believes is of significant interest to the SRA.

(ii) Cases reviewed by the SRA shall be considered under the standards set forth in § 70.9.

(2) *Processing the decisional document.* (i) The decisional document shall be transmitted by the DRB president under paragraph (e) of this section.

(ii) The following guidance applies to cases that have been forwarded to the SRA except for cases reviewed on the DRB's own motion without the participation of the applicant or the applicant's counsel:

(A) The applicant and counsel or representative, if any, shall be provided with a copy of the proposed decisional document, including the DRB president's recommendation to the SRA, if any. Classified information shall be summarized.

(B) The applicant shall be provided with a reasonable period of time, but not less than 25 days, to submit to the SRA a rebuttal. An issue in rebuttal consists of a clear and specific statement by the applicant in support of or in opposition to the statements of the DRB or DRB president on decisional issues and other clear and specific issues that were submitted by the applicant in accordance with paragraph (a)(4)(i) of this section. The rebuttal shall be based solely on matters in the record before when the DRB closed the case for deliberation or in the president's recommendation.

(3) *Review of the decisional document.* If corrections in the decisional document are required, the decisional document shall be returned to the DRB for corrective action. The corrected decisional document shall be sent to the applicant (and counsel, if any), but a further opportunity for rebuttal is not required unless the correction produces a different result or includes a substantial change in the discussion by the DRB (or DRB president) of the issues raised by the majority or the applicant.

(4) *The Addendum of the SRA.* The decision of the SRA shall be in writing and shall be appended as an addendum to the decisional document under the guidance in this subsection.

(i) *The SRA's decision.* The addendum shall set forth the SRA's decision whether there will be a change in the character of or reason for discharge (or both); if the SRA concludes that a change is warranted, the particular change to be made shall be specified. If the SRA adopts the decision recommended by the DRB or the DRB president, the decisional document shall contain a reference to the matter adopted.

(ii) *Discussion of issues.* In support of the SRA's decision, the addendum shall set forth the SRA's position on decisional issues, items submitted as issues by an applicant in accordance with paragraph (a)(4)(i) of this section, and issues raised by the DRB and the DRB president in accordance with the following guidance:

(A) *Adoption of the DRB president's recommendation.* The addendum may state that the SRA has adopted the DRB president's recommendation.

(B) *Adoption of the DRB's proposed decisional document.* The addendum may state that the SRA has adopted the proposed decisional document prepared by the DRB.

(C) *Adoption of specific statements from the majority or the DRB president.* If the SRA adopts the views of the DRB or the DRB president only in part, the addendum shall cite the specific statements adopted. If the SRA modifies a statement submitted by the DRB or the DRB president, the addendum shall set forth the modification.

(D) *Response to issues not included in matter adopted from the DRB or the DRB president.* The addendum shall set forth the following if not adopted in whole or in part from the DRB or the DRB president:

(1) A list of the issues on which the SRA's decision is based. Each such decisional issue shall be addressed by the SRA under paragraph (e) of this section. This includes reasons for rejecting the conclusion of the DRB or the DRB president with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in change to the discharge more favorable to the applicant than that afforded by the SRA's decision. Such issues shall be addressed under the principles in paragraph (e) of this section.

(2) The SRA's response to items submitted as issues by the applicant under paragraph (d) of this section.

(iii) *Response to the rebuttal.* (A) If the SRA grants the full change in discharge requested by the applicant (or a more favorable change), that fact shall be noted, the decisional issues shall be addressed under paragraph (e) of this section, and no further response to the rebuttal is required.

(B) If the SRA does not grant the full change in discharge requested by the applicant (or a more favorable change), the addendum shall list each issue in rebuttal submitted by an applicant in accordance with this section, and shall set forth the response of the SRA under the following guidance:

(1) If the SRA rejects an issue in rebuttal, the SRA may respond in accordance with the principles in paragraph (e) of this section.

(2) If the matter adopted by the SRA provides a basis for the SRA's rejection of the rebuttal material, the SRA may note that fact and cite the specific matter adopted that responds to the issue in rebuttal.

(3) If the matter submitted by the applicant does not meet the requirements for rebuttal material in paragraph (b)(2)(ii)(B) of this section.

(iv) *Index entries.* Appropriate index entries shall be prepared for the SRA's actions for matters that are not adopted from the DRB's proposed decisional document.

(h) *The decisional document.* A decisional document shall be prepared for each review. At a minimum, this document shall contain:

(1) The circumstances and character of the applicant's service as extracted from available service records, including health records, and information provided by other Government authorities or the applicant, such as, but not limited to:

(i) Information concerning the discharge at issue in the review, including:

(A) Date (YYMMDD) of discharge.

(B) Character of discharge.

(C) Reason for discharge.

(D) The specific regulatory authority under which the discharge was issued.

(ii) Date (YYMMDD) of enlistment.

(iii) Period of enlistment.

(iv) Age at enlistment.

(v) Length of service.

(vi) Periods of unauthorized absence.

(vii) Conduct and efficiency ratings (numerical or narrative).

(viii) Highest rank received.

(ix) Awards and decorations.

(x) Educational level.

(xi) Aptitude test scores.

(xii) Incidents of punishment pursuant to Article 15, Uniform Code of Military Justice (including nature and date (YYMMDD) of offense or punishment).

(xiii) Convictions by court-martial.

(xiv) Prior military service and type of discharge received.

(2) A list of the type of documents submitted by or on behalf of the applicant (including a written brief, letters of recommendation, affidavits concerning the circumstances of the discharge, or other documentary evidence), if any.

(3) A statement whether the applicant testified, and a list of the type of witnesses, if any, who testified on behalf of the applicant.

(4) A notation whether the application pertained to the character of discharge, the reason for discharge, or both.

(5) The DRB's conclusions on the following:

(i) Whether the character of or reason for discharge should be changed.

(ii) The specific changes to be made, if any.

(6) A list of the items submitted as issues on DD Form 293 or expressly incorporated therein and such other items submitted as issues by the applicant that are identified as inadvertently omitted under paragraph (a)(4)(i)(D) of this section. If the issues are listed verbatim on DD Form 293, a copy of the relevant portion of the Form may be attached. Issues that have been withdrawn or modified with the consent of the applicant need not be listed.

(7) The response to the items submitted as issues by the applicant under the guidance in paragraph (d) of this section.

(8) A list of decisional issues and a discussion of such issues under the guidance in paragraph (e) of this section.

(9) Minority views, if any, when authorized under rules of the Military Department concerned.

(10) The recommendation of the DRB president when required by paragraph (f) of this section.

(11) The addendum of the SRA when required by paragraph (g) of this section.

(12) Advisory opinions, including those containing factual information, when such opinions have been relied upon for final decision or have been accepted as a basis for rejecting any of the applicant's issues. Such advisory opinions or relevant portions thereof that are not fully set forth in the discussion of decisional issues or otherwise in response to items submitted as issues by the application shall be incorporated by reference. A copy of opinions incorporated by reference shall be appended to the decision and included in the record of proceedings.

(13) A record of the voting, including:

(i) The number of votes for the DRB's decision and the number of votes in the minority, if any.

(ii) The DRB member's names (last name, first name, M.I.) and votes. The copy provided to the applicant may substitute a statement that the names and votes will be made available to the applicant at the applicant's request.

(14) Index entries for each decisional issue under appropriate categories listed in the index of decisions.

(15) An authentication of the document by an appropriate official.

(i) *Issuance of decisions following discharge review.* The applicant and counsel or representative, if any, shall be provided with a copy of the decisional document and of any further action in review. The applicant (and counsel, if any) shall be notified of the availability of the complaint process under § 70.10. Final notification of decisions shall be issued to the applicant with a copy to the counsel or representative, if any, and to the Military Service concerned.

(1) Notification to applicants, with copies to counsel or representatives, shall normally be made through the U.S. Postal Service. Such notification shall consist of a notification of decision, together with a copy of the decisional document.

(2) Notification to the Military Services shall be for the purpose of appropriate action and inclusion of review matter in personnel records. Such notification shall bear appropriate certification of completeness and accuracy.

(3) Actions on review by superior authority, when occurring, shall be provided to the applicant and counsel or representative in the same manner as the notification of the review decision.

(j) *Record of DRB proceedings.* (1) When the proceedings in any review have been concluded, a record thereof will be prepared. Records may include written records, electromagnetic records, videotape recordings, or a combination thereof.

(2) At a minimum, the record will include the following:

(i) The application for review;

(ii) A record of the testimony in verbatim, summarized, or recorded form at the option of the DRB concerned;

(iii) Documentary evidence or copies thereof, considered by the DRB other than the Military Service record;

(iv) Briefs and arguments submitted by or on behalf of the applicant;

(v) Advisory opinions considered by the DRB, if any;

(vi) The findings, conclusions, and reasons developed by the DRB;

(vii) Notification of the DRB's decision to the cognizant custodian of the applicant's records, or reference to the notification document;

(viii) Minority reports, if any;

(ix) A copy of the decisional document.

(k) *Final disposition of the Record of Proceedings.* The original record of proceedings and all appendices thereto shall in all cases be incorporated in the Military Service record of the applicant and the Military Service record shall be returned to the custody of the appropriate records holding facility. If a portion of the original record of the proceedings cannot be stored with the Military Service record, the Military Service record shall contain a notation as to the place where the record is stored. Other copies shall be filed and disposed of in accordance with appropriate Military Service regulations.

(l) *Availability of Discharge Review Board documents for inspection and copying.* (1) A copy of the decisional document prepared in accordance with paragraph (d) of this section shall be made available for public inspection and copying promptly after a notice of final decision is sent to the applicant.

(2) To prevent a clearly unwarranted invasion of personal privacy, identifying details of the applicant and other persons will be deleted from documents made available for public inspection and copying.

(i) Names, addresses, social security numbers, and Military Service numbers must be deleted. Written justification shall be made for all other deletions and shall be available for public inspection.

(ii) Each DRB shall ensure that there is a means for relating a decisional document number to the name of the applicant to permit retrieval of the applicant's records when required in processing a complaint under § 70.10.

(3) Any other privileged or classified material contained in or appended to any documents required by this Part to be furnished the applicant and counsel or representative or made available for public inspection and copying may be deleted therefrom only if a written statement of the basis for the deletions is provided the applicant and counsel or representative and made available for public inspection. It is not intended that the statement be so detailed as to reveal the nature of the withheld material.

(4) DRB documents made available for public inspection and copying shall be located in the Armed Forces Discharge Review/Correction Board Reading Room. The documents shall be indexed in a usable and concise form so as to enable the public, and those who represent applicants before the DRBs, to isolate from all these decisions that are indexed, those cases that may be similar to an applicant's case and that indicate the circumstances under or reasons for (or both) which the DRB or the Secretary concerned granted or denied relief.

(i) The reading file index shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason and authority for the discharge. It shall also include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions, and reasons.

(ii) The index shall be maintained at selected permanent locations throughout the United States. This ensures reasonable availability to applicants at least 30 days before a traveling panel review. A list of these locations shall be published in the FEDERAL REGISTER by the Department of the Army. The index shall also be made available at sites selected for traveling panels or hearing examinations for such periods as the DRB or a hearing examiner is present and in operation. An applicant who has requested a traveling panel review or a hearing examination shall be advised in the notice of such review of the permanent index locations.

(iii) The Armed Forces Discharge Review/Correction Board Reading Room shall publish indexes quarterly for all DRBs. All DRBs shall be responsible for timely submission to the Reading Room of individual case information required for update of the indexes. In addition, all DRBs shall be responsible for submission of new index categories based upon published changes in policy, procedures, or standards. These indexes shall be available for public inspection or purchase (or both) at the Reading Room. When the DRB has accepted an application, information concerning the availability of the index shall be provided in the DRB's response to the application.

(iv) Copies of decisional documents will be provided to individuals or organizations outside the NCR in response to written requests for such documents. Although the Reading Room shall try to make timely responses to such requests, certain factors such as the length of a request, the volume of other pending requests, and the impact of other responsibilities of the staff assigned to such duties may cause some delays. A fee may be charged for such documents under appropriate DoD and Department of the Army directives and regulations. The manual that accompanies the index of decisions shall notify the public that if an applicant indicates that a review is scheduled for a specific date, an effort will be made to provide requested decisional documents before that date. The individual or organization will be advised if that cannot be accomplished.

(v) Correspondence relating to matters under the cognizance of the Reading Room (including requests for purchase of indexes) shall be addressed to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(m) *Privacy Act information.* Information protected under the Privacy Act is involved in the discharge review functions. The provisions of Part 286a of this title shall be observed throughout the processing of a request for review of discharge or dismissal.

(n) *Information requirement.* Each Military Department shall provide the Deputy Assistant Secretary of Defense (Military Personnel and Force Management) DASD (MP&FM), Office of the ASD (MRA&L), with a semiannual report of discharge review actions in accordance with § 70.11.

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9855, Mar. 9, 1983; 48 FR 35644, Aug. 5, 1983]

§ 70.9 Discharge review standards.

(a) *Objective of review.* The objective of a discharge review is to examine the propriety and equity of the applicant's discharge and to effect changes, if necessary. The standards of review and the underlying factors that aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service. No factors shall be established that require automatic change or denial of a change in discharge. Neither a DRB nor the Secretary of the Military Department concerned shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the DRB or the Secretary of the Military Department concerned shall give full, fair, and impartial considerations to all applicable factors before reaching a decision. An applicant may not rceive a less favorable discharge than that issued at the time of separation. This does not preclude correction of clerical errors.

(b) *Propriety.* (1) A discharge shall be deemed proper unless, in the course of discharge review, it is determined that:

(i) There exists an error of fact, law, procedure, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

(ii) A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

(2) When a record associated with the discharge at the time of issuance involves a matter in which the primary responsibility for corrective action rests with another organization (for example, another Board, agency, or court), the DRB will recognize an error only to the extent that the error has been corrected by the organization with primary responsibility for correcting the record.

(3) The primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis. Prior decisions in which the DRB exercised its discretion to change a discharge based on issues of equity (including the factors cited in such decisions or the weight given to factors in such decisions) do not bind the DRB in its review of subsequent cases because no two cases present the same issues of equity.

(4) The following applies to applicants who received less than fully Honorable administrative discharges because of their civilian misconduct while in an inactive reserve component and who were discharged or had their discharge reviewed on or after April 20, 1971: the DRB shall either recharacterize the discharge to Honorable without any additional proceedings or additional proceedings shall be conducted in accordance with the Court's Order of December 3, 1981, in *Wood v. Secretary of Defense* to determine whether proper grounds exist for the issuance of a less than Honorable discharge, taking into account that;

(i) An Other than Honorable (formerly undesirable) Discharge for an inactive reservist can only be based upon civilian misconduct found to have affected directly the performance of military duties;

(ii) A General Discharge for an inactive reservist can only be based upon civilian misconduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.

(c) *Equity.* A discharge shall be deemed to be equitable unless:

(1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that:

(i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(ii) There 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.

(2) At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member.

(3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this section and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:

(i) Quality of service, as evidenced by factors such as:

(A) Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative);

(B) Awards and decorations;

(C) Letters of commendation or reprimand;

(D) Combat service;

(E) Wounds received in action;

(F) Records of promotions and demotions;

(G) Level of responsibility at which the applicant served;

(H) Other acts of merit that may not have resulted in a formal recognition through an award or commendation;

(I) Length of service during the service period which is the subject of the discharge review;

(J) Prior military service and type of discharge received or outstanding postservice conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review;

(K) Convictions by court-martial;

(L) Records of nonjudicial punishment;

(M) Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in military service records;

(N) Records of periods of unauthorized absence;

(O) Records relating to a discharge instead of court-martial.

(ii) Capability to serve, as evidenced by factors such as:

(A) *Total capabilities.* This includes an evaluation of matters, such as age, educational level, and aptitude scores. Consideration may also be given whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to military service.

(B) *Family and Personal Problems.* This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

(C) *Arbitrary or capricious action.* This includes actions by individuals in authority that constitute a clear abuse of such authority and that, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.

(D) *Discrimination.* This includes unauthorized acts as documented by records or other evidence.

§ 70.10 Complaints concerning decisional documents and index entries.

(a) *General.* (1) The procedures in this section—are established for the sole purpose of ensuring that decisional documents and index entries issued by the DRBs of the Military Departments comply with the decisional document and index entry principles of this Part.

(2) This section may be modified or supplemented by the DASD(MP&FM).

(3) The following persons may submit complaints:

(i) A former member of the Armed Forces (or the former member's counsel) with respect to the decisional document issued in the former member's own case; and

(ii) A former member of the Armed Forces (or the former member's counsel) who states that correction of the decisional document will assist the former member in preparing for an ad-

ministrative or judicial proceeding in which the former member's own discharge will be at issue.

(4) The Department of Defense is committed to processing of complaints within the priorities and processing goals set forth in paragraph (d)(1)(iii) of this section. This commitment, however, is conditioned upon reasonable use of the complaint process under the following considerations. The DRBs were established for the benefit of former members of the Armed Forces. The complaint process can aid such persons most effectively if it is used by former members of the Armed Forces when necessary to obtain correction of their own decisional documents or to prepare for discharge reviews. If a substantial number of complaints submitted by others interferes with the ability of the DRBs to process applications for discharge review in a timely fashion, the Department of Defense will adjust the processing goals to ensure that the system operates to the primary advantage of applicants.

(5) The DASD(MP&FM) is the final authority with respect to action on such correspondence.

(b) *The Joint Service Review Activity (JSRA).* A three member JSRA consisting of one judge advocate from each Military Department shall advise the DASD(MP&FM). The operations of the JSRA shall be coordinated by a full-time administrative director, who shall serve as recorder during meetings of the JSRA. The members and the administrative director shall serve at the direction of the DASD(MP&FM).

(c) *Classification and control of correspondence*—(1) *Address of the JSRA.* Correspondence with the OSD concerning decisional documents or index entries issued by the DRBs shall be addressed as follows: Joint Service Review Activity, OASD(MRA&L) (MP&FM), Washington, DC 20301.

(2) *Docketing.* All such correspondence shall be controlled by the administrative director through the use of a uniform docketing procedure.

(3) *Classification.* Correspondence shall be reviewed by the administrative director and categorized either as a complaint or an inquiry in accordance with the following:

(i) *Complaints.* A complaint is any correspondence in which it is alleged that a decisional document issued by a DRB or SRA contains a specifically identified violation of the Stipulation of Dismissal, Settlement Agreement, or related Orders in the *Urban Law* case or the decisional document or index entry principles of this Directive. A complainant who alleges error with respect to a decisional document issued to another person is encouraged to set forth specifically the grounds for determining that a reasonable person familiar with the discharge review process cannot understand the basis for the decision. *See* paragraph (d)(1)(i)(B) of this section.

(ii) *Inquiries.* An inquiry is any correspondence other than a complaint.

(d) *Review of complaints.* (1) *Guidance.* The following guidance applies to review of complaints:

(i) *Standards.* Complaints shall be considered under the following standards:

(A) *The applicant's case.* A complaint by an applicant with respect to the decisional document issued in the applicant's own discharge review shall be considered under the Stipulation of Dismissal in the *Urban Law* case and other decisional document requirements applicable at the time the document was issued, including those contained in the Settlement Agreement and related Orders, subject to any limitations set forth therein with respect to dates of applicability. If the authority empowered to take corrective action has a reasonable doubt whether a decisional document meets applicable requirements of the *Urban Law* case or other applicable rules, the complaint shall be resolved in the applicant's favor.

(B) *Other cases.* With respect to all other complaints, the standard shall be whether a reasonable person familiar with the discharge review process can understand the basis for the decision, including the disposition of issues raised by the applicant. This standard is designed to ensure that the complaint process is not burdened with the need to correct minor errors in the preparation of decisional documents.

(ii) *Use of DD Form 293.* With respect to any decisional document issued on or after November 27, 1982, a complaint alleging failure of the DRB to address adequately matter not submitted on DD Form 293 or expressly incorporated therein will be resolved in the complainant's favor only if the failure to address the issue was arbitrary, capricious, or an abuse of discretion.

(iii) *Scope of review.* When a complaint concerns a specific issue in the applicant's own discharge review, the complaint review process shall involve a review of all the evidence that was before the DRB or SRA, including the testimony and written submissions of the applicant, to determine whether the issue was submitted, and if so, whether it was addressed adequately with respect to the Stipulation of Dismissal, Settlement Agreement, or related Orders in the *Urban Law* case and other applicable provisions of this Directive. With respect to all other complaints about specific issues, the complaint review process may be based solely on the decisional document, except when the complainant demonstrates that facts present in the review in question raise a reasonable likelihood of a violation of applicable provisions of the Stipulation of Dismissal and a reasonable person, familiar with the discharge review process, could resolve the complaint only after a review of the evidence that was before the DRB.

(iv) *Allegations pertaining to an applicant's submission.* The following additional requirements apply to complaints about modification of an applicant's issue or the failure to list or address an applicant's issue:

(A) When the complaint is submitted by the applicant, and the record of the hearing is ambiguous on the question whether there was a meeting of minds between the applicant and the DRB as to modification or omission of the issue, the ambiguity will be resolved in favor of the applicant.

(B) When the complaint is submitted by a person other than the applicant, it must set forth facts (other than the mere omission or modification of an issue) demonstrating a reasonable likelihood that the issue was omitted or modified without the applicant's consent.

(C) When the complaint is rejected on the basis of the presumption of regularity, the response to the complaint must be set forth the reasons why the evidence submitted by the complainant was not sufficient to overcome the presumption.

(D) With respect to decisional documents issued on or after the effective date of the amendments to § 70.8, any change in wording of an applicant's issue which is effected in violation of the principles set forth in § 70.8(a)(5)(iii) constitutes an error requiring corrective action. With respect to a decisional document issued before that date, corrective action will be taken only when there has been a complaint by the applicant or counsel with respect to the applicant's own decisional document and it is determined that the wording was changed or the issue was omitted without the applicant's consent.

(E) If there are references in the decisional document to matters not raised by the applicant and not otherwise relied upon in the decision, there is no requirement under the *Urban Law* case that such matters be accompanied by a statement of findings, conclusions, or reasons. For example, when the DRB discusses an aspect of the service record not raised as an issue by the applicant, and the issue is not a basis for the DRB's decision, the DRB is not required to discuss the reasons for declining to list that aspect of the service record as an issue.

(v) *Guidance as to other types of complaints.* The following guidance governs other specified types of complaints:

(A) The Stipulation of Dismissal requires only that those facts that are essential to the decision be listed in the decisional document. The requirement for listing specified facts from the military record was not established until March 29, 1978, in 32 CFR Part 70 Decisional documents issued prior to that date are sufficient if they meet the requirements of the Stipulation.

(B) When an applicant submits a brief that contains material in support of a proposed conclusion on an issue, the DRB is not required to address each aspect of the supporting material in the brief. However, the decisional document should permit the applicant to understand the DRB's position on the issue and provide reviewing authorities with an explanation that is sufficient to permit review of the DRB's decision. When an applicant submits specific issues and later makes a statement before the DRB that contains matter in support of that issue, it

is not necessary to list such supporting matter as a separate issue.

(C) For all decisional documents issued before November 27, 1982, failure to respond to an issue raised by an applicant constitutes error unless it reasonably may be inferred from the record that the DRB response relied on one of the exceptions listed in § 70.8(d)(3)(ii); (e)(3)(ii)(C) (*3*) through (*4*) and (e)(6)(ii)(C) (*3*) through (*4*). If the decisional document supports a basis for not addressing an issue raised by the applicant (for example, if it is apparent that resolving the issue in the applicant's favor would not warrant an upgrade), there is no requirement in the Stipulation of Dismissal that the decisional document explain why the DRB did not address the issue. With respect to decisional documents issued on or after November 27, 1982, a response shall be prepared in accordance with the decisional document principles set forth in § 70.8.

(D) When a case is reviewed upon request of an applicant, and the DRB upgrades the discharge to "General," the DRB must provide reasons why it did not upgrade to "Honorable" unless the applicant expressly requests lesser relief. This requirement applies to all requests for corrective action submitted by an applicant with respect to his or her decisional document. In all other cases, this requirement applies to decisional documents issued on or after November 9, 1978. When the DRB upgrades to General, its explanation for not upgrading to Honorable may consist of reference to adverse matter from the applicant's military record. When a discharge is upgraded to General in a review on the DRB's own motion, there is no requirement to explain why the discharge was not upgraded to Honorable.

(E) There is no requirement under the Stipulation of Dismissal to provide reasons for uncontested findings. The foregoing applies to decisional documents issued before November 27, 1982. With respect to decisional documents issued on or after that date, the following guidance applies with respect to an uncontested issue of fact that forms the basis for a grant or denial of a change in discharge: the decisional document shall list the specific source of information relied upon in reaching the conclusion, except when the information is listed in the portion of the decisional document that summarizes the service record.

(F) The requirements of § 70.8(e)(3)(ii)(B)(*2*) and (e)(6)(ii)(B)(*2*) with respect to explaining use of the presumption of regularity apply only to decisional documents issued on or after November 27, 1982. When a complaint concerning a decisional document issued before that date addresses the adequacy of the DRB's use of the presumption of regularity, or words having a similar import, corrective action will be required only if a reasonable person familiar with the discharge review process can not understand the basis for relying on the presumption.

(G) When the DRB balances mitigating factors against aggravating factors as the reason for a conclusion, the Stipulation of Dismissal does not require the statement of reasons to set forth the specific factors that were balanced if such factors are otherwise apparent on the fact of the decisional document. The foregoing applies to decisional documents prepared before November 27, 1982. With respect to decisional documents prepared after that date, the statements addressing decisional issues in such a case will list or refer to the factors supporting the conclusion in accordance with § 70.8(e)(6)(ii).

(vi) *Documents that were the subject of a prior complaint.* The following applies to a complaint concerning a decisional document that has been the subject of prior complaints:

(A) If the complaint concerns a decisional document that was the subject of a prior complaint in which action was completed, the complainant will be informed of the substance and disposition of the prior complaint, and will be further informed that no additional action will be taken unless the complainant within 30 days demonstrates that the prior disposition did not produce a decisional document that comports with the requirements of paragraph (d)(1)(i)(A) of this section.

(B) If the complaint concerns a decisional document that is the subject of a pending complaint, the complainant will be informed that he or she will be provided with the results of the pending complaint.

(C) These limitations do not apply to the initial complaint submitted on or after the effective date of the amendments to this section by an applicant with respect to his or her own decisional document.

(2) *Duties of the administrative director.* The administrative director shall take the following actions:

(i) Acknowledge receipt of the complaint;

(ii) Assign a docket number and note the date of receipt; and

(iii) Forward the complaint to the Military Department concerned, except that the case may be forwarded directly to the DASD (MP&FM) when the administrative director makes an initial determination that corrective action is not required.

(3) *Administrative processing.* The following guidance applies to administrative processing of complaints:

(i) Complaints normally shall be processed on a first-in/first-out basis, subject to the availability of records, pending discharge review actions, and the following priorities:

(A) The first priority category consists of cases in which (*1*) there is a pending discharge review and the complainant is the applicant; and (*2*) the complainant sets forth the relevance of the complaint to the complainant's pending discharge review application.

(B) The second priority category consists of requests for correction of the decisional document in the complainant's own discharge review case.

(C) The third priority category consists of complaints submitted by former members of the Armed Forces (or their counsel) who state that the complaint is submitted to assist the former member's submission of an application for review.

(D) The fourth priority category consists of other complaints in which the complainant demonstrates that correction of the decisional document will substantially enhance the ability of applicants to present a significant issue to the DRBs.

(E) The fifth priority category consists of all other cases.

(ii) Complainants who request consideration in a priority category shall set forth in the complaint the facts that give rise to the claim of placement in the requested category. If the complaint is relevent to a pending discharge review in which the complainant is applicant or counsel, the scheduled date of the review should be specified.

(iii) The administrative director is responsible for monitoring compliance with the following processing goals:

(A) The administrative director normally shall forward correspondence to the Military Department concerned within 3 days after the date of receipt specified in the docket number. Correspondence forwarded directly to the DASD(MP&FM) under paragraph (d)(2)(iii) of this section, normally shall be transmitted within 7 days after the date of receipt.

(B) The Military Department normally shall request the necessary records within 5 working days after the date of receipt from the administrative director. The Military Department normally shall complete action under paragraph (d)(4) of this section within 45 days after receipt of all necessary records. If action by the Military Department is required under paragraph (d)(9) of this section, normally it shall be completed within 45 days after action is taken by the DASD(MP&FM).

(C) The JSRA normally shall complete action under paragraph (d)(7) of this section at the first monthly meeting held during any period commencing 10 days after the administrative director receives the action of the Military Department under paragraph (d)(5) of this section.

(D) The DASD(MP&FM) normally shall complete action under paragraph (d)(8) of this section within 30 days after action is taken by the JSRA under paragraph (d)(7) of this section or by the administrative director under paragraph (d)(2)(iii) of this section.

(E) If action is not completed within the overall processing goals specified in this paragraph, the complainant shall be notified of the reason for the delay by the administrative director and shall be provided with an approximate date for completion of the action.

(iv) If the complaints are submitted in any 30 day period with respect to more than 50 decisional documents, the administrative director shall adjust the processing goals in light of the number of complaints and discharge review applications pending before the DRBs.

(v) At the end of each month, the administrative director shall send each

Military Department a list of complaints, if any, in which action has not been completed within 60 days of the docket date. The Military Department shall inform the administrative director of the status of each case.

(4) *Review of complaints by the Military Departments.* The Military Department shall review the complaint under the following guidance:

(i) *Rejection of complaint.* If the Military Department determines that all the allegations contained in the complaint are not specific or have no merit, it shall address the allegations using the format at attachment 1 (Review of Complaint).

(ii) *Partial agreement.* If the Military Department determines that some of the allegations contained in the complaint are not specific or have no merit and that some of the allegations contained in the complaint have merit, it shall address the allegations using the format at attachment 1 and its DRB shall take appropriate corrective action in accordance with paragraph (d)(4)(v) of this section.

(iii) *Full agreement.* If the Military Department determines that all of the allegations contained in the complaint have merit, its DRB shall take appropriate corrective action in accordance with paragraph (d)(4)(v) of this section.

(iv) *Other defects.* If, during the course of its review, the Military Department notes any other defects in the decisional document or index entries (under the applicable requirements of the *Urban Law* case or under this part) the DRB shall take appropriate corrective action under paragraph (d)(4)(v) of this section. This does not establish a requirement for the Military Department to review a complaint for any purpose other than to determine whether the allegations contained in the complaint are specific and have merit; rather, it simply provides a format for the Military Department to address other defects noted during the course of processing the complaint.

(v) *Appropriate corrective action.* The following procedures govern appropriate corrective action:

(A) If a complaint concerns the decisional document in the complainant's own discharge review case, appropriate corrective action consists of amending the decisional document or providing the complainant with an opportunity for a new discharge review. An amended decisional document will be provided if the applicant requests that form of corrective action.

(B) If a complaint concerns a decisional document involving an initial record review under the Special Discharge Review Program or the Pub. L. 95-126 rereview program, appropriate corrective action consists of (*1*) amending the decisional document; or (*2*) notifying the applicant and counsel, if any, of the opportunity to obtain a priority review using the letter providing at attachment 6. When the DRB takes corrective action under this provision by amending a decisional document, it shall notify the applicant and counsel, if any, of the opportunity to request a *de novo* review under the Special Discharge Review Program or under Pub. L. 95-126 rereview program, as appropriate.

(C) When corrective action is taken with respect to a decisional document in cases prepared under Pub. L. 95-126 the DRB must address issues previously raised by the DRB or the applicant during review of the same case during the SDRP only insofar as required by the following guidance:

(*1*) When the DRB bases its decision upon issues previously considered during the SDRP, the new decisional document under Pub. L. 95-126 must address those issues;

(*2*) If, during consideration of the case under Pub. L. 95-126 the applicant presents issues previously considered during the SDRP, the new decisional document must address those issues; and

(*3*) If a decisional document concerning an initial record review under Pub. L. 95-126 is otherwise defective and corrective action is taken after a request by the applicant for a priority review in response to the letter at attachment 6, the new decisional document shall address all issues previously raised by the applicant during the SDRP.

(D) Except for cases falling under paragraph (d)(4)(v)(B) of this section, if a complaint concerns a decisional document in which the applicant received an Honorable Discharge and the full relief requested, if any, with respect to the reason for discharge, appropriate corrective action consists of amending the decisional document.

(E) In all other cases, appropriate corrective action consists of amending the decisional document or providing the applicant with the opportunity for a new review, except that an amended decisional document will be provided when the complainant expressly requests that form of corrective action.

(vi) *Amended decisional documents.* One that reflects a determination by a DRB panel (or the SRA) as to what the DRB panel (or SRA) that prepared the defective decisional document would have entered on the decisional document to support its decision in this case.

(A) The action of the amending authority does not necessarily reflect substantive agreement with the decision of the original DRB panel (or SRA) on the merits of the case.

(B) A corrected decisional document created by amending a decisional document in response to a complaint will be based upon the complete record before the DRB (or the SRA) at the time of the original defective statement was issued, including, if available, a transcript, tape recording, videotape or other record of a hearing, if any. The new decisional document will be indexed under categories relevant to the new statements.

(C) When an amended decisional document is required under paragraphs (d)(4)(v)(A) and (d)(4)(v)(D) of this section and the necessary records cannot be located, a notation to that effect will be made on the decisional document, and the applicant and counsel, if any, will be afforded an opportunity for a new review, and the complainant will be informed of the action.

(D) When an amended decisional document is requested under paragraph (d)(4)(v)(C) and the necessary records cannot be located, a notation to that effect will be made on the decisional document, and the complainant will be informed that the situation precludes further action.

(vii) *Time limit for requesting a new review.* An applicant who is afforded an opportunity to request a new review may do so within 45 days.

(viii) *Interim notification.* When the Military Department determines that some or all of the allegations contained in the complaint are not specific or have no merit but its DRB takes corrective action under paragraph (d)(4)(ii) or (d)(4)(iv) of this section, the DRB's notification to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel, should include the following or similar wording: "This is in partial response to (your)/(a) complaint to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated ——— concerning ——— Discharge Review Board decisional document ———. A final response to (your)/(the) complaint, which has been returned to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) for further review, will be provided to you in the near future."

(ix) *Final notification.* When the Discharge Review Board takes corrective action under paragraphs (d)(4)(iii) and (d)(9) of this section ——— its notification to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel, should include the following or similar wording: "This is in response to (your)/(a) complaint to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated ——— concerning ——— Discharge Review Board decisional document ———.

(5) *Transmittal to the administrative director.* The Military Department shall return the complaint to the administrative Director with a copy of the decisional document and, when applicable, any of the following documents:

(i) The "Review of Complaint."

(ii) A copy of the amendment to the decisional document and the accompanying transmittal letter or letters to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel.

(iii) A copy of the notification to the applicant and counsel, if any, of the opportunity to request a new review, and a copy of the notification to the complainant, if other than the applicant or counsel, that the applicant has been authorized a new review.

(6) *Review by the administrative director.* The administrative director shall review the complaint and accompanying documents to ensure the following:

(i) If the Military Department determined that any of the allegations contained in the complaint are not specif-

ic or have no merit, the JSRA shall review the complaint and accompanying documents. The JSRA shall address the allegations using the format at attachment 2 (Review of and Recommended Action on Complaint) and shall note any other defects in the decisional document or index entries not previously noted by the Military Department. This does not establish a requirement for the JSRA to review such complaints for any purpose other than to address the allegations contained in the complaint; rather, it simply provides a format for the JSRA to address other defects noted in the course of processing the complaint.

(ii) If the Military Department determined that all of the allegations contained in the complaint have merit and its DRB amended the decisional document, the amended decisional document shall be subject to review by the JSRA on a sample basis each quarter using the format at attachment 3 (Review of any Recommendation on Amended Decisional Document).

(iii) If the Military Department determined that all of the allegations contained in the complaint have merit and its DRB notified the applicant and counsel, if any, of the opportunity to request a new review, review of such corrective action is not required.

(7) *Review by the JSRA.* The JSRA shall meet for the purpose of conducting the reviews required in paragraphs (d)(6)(i), (d)(6)(ii), and (d)(9)(iii)(A) of this section. The Administrative director shall call meetings once a month, if necessary, or more frequently depending upon the number of matters before the JSRA. Matters before the JSRA shall be presented to the members by the recorder. Each member shall have one vote in determining matters before the JSRA, a majority vote of the members determining all matters. Determinations of the JSRA shall be reported to the DASD(MP&FM) as JSRA recommendations using the prescribed format. If a JSRA recommendation is not unanimous, the minority member may prepare a separate recommendation for consideration by the DASD(MP&FM) using the same format. Alternatively, the minority member may indicate "dissent" next to his signature on the JSRA recommendation.

(8) *Review by the DASD(MP&FM).* The DASD(MP&FM) shall review all recommendations of the JSRA and the administrative director as follows:

(i) The DASD(MP&FM) shall review complaints using the format at Attachment 4 (Review of and Action on Complaint). The DASD(MP&FM) is the final authority in determining whether the allegations contained in a complaint are specific and have merit. If the DASD(MP&FM) determines that no further action by the Military Department is warranted, the complainant and the Military Department shall be so informed. If the DASD(MP&FM) determines that further action by the Military Department is required, the Military Department shall be directed to ensure that appropriate corrective action is taken by its DRB and the complainant shall be provided an appropriate interim response.

(ii) The DASD(MP&FM) shall review amended decisional documents using the format at attachment 5 (Review of and Action on Amended Decisional Document). The DASD(MP&FM) is the final authority in determining whether an amended decisional document complies with applicable requirements of the *Urban Law* case and, when applicable, this Directive. If the DASD(MP&FM) determines that no further corrective action by the Military Department is warranted, the Military Department shall be so informed. If the DASD(MP&FM) determines that further corrective action by the Military Department is required, the Military Department shall be directed to ensure that appropriate corrective action is taken by its DRB.

(iii) It is noted that any violation of applicable requirements of the *Urban Law* case is also a violation of this part. However, certain requirements under this part are not requirements under the *Urban Law* case. If the allegations contained in a complaint are determined to have merit or if an amended decisional document is determined to be defective on the basis of one of these additional requirements under this part the DASD(MP&FM) determination shall reflect this fact.

(9) *Further action by the Military Department.* (i) With respect to a determination by the DASD (MP&FM) that further action by the Military Department is required, its DRB shall take appropriate corrective action in accordance with paragraph (d)(4) of this section.

(ii) The Military Department shall provide the administrative director with the following documents when relevant to corrective action taken in accordance with paragraph (d)(4) of this section:

(A) A copy of the amendment to the decisional document and the accompanying transmittal letter or letters to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel.

(B) A copy of the notification to the applicant and counsel, if any, of the opportunity to request a new review, and a copy of the notification to the complainant, if other than the applicant or counsel, that the applicant has been authorized a new review.

(iii) The administrative director shall review the documents relevant to corrective action taken in accordance with paragraph (d)(4) of this section, and ensure the following:

(A) If the DRB amended the decisional document, the amended decisional document shall be subject to review by the JSRA on a sample basis each quarter using the format at attachment 3 (Review of and Recommended Action on Amended Decisional Document).

(B) If the DRB notified the applicant and counsel, if any, of the opportunity to request a new review, review of such corrective action is not required.

(10) *Documents required by the JSRA or DASD (MP&FM).* Upon request, the Military Department shall provide the administrative director with other documents required by the JSRA or the DASD (MP&FM) in the conduct of their reviews.

(e) *Responses to inquiries.* The following procedures shall be used in processing inquiries:

(1) The administrative director shall assign a docket number to the inquiry.

(2) The administrative director shall forward the inquiry to the Military Department concerned.

(3) The Military Department shall prepare a response to the inquiry and provide the administrative director with a copy of the response.

(4) The Military Department's response shall include the following or similar wording: "This is in response to your inquiry to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated ——— concerning ———.

(f) *Indexing.* The DRB concerned shall reindex all amended decisional documents and shall provide copies of the amendments to the decisional documents to the Armed Forces Discharge Review/Correction Board Reading Room.

(g) *Disposition of documents.* The administrative director is responsible for the disposition of all Military Department, DRB, JSRA, and DASD (MP&FM) documents relevant to processing complaints and inquiries.

(h) *Referral by the General Counsel, Department of Defense.* The Stipulation of Dismissal permits *Urban Law* plaintiffs to submit complaints to the General Counsel, DoD, for comment. The General Counsel, DoD, may refer such complaints to the Military Department concerned or to the JSRA for initial comment.

(i) *Decisional document and index entry principles.* The DASD (MP&FM) shall identify significant principles concerning the preparation of decisional documents and index entries as derived from decisions under this section and other opinions of the Office of General Counsel, DoD. This review shall be completed not later than October 1 and April 1 of each year, or more frequently if deemed appropriate by the DASD (MP&FM). The significant principles identified in the review shall be coordinated as proposed as amendments to the sections of this part.

(j) *Implementation of amendments.* The following governs the processing of any correspondence that is docketed prior to the effective date of amendments to this section except as otherwise provided in such amendments:

(1) Any further action on the correspondence shall be taken in accordance with the amendments; and

(2) No revision of any action taken prior to the effective date of such amendments is required.

ATTACHMENT 1—REVIEW OF COMPLAINT

Military Department:

Decisional Document Number:

Name of Complainant:

Docket Number:

Date of this Review:

1. Specific allegation(s) noted:

2. With respect in support of the conclusion, enter the following information:

a. Conclusion whether corrective action is required.

b. Reasons in support of the conclusion, including findings of fact upon which the conclusion is based.

3. Other defects noted in the decisional document or index entries:

(Authentication)

ATTACHMENT 2—JOINT SERVICE REVIEW ACTIVITY

Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)

Review by the Joint Service Review Activity

Military Department:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

1. The Military Department's "Review of Complaint" is attached as enclosure 1.

2. Specific Allegations: See Part 1 of Military Department's "Review of Complaint" (enclosure 1).

3. Specific allegation(s) not noted by the Military Department:

4. With respect to each allegation, enter the following information:

a. Conclusion as to whether corrective action is required.

b. Reasons in support of the conclusion, including findings of fact upon which conclusion is based.

NOTE.—If JSRA agrees with the Military Departments, the JSRA may respond by entering a statement of adoption.

5. Other defects in the decisional document or index entries not noted by the Military Departments:

6. *Recommendation:*

[ ] The complainant and the Military Department should be informed that no further action on the complaint is warranted.

[ ] The Military Department should be directed to take corrective action consistent with the above comments.

Army Member, JSRA
Air Force Member, JSRA
Navy Member, JSRA
Recorder, JSRA

ATTACHMENT 3—JOINT SERVICE REVIEW ACTIVITY

Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)

Review of Amended Decisional Document (Quarterly Review)

Military Department:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

Recommendation:

[ ] The amended decisional document complies with the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28. The Military Department should be informed that no further corrective action is warranted.

[ ] The amended decisional document does not comply with the Stipulation of Dismissal or DoD Directive 1332.28 as noted herein. The Military Department should be directed to ensure that corrective action consistent with the defects noted is taken by its Discharge Review Board.

Army Member, JSRA
Air Force Member, JSRA
Navy Member, JSRA
Recorder, JSRA

Yes	No	NA	Item	Source
☐	☐	☐	1. *Date of discharge*	1. DoD Directive 1332.28, enclosure 3, subsection H.1.; Stipulation (Jan. 31, 1977) para. 5.A.(1)(d)(i) (reference (1)).
☐	☐	☐	a. Date of discharge	
☐	☐	☐	b. Character of discharge	
☐	☐	☐	c. Reason for discharge	
☐	☐	☐	d. Specific regulatory authority under which discharge was issued.	
☐	☐	☐	2. *Service data.* (This requirement applies only in conjunction with Military Department implementation of General Counsel, DoD, letter dated July 20, 1977, or to discharge reviews conducted on or after March 29, 1978.)	2. DoD Directive 1332.28, enclosure 3, subsection H.1.; Annex B, (June ——, 1982) para. 2–2 (reference (1)).
☐	☐	☐	a. Date of enlistment	
☐	☐	☐	b. Period of enlistment	
☐	☐	☐	c. Age at enlistment	
☐	☐	☐	d. Length of service	
☐	☐	☐	e. Periods of unauthorized absence*	
☐	☐	☐	f. Conduct and efficiency ratings (numerical and narrative)*	
☐	☐	☐	g. Highest rank achieved	
☐	☐	☐	h. Awards and decorations*	
☐	☐	☐	i. Educational level	
☐	☐	☐	j. Aptitude test scores	
☐	☐	☐	k. Art. 15s (including nature and date of offense or punishment)*	
☐	☐	☐	l. Convictions by court-martial*	
☐	☐	☐	m. Prior military service and type of discharge(s) received*	
☐	☐	☐	3. *Reference to materials presented by applicant.* (This requirement applies only to discharge reviews conducted on or after March 29, 1978.)	3. DoD Directive 1332.28, enclosure 3, subsection H.2.; H.3.
☐	☐	☐	a. Written brief*	
☐	☐	☐	b. Documentary evidence*	
☐	☐	☐	c. Testimony*	
☐	☐	☐	4. *Items submitted as issues.* (See issues worksheet).	4. DoD Directive 1332.28, enclosure 3, subsection H.6.
☐	☐	☐	5. *Conclusions.* The decisional document must indicate clearly the DRB's conclusion concerning:	5. Dod Directive 1332.28, enclosure 3, subsection H.5.; Stipulation (Jan. 31, 1977), paragraph 5.A.(1)(d)(iv) (reference (1)).
☐	☐	☐	a. Determination of whether a discharge upgraded under SDRP would have been upgraded under DoD Directive 1332.28. (This applies only to mandatory reviews under P.L. 95–126 or Special Discharge Review Program (SDRP).	
☐	☐	☐	b. Character of discharge, when applicable[1]	
☐	☐	☐	c. Reason for discharge, when applicable[2]	
☐	☐	☐	6. *Reasons for conclusions.* The decisional document must list and discuss the items submitted as issues by the applicant; and list and discuss the decisional issues providing the basis for the DRB's conclusion concerning:	6. DoD Directive 1332.28, enclosure 3, subsection H.7., H.8.; Stipulation (Jan. 31, 1977) para. 5.A.(1)(d)(v) (reference (1)).
☐	☐	☐	a. Whether a discharge upgraded under the SDRP would have been upgraded under DoD Directive 1332.28. (This applies only to mandatory rereviews under P.L. 95–126 or SDRP reviews.).	
☐	☐	☐	b. Character of discharge, where applicable[1]	
☐	☐	☐	c. Reason for discharge, where applicable[2]	
☐	☐	☐	7. *Advisory opinions**	7. DoD Directive 1332.28, enclosure 3, subsection H.12., Stipulation (Jan. 31, 1977) para. 5.A.(1)(f) (reference (1)).
☐	☐	☐	8. *Recommendation of DRB President*	8. DoD Directive 1332.28, enclosure 3, subsection H.12., Stipulation (Jan. 31, 1977) para. 5.A.(1)(g) (reference (1)).
☐	☐	☐	9. *A record of voting*	9. DoD Directive 1332.28, enclosure 3, subsection H.13., Stipulation (Jan. 31, 1977) para. 5.A.(3) (reference (1)).
☐	☐	☐	10. *Indexing of decisional document*	10. DoD Directive 1332.28, enclosure 3, subsection H.14., Stipulation (Jan. 31, 1977) para. 5.A.(5)(a) (reference (1)).
☐	☐	☐	11. *Authentication of decisional document.* (This requirement applies only to discharge reviews conducted on or after March 29, 1978.)	11. DoD Directive 1332.28, enclosure 3, subsection H.15.
☐	☐	☐	12. *Other*	12. As appropriate.

Explanation of Items marked "No."

Key:

Yes: The decisional document meets the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28.

No: The decisional document does not meet the requirements of the Stipulation of Dismissal or DoD Directive 1332.28.

NA: Not applicable.

*Items marked by an asterisk do not necessarily pertain to each review. If the decisional document contains no reference to such an item, NA shall be indicated. When there is a specific complaint with respect to an item, the underlying discharge review record shall be examined to address the complaint.

[1] In this instance "when applicable" means all reviews except:

a. Mandatory rereviews under P.L. 95–126 or SDRP reviews.

b. Reviews in which the applicant requested only a change in the reason for discharge and the DRB did not raise the character of discharge as a decisional issue.

[2] In this instance "when applicable" means all reviews in which:

a. The applicant requested a change in the reason for discharge.

b. The DRB raised the reason for discharge as a decisional issue.

c. A change in the reason for discharge is a necessary component of a change in the character of discharge.

ATTACHMENT 4.—ISSUES WORKSHEETS[1]

	Listed	Addressed	Corrective action required
A. Decisional issues providing a basis for the conclusion regarding a change in the character of or reason for discharge. (DoD Directive 1332.28, enclosure 3, subsection D.2):			
1.	☐	☐	☐
2.	☐	☐	☐
3.	☐	☐	☐
B. Items submitted as issues by the applicant that are not identified as decisional issues. (DoD Directive 1332.28, enclosure 3, subsection D.3):			
1.	☐	☐	☐
2.	☐	☐	☐
3.	☐	☐	☐
C. Remarks:			

[1] This review may be made based upon the decisional document without reference to the underlying discharge review record except as follows: if there is an allegation that a specific contention made by the applicant to the DRB was not addressed by the DRB. In such a case, the complaint review process shall involve a review of all the evidence that was before the DRB, including the testimony and written submissions of the applicant, to determine whether the contention was made, and if so, whether it was addressed adequately with respect to the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28.
This review may be based upon the decisional document without reference to the regulation governing the discharge in question except as follows: if there is a specific complaint that the DRB failed to address a specific factor required by applicable regulations to be considered for determination of the character of and reason for the discharge in question [where such factors are a basis for denial of any of the relief requested by the applicant]. (The material in brackets pertains only to discharge reviews conducted on or before March 28, 1978.)

ATTACHMENT 5—OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS)

Review of Complaint (DASD(MP&FM))

Military Department:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

1. Each allegation is addressed as follows:
a. Allegation.
b. Conclusion whether corrective action is required.
c. Reasons in support of the conclusion, including findngs of fact upon which the conclusion is based.

NOTE: If the DASD(MP&FM) agrees with the JSRA, he may respond by entering a statement of adoption.

2. Other defects noted in the decisional document or index entries:

3. *Determinations:*

[ ] No further action on the complaint is warranted.

[ ] Corrective action consistent with the above comments is required.

Deputy Assistant Secretary of Defense (Military Personnel & Force Management)

ATTACHMENT 6—OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS)

Review of Amended Decisional Document (DASD (MP&FM))

Military Department:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

Recommendation:

[ ] The amended decisional document complies with the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28. No further corrective action is warranted.

[ ] The amended decisional document does not comply with the Stipulation of Dismissal or DoD Directive 1332.28 as noted herein. Further corrective action is required consistent with the defects noted in the attachment.

Deputy Assistant Secretary of Defense (Military Personnel & Force Management)

Remarks:

ATTACHMENT 7

Dear ——:

It has been determined that the decisional document issued in your case by the (Army) (Navy) (Air Force) Discharge Review Board during the (Special Discharge Review Program) (rereview program under Pub. L. No. 95-126) should be reissued to improve the clarity of the statement of findings, conclusions, and reasons for the decision in your case.

In order to obtain a new decisional document you may elect one of the following options to receive a new review under the (Special Discharge Review Program) (rereview program mandated by Pub. L. No. 95-126):

1. You may request a new review, including a personal appearance hearing if you so desire, by responding on or before the suspense date noted at the top of this letter. Taking this action will provide you with a priority review before all other classes of cases.

2. You may request correction of the original decisional document issued to you by responding on or before the suspense date noted at the top of this letter. After you receive a corrected decisional document, you will be entitled to request a new review, including a personal appearance hearing if you so desire. If you request correction of the original decisional document, you will not receive priority processing in terms of correcting your decisional document or providing you with a new review; instead, your case will be handled in accordance with standard processing procedures, which may mean a delay of several months or more.

If you do not respond by the suspense date noted at the top of this letter, no action will be taken. If you subsequently submit a complaint about this decisional document, it will be processed in accordance with standard procedures.

To ensure prompt and accurate processing of your request, please fill out the form below, cut it off at the dotted line, and return it to the Discharge Review Board of the Military Department in which you served at the address listed at the top of this letter.

Check only one:

[ ] I request a new review of my case on a priority basis. I am requesting this priority review rather than requesting correction of the decisional document previously issued to me. I have enclosed DD Form 293 as an application for my new review.

[ ] I request correction of the decisional document previously issued to me. I understand that this does not entitle me to priority action in correcting my decisional document. I also understand that I will be able to obtain a further review of my case upon my request after receiving the corrected decisional document, but that such a review will not be held on a priority basis.

Dates ——————————

Signatures ——————————

Printed Name and Address

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9856, Mar. 9, 1983]

§ 70.11 DoD semiannual report.

(a) Semiannual reports will be submitted by the 20th of April and October for the preceding 6-month reporting period (October 1 through March 31 and April 1 through September 30).

(b) The reporting period will be inclusive from the first through the last days of each reporting period.

(c) The report will contain four parts:

(1) *Part 1.* Regular Cases.

(2) *Part 2.* Reconsideration of President Ford's Memorandum of January 19, 1977, and Special Discharge Review Program Cases.

(3) *Part 3.* Cases Heard under Pub. L. 95-126 by waiver of 10 U.S.C. 1553, with regard to the statute of limitations.

(4) *Part 4.* Total Cases Heard.

SEMIANNUAL DRB REPORT—RCS DD-M(SA) 1489; SUMMARY OF STATISTICS FOR DISCHARGE REVIEW BOARD (FY)

[Sample format]

Name of board	Nonpersonal appearance			Personal appearance			Total		
	Applied	Number approved	Percent approved	Applied	Number approved	Percent approved	Applied	Number approved	Percent approved

Note:
Identify numbers separately for traveling panels, regional panels, or hearing examiners, as appropriate.
Use of additional footnotes to clarify or amplify the statistics being reported is encouraged.

APPENDIX 9D

BOARD FOR CORRECTION OF NAVAL RECORDS RE-REVIEW CASES

The BCNR has agreed to reconsider any decisions made after 1969 in which a BCNR recommendation favorable to the veteran had been rejected or "substantially modified"[1] by the Secretary of the Navy to the detriment of the veteran. This agreement stems from recent findings that uniformed members of the military were advising the Secretary of the Navy on final BCNR decisions.[2] The military personnel formed their own opinions on the claim, and submitted comments to the Secretary in an attempt to assist him with his decision. The Department of Defense investigated the situation, and issued an order that any comments and decisions must be purely civilian in nature, with no involvement by military members. The Department of Defense reasoned that, since the BCNR is supposed to be a civilian board before which former and present service members may bring grievances,[3] the advisory opinions should also be made by civilians.

Reconsideration is not always automatic; in some instances a veteran must apply for reconsideration. Also, the Navy is not informing veterans of the ability to challenge a past decision, so many veterans may be unaware of this right.

There also is some indication that the Navy intends to limit relief to decisions made within the past two years; however, this limit is not yet official. Since the practice of military intervention in BCNR decisions dates as far back as 1969, adverse decisions by the Secretary of the Navy stemming from that year to January 1989 may be challenged.

In order to determine eligibility to challenge a BCNR decision, a veteran needs to look at the response received from the BCNR. Included in the response will be both what the board recommended and what the Secretary of the Navy finally decided. If the board's recommendation favored the veteran to a greater extent than the final decision, this decision may be challenged by applying to the BCNR for reconsideration of the earlier decision.[4]

---

[1]The Navy has not yet specified what it will consider "substantially modified."

[2]The Secretary of the Navy has the final decision-making power in cases before the BCNR. The BCNR board will formulate an opinion, which is then sent to the Secretary of the Navy for final approval, modification, or rejection. If the Secretary's decision differs from the BCNR's recommendations, he must state the reasons for his decision, including any advisory opinions considered. See 32 C.F.R. §§ 723.7, 723.3 (e)(5) (setting out requirements for statement supporting denial).

[3]10 U.S.C. § 1552(a).

[4]For more information on seeking reconsideration under this section, contact Attorney Thomas G. Bowman, Military and Veterans Legal Assistance, Government Center, P. O. Box 288, Fall River, MA 02722 (508)675-4266/(401)683-2561.

CHAPTER 10
Research

A. Overview

The basic research techniques described in MDU remain unchanged.

B. Chapter Supplement

The Review Board Reading Room, referred to throughout this chapter has a new mailing address (see Supp. § 10.1.4 below). Also, because of increased security at all military facilities, the Reading Room is now inside the Pentagon perimeter. This means that to enter, one must be escorted by an employee of the reading room. To get an escort, call the Reading Room from the Pentagon security gate. The telephone number is (703) 695-3973. Calling ahead is a good idea anyway, as the Reading Room is occasionally closed.

C. Section Supplement

10.1 Discharge Index

10.1.1 Introduction

10.1.2 Structure of Index and Listing

• P.10/2L:

A composite index to all Discharge Review Board and Board for Correction of Military Records decisions reported since April 1977 is now available on microfiche. This index is changed significantly from previous editions. Although the DRB and BCMR index is still issued quarterly, each issuance is a cumulative set of all post-April 1977 cases, not just a listing of cases released that quarter. Each service has its own section on separate microfiche. Part II, which lists cases by subject matter addressed, has been abbreviated to eliminate several columns of information. This format makes it more difficult to use since it is harder to narrow your selection of cases for research. The index may be obtained from Military Review Boards Agency, SFRB-2 (AFRR-Index), Pentagon, Washington, D.C. 20310-1809. The revised listing of the topics included in the Index currently in use can also be obtained from the above address. It is also available at 49 Fed. Reg. 18,589 (May 1, 1984). Copies of the index are free to non-profit organizations. All others must make a check for $10.70 payable to the Treasurer of the United States.

10.1.3 Using the Index and Listing

10.1.4 Problems

• P.10/3L, n.10:

The Reading Room address is now: Military Review Boards Agency, SFRB-2, (AFRR-Index), The Pentagon, Washington, D.C. 20310-1809.

10.2 DRB/BCMR Decisional Documents

10.2.1 Introduction

10.2.2 Obtaining Decisional Documents

10.2.3 Using Decisional Documents

• P.10/3R, ¶ 5:

Citation to past decisions is rarely, if ever, "critical in persuading the DRBs to grant an upgrade . . ." as stated in MDU.[1] Use of past decisions can, however, put at ease a board panel concerned about breaking new ground and can lend credibility to an argument by showing that it has been accepted before.

10.2.4 Problems

10.3 Regulations

10.3.1 Introduction

• P.10/4R:

Sometimes commands issue supplements to specific regulations. These can be significant to understanding how a regulation was implemented. Such supplements are, however, difficult to obtain, especially if they are no longer in effect. Nevertheless, where a regulatory supplement is known to have existed, a request under the Freedom of Information Act should be made to the issuing command as well as the other sources described in § 10.3.2. It is important to remember that these supplements are only binding on the command that issued them.

10.3.2 Obtaining Regulations

a. P. 10/5:

Under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(2), the public has a right to access to military regulatory materials. Each service is required under DoD DIR 5400.7 (32 C.F.R. Part 286, 45 Fed. Reg. 80,502 (Dec. 5. 1980)) to maintain a current (quarterly) subject-matter or topical index.

FOIA requires that regulations be available for public inspection and copying unless the materials are promptly published and copies offered for sale. The documents which must be made available include:

1. Department of Defense

The subject-matter index for DoD directives is the "DoD Directive System Quarterly Index," DoD DIR 5025.1-1. Under 32 C.F.R. Part 289, this index and DoD directives are available either singly or on a subscription basis. Single copies and the quarterly index may be obtained free of charge from Commanding Officer, Attn: Code

[1] In Strang v. Marsh, 602 F. Supp. 1565 (D.R.I. 1985), a court held that the DRBs are not required to distinguish prior decisions.

301, Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120. For urgent requests, call (215) 697-3321 or (215) 697-2179.

For purposes of subscription orders, directives are divided into series, by subject matter. Subscription orders may be placed with the Director, Navy Publications and Printing Service, Bldg. 4, Sec. D, 700 Robbins Ave., Philadelphia, PA 19111.

2. Army

The major index to Army directives is DA Pam 310-1, which is supplemented biweekly with the Baltimore Publications Bulletin. DA Pam 310-1 lists all regulations, circulars, pamphlets, and similar materials. DA Pam 310-2 is an index of blank forms. Other specialized indexes are listed in DA Pam 310-1.

Single copies of almost all Army publications are distributed free of charge. Administrative and doctrinal publications (including regulations) may be ordered from the U.S. Army AG Publications Center, 2800 Eastern Boulevard, Baltimore, MD 21220. Approximately 30 days is required for service.

3. Navy

The basic Navy index of regulatory materials is the "Consolidated Subject Index of Instructions," NACV-PUBNOTE 5215, which is revised quarterly; the Index may be obtained by writing to SECNAV/CNO, Directives, Room 5E585, The Pentagon, Washington, D.C. 20350. Other Navy instructions should be requested through the commands which issued them. Order JAG publications from the Office of the Judge Advocate General, Navy Department, Administrative Law (Code 13), Washington, D.C. 20370; address requests for BUPERS Instructions to Chief of Naval Personnel, Navy Department, Attn: Publications Branch, Room 1723, Arlington Annex, Washington, D.C. 20390. The charge for requested documents will vary depending on what is ordered.

The Navy's Manual of The Judge Advocate, Manual of The Medical Department, and Navy Military Personnel Manual are available from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

4. Air Force

The "Numerical and Subjective Index of Standard Publications and Recurring Periodicals," AFR 0-2, is published quarterly by the Air Force. Requests for Air Force publications should be generally made in writing to the nearest Air Force installation. In the District of Columbia, however, requests should be sent to Headquarters, 1100 ABG/DAD, Bolling Air Force Base, Washington, D.C. 20332. Price information may be found in "Disclosure of Air Force Records to the Public," AFR 12-30.

5. Marine Corps

The index of Marine Corps directives is "Marine Corps Directives System Semiannual Checklist," MC BUL 5215. This and other Marine Corps publications may be obtained from: Commandant of the Marine Corps (Code HQSP), Headquarters, U.S. Marine Corps, Washington, D.C. 20380. The telephone number is: (202) 694-2568 or (202) 694-2580. Upon receipt of a request, the office will send out a bill. Payment must be received before the requested documents will be mailed. Copies of Marine Corps directives may also be obtained in person, in Room 1302, Navy Annex, Columbia Pike and Arlington Ridge Road, Arlington, VA 20380, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday.

6. Coast Guard

The index for Coast Guard publications is CO-23,6 "Directives, Publications and Reports Index." Coast Guard publications may be ordered from the Publications Office (CGMA-3/74), U.S. Coast Guard Headquarters, 400 Seventh St., S.W., Washington, D.C. 20590 (Phone: (202) 428-2316). *See generally* CG-5212.6.

7. National Guard Bureau (NGB)

The NGB issues NGB Pam 310-1, "Index of Applicable Administrative Publications," and ANGRO-2, the index of Air National Guard regulations. Certain Army National Guard regulations are found in 32 C.F.R. Part 5634. National Guard regulations as such are not published in the Federal Register. They may, however, be obtained from: National Guard Bureau (NGB-DAP), Room 2C368, The Pentagon, Washington, D.C. 20310.

b. P.10/6L, n.36:

The National Veterans Law Center is no longer in existence. Its functions have largely been assumed by the National Veterans Legal Services Project, Suite 610, 2001 S Street, N.W., Washington, D.C. 20009.

10.3.3 Using the Regulations

• P.10/6L, ¶ 5:

Footnote 40 should be referenced at the end of this paragraph, instead of where it is referenced in the original text.

10.3.4 Problems

a. P.10/6L, n.40:

This footnote should be associated with § 10.3.3, P.10/6L, ¶ 5.

b. P.10/6R, n.43:

Cite is now 32 C.F.R. § 70.8(b)(8).

c. P.10/7L, n.46:

The current version of the cited provision is at 32 C.F.R. § 70.8(b)(8)(iii), (iv).

Appendix 10A

Reading Room Policy

a. *See* Supp. App. 9C, 32 C.F.R. § 70.8(L), (M), and (N), for current procedures.

Appendix 10B

Samples From Discharge Index

Appendix 10C

Subject/Category Listing for Discharge Index

[*See* new subject/category listing at page 10S/3.]

Appendix 10D

Model Request Letters

Appendix 10E

Sample DRB Decisional Documents

Appendix 10F

Miscellaneous Citations and Addresses

a. P.10F/1, last ¶:

This publication may be ordered from Publications Dept., ACLU Foundation, 122 Maryland Avenue, N.E., Washington, D.C. 20002, prepaid $45.00 or $15.00 for tax exempt organizations.

APPENDIX 10C

PART I of the INDEX

The cases in PART I of the INDEX are arranged in order by CASE NUMBER. At the top of each microfiche near the center, you will find the words PART I CASE NUMBER. Below it you will find two case numbers seperated by the word TO.

ARMED FORCES DISCHARGE REVIEW AND CORRECTION BOARD CASE RECORD INDEX	PART I CASE NUMBER XXXXXXXXX TO XXXXXXXXX	AUG 80 FICHE 001

NOW, LOOK FOR THE MICROFICHE WHERE THE CASE NUMBER YOU WANT IS BETWEEN THESE TWO CASE NUMBERS. On the same line as the CASE NUMBER in PART I are the following:

DATE OF THE REVIEW BOARD DECISION
** TYPE OF DISCHARGE THE PERSON HAS
** DATE OF THE DISCHARGE OF THE PERSON WHO APPEALED
** AUTHORITY (REGULATION USED) FOR DISCHARGE OR CHANGE BY REVIEW BOARD
** REASON FOR DISCHARGE, INDEX NUMBER (found in SECTION IA of this guide)
BOARD DECISION ON THE APPEAL AND VOTES
SERVICE SECRETARY ACTION
ISSUES ADDRESSED INDEX NUMBERS (reasons why the applicant thought his discharge should be upgraded)
* FICHE (sheet of film where cases will be found)
* FRAME (place where case starts; it's the microfiche page number)

EXAMPLE:

CASE NO.	DATE OF BD DECN	TYPE DISCH	DATE OF DISCH	DISCHARGE AUTHORITY	REASON FOR DISCH (INDEX REF. NO.)	BOARD DECN	SECT DECN	ISSUE ADDR 1	2	3	4	FICHE	FRAME
AD7701772	10-10-77	UD	04-13-64	AR635-208	03408	HD 3-0	A	03408	07401	05600	07402	1000001	A-10
AD7701772	10-10-77	UD	04-13-64	AR635-208				00303				1000004	F-12
AD7701773	10-10-77	UD	05-29-73	AR635-200 CH10	A7000	HD 3-2	A	A7100	A9230	A9310	A9318	1000002	C-01

Case No.
Date of Board Decision
** Type of Discharge
** Date of Discharge
** Discharge Authority
** Reason for Discharge
Board Decision
Secretarial Authority
Issues Addressed
* Case Location (fiche and frame)

*For Reading Room Use Only
**Applicable only in Discharge Review Cases

Armed Forces Discharge Review and Correction Board Case Record Index Instructions and Category List

Discharge Review Boards

FACTS NEEDED TO USE THE INDEX

IN ORDER TO USE THE INDEX YOU MUST KNOW

1. THE SERVICE FROM WHICH YOU WERE DISCHARGED. The first two letters of the case number tell the service from which the applicant was separated as follows:
   - AD Army Discharge Review Cases
   - FD Air Force Discharge Review Cases
   - ND Navy Discharge Review Cases
   - MD Marine Corps Discharge Review Cases

2. THE TYPE OF DISCHARGE THAT YOU RECEIVED
   - HD Honorable Discharge
   - GD General Discharge (Discharge Under Honorable Conditions)
   - CD Clemency Discharge
   - UD Undesirable Discharge (Under Other Than Honorable Conditions)
   - BD Bad Conduct Discharge (result of court-martial)
   - DD Dishonorable Discharge (result of court-martial)

3. THE REASON YOU WERE DISCHARGED Some Examples are:
   - Conviction of Civilian Court
   - Homosexuality
   - Character and Behavior Disorder
   - For the good of the Service (instead of court-martial)
   - Misconduct-frequent incidents with Military or Civilian authorities

4. THE REASONS WHY YOU THINK THAT YOUR DISCHARGE SHOULD BE UPGRADED SUCH AS
   - Alcoholism
   - Combat Service
   - Discrimination
   - Drugs
   - Personal Problems
   - Hardship
   - Post-Service Conduct

5. THE CODES USED BY THE BOARD TO EXPLAIN ITS DECISION AS SHOWN IN THE INDEX. These codes show an upgrade using the GD or HD explained in paragraph 2 above or show the letters NC meaning that the Board decided not to change the discharge originally awarded. The letters CU or NU apply to discharges which were upgraded under Special Discharge Review Programs but had to be reviewed again under Uniform Standards. The letters CU mean that the discharge awarded under the Special Program was affirmed under regular review standards. The letters NU mean that the discharge awarded under the Special Program was not affirmed under regular review standards.

6. THE INDEX CODES USED BY THE BOARD TO SHOW WHY AN APPLICANT WAS DISCHARGED AND WHY HE/SHE THOUGHT THE DISCHARGE SHOULD BE UPGRADED. These codes are listed in SECTIONS 1A and 1B of this guide.

SAMPLE CASE

Let's assume that you were discharged from the Army with an Undesirable Discharge (UD). For The Good Of The Service (instead of court-martial) you had only a short unauthorized absence (AWOL) of less than 30 days and you think that your use of drugs and your personal problems caused your problems in the service.

TO USE THE INDEX YOU MUST FIRST LOOK IN SECTION 1 (The Subject/Category Listing) TO FIND THE NUMERICAL CODES FOR THE ISSUES THAT APPLY IN YOUR CASE.

EXAMPLE 1. In the sample case outlined above you should first look for the Reason for Discharge in the PROPRIETY section under REASONS FOR DISCHARGE AND SPECIFIC ELEMENTS PERTAINING TO THESE DISCHARGES. The Index Number for Discharge For The Good of the Service is index A70.00.

2. Next look in the EQUITY section under QUALITY OF SERVICE for Record of Unauthorized Absences (indicates isolated/minor offenses) under index A92.29/30.

3. Finally look in the EQUITY section under CAPABILITY TO SERVE for Personal Problems (index A93.09/10) and for Drugs (index A93.17/08).

AFTER YOU HAVE THE INDEX NUMBERS FOR THE REASON FOR YOUR DISCHARGE AND FOR THE REASONS YOU THINK YOUR DISCHARGE SHOULD BE UPGRADED, YOU LOOK AT THE INDEX, PART II TO FIND CASES WHICH HAVE THE EQUITY INDEX NUMBERS YOU HAVE FOUND (ABOVE).

EXAMPLE 1. Find all of the cases which have index A92.30 under the columns titled ISSUES ADDRESSED. The even number .30 shows favorable Board consideration.

ISSUE	REASON FOR DISCHARGE	BOARD DECN	CASE NUMBER	SUF	REC
A9230	04902	GD 5-0	AD7701500		
A9230	A7000	GD 5-0	AD7701517		A
A9230	A7000	HD 3-2	AD7701519		
A9230	03408	GD 5-0	AD7701533	1	
A9230	A7000	NC 5-0	AD7701554		

2. Look under column headed REASON FOR DISCHARGE (INDEX REF NO) and pick out the index number for your Reason for Discharge (A70.00).

ISSUE	REASON FOR DISCHARGE	BOARD DECN	CASE NUMBER	SUF	REC
A9230	04902	GD 5-0	AD7701500		
A9230	A7000	GD 5-0	AD7701517		A
A9230	A7000	HD 3-2	AD7701519		
A9230	03408	GD 5-0	AD7701533	1	
A9230	A7000	NC 5-0	AD7701554		

3. Look under column headed BOARD DECN on the same line as the index for discharge you just found to see if the discharge was upgraded. This means that the column must have either a GD or an HD entry.

ISSUE	REASON FOR DISCHARGE	BOARD DECN	CASE NUMBER	SUF	REC
A9230	04902	GD 5-0	AD7701500		
A9230	A7000	GD 5-0	AD7701517		A
A9230	A7000	HD 3-2	AD7701519		
A9230	03408	GD 5-0	AD7701533	1	
A9230	A7000	NC 5-0	AD7701554		

4. If the board decision is either GD or HD, look under column four (CASE NUMBER) and write the CASE NUMBER on a seperate piece of paper for your later use.

ISSUE	REASON FOR DISCHARGE	BOARD DECN	CASE NUMBER	SUF	REC
A9230	04902	GD 5-0	AD7701500		
A9230	A7000	GD 5-0	AD7701517		A
A9230	A7000	HD 3-2	AD7701519		
A9230	03408	GD 5-0	AD7701533	1	
A9230	A7000	NC 5-0	AD7701554		

5. Return to the column headed REASON FOR DISCHARGE (INDEX REF NO) and go down to the next number which is the same as yours (A70.00) and follow steps 2, 3 and 4 above. Continue doing this until you have finished all of the pages which have the information you need for your first issue A92.30 (AWOL).

6. Next, take the second ISSUE index number that applies to your case (personal problems index A93.10) and find all of the cases with this index number under the column titled ISSUES ADDRESSED and follow the same procedure as you did before, in steps 2, 3, 4 and 5 above.

7. Complete the process following the same system with your last index (Drugs - A93.18).

YOU NOW HAVE A LIST OF ALL OF THE CASES OF PEOPLE DISCHARGED FOR THE SAME REASON YOU WERE DISCHARGED AND WHO FELT THAT THEIR DISCHARGES SHOULD BE UPGRADED FOR SOME OF THE SAME REASONS YOU DO. THE NEXT THING YOU WANT TO DO IS TO MAKE THE LIST INCLUDE ONLY THE ISSUES YOU HAVE SO THAT YOUR LIST IS A LIST OF CASES WHICH BEST LOOKS LIKE YOURS. TO DO THAT, YOU NOW TURN BACK TO PART I OF THE INDEX AND USE THE CASE NUMBERS WHICH YOU HAVE WRITTEN ON THE SEPARATE PAPER. YOU LOOK UP EACH CASE WHICH YOU FOUND BY CASE NUMBER AND LOOK UNDER THE ISSUES ADDRESSED COLUMN. EACH CASE WHICH HAS ALL OF YOUR ISSUE NUMBERS TOGETHER AND ONLY YOUR ISSUE NUMBERS IS A CASE YOU WANT TO HELP YOU IN PREPARING YOUR CASE. ONCE YOU HAVE ALL OF THE CASE NUMBERS FOR CASES WITH YOUR REASON FOR DISCHARGE AND YOUR ISSUES YOU ARE READY TO REQUEST CASES TO REVIEW.

NOTE: The above example uses the INDEX NUMBERS contained in Section 1B for cases heard after mid 1978. For cases heard prior to mid 1978 the INDEX NUMBERS contained in Section 1A would be used in the same manner.

Corrections Boards

FACTS NEEDED TO USE INDEX

In order to use the index for Corrections Board cases you must know:

1. The service from which you wish correction or discharge upgrade.

As with Discharge Review cases, the first two letters of the case number tell the service with which the applicant was a member:

AC - Army Corrections Board

FC - Air Force Corrections Board

NC - Naval Corrections Board

MC - Marine Corrections Board

CG - Coast Guard Corrections Board

2. THE TYPE OF DISCHARGE THAT YOU RECEIVED (IF APPLICABLE)

HD Honorable Discharge

GD General Discharge (Discharge Under Honorable Conditions)

CD Clemency Discharge

UD Undesireable Discharge (Under Other Than Honorable Conditions)

BD Bad Conduct Discharge (result of court-martial)

DD Dishonorable Discharge (result of court-martial)

3. THE REASON YOU WERE DISCHARGED (IF APPLICABLE) Some Examples are:

Conviction of Civilian Court

Homosexuality

Character and Behavior Disorder

For the good of the Service (instead of court-martial)

Misconduct-frequent incidents with Military or Civilian authorities

4. THE REASONS WHY YOU THINK THAT YOUR DISCHARGE SHOULD BE UPGRADED (IF APPLICABLE) SUCH AS

Alcoholism

Combat Service

Discrimination

Drugs

Personal Problems

Hardship

Post-Service Conduct

Subject/Catogory Listing To Accompany the Armed Forces Discharge Review and Correction Boards Index

FOREWORD
September 1986

This Subject Category Listing is for use with the Armed Forces Discharge Review/Correction Boards Index.

Its purpose is to assign numerical codes to various "Reasons for Discharge" used in the review process. This includes issues raised by the applicant and those identified by the Board in arriving at its determination.

The Subject Category Listing is divided into two sections: Section I contains those issue numbers that are used for discharge review cases; Section II deals with those issue numbers used in nondischarge review cases.

Section I
Subsection IA, the issues in use today, has been used by the Discharge Review Boards since mid-1978. It incorporates the terminology contained in DoD Directive 1332.28, "Discharge Review Board (DRB) Procedures and Standards," dated 11 August 1982 and covers pages 4-32. It contains numerical codes A00.01-A99.99.

Subsection IB contains issue numbers used by the boards prior to mid-1978; its inclusion in this revision is as a historical reference. This section spans pages 35-51 and represents issue numbers 001.00-099.99.

Section II
The issues in use today, contains issue numbers used by the Correction Boards to designate non-discharge cases. This section spans pages 52-63 and contains numerical codes 100.00-144.00.

Asterisks (**) mark those categories in Section IA that are effected by this update. Suggestions for changes in the Subject/Category listing should be sent to the following address.

Administrative Director
Joint Service Review Activity
OASD(MI&L)(MP&FM)
Washington, D.C. 20301

This document is maintained and published by the DA Military Review Boards Agency as proponent agency for the Department of Defense. If you desire additional copies of this publication, their address is as follows:

DA Military Review Boards Agency
Washington, D.C. 20310-1809

SECTION 1A

Issue numbers used to index discharge cases reviewed after mid-1978 (Numerical Codes A00.01 - A99.99)

OUTLINE TO THE REVISED SUBJECT/CATEGORY LISTING
PROPRIETY CONSIDERATIONS

EQUITY CONSIDERATIONS

OTHER CONSIDERATIONS

EXPLANATION OF THE REVISED SUBJECT/CATEGORY LISTING
As Its Relates to the Discharge Review Boards

**

The revised Subject/Category listing (S/CL) incorporates the Discharge Review standards with those which resulted from the Urban Law litigation and subsequent changes in DoD Directive 1332.28, "Discharge Review Board (DRB) Procedures and Standards." The most recent changes (1 September 1986) to the S/CL are marked with two asterisks (**).

The current S/CL which pertains to the DRB's is divided into ten parts: Parts A through D relate to PROPRIETY CONSIDERATIONS; Parts E through H relate to EQUITY CONSIDERATIONS; and Parts I through J relate to OTHER CONSIDERATIONS and SPECIAL PROGRAMS. For further explanation of these parts, see the comments contained on page 25.

The index reference numbers have been assigned for easy use. The letter "A" precedes each index number to indicate that it is from the revised S/CL (after mid-1978).

(a). REASONS FOR DISCHARGE are indicated by "major digits" A03.00--A84.00.

(b). SPECIFIC PROCEDURAL ELEMENTS unique to a particular Reason of Discharge are indicated by the "major digit" assigned that reason and "minor digits" reflecting the Specific Procedural Elements, e.g. A03.08, A70.04.

(c). PROCEDURAL ELEMENTS COMMON TO ALL DISCHARGES begin with the "major digit" A01 and are further categorized by "minor digits," e.g. A01.02 or A01.11.

(d). PROCEDURAL ELEMENTS COMMON TO ALL DISCHARGES WHERE THE SERVICEMEMBER HAS A RIGHT TO A BOARD HEARING begin with the "major digit" A02. and are further categorized by "minor digits," e.g. A02.02 or A02.13.

(e). ALL EQUITY CONSIDERATIONS are reflected by the "major digits" A90.--A94. and are further categorized by "minor digits," eg. A92.03 or A93.14.

(f). CONTENTIONS OR ISSUES ADDRESSED WHICH CONCERN THE PROPRIETY OF ADMINISTRATIVE ACTIONS indirectly related to the discharge process but which may reflect on the equity of the process begin with the "major digit" A99. and are further categorized by "minor digit," e.g. A99.01 or A99.08.

(g). All consideration under SPECIAL PROGRAMS concerning discharge review are indicated by the "major digit" A00. and further are categorized by "minor digits" e.g. A00.21, A00.14.

For example, in the Computer Printout (Part I of the Index) you might see under the headings the following:

EXAMPLE

REASON FOR DISCHARGE	ISSUES ADDRESSED
A03.00	A01.10, A03.03, A92.02,A93.07,A93.22

Common Element Equity Considerations

Specific Procedural Reqm't Pertaining to the Discharge

Index numbers from S/CL corresponding to Reason For Discharge and Issues Addressed in Example above:

(A03.00)	Discharge for Expiration of Term of Service (ETS)
(A01.09/10)	Characterization Based in part on Prior Service
(A03.03/04)	Personal Decorations During Current Service Not Considered
(A92.01/02)	Conduct and Efficiency Ratings
(A93.07/08)	Marital/Family Problems
(A93.21/22)	Medical/Physical Problems

**

The Subject/Category Listing uses a slash to indicate that two numbers have been assigned to a particular issue, e.g. A03.03/04 indicates either A03.03 or A03.04. The even numbers indicates favorable consideration by the Board concerning a standard of equity (A92.02) or that a claim of impropriety was valid (A01.10). An odd number indicates unfavorable consideration of equity (93.07) or that a claim of impropriety was invalid (A03.03). The index number will be odd except when the Board uses that item as a basis for upgrade. For example: even if the applicant served well in combat, the index number will be (A92.07) if the Board does not use his combat service as a basis to grant relief.

Board Members should code not only the Reason For Discharge and Issues raised, but all areas of consideration which provided the basis for their decision. To enable an applicant to determine which Issue addressed provided the principal reason for the Board's decision, an index reference number assigned to that reason should, whenever possible, be the first number entered under the ISSUES ADDRESSED.

For PROPRIETY CONSIDERATIONS, a number relating to a specific procedural error will be entered first (see A01.10).

For EQUITY CONSIDERATIONS, a number relating to a broad area of EQUITY, e.g. A93.00 may be appropriate, especially in those cases where more than one Equity consideration provided the basis for the decision.

EXPLANATION OF PARTS RELATING TO THE DISCHARGE REVIEW PORTION OF THE SUBJECT/CATEGORY LISTING

PART A..... relates to propriety issues common to all discharges.

PART B..... relates to propriety issues common to all discharges where the servicemember has a right to a hearing before a Board of Officers.

PART C..... index reference numbers assigned to specific Reasons for Discharge--under each reason, the considerations of propriety unique to that discharge.

PART D..... Two policy changes that have been made expressly retroactive.

PART E..... relates to procedural changes which past applicants have suggested represent a substantial enhancement of rights and which, if applied retroactively, would result in a more favorable characterization of discharge. This Part also includes index reference numbers which relate to policy changes concerning the characterization of discharge a Servicemember can or must receive when separated for a particular reason.

PART F..... Equitable Considerations relating to a former servicemember's Quality of Service.

PART G..... Equitable Considerations relating to a former servicemember's Capability to Serve.

PART H..... Equitable Considerations which do not clearly fall within one of the parts above.

PART I..... relates to considerations of impropriety in administrative actions indirectly related to the discharge process but which may reflect on the equity of that process.

PART J..... relates to Special Programs for discharge review.

SECTION 1

REVISED SUBJECT/CATEGORY LISTING (1978)

UPDATED 1 September 1986

PROPRIETY CONSIDERATIONS

PART A COMMON ELEMENTS THROUGHOUT THE DISCHARGE PROCESS

**
(A01.00) Propriety of Discharge (discharge is proper, no specific issues of propriety)

(A01.01/02) Separation action not properly initiated

(A01.03/04) SM not properly notified of separation action

(A01.05/06) Improper physical examination at separation

(A01.07/08) Discharge authority not proper

(A01.09/10) Characterization based in part on prior service

(A01.11/12) Characterization based in part on pre-service record

(A01.13/14) Evidence in record does not support reason for discharge

** (A01.15/16) SM not separated within reasonable/required time after approval

(A01.17/18) JAG's (Legal) review, when required, defective

(A01.19/20) SM's ratings/grades were not properly calculated or administered

(A01.21/22) Evidence obtained in violation of Article 31, UCMJ, (Self Incrimination) improperly considered

(A01.23/24) Evidence obtained from unlawful search improperly considered

(A01.25/26) Hearsay evidence improperly considered

(A01.27/28) Unsworn testimony or statements improperly considered

** (A01.29/30) Exempt/limited use evidence (related to alcohol/drug abuse) improperly considered

(A01.31/32) Other evidence improperly considered, including defective records of disciplinary offenses

** (A01.33/34) Discharge Under Conditions Other Than Honorable of inactive reservist based upon civilian misconduct found not to have affected directly the performance of military duties. Deleted 1 September 1986. Use (A61.11/12)

** (A01.35/36) Discharge with a General Discharge of inactive reservist based upon civilian misconduct found not to have had an adverse impact on the overall effectiveness of the military police morale and efficiency. Deleted 1 September 1986. Use (A61.13/14)

(A01.37/38) No counsel provided

(A01.39/40) Inadequate counsel

(A01.41/42) No board of officers

(A01.43/44) Presumption of regularity (Incomplete record)

** (A01.45/46) Counseling requirements not met or waived

** (A01.47/48) Rehabilitative requirements not met or waived

** (A01.49/50) Mental Status or Psychiatric Evaluation not conducted

** (A01.51/52) Statement submitted by applicant during discharge process not considered

** (A01.53/54) Honorable discharge mandated in this case

** (A01.55/56) Characterization or reason for discharge improperly changed by an authority involved in the discharge process and/or appropriate entries not made in file showing reason

** (A01.57/58) Discharge is improper because it was based on an invalid urinalysis test

** (A01.59/60) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

PART B ELEMENTS COMMON TO DISCHARGES WHERE SM HAS RIGHT TO BOARD HEARING

(A02.00)

(A02.01/02) Commander's report improper

(A02.03/04) SM not properly notified of right to request board hearing

(A02.05/06) SM not properly notified of right to submit statement

(A02.07/08) Improper counsel for consultation

(A02.09/10) Waiver of board hearing not proper

(A02.11/12) Improper denial of request for board hearing

(A02.13/14) Improper composition of board

(A02.15/16) Improper counsel for representation

(A02.17/18) Ineffective assistance of counsel

(A02.19/20) Request for witness improperly denied

(A02.21/22) Command intervention (influence) improper

(A02.23/24) Improper denial of request to personally appear

(A02.25/26) Recommendation of board improper

(A02.27/28) Discharge authority's approval improper in light of board recommendation

(A02.29/30) Withdrawal of waiver not properly considered

(A02.31/32) Improper vacation of suspended administrative discharge

(A02.33/34) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

PART C REASONS FOR DISCHARGE AND SPECIFIC ELEMENTS PERTAINING TO THESE DISCHARGES

(A03.00) Discharge For Expiration of Term of Service/Enlistment (ETS)

(A03.01/02) SM member did meet regulatory criteria for Honorable Discharge

** (A03.03/04) Personal decoration during current service not considered. Deleted 1 September 1986. Use (A92.03/04) Equity Consideration

** (A03.05/06) Characterization based on isolated acts of indiscipline. Deleted 1 September 1986. Use (A92.35/36) Equity Consideration

(A03.07/08) Characterization based on mental status or other medical evaluation

** (A03.09/10) (Characterization improperly changed by commanding officer or transfer activity and appropriate entries not made in file showing reason) Deleted 1 September 1986. Use (A01.55/56)

**
(A04.00) Discharge for Convenience of Government (Best Interest of the Service/Changes in Service Obligation) (see specific categories (A05.00 to A28.00) below)

(A05.00) Reduction in strength (Service manpower)

(A06.00) Erroneous induction or enlistment

(A07.00) Early separation under directed programs

** (A07.10) Insufficient retainability for required retraining

** (A07.20) Bar to reenlistment

(A08.00) Discharge on basis of alien status

(A09.00) Lack of jurisdiction

(A10.00) Sole surviving son/daughter or family member

(A11.00) Concealment of arrest record

(A12.00) Secretarial authority

**
(A13.00) Discharge for failure to meet weight control standards (formerly obesity)

(A14.00) Discharge for motion/travel sickness

(A15.00) Inability to perform duties due to parenthood

(A16.00) Discharge to accept commission

(A17.00) Discharge for enlistment/reenlistment

**
(A18.00) Physically disqualified for or eliminated from Officer Candidate School

(A19.00) SM erroneously delivered punitive discharge before review final

(A20.00) Discharge for allergy to clothing

(A21.00) SM serving constructive enlistment with defective contract

(A22.00) Discharge for pregnancy or marriage

(A23.00) Discharge for conscientious objection

(A24.00) Marginal performer discharge (EDP/QMP): Non-trainee (1 Sep 73 - 30 Sep 82)

** (A24.01/02) (SM not properly counseled by command). Deleted 1 September 1986. Use (A01.45/46)

(A24.03/04) SM met required standards of performance after award of MOS

(A24.05/06) SM not in unit from which separated for required period of time

(A24.07/08) SM did not consent to discharge

** (A24.09/10) (Improper counsel for consultation (when required)). Deleted 1 September 1986. Use (A01.37/38 or A01.39/40)

** (A24.11/12) (Statement submitted not considered) Deleted 1 September 1986. Use (A01.51/52)

** (A24.13/14) (Not separated within specified period of time in service). Deleted 1 September 1986. Use (A01.15/16)

(A25.00) Marginal performer discharge (TDP): Trainee (1 Sep 73 - 30 Sep 82)

** (A25.01/02) (SM not discharged within required time after enlistment). Deleted 1 September 1986. Use (A01.15/16)

** (A25.03/04) (Trainee discharge not properly characterized as honorable). Deleted 1 September 1986. Use (A01.53/54)

** (A25.05/06) (Trainee discharge not properly counseled by command before discharge). Deleted 1 September 1986. Use (A01.45/46)

** (A25.07/08) (Statement/rebuttal submitted not considered). Deleted 1 September 1986. Use (A01.51/52)

(A26.00) Substandard performance/behavior (Petty Officer)

(A27.00) Substandard performance/behavior (Non-Petty Officer)

(A28.00) Condition//medical disability which interferes with performance of duties, not a physical disability

** (A28.10) Conditions which interfere with military service

(A29.00) Entry Level Performance and Conduct (ELS) (After 1 Oct 82)

** (A29.01/02) (Member not properly counseled/rehabilitated by command before separation). Deleted 1 September 1986. Use (A01.45/46 or A01.47/48)

(A29.03/04) Member not discharged within 180 days of AD/IADT

** (A29.05/06) (Member not separated within three duty days after approval by separation authority). Deleted 1 September 1986. Use (A01.15/16).

** (A29.07/08) (Statement/rebuttal not considered). Deleted 1 September 1986. Use (A01.51/52)

**

(A30.00) Convenience of the Government (Officers) (See specific categories (A30.10 to A30.70) below)

** (A30.01/02) Renumbered. See (A30.10) below
** (A30.03/04) Renumbered. See (A30.30) below
** (A30.05/06) Renumbered. See (A30.50) below
** (A30.07/08) Renumbered. See (A30.70) below

** (A30.10) Parenthood

** (A30.30) Other designated physical or mental condition

** (A30.50) Review Action

** (A30.70) Conduct adverse to the best interest of the service

(A31.00) Discharge for physical disability

(A32.00) Discharge (Characterization) as a result of DRB action

(A33.00) Discharge (Characterization) as a result of other official board action (e.g. clemency & parole, correction of military records)

(A34.00) Discharge for minority

(A35.00) Discharge for dependency or hardship

**

(A36.00) (Discharge for security reasons). Deleted 1 September 1986. Use (A37.00).

(A37.00) Discharge in the interest of national security

(A38.00) Failure in prisoner rehabilitation/retraining

**

(A39.00) Action by the Special Court-Martial authority

**

(A40.00) Discharge for Unsuitability (Prior to 1 Oct 82. For discharges prior to 8 Apr 59 use (A78.00)) (See specific categories (A41.-48. below)

** (A40.01/02) (Counseling requirements not met or waived). Deleted 1 September 1986. Use (A01.45/46)

** (A40.03/04) (Rehabilitative requirements not met or waived). Deleted 1 September 1986. Use (A01.47/48)

** (A40.05/06) (Mental status evaluation (when required) not conducted). Deleted 1 September 1986. Use (A01.49/50)

** (A40.07/08) (Requested psychiatric or psychological report not conducted). Deleted 1 September 1986. Use (A01.49/50)

(A41.00) Inaptitude

(A42.00) Personality disorder (Old character & behavior disorder)

(A42.01/02) Neuropsychiatric (NP) evaluation not proper/present

(A43.00) Apathy

(A44.00) Enuresis

(A45.00) Alcohol abuse

(A46.00) Homosexual tendencies

(A46.01/02) No verified record of homosexual acts prior to or during service

(A46.03/04) Did not exhibit, profess or admit to homosexual tendencies

** (A46.05/06) (Psychiatric/psychological evaluation (when required) not performed). Deleted 1 September 1986. Use (A01.49/50)

(A47.00) Financial irresponsibility

(A48.00) Unsanitary habits

(A49.00) Discharge for Unsatisfactory Performance (After 30 Sep 82)

** (A49.01/02) (Counseling and rehabilitation requirements not waived). Deleted 1 September 1986. Use (A01.45/46)

** (A49.03/04) (Notification requirements not met). Deleted 1 September 1986. Use (A01.01/02)

** (A49.05/06) (Mental status evalution or psychiatric evaluation report (if applicable) not conducted). Deleted 1 September 1986. Use (A01.49/50)

** (A49.07/08) (Medical examination (if applicable) not conducted). Deleted 1 September 1986. Use (A01.05/06)

** (A49.09/10) (Statement/rebuttal not considered). Deleted 1 September 1986. Use (A01.51/52)

(A50.00) Discharge for Unfitness (see specific categories A51. - A58. below)

** (A50.01/02) (Counseling requirements not met or waived). Deleted 1 September 1986. Use (01.45/46)

** (A50.03/04) (Rehabilitative requirements not met or waived). Deleted 1 September 1986. Use (A01.47/48)

** (A50.05/06) (Mental status evaluation (when required) not conducted). Deleted 1 September 1986. Use (A01.49/50)

** (A50.07/08) (Requested psychiatric or psychological report not conducted. (Deleted 1 September 1986. Use (A01.49/50)

**
(A51.00) Frequent involvement with civil or military authorities (8 Apr 59 to 31 Mar 76)

**
(A52.00) Sexual perversion (Prior to 1 Oct 82)

**
(A53.00) Drug use, sale or possession (Prior to 1 Oct 82)

**
(A54.00) Established pattern of shirking (Prior to 1 Oct 82)

**
(A55.00) Established pattern of failure to pay debts (Prior to 1 Oct 82)

**
(A56.00) Established pattern of failure to support dependents (Prior to 1 Oct 82)

**
(A57.00) Homosexual acts (Prior to 10 Mar 81)

(A57.01/02) No confirmed proposal, solicitation, attempt or performance of homosexual acts

(A57.03/04) Isolated incident stemmed from immaturity, curiosity or intoxication

** (A57.05/06) (Psychiatric/psychological evaluation (when required) not conducted). Deleted 1 September 1986. Use (A01.49/50)

**
(A58.00) Unsanitary habits (Prior to 1 Oct 82)

**
(A59.00) Discharge for homosexuality (After 9 Mar 81)

** (A59.01/02) (Notification requirements not met). Deleted 1 September 1986. Use (A01.01/02)

** (A59.03/04) (Mental status evaluation not conducted). Deleted 1 September 1986. Use (A01.49/50)

** (A59.05/06) (Statement/rebuttal not considered). Deleted 1 September 1986. Use (A01.51/52)

(A59.07/08) With subordinate

(A59.09/10) Location subject to military control

(A59.11/12) For compensation

(A59.13/14) With person under 16 years of age

(A59.15/16) Openly in public view

(A59.17/18) With use of force, coercion, or intimidation

(A59.19/20) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

(A60.00) Discharge for Misconduct (See specific categories A61. - A67. below)

(A61.00) Conviction by civil authorities (Foreign or domestic)

(A61.01/02) No conviction which met UCMJ punishment standards

(A61.03/04) Discharged before appeal action completed

(A61.05/06) Discharge not in accordance with policy for Non-U.S. convictions

** (A61.07/08) (Mental status evaluation (when required) not conducted). Deleted 1 September 1986. Use (A01.49/50)

(A61.09/10) Improperly discharged after constructive waiver

(A61.11/12) Misconduct of inactive reservist discharged under other than honorable conditions based upon civilian misconduct found not to have affected directly the performance of military duties

(A61.13/14) Misconduct of inactive reservist discharged under honorable conditions based upon civilian misconduct found not to have had an adverse impact on the overall effectiveness of the military morale and efficiency

** (A61.15/16) (Seriousness of offense). Deleted 1 September 1986. Use (A92.35/36) Equity Consideration

(A62.00) Fraudulent enlistment

(A62.01/02) Fraudulent entry not substantiated

** (A62.03/04) (Mental status evaluation (when required) not conducted). Deleted 1 September 1986. Use (A01.49/50)

(A62.05/06) Recruiter misconduct

**
(A63.00) Prolonged unauthorized absence (extended AWOL/desertion) (Prior to 1 Oct 82)

(A63.01/02) Unauthorized absence (AWOL/desertion) not continuous 1 year or more

** (A63.03/04) (Mental status evaluation (when required) not conducted). Deleted 1 September 1986. Use (A01.49/50)

**
(A64.00) Frequent involvement with civil or military authorities (1 Apr 76 to 30 Sep 82) (See procedural elements under unfitness A50.01-08)

(A64.01/02) Criteria for under other than honorable conditions (UOTHC/UOHC) not met

**

(A65.00) Homosexual acts (After 10 March 1981) (See procedural elements under unfitness A50.01-08; and A57.01-06)

(A66.00) Drug abuse (See procedural elements under unfitness A50.01-08)

(A67.00) Acts or patterns of misconduct (See specific categories (A67.10 to 67.70) below

** (A67.01/02) Renumbered. See (A67.10) below
** (A67.03/04) Renumbered. See (A67.30) below
** (A67.05/06) Renumbered. See (A67.50) below
** (A67.07/08) Renumbered. See (A67.70) below

** (A67.10) Minor disciplinary infractions (After 1 Oct 82)

** (A67.30) Serious offense (civil or military) (After 1 Oct 82)

** (A67.50) Pattern of misconduct (After 1 Oct 82)

** (A67.70) Illegal use of drugs (After 1 July 83)

** (A67.90) Prejudicial to good order and discipline

(A68.00) Bad Conduct Discharge (BCD)

(A68.01/02) BCD not affirmed on appellate review

** (A68.03/04) (Seriousness of offense). Deleted 1 September 1986. Use (A92.35/36) Equity Consideration

**

(A69.00) Discharge for alcohol/drug rehabilitation failure (After 20 Nov 77)

(A69.01/02) SM was not rehabilitative failure

(A69.03/04) SM was discharged prior to minimal treatment

** (A69.05/06) (Discharge not properly characterized as honorable). Deleted 1 September 1986. Use (A01.53/54)

** (A69.07/08) (Improper counsel for consultation). Deleted 1 September 1986. Use (A01.37/38 or A01.39/40)

(A70.00) Request for discharge for good of service (GOS) for conduct which rendered SM triable by CM (See specific categories A71.-A77. below)

(A70.01/02) Charges not preferred

(A70.03/04) Offense charged, not punishable by a "Punitive Discharge"

(A70.05/06) SM did not request for GOS discharge

** (A70.07/08) (SM not properly counseled by attorney). Deleted 1 September 1986. Use (A01.37/38 or A01.39/40)

(A70.09/10) Request for withdrawal of GOS discharge not processed/considered

(A70.11/12) SM could not knowingly request GOS discharge at the time

(A70.13/14) No UCMJ jurisdiction over the person

(A70.15/16) No UCMJ jurisdiction over the offense

** (A70.17/18) (Seriousness of offense). Deleted 1 September 1986. Use (A92.35/36) Equity Consideration

(A71.00) Conduct triable by CM: AWOL

** (A71.01/02) Renumbered. See (A71.10) below
** (A71.03/04) Renumbered. See (A71.30) below

** (A71.10) Conduct triable by CM: Absent from appointed place of duty.

** (A71.30) Conduct triable by CM: Missing movement

(72.00) Conduct triable by CM: Larceny

(A73.00) Conduct triable by CM: Assault

(A74.00) Conduct triable by CM: Drugs

(A75.00) Conduct triable by CM: DOLO

** (A75.01/02) Renumbered. See (A75.10) below
** (A75.03/04) Renumbered. See (A75.30) below

** (A75.10) Conduct triable by CM: Dereliction of duty

** (A75.30) Conduct triable by CM: Sleeping on duty

(A76.00) Conduct triable by CM: Disrespect

** (A76.01/02) Renumbered. See (A76.10) below

** (A76.10) Conduct triable by CM: Making a false official statement

(A77.00) Conduct triable by CM: Homosexuality

(A78.00) Discharge for inaptitude or unsuitability (Discharges prior to April 1959)

(A79.00) Discharge for undesirable habits or traits (Discharges prior to April 1959)

(A80.00) Officer resignation

(A80.01/02) Officer did not tender resignation

(A80.03/04) No elimination action initiated, when required

(A80.05/06) Request not forward to military department by GCM authorities

(A81.00) Officer elimination

(A82.00) Officer expiration of term of service

(A83.00) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

**

(A84.00) Discharge for unsatisfactory participation/attendance at drills/meetings (Reserve or National Guard personnel)(Use procedural elements under (A01.) series)

** (A84.01/02) (Member not properly notified by command before separation). Deleted 1 September 1986. Use (A01.01/02)

** (A84.03/04) (Statement/rebuttal submitted not considered). Deleted 1 September 1986. Use (A01.51/52)

PART D POLICY CHANGES MADE SPECIFICALLY RETROACTIVE

**

(A85.00) Drug use/possession (Laird Memorandum) (Only applies to discharges executed on or before 7 July 1971)

(A85.01/02) Discharge based solely on drug related conduct

(A85.03/04) Discharge based solely on drug use/possession

(A85.05/06) Discharge based on sale, but mere conduit theory applies

(A85.07/08) Service record otherwise satisfactory

(A86.00) Personality Disorder (Old character and behavior disorder)

(A86.01/02) No NP evaluation

(A86.03/04) No NP evaluation diagnosing a personality disorder

(A86.05/06) Evaluation not conducted by proper medical authority

** (A86.07/08) (No clear and demonstrable reason for less than honorable discharge). Deleted 1 September 1986. Use (A01.53/54)

(A87.00) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

(A88.00)

(A89.00)

EQUITY CONSIDERATIONS
(CONTENTIONS, ISSUES OR CONSIDERATIONS)

PART E POLICY CHANGES NOT SPECIFICALLY RETROACTIVE

(A90.00) Procedural

(A90.01/02) Formal notification of separation action

(A90.03/04) Opportunity to respond (e.g. Submit statements)

(A90.05/06) Opportunity for a board hearing

(A90.07/08) Right to lawyer for consultation

(A90.09/10) Right to lawyer for representation

(A90.11/12) Opportunity to examine cross-examine witness(es)

(A90.13/14) Other [Submit category/issues to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

(A91.00) Policy

(A91.01/02) Character of discharge received by SM is not now authorized or required when a SM is discharged for the same reason or conduct

(A91.03/04) Conduct for which SM was discharged no longer provides an authorized basis for separation

** (A91.05/06) Clemency is warranted (Discharged with a BCD)

** (A91.07/08)) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

PART F QUALITY OF SERVICE

(A92.00)

(A92.01/02) Conduct and efficiency ratings

(A92.03/04) Awards and decorations

(A92.05/06) Letter of commendation

(A92.07/08) Combat service

(A92.09/10) Wounds received in action

(A92.11/12) Record of promotions

(A92.13/14) Rank/responsibility level at which SM served

(A92.15/16) Other acts of merit

(A92.17/18) Date and period of service which is subject of DRB review; length and quality of service under review

(A92.19/20) Prior (Honorable) military service

(A92.21/22) Post service conduct (Good citizenship)

(A92.23/24) Record of non-judicial punishment

(A92.25/26) Record of Court(s)-martial convictions

(A92.27/28) Record of conviction(s) by civil authorities while in service and part of service record

(A92.29/30) Record of unauthorized absences

(A92.31/32) AWOL, extended or multiple unauthorized absences

(A92.33/34) Record of confinement or other lost time

** (A92.35/36) Offenses of isolated/minor nature (Not a serious offense)

(A92.37/38) Guilty of offense

(A92.39/40) Uncorroborated drug abuse charges

** (A92.41/42) Bar to Reenlistment

(A92.43/44) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

PART G CAPABILITY TO SERVE (FACTORS WHICH COULD IMPAIR ABILITY TO SERVE)

(A93.00)

(A93.01/02) Age and maturity

(A93.03/04) Aptitude (Scores and education)

(A93.05/06) Deprived background

(A93.07/08) Marital/family problems

(A93.09/10) Personal problems

(A93.11/12) Financial problems

(A93.13/14) Discrimination: Religious

(A93.15/16) Discrimination: Racial

(A93.17/18) Drugs

(A93.19/20) Alcohol

(A93.21/22) Medical/physical

(A93.23/24) Psychiatric/psychological problems (may include situational maladjustment)

(A93.25/26) Matters or conscience

(A93.27/28) Waiver of moral standards for enlistment

(A93.29/30) Counseling (by command, chaplain, etc.)

** (A93.31/32) Discrimination: Sex

** (A93.33/34) Personality conflicts

** (A93.35/36) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

PART H OTHER EQUITABLE CONSIDERATIONS

(A94.00)

(A94.01/02) Severity of punishment (Civil or military): Current standards

(A94.03/04) Inaptitude ("Would but couldn't")

(A94.05/06) Too harsh: At issuance, discharge inconsistent with standards of discipline

** (A94.07/08) Discharge in lieu of Court-Martial: Although a punitive discharge was authorized, the type of discharge the applicant received was too harsh under the circumstances

(A94.09/10) Multiple minor offenses (Multiplicity)

** (A94.11/12) Arbitrary and capricious command actions or supervisory mismanagement or abuse that constitute a clear abuse of authority, and which, although not amounting to prejudicial or legal error, may have contributed to the decision to discharge or the characterization of service

(A94.13/14) Vietnam war syndrome

(A94.15/16) Received clemency discharge

(A94.17/18) Completed alternate service or excused there from

(A94.19/20) Failed to complete alternate service but reasonable explanation

(A94.21/22) Homosexual interest self-admitted

(A94.23/24) Homosexual act(s) committed with express/implied consent of an adult(s)

(A94.25/26) Homosexual act(s) off military installation

(A94.27/28) Homosexual act(s) resulted from duress

(A94.29/30) Drugs: Simple possession (Small amount)

(A94.31/32) Drugs: Use off duty

(A94.33/34) Drugs: Use off military reservation

(A94.35/36) Drugs: No use after exemption granted

(A94.37/38) Drugs: No sale/trafficking

(A94.39/40) Drugs: Use/possession

(A94.41/42) Substantial enhancement of rights (current standards)

(A94.43/44) Lack of alcohol/drug treatment

(A94.45/46) Not within the purview of DRB

** (A94.47/48) Not an element of fact, law, procedure or discretion

(A94.49/50) Counseling pertaining to VA benefits not received

(A94.51/52) Counseling regarding request for change in character/reason of discharge not received

** (A94.53/54) Unclear or nonspecific issue

** (A94.55/56) The reason for discharge is inequitable

(A94.57/58) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

**
(95.00) Equity of Discharge (discharge is equitable, no issues of equity)

**
(A96.00) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

(A97.00)

(A98.00)

OTHER CONSIDERATIONS

PART I ADMINISTRATIVE ACTION INDIRECTLY RELATED TO DISCHARGE PROCESS

(A99.00)

(A99.01/02) Application for conscientious objector (CO)

(A99.03/04) Application for hardship discharge

(A99.05/06) Improper enlistment

(A99.07/08) Improper induction

(A99.09/10) Enlistment option not satisfied or waived

(A99.11/12) Application for compassionate reassignment

(A99.13/14) Evaluation/consideration for physical disability discharge

(A99.15/16) Selected changes in service obligations

(A99.17/18) Other [Submit category/issue to:

Administrative Director
Joint Service Review Activity
OASD(MI&L) (MP&FM)
Washington, D.C. 20301]

PART J SPECIAL PROGRAMS

**

(A00.00) Presidential Proclamation (PP4313), 16 SEP 74

(A00.10) Presidential Memorandum 9 JAN 77

(A00.11/12) SM who applied for clemency UP PP4313, and was wounded in combat (Vietnam)

(A00.20) Special Discharge Review Program (SDRP)

(A00.21/22) Tour in Southeast Asia or Western Pacific

(A00.23/24) Wounded in Combat

(A00.25/26) Decorated for Valor/Merit

(A00.27/28) Previous Honorable Discharge

(A00.29/30) Satisfactorily served 24 Months prior to Discharge

(A00.31/32) Completed Alternate Service or was excused IAW Presidential Proclamation 4313

(A00.33/34) Age, Aptitude, Length of Service at time of Discharge

(A00.35/36) Education Level

(A00.37/38) Deprived Background

(A00.39/40) Personal Distress

(A00.41/42) Waiver to Enlist

(A00.43/44) Conscience

(A00.45/46) Drugs or Alcohol

(A00.47/48) Good Citizenship

(A00.49/50) Other factors

(A00.51/52) Discharge for Act(s) of Violence

(A00.53/54) Discharge for Act(s) of Dishonor

(A00.55/56) Discharge for Desertion in or from Combat Theater

(A00.57/58) Discharge for Offense(s) subject to Civilian Criminal Prosecution

(A00.59/60) Determination of Program Eligibility

GLOSSARY

PURPOSE: To update and clarify the MEANING and TYPES of Issues indexed under each Index Category which are not self-evident in their concept. (Revised Subject/Category Listing, September 1986)

1. Part A: Common Elements Throughout the Discharge Process
A major category which relates to areas of potential impropriety which are common to all discharges regardless of the particular reason.

2. A01.13/14: Evidence In Record Does Not Support Reason For Discharge
For general application in cases such as UNFITNESS: frequent incidents, where the record does not reveal the "frequent incidents" and command action is not specific enough to support the action. This is NOT INTENDED FOR USE IN CASES where there is a more definitive, specified error or omission such as the absence of a valid Neuropsychiatric Evaluation (NPE) required for discharge as Unsuitable for C&B.

3. Part B: Elements Common to Discharges (Where SM Has A Right to Board Action) This is for use as a general application in board potential cases regardless of whether or not a board was actually convened to recommend retention/separation.

4. A02.21/22: Command Intervention (Influence) Improper This applies to cases which relate to a Discharge Authority who exercised some influence over a board or a member of his command which influenced improperly, eliminated or reduced the board's or member's impartially.

5. A03.03/04: Personal Decoration or Awards and Decorations An award or a decoration given to an individual by name for a specific act (valorous or meritorious) or period of service (meritorious). This does NOT include consideration of service or campaign ribbons or medals given to all persons in a general category who served in an area or during a period.

6. A32.00 and 33.00: Discharge (Characterization) As A Result of DRB or Other Official Board Action A category which allows indexing of changes made by official Boards (Review or Correction) which alter the original reason for discharge.

7. A50.00 and 60.00: Unfitness or Misconduct Categories which are essentially the same in meaning and action but for which the title of the overall category of offenses has changed. UNFITNESS as a class of reasons for discharge was changed to MISCONDUCT in 1977.

8. A78.00 and 79.00: Discharge For Inaptitude or Unsuitability And Discharge For Undesirable Habits or Traits (Discharges prior to Apr 59)
This is the term used as the "reason for discharge" for discharges prior to April 1959, for conduct which subsequently would have resulted in a discharge for UNSUITABILITY, UNFITNESS or MISCONDUCT.

9. A92.17/18: Date and Period of Service Which is Subject of DRB Review
A category which relates to the period of service (dates inclusive) as compared to other periods when one could have served under less strenuous circumstances or in a less demanding environment. This also relates his length of service (period) to the term of his obligation (enlistment or induction); that is, how much of his obligation did he complete.

10. A94.09/10: Multiple Minor Offenses This term describes the concept that while punishment may properly be imposed for each of two or more offenses arising out of the same act or transaction, what is substantially one act or transaction should not be made the basis for an unreasonable multiplication of charges against one person. This is not synonymous with "stacking of charges."

11. A99.00: Administrative Actions Indirecty Related to Discharge Process Actions which require proper administrative disposition but which are not specifically regulatory or procedural steps in the discharge process or not directly related to one of those steps. Improper administrative disposition in these areas may reflect on the equity of the discharge while not rendering the discharge improper.

12. A00.20: Special Discharge Review Program A special category of discharge reviews for SM who were separated from service on active duty (not including ACDUTRA between 4 August 1964 and 28 March 1973 [inclusive]); or who were discharged from the service under the Deserter Returnee Program whose desertion began during the period of the SDRP (stated above) and who applied for review during the period 5 April 1977-4 October 1977, inclusive.

13. Prejudicial Error: An error of fact, law, or procedure associated with the discharge at the time of issuance which prejudiced the rights of the SM to the extent that there is substantial doubt that the characterization of service would have remained the same if the error had not been made.

SECTION 1B

Issue numbers used to index discharge cases heard prior to mid-1978 (Numerical codes 001.00 - 099.00)
Historical Reference

SECTION II

Issue numbers to index non-discharge cases
(Numerical Codes 100.00 - 144.00)

CORRECTION BOARDS INDEX - NON-DISCHARGE CASES

A

100.00 ADMINISTRATIVE MATTERS

- 100.01 Change of Name/Sex
- 100.02 Change of Date/Place of Birth
- 100.03 Change of Reenlistment
- 100.04 Presumption of Death
- 100.05 Change of MOS/Designation
- 100.06 Bar to Reenlistment
- 100.07 Training

101.00 ARCHIVES CASES

- 101.01 Civil War
- 101.02 Desertion
- 101.03 Spanish-American War
- 101.04 Establish Service
- 101.05 Revolutionary War

102.00 APPOINTMENTS

- 102.01 Effective Date
- 102.02 Grade
- 102.03 Component
- 102.04 Reason for Disqualification
- 102.05 Inter-Service Transfer
- 102.06 Termination
- 102.07 Date Of Rank
- 102.08 Constructive Service for Officers

103.00 B

C

104.00 CADETS USMA/USNA/USAFA

- 104.00 Restoration of Status
- 104.02 Graduation/Appointments

105.00 Courts Martial

- 105.01 Sentence (Including Dismissal/Discharge)
- 105.02 Mental Incompetency/Capacity
- 105.03 Lack of Opportunity for Restoration
- 105.04 Conscientious Objection
- 105.05 Impeachment of Testimony
- 105.06 Use or Possession of Drugs

106.00 CLEMENCY DISCHARGE/PARDON

107.00 DECORATIONS AND AWARDS

108.00 DISABILITY SEPARATION/RETIREMENT

- 108.01 Diagnosis
- 108.02 Percentage of Disability
- 108.03 Line of Duty Determination
- 108.04 Permanent
- 108.05 Temporary
- 108.06 Termination
- 108.07 Combat Incurred
- 108.08 Instrumentality of War
- 108.09 Grade
- 108.10 Effective Date

109.00 DISCHARGE FROM DRAFT (WWI)

110.00 DISCHARGE/SEPARATION DOCUMENTS

- 110.01 Change in Date
- 110.02 Reason and Authority
- 110.03 Reinstatement

111.00 EFFICIENCY/EFFECTIVENESS REPORTS

- 111.01 Officers and Warrant Officers
- 111.02 Enlisted Personnel
- 111.03 Bias/Prejudice - Rater/Indorser
- 111.04 Administrative/SRB Review
- 111.05 Void

112.00 ENLISTMENT/REENLISTMENT CONTRACT

- 112.01 Home of Record
- 112.02 Grade/Date of Rank
- 112.03 Term of Enlistment
- 112.04 Broken Enlistment Commitment
- 112.05 Date of Enlistment
- 112.06 Void
- 112.07 Constructive Service
- 112.08 Continuous Service
- 112.09 Base Pay Entry Date
- 112.10 Waiver to Reenlist

113.00 ESTABLISHMENT OF SERVICE

- 113.01 Reserve Components
- 113.02 SATC
- 113.03 Furlough
- 113.04 Active Duty Service Commitment

113.04 WWI Railway Battalions

113.05 Civilian Conservation Corps

F

114.00 FITNESS REPORTS (NAVY/MARINE CORPS)

114.01 Removal of Officer Reports

114.02 Revised Reports

114.03 Enlisted Performance Evaluation--Removal/Modify

115.00 FLYING STATUS

115.01 Effective Date

115.02 Removal From

115.03 Qualifying Service

115.04 Aeronautical Ratings

116.00 G

117.00 H

118.00 I

J

119.00 JURISDICTION OF BOARD

119.01 Philippine Guerrilla Cases

K

120.00

L

121.00 LEAVE ADJUSTMENT

121.01 Type of Leave

121.02 Lump Sum Settlement

121.03 Restored

122.00 LINE OF DUTY STATUS

122.01 Injury

122.02 Disease/EPTS

122.03 Mental Responsibility

123.00 LOST TIME

123.01 Absence Without Leave/Desertion

123.02 Mental Incompetency

123.03 Injury or Illness on Leave

123.04 Error or Technicality

123.05 Port Call

123.06 Confinement

123.07 Removal

123.08 Restored

M

124.00 MEDICAL RECORDS

124.01 Change in Diagnosis

124.02 Dates of Treatment

124.03 Establishment of Record of Treatment

124.04 Removal

N

125.00 NATIONAL GUARD

125.01 Status

125.02 Federal Recognition

126.00 NONJUDICIAL PUNISHMENT

126.01 Improperly Filed

126.02 Excessive Punishment

126.03 Removal of Reprimands

126.04 Expunge Record

127.00

O

P

128.00 PAY AND ALLOWANCE

128.01 Family Separation Allowance

128.02 Travel Pay

128.03 Dislocation Allowance

128.04 Flying/Incentive Pay (including Submarine, Flight Deck, Experimental Stress duty, etc.)

128.05 Enlistment/Reenlistment Bonuses

128.06 Variable Incentive Pay/Continual/Medical/Dental, etc.

128.07 Proficiency Pay

128.08 Severance Pay

128.09 Readjustment Pay

128.10 Remission/Cancellation of Indebtedness

128.11 Mustering-Out Pay

128.12 BAQ/Subsistence Allowance

128.13 Uniform/Clothing Allowance

128.14 Other Types Pay

129.00 PAY GRADE

- 129.01 Service Credit
- 129.02 Revocation of Orders
- 129.03 Authority
- 129.04 Highest Grade Satisfactory Held for Pay Purposes

145.00 PHYSICAL DISABILITY

- 145.01 Incurred while on unauthorized absence
- 145.02 Existed prior to entry/aggravated
- 145.03 Existed prior to entry/ not aggravated
- 145.04 Incurred while not in receipt of basic pay
- 145.05 Disciplinary action pending; handling of
- 145.06 Administrative discharge proceedings pending; handling of

130.00 PRISONER OF WAR

131.00 PROMOTION

- 131.01 Selection Boards
- 131.02 Removal From Recommended List
- 131.03 Failure to be Considered
- 131.04 Effective Date
- 131.05 Date of Rank
- 131.06 Prisoner of War
- 131.07 Casualty Status
- 131.08 Terminal Leave Promotion
- 131.09 Advancement in Grade
- 131.10 Passover/Failure of selection - Removal

Q

132.00

R

133.00 REDUCTION IN GRADE/RANK

- 133.01 Misconduct
- 133.02 Inefficiency
- 133.03 Void/Removal Record
- 133.04 Technical Defect

134.00 REMOVAL/DELETION OF RECORDS

- 134.01 Letters of Reprimand/Admonition
- 134.02 Derogatory Material
- 134.03 Remark of Desertion

135.00 RESERVE SERVICE CREDIT

- 135.01 Transfer Between Components
- 135.02 Retirement Point Credits
- 135.03 Change of Status
- 135.04 War/National Emergency Service
- 135.05 Date of Retirement

136.00 RETIREMENT/SEPARATION (OTHER THAN DISABILITY)

- 136.01 Effective Date

S

137.00 SURVIVORS BENEFIT PLAN AND RSFPP

137.01 Eligibility

137.02 Effective Date of Participation

137.03 Termination of Participation

137.04 Change in Election

T

138.00

U

139.00

V

140.00

W

141.00

X

142.00 Statue of Limitations

142.01 As One Reason to Deny

142.02 Waived in the Interest of Justice

142.03 Waived for Justifiable/valid reason

Y

143.00

Z

144.00

CHAPTER 11
Preparing a List of Contentions

A. Overview

After the publication of MDU in 1982, the plaintiffs in the *Urban Law* case discovered that provisions of the agreement settling that case were being violated. The plaintiffs reopened the case. As a result, there were several changes in the Review Board regulations pertaining to contentions (now called "issues"). The entire text of the settlement was printed at 47 Fed. Reg. 37,769 (Aug. 26, 1982). In general, Review Board compliance with the settlement has improved.

B. Chapter Supplement

The "Contentions" which are the subject of this chapter are now called "Issues."

C. Section Supplement

11.1 Introduction

• P.11/2L, ¶ 2:

See Overview, *supra.*

11.2 Benefits of Carefully Preparing a Complete List of Contentions

11.3 Cases in Which a Careful List of Contentions Should Be Prepared

11.4 How to Prepare a List of Contentions

a. P.11/4L, n.22:

32 C.F.R. § 70.8(d)(e) provides information on the handling of submitted issues at the DRBs.

b. P.11/4L, last ¶:

Issues must now be presented in writing on a DD-293 form. This is the DRB application form. A new DD-293, with an amended list of issues, can be submitted at any time before consideration of the case by the Board. It is not uncommon to indicate on the original DD-293 that issues will be submitted later and then submit the issues on an amended form when the brief is submitted. It is permissible to indicate on the form that the issues are attached on a separate piece of paper (the issues are thus "incorporated by reference"). This is often necessary because of the paucity of space provided on the form. Sometimes when new issues are offered at the time of a hearing, a DRB form other than the DD-293 will be provided. Incorporation by reference or listing the issues on this form is sufficient.

11.4.1 Contentions as to the Relief Required if a Discharge Is Improper

• P.11/5R, n.27:

32 C.F.R. § 41 was not amended as described, but the Army now requires a HD at ETS. AR 635-200, ¶ 3-7(a)(1).

11.4.2 Contentions Citing Past Board Decisions

11.4.2.1 Position of the Boards When Past Cases Are Cited

• P.11/6L, ¶ 2:

DoD's current position is that the boards must be consistent in their decisions on matters of law and must respond to issues citing past cases on propriety issues. DoD does not, however, require distinguishing equity cases although the ADRB still appears to do so (the Army had a regulation requiring this but it was rescinded).[1]

11.4.2.2 How to Prepare Contentions Citing Past Board Decisions

a. P.11/6R, last ¶:

When citing to past cases, copies of the decisions must be submitted to the board.

b. P.11/7R, ¶ 1:

Cite in this issue is now 32 C.F.R. § 70.9(c)(1).

11.4.3 Contentions in Cases Being Reviewed By the Secretarial Reviewing Authority

11.5 Recourses If the Board or Secretarial Reviewing Authority Does not Adequately Address the Contentions

11.5.1 Department of Defense (DOD) Grievance Procedure

• P.11/8R, ¶ 3:

(1) DoD has instituted a list of five priority levels for responding to complaints. Top priority is for applicants who need the clarified decision to prepare their application. Next priority is former applicants who want the decision in their own case corrected. Third is veterans who are about to apply. Fourth is anyone who can demonstrate that correction of the decision will benefit applicants. The last priority is everyone else.[2] The significance of these priorities is unclear. Adding to the confusion in the regulations is a provision which appears to limit the filing of complaints to those in the top two priorities.[3] The overall intent of the regulation, however, seems to be to allow others to complain, subject to the priorities specified. The priorities appear to be an attempt to have a mechanism in place to limit the number of complaints, if it is ever necessary to do so.

(2) It probably is not common, but in at least one case

[1] In Strang v. Marsh, 602 F. Supp. 1565 (D.R.I. 1985), a court held that the DRBs are not required to distinguish prior decisions.

[2] 32 C.F.R. § 70.10(d)(3).

[3] 32 C.F.R. § 70.10(a)(3).

the ADRB reversed its decision on the merits after reexamining the case following the filing of a grievance.

11.5.2 The Advantages of Using the DOD Grievance Procedure

Appendix 11A

Urban Law Institute: **Stipulation of Dismissal**

Appendix 11B

Urban Law Institute: **Order**

Appendix 11C

Examples of Unauthorized Board Pressure to Change Contentions

CHAPTER 12
Challenging Discharges for Legal Errors: The Impropriety Approach

A. Overview

There have been two areas of change in challenging discharges for legal errors. First, there have, of course, been changes in the law. Second, the way the boards treat these errors has changed.

In general, the boards are now even more reluctant than before to find an impropriety. Even when they appear to acknowledge that legal error has occurred, they call it an "inequity." Stressing improprieties in a case is, nevertheless, still very important. If regulations, statutes, or the Constitution has been violated, it is an indication of an unfair process which may be grounds for an equity based upgrade. Legal arguments also must be preserved if appeal to court is contemplated. Failure to raise these arguments at the boards may result in their waiver and preclude raising them in court. While the DRBs have virtually abandoned granting upgrades based on improprieties, the BCMRs do it somewhat more frequently. Several significant court decisions have strengthened the argument that prejudicial error mandates an upgrade.

B. Chapter Supplement

1. New Subsection on Right to Counsel

Note new § 12.5.1.a.

2. Cross References

Note that many of the legal errors discussed in this chapter are the subject of discussion in other chapters. For instance, fraudulent enlistment is discussed extensively in Chapter 18. Care should be taken to consult the new index in this supplement.

3. Propriety Versus Equity

In recent years the boards have cited equity as the basis for most upgrades. Even if the board makes a factual finding that appears to make the discharge improper, the board usually denies that there is an impropriety and either decides against the applicant or reaches a favorable result by stating that the discharge was inequitable.

4. Army Discharge Review Board Standard Operating Procedure

On December 17, 1982, the Army Discharge Review Board (ADRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Though it no longer has any legal affect, citation to directly relevant provisions of the SOP may add credibility to an applicant's arguments.

C. Section Supplement

12.1 Introduction

12.1.1 General

12.1.2 Sample Contentions

a. P.12/4R-12/7R:

The provisions cited as AR 635-200, ¶ 13-2, *et seq.*, are now at AR 635-200, ¶ 1-18.

b. P.12/5R, n.6:

(1) *See United States v. Kline,* 14 M.J. 64, 10 MIL. L. REP. 2894 (C.M.A. 1982). Adverse statements were placed in servicemember's record. Navy regulations require that adverse matter not be placed in the servicemember's record without an opportunity to comment or a statement in writing that he or she does not wish to comment. No comment or signed statement that the servicemember did not wish to comment was in the records. Only unsigned acknowledgements, with no indication of a refusal to sign, were in the record. The court held that the presumption of regularity did not give rise to a presumption that the service member had an opportunity to respond to the adverse statements. The court held that the unsigned acknowledgements dispelled the presumption. The adverse statements were found inadmissible in a court-martial because they were not prepared in accordance with regulations as required by ¶ 75d of the Manual for Courts-Martial, United States, 1969).

Although these ratings might well be found admissible in an administrative setting,[1] the decision on the presumption of regularity is important. That presumption was found to be dispelled when surrounding circumstances were "irregular." In this case, the irregular circumstance was the unsigned acknowledgement. *Cf. Kelly v. United States,* discussed at Supp. § 9.2.10.4, n.11, *supra.*

(2) ¶ 2 of note:

The language quoted is now at 32 C.F.R. § 70.8(b)(12)(vi).

(3) ¶ 3 of note:

The ADRB SOP has been withdrawn. Citation to direct-

[1]The MANUAL FOR COURTS-MARTIAL, upon which the *Kline* case is partly based, is not directly applicable to administrative proceedings. *See also* discussion in Supp. § 12.5.7.8.4.

ly relevant provisions of it may, however, add credibility to an applicant's arguments.

12.2 Flaws in the Review Boards' Approach

a. P.12/7R:

Currently, there is an error in the DRB's approach which is far more fundamental than those listed in MDU. The boards simply refuse to find that legal errors occur. Where cases are granted, it is almost always on equitable grounds.

b. P.12/7R, n.10:

The current version of the language quoted is at 32 C.F.R. § 70.9.

c. P.12/8L, n.12:

In *White v. Secretary of the Army,* 878 F.2d 501 (D.C. Cir. 1989), the servicemember had accepted a discharge for the Good of the Service in violation of regulations.[2] The court ruled that the BCMR erred in not upgrading White's Undesirable Discharge. The court found the BCMR's rationale, that White's disciplinary record provided grounds for an Undesirable Discharge for "frequent incidents of a discreditable nature" and that further infractions were likely, fundamentally flawed. The court held that, under the circumstances of the case, the Army was not permitted to justify the Undesirable Discharge on the basis of conduct for which the servicemember was not charged in the proceeding which led to his request for a discharge. Otherwise, White would in effect have been discharged for frequent incidents without the benefit of the procedural rights which attend that reason for discharge and without an opportunity to defend himself.

d. P.12/8L, n.13:

This provision is now at 32 C.F.R. § 70.8(b)(12)(vi).

e. P.12/8L, n.15:

Current Army regulations provide some guidance. The available characterizations are dependent on the reason for discharge. See AR 635-200.

12.3 Sources of Law and Authority Relevant to Discharge Upgrade Cases

12.3.1 Civilian Courts

• P.12/8R, ¶ 3:

The United States Court of Claims has been restructured with the new United States Claims Court assuming much of its jurisdiction. The new Claims Court's cases are reported in the Federal Reporter, Claims Court Reports, and the Military Law Reporter.

12.3.2 Military Courts

• P.12/9, n.21:

See Fairchild v. Lehman, 814 F.2d 1555 (Fed. Cir. 1987).[3]

12.3.3 Military Administrative Rulings

12.3.3.1 Opinions of the Judge Advocate General

• P.12/9L, n.25:

Air Force JAG address is now:

Hq. USAF/JAJM
Bolling Air Force Base
Washington, D.C. 20332

12.3.3.2 DRB and BCMR Decisions

• P.12/9R, ¶ 2:

DRB and BCMR decisions also can be useful in identifying relevant JAG opinions which they cite.

12.3.4 Military Regulations

• P.12/9R, ¶ 3:

The regulations which are relevant are those in effect at the time they were applied to the servicemember and current versions of those regulations.[4]

12.4 Limitations on the Military's Statutory Authority to Grade Discharges

12.4.1 Introduction

• P.12/10L, ¶ 1:

See generally Comment, *Judicial Limitations on Military Characterizations of Discharge:* Roelofs v. Secretary of the Air Force, 10 MIL. L. REP. 6001 (Mar.-Apr. 1982).

12.4.2 Case Law

a. P.12/10L, add after ¶ 2:

Also, "[e]ver since the Supreme Court's decision in [*Harmon v. Brucker,* 355 U.S. 579 (1958)], it has been settled that the character of discharge must be determined solely on the basis of the member's performance during the current enlistment. Lower courts have consistently followed this rule. *See Murray v. United States,* 154 Ct. Cl. 185 (1961); *Clackum v. United States,* 296 F.2d 226, 148 Ct. Cl. 404 (1960)." OpJAGAF 1983/3, January 28, 1983.

b. P.12/11R, n.45:

(1) Compare *Roelofs* with *Lord v. Lehman,* 540 F. Supp. 125, 10 MIL. L. REP. 2856 (E.D. Pa. 1982) and *Kalista v. Secretary of the Navy,* 560 F. Supp. 608 (D. Colo. 1983). In *Lord v. Lehman,* the court held that "Lord's crime of burning an empty trailer-home was extremely serious and the Marine Corps' decision that it did not want to retain a person who committed such a crime is certainly justifiable. . . . Nor was it arbitrary and capricious for the BCNR to conclude that an undesirable discharge was appropriate in light of the seriousness of the offense."[5] 540 F. Supp. at 131. In *Kalista v. Secretary of the Navy,* the court found that "[t]here is no question that a sentence of up to four years imposed by the North Carolina courts on [the servicemember] would have a direct effect on the Marine Corps."

(2) The last textual sentence of this footnote should read:

> "The Air Force argued that based on evidence of these facts, 'it is inconceivable . . . that appellant's conviction and the circumstances surrounding the offense [had not] adversely affected the quality of his military service.'"

(3) *See also* Chapter 24.

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[2]The Court-Martial was not authorized to issue a punitive discharge.

[3]Case discussed at Supp. § 12.5.3.1.b.

[4]*See infra* Chapter 21.

[5]Although not emphasized by the court, Lord's civilian sentence precluded him from performing his military duties.

c. P. 12/11R, n.48:

See Kalista v. Secretary of the Navy, 560 F. Supp. 608, 614 (D. Colo. 1983).

d. P.12/12L, ¶ 2, add to end of section:

(1) *Gay Veterans Association, Inc. v. Secretary of Defense,* 850 F.2d 764 (D.C. Cir. 1988) is the most significant recent case in this area and may represent a change in approach by the federal circuit court which authored *Roelofs.* The court affirms by the *Harmon v. Brucker, Roelofs,* and *Wood* line of cases, but follows a very low standard for accepting that there is a nexus between the conduct of the servicemember and military service. The court held that homosexual conduct can be presumed to be a "negative aspect" in a servicemember's record which may support issuance of a less than honorable discharge, including a UD. The court upheld DoD regulations allowing less than honorable discharges where the conduct is a "significant negative aspect" which outweighs positive service accomplishments. The service-connection requirement was met by merely the inherent service-connection of homosexual conduct found by the court.

The impact of this case is uncertain since it is in the context of homosexual conduct in the military, a very volatile and emotional area. This case may not portend a trend.[6]

(2) In *Lord v. Lehman,* 540 F. Supp. 125, 10 MIL. L. REP. 2856 (E.D. Pa. 1982), the court reviewed a BCNR decision sustaining an UOTHC discharge based on a civilian arson conviction. The court held that the Marine Corps regulations involved created a presumption of an UOTHC discharge which could be overcome by "particular circumstances in a given case [which] warrant[s] a general or honorable discharge." 32 C.F.R. § 730.51(b)(9). The court stated that the Marine Corps was required to articulate a "sufficient explanation of the basis" for its decision that the presumption had not been overcome (citing *Neal v. Secretary of Navy,* 639 F.2d 1029, 1038 (3d Cir. 1981)). The court in Lord held that a "sufficient explanation" by the BCNR could cure inadequate explanations by the ADB that considered the discharge originally. The court found sufficient the BCNR's bare statement that "[i]n its review of [the] application the Board carefully weighed all potentially mitigating factors, such as [the] allegation of recruiter connivance, service record, youth and immaturity, and processes of the discharge, against the serious nature of [the] civil offense. It concluded that these factors were not sufficient to warrant recharacterization of the undesirable discharge." Thus, the court upheld the UOTHC discharge where there had been no finding of a connection between the conduct and performance of military duties.[7] And the after-the-fact rationalizations of the BCNR were found to be sufficient to justify the discharge decision.

12.4.3 When to Use the Case Law

12.4.3.1 General

a. P.12/12R, ¶ 1:

Whether it is permissible to give a servicemember an administrative discharge, irrespective of the character of discharge, based on events or conditions that arose prior to the current enlistment was addressed in *Keef v. United States,* 185 Ct. Cl. 454 (1968). The court found valid a decision to discharge based on homosexual activities which occurred during a prior enlistment. The court held that as long as the character of discharge was based on the current enlistment, the Air Force could use events occurring during a previous enlistment as a basis for a decision to discharge. *See also* OpJAGAF 1983/3, January 28, 1983.

b. P.12/12R, n.51:

(1) The ADRB SOP has been withdrawn. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments.

(2) *But see* MD 81-04779 (UOTHC to GD; upgrade pursuant to *Wood.* Board found that civil conviction for drug sale while in the inactive reserves did not have "any direct, deleterious effect upon the applicant's military service or upon the effectiveness of the armed forces.").

(3) *But see* NC 81-08450, NC 80-07703 (applying *Harmon v. Brucker,* 355 U.S. 579 (1958) and *Bland v. Connally,* 293 F.2d 852 (D.C. Cir. 1961) to servicemembers who were accused of associating with communists in the mid-1950s. The discharges were upgraded to fully honorable).

12.4.3.2 Sample Contentions

12.5 Procedural Errors

12.5.1 Introduction

12.5.1.1 Failure to Follow Regulations

a. P.12/14L, n.59:

Blassingame v. Secretary of the Navy, 866 F.2d 556 (2d Cir. 1989) (discussed at Supp. § 12.5.1.2.a).

b. P.12/14L, n.60:

Blassingame v. Secretary of the Navy, 866 F.2d 556 (2d Cir. 1989) (discussed at Supp. § 12.5.1.2.a).

12.5.1.2 What is Prejudicial Error?

a. P.12/14L, ¶ 3:

(1) In *Blassingame v. Secretary of the Navy,* 866 F.2d 556 (2d Cir. 1989), the court held that the failure of the Marine Corps to investigate a case of erroneous enlistment was prejudicial error. Blassingame had received an Undesirable Discharge for various acts of indiscipline. His original enlistment was, however, erroneous.[8] A Marine Corps regulation required commanders to investigate cases of erroneous enlistment which came to their attention and "promptly" report to the Commandant of the Marine Corps. The regulation also required Discharge with a characterization of not less favorable than General, Under Honorable Conditions. The court assumed knowledge under the facts of the case, by the Marine Corps, of Blassingame's

[6] *See also* Doe v. Secretary of the Air Force, 563 F. Supp. 4 (D.D.C. 1982), *aff'd without opinion,* 701 F.2d 221 (D.C. Cir. 1983). A former officer, separated UOTHC for homosexual acts, argued that his conduct did not have an impact on the performance of his military duties. The district court held that a discharge UOTHC "is equivalent to a finding that the plaintiff performed inadequately on the job [and] homosexual behavior does not in and of itself imply inadequate performance of military duties," and that under Roelofs, the veteran's discharge must therefore be recharacterized to UHC. The court rejected the claim that Roelofs required an HD in Doe's case, despite the fact that Doe was not convicted by civilian or military authorities for his homosexual conduct. The Court of Appeals affirmed.

For more discussion of these cases see Supp. § 14.1.

[7] Lord's civilian sentence did, however, preclude his performance of his military obligations.

[8] He was too young.

erroneous enlistment and found that the failure to investigate and process him was prejudicial error:

> [b]ut for the Corps's initial improper induction and subsequent failure to investigate, Blassingame's record might have been spared the blemish of an "undesirable" discharge.
>
> . . .The NDRB held that, even assuming illegal induction, appellant could not show that he would have been granted an honorable or a general discharge. But Blassingame should not be required to bear this burden, any more than he should be charged with the responsibility of ensuring the Marine Corps follows its own regulations. . . .

(2) *See also Rucker v. Secretary of the Army,* 702 F.2d 966 (11th Cir. 1983) (Overturning district court holding that servicemember had waived his right to counsel and to make a statement by being absent from military control while in civilian custody).

b. P.12/15R, n.66a:

The current version of the language quoted is at 32 C.F.R. § 70.9(b)(1)(i).

c. P.12/15R, ¶ 2:

The Army DRB SOP has been withdrawn. Citation to the list of errors may, however, add credibility to an argument that an error was prejudicial.

d. P.12/15R, n.69:

The current cite is 32 C.F.R. § 70.8(b)(12)(vi).

12.5.1.3 Prejudicial Error Should Result in An Honorable Discharge

a. P.12/15R, last ¶:

See Supp. P. 9/23, n.108 and P. 9/24, n.112.

b. P.12/16R, ¶ 3:

Note that under current regulations, an HD is required at ETS in the Army and Air Force.[9] Even in cases where discharge pre-dated these regulations, the *Carter* argument, in conjunction with a current standards argument,[10] can lead to an HD.

12.5.1.4 Scope of This Section

12.5.1a RIGHT TO COUNSEL

An important procedural right which was not discussed in MDU is that of the right to counsel even when there is no ADB. Generally, there is a right to consult with counsel in making the many decisions to be made at the initiation of discharge proceedings—including the decision of whether to ask for an ADB.[11]

12.5.2 Predischarge Action: Counseling and Rehabilitative Efforts

12.5.2.1 General Rules

a. P.12/17L, n. 80:

In recent years before most reasons for discharge, there has been a requirement for at least one counseling session to give the member an opportunity to overcome his or her deficiencies.[12] The exceptions are where there is a condition which is not viewed by the military as curable or there has been a serious specific act which is viewed as making the servicemember irretrievably unacceptable, *e.g.,* homosexuality, aberrant sexual tendencies, drug sales.[13]

b. P.12/17L, ¶ 2:

Note that at various times a record of the counseling sessions has been required. Where such a record is missing, the presumption of regularity would not support the conclusion that a counseling session occurred.[14] In fact the opposite should be true.

c. P.12/17L, n. 84:

See AD 80-7961A (rehabilitative transfer between companies within same unit resulted in inequitable discharge); AD 80-05815 (1956 discharge inequitable because servicemember had served in only one unit during his unsatisfactory period, and was never afforded the opportunity for a rehabilitative transfer); AD 80-05747 (servicemember inequitably discharged in 1948 because, *inter alia,* "the nature of his indisciplines demanded a rehabilitative transfer in an effort to provide him an environment in which he could perform in a satisfactory manner."); AD 80-04238 (upgrade to HD; 1957 discharge. Board granted upgrade because, though he was rehabilitatively transferred out of his unit, that transfer was to a unit adjoining his old unit. The Board recognized that this transfer between units was not effective as a proper rehabilitative transfer); AD 80-03971 (1958 discharge too harsh when the servicemember had minor offenses and had received no rehabilitative transfer prior to separation).

12.5.2.2 Relevant DRB Index Categories

12.5.2.3 Sample Contentions

12.5.3 Initiation of Discharge: Notice

12.5.3.1 General Rules

a. P.12/18L, ¶ 4:

Regulations often required 48 hours to respond. If notice was given on Friday, it may not have been adequate to permit the servicemember to locate and consult with a counsel.

b. P.12/18L, n. 94:

See Fairchild v. Lehman, 814 F.2d 1555 (Fed. Cir.

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[9]*See* AR 635-200, ¶ 3-7(a)(1).

[10]*See* Chapter 22. *See also* White v. Secretary of the Army, discussed at Supp. P.12S/3.

[11]*See, e.g.,* NAVMILPERSCOMINST 1910.1.4.c, Dec. 30, 1980. The right to counsel may be subject to a number of conditions. For example, in the early 1980s, BUPERSMAN only gave the right to counsel in Unsuitability cases where the servicemember's performance marks warranted less than an HD. BUPERSMAN 3420184.4.b; NAVMILPERSCOMINST 1910.1.3.d, Dec. 30, 1980. *See also* § 12.9.4.2, P.12/61R, last ¶.

[12]*See* 32 C.F.R. Part 41, App. A, Part 2, § A, ¶ 2; BUPERSMAN 3420184.2; BUPERSNOTE 1910, Mar. 24, 1981; NAVMILPERSCOMINST 1910.1, Dec. 30, 1980.

[13]*Id.*

[14]*See, e.g.,* AR 635-212, ¶ 7a:

> When an individual's behavior has been such that continued behavior of a similar nature may warrant action against him under this regulation, the individual will be counseled by a responsible person or persons. *Each counseling session will be recorded (to include date and by whom counseled).* Counseling will include but not be limited to the following: reasons for counseling; the fact that continued behavior of a similar nature may result in initiating action under this regulation; and if action is taken and separation accomplished, the type of discharge that may be issued and the effect of each type. (Emphasis added.)

Cf. Kelly v. United States, discussed at Supp. § 9.2.10.4, n.11, *supra.*

1987). In *Fairchild,* the court found that the BCNR erred in upholding an NJP where the servicemember had presented an affidavit stating that his military defense counsel had incorrectly notified him that, if he waived his right to trial and accepted his NJP, he would not be subject to a less than honorable discharge for his offense. The BCNR solicited a letter from the servicemember's defense counsel which stated that he could only assume that he had advised the servicemember correctly, but did not remember specifically. The court found that the BCNR had erred in upholding the NJP where the servicemember had, subsequent to accepting the NJP, been faced with discharge on the basis of the NJP offense.

12.5.3.2 Relevant DRB Index Categories

• P.12/18R, ¶ 4:

DRB index category listed as A01.04 should be A03.04.

12.5.3.3 Sample Contentions

12.5.4 Medical and Psychiatric Examinations

12.5.4.1 General Rules

a. P.12/19R, ¶ 2:

In alcohol abuse cases, a recent medical evaluation of the servicemember's dependence or non-dependence on alcohol has been required.[15]

b. P.12/20L, n.110:

In *Valecillo v. David,* 360 F. Supp. 896, 1 MIL. L. REP. 2275 (D.N.J. 1973), the Army did not fail to diagnose as stated in this note. There was a diagnosis, but the Army failed to inform the servicemember that it was a disqualifying condition.

12.5.4.2 Relevant DRB Index Categories

12.5.4.3 Sample Contentions

12.5.5 Waiver of Rights[16]

12.5.5.1 General Rules

a. P.12/20R, n.112:

See Bernstein v. United States, 699 F. Supp. 484 (E.D. Pa. 1988); *Krzeminski v. United States,* 13 Cl. Ct. 430 (1987).

b. P.12/20R, n.113:

See Rucker v. Secretary of the Army, 702 F.2d 966 (11th Cir. 1983) (discussed at Supp. § 12.5.7.3.a).

c. P.12/21L, n.116:

See Fairchild v. Lehman, 814 F.2d 1555 (Fed. Cir. 1987) (discussed at Supp. §§ 12.5.3.1.b and 12.7.2.3.b(3)); *Krzeminski v. United States,* 13 Cl. Ct. 430 (1987).

d. P.12/21L, ¶ 1:

This type of "plea-bargain" waiver of hearing in exchange for a favorable recommendation by the CO has been, in some instances, governed by regulations. Where a regulation was extant, its provisions must be followed.[17]

e. P.12/21R, n.122:

See Cole v. United States, 689 F. 2d 1040 (Ct. Cl. 1982) (on summary judgment motion, withdrawal of resignation regulation upheld, but trial allowed on issue of whether outspoken officer's first amendment rights violated by superior's recommendations against accepting withdrawal).

f. P.12/22L, add after ¶ 4:

Under certain circumstances, a waiver of a hearing can be denied. For instance, an Air Force Personnel Board may recommend that a separation case of a probationary reserve officer be returned to the appropriate commander for referral to a Board of Inquiry. AFR 36-2, §§ 22c, 36b, 38c, 39d; Op-JAGAF 1983/69, September 9, 1983.

12.5.5.2 Relevant DRB Index Categories

12.5.5.3 Sample Contentions

12.5.6 The Commanding Officer's Report

12.5.6.1 General Rules

• P.12/22R, last ¶:

Wolfe v. Marsh, 835 F.2d 354 (D.C. Cir. 1987) held that the Army's failure to follow its regulation (AR 635-200, ¶ 10-3) requiring that intermediate commanding officers review and make recommendations regarding a "Chapter 10" discharge request did not render the discharge *per se* invalid. The court emphasized that the intermediate commanding officers only made recommendations which could be followed or ignored by the discharge authority. The court also noted that in this case, the intermediate commanding officers had previously recommended a court-martial for the offenses charged and that this gave the discharge authority "a fair indication of their views."

12.5.6.2 Relevant DRB Index Categories

12.5.6.3 Sample Contentions

12.5.7 The Hearing: Administrative Discharge Board (ADB)

• P.12/23R, ¶ 3:

See Chilcott v. Orr, 747 F.2d 29 (1st Cir. 1984) for discussion of Air Force regulations regarding the right to a hearing prior to an administrative discharge.

12.5.7.1 Introduction

a. P.12/23R, ¶ 3:

(1) *See Chilcott v. Orr,* 747 F.2d 29 (1st Cir. 1984) for a discussion of the requirements for hearings for discharges under AFR 39-10. This case also holds that AFR § 39-10, ¶¶ 6-53 and 6-54, pertaining to timeliness of Air Force discharge actions following a civilian conviction, is not applicable where the discharge is based on the facts of a civilian arrest, but where there was no conviction.

(2) A federal district court has recently ruled that the Army regulatory provision denying a hearing in a "Misconduct— abuse of illegal drugs" case for those with less than six years service and who are not facing worse than

[15]BUPERSMAN 3420814.1.a, NAVMILPERSCOMINST 1910.1, ¶ 3.

[16]*See also* § 12.9.4 regarding improper confessions.

[17]*See, e.g.,* BUPERSNOTE 1910, 3420186, ¶ 1, Mar. 24, 1981:

> [T]he commanding officer may entertain a proposal for an agreement with the member to waive his or her administrative discharge board hearing provided the commanding officer agrees to recommend to the Chief of Naval Personnel that the member be separated with a general discharge. Under the terms of this agreement, the Chief of Naval Personnel may direct a discharge under honorable conditions or direct that the command conduct the requested administrative discharge board.

a General, Under Honorable Conditions, discharge, is a violation of constitutional due process and equal protection rights. *May v. Gray,* 708 F. Supp. 716 (E.D.N.C. 1988).

(3) *See also* § 4.5.

b. P.12/23R, n.129:

See DAJA-AL, 1983/2345, August 9, 1983 (under AR 635-200 a special court-martial convening authority (SPCMCA) may not convene an administrative separation board where a characterization of service of UOTHC is authorized. Also, the SPCMCA is not authorized to forward a recommendation for a UOTHC discharge to the General Court-Martial Convening Authority for approval where the board was convened by the SPCMCA. In this circumstance, the SPCMCA may either set aside the findings and recommendations and convene a new board or approve a separation of a more favorable character than that recommended).

12.5.7.2 ADB Composition

• P.12/24R, n.138:

(1) *Cf. Evenson v. United States,* 654 F.2d 68, 9 MIL. L. REP. 2821 (Ct. Cl. 1981) (officer selection board composition).

(2) The separation of a soldier based on an administrative separation board consisting of two commissioned officers and two noncommissioned officers, where regulation (AR 635-200, ¶ 2-7a) requires a majority of commissioned or warrant officers, is void. DAJA-AL 1986/2619, September 12, 1986.

(3) *Wolfe v. Marsh,* 835 F.2d 354 (D.C. Cir. 1987) limits *Henderson* "to the extent it is consistent with *Dilley* and this opinion." *Wolfe* held that the Army's failure to follow its regulation (AR 635-200, ¶ 10-3) requiring that intermediate commanding officers review and make recommendations regarding a "Chapter 10" discharge request did not render the discharge per se invalid. The court distinguished *Dilley* on the grounds that in that case the actual decision-making board was improperly constituted whereas, in *Wolfe,* the discharge authority had only been denied the non-binding opinions of intermediate commanders. It is unclear whether, by extension of the logic of *Wolfe,* discharges accomplished after a non-binding recommendation of an improperly constituted ADB would be void.

The *Wolfe* court also emphasized that the requirements for reservist membership on the board in *Dilley* were a congressional mandate designed to overcome institutional bias. The *Wolfe* court found that a court reversal of the BCMR decision in *Dilley* was appropriate because a board within the military is not empowered to decide that a military institutional bias has been non-prejudicial. In *Wolfe,* the violated regulation did not relate to overcoming an institutional bias and the BCMR decision was found deserving of greater deference. *See also* Supp § 12.5.6.1.

12.5.7.3 Right to Counsel

a. P.12/25L, n.143:

Rucker v. Secretary of the Army, 702 F.2d 966 (11th Cir. 1983) (overturning district court holding that servicemember had waived his right to counsel and to make a statement by being absent from military control while in civilian custody).

b. P.12/25L, n.150:

See AD 7X-06310A.

c. P.12/25R, n.151:

See also cases cited at n.150 supra.

12.5.7.4 Notice of Hearing

12.5.7.5 Burden of Proof

12.5.7.6 How Much Evidence (Standard of Proof)

• P.12/26L, n.156:

But see n.157.

12.5.7.7 Command Influence

a. P.12/26L, ¶ 2:

Widespread incidents of improper command influence were found at the 3d Armored Division in Frankfurt, Germany from 1982–1984, while under the command of Major General Thurman E. Anderson. Improper command influence in drug cases has been alleged of Brigadier General Leslie E. Beavers while he was the commander of the 1st Armored Division, Artillery and Installation command, of Pinder Barracks in Zirnodorf Germany, from 1981 to 1984.[18]

b. P.12/26L, n.159:

Note further that the command may not withhold favorable information in describing a servicemember's military record. AD 79-07929.

12.5.7.8 Evidence

12.5.7.8.1 General Rules

a. P.12/26, n.164:

But see Kalista v. Secretary of the Navy, 560 F. Supp. 608, 615 (D. Colo. 1983) (court held that it was not a denial of the servicemember's rights where he was refused the opportunity to appear at his discharge hearing while in civilian confinement, although the civilian authorities had authorized his attendance at the hearing, where the Marine Corps regulation provided the servicemember the right to appear at the ADB "[s]ubject to his availability (*i.e.,* not in civil confinement or on unauthorized absence).").

b. P.12/26R, ¶ 2:

(1) *See* Chapter 15 for discussion of drug test results as evidence. Evidence issues are also addressed at § 12.7.

(2) *See also* § 12.9.4 regarding improper confessions.

12.5.7.8.2 Hearsay and Confrontation of Witnesses

a. P.12/26R, n.169:

See MARCORSEPMAN § 6317, which provides that "[t]estimonial evidence may be presented to the administrative board through the personal appearance of the witness, through the use of oral or written depositions, unsworn written statements, affidavits, testimonial stipulations, or any other accurate and reliable means for presenting testimonial evidence. . . ." *See also Garrett v. Lehman,* 751 F.2d 997 (9th Cir. 1985).[19]

b. P.12/27L, n.171:

See Schultz v. Wellman, 717 F.2d 301, 11 MIL. L. REP. 2920 (6th Cir. 1983) (dictum in footnote 15, 717 F.2d at 307, 11 MIL. L. REP. at 2922, that there is no constitutional due process right to compulsory process or confrontation of witnesses).

c. P.12/27L, n.173:

See Schultz v. Wellman, 717 F.2d 301, 11 MIL. L. REP. 2920 (6th Cir. 1983) (discussed this section at "b").

[18]*Army Times,* May 6, 1985.

[19]Discussed at Supp. §§ 12.5.7.8.3, 12.5.7.8.4, and 12.9.3.2.c.

d. P.12/28L, add to end of section:

Cross-examination at a discharge hearing can be rendered meaningless by the actions of the hearing officer. In *Harvin v. United States,* 661 F.2d 885, 228 Ct. Cl. 605 (1981), a challenge to the dismissal of an INS inspector, the court held that barring witnesses from referring to notes to refresh their memory, during cross-examination, was reversible error and remanded for further proceedings.

12.5.7.8.3 Relevance and Materiality

• P.12/28L, n.191:

But see Garrett v. Lehman, 751 F.2d 997 (9th Cir. 1985) (holding that recorder's allusions to "some type of misconduct as a juvenile" and to a federal district court's refusal to issue a temporary restraining order to bar the proceedings, were not grounds for overturning the discharge).[20]

12.5.7.8.4 Illegally Obtained Evidence

a. P.12/28R, ¶ 2:

Garrett v. Lehman, 751 F. 2d 997 (9th Cir. 1985) held that the exclusionary rule does not apply to military administrative discharge proceedings. Under the analytic framework of *INS v. Lopez-Mendoza,* 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984), the court found that these proceedings were not criminal or quasi-criminal and that the costs outweighed the benefits of applying the exclusionary rule to this sort of civil proceeding. Judicial reluctance to interfere with military matters was emphasized by the court.[21]

b. P.12/28R, n.198:

Ruiz has been overturned. The Court of Military Appeals now permits involuntary urine sampling despite the possible consequences. *See, e.g., Unger v. Ziemniak,* 27 M.J. 349 (C.M.A. 1989).

c. P.12/28R, ¶ 3:

(1) In light of *Ruiz* being overturned, Article 31 no longer provides a basis for exclusion of evidence in an administrative hearing.

(2) Even in courts-martial, the courts have broadened on what evidence is admissible. *See* discussion at 10 MIL. L. REV. 1096.

12.5.7.8.5 Double Jeopardy[22]

• P.12/28R, last ¶:

(1) The DoD discharge directive now provides that:

> A member may not be separated on the basis of . . . [c]onduct that has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof except in the following circumstances:
>
> (1) When such action is based upon a judicial determination not going to the guilt or innocence of the respondent; or
>
> (2) When the judicial proceeding was conducted in a State or foreign court and the separation is approved by the Secretary concerned.[23]

An example of an earlier regulation similar to the Air Force regulation cited in MDU is BUPERSNOTE 1910, 3420181, ¶ 4.f., Mar. 24, 1981:

> A member shall not be [given an UOTHC Discharge] if the grounds for such discharge action are based wholly or in part upon acts or omissions for which the member has been previously tried by court-martial resulting in acquittal or action having the effect thereof, except when such acquittal or equivalent disposition is based on a legal technicality not involving the basic issue of guilt.

See also AR 635-200, and § 12.9.3.

(2) *See United States v. Browers,* 20 M.J. 356 (C.M.A. 1985). The government challenged an acquittal as a nullity on the grounds that an interlocutory appeal had been filed which stayed the proceeding before the verdict. The government had, subsequent to the acquittal, dropped the charges opting instead to pursue administrative discharge proceedings. The court first had to consider the question of mootness since the charges had been dropped even though the case was on appeal. The court found that the case was not moot because existence, *vel non,* of a court-martial acquittal could affect the administrative proceedings. After finding the case not to be moot, the court held that the government had no right to the interlocutory appeal and that the acquittal was not a nullity.

(3) *See also Watkins v. United States Army,* 875 F.2d 699 (9th Cir. 1989)[24] (after repeated consideration over the years of servicemember's homosexuality and its effect on eligibility for reenlistment, Army estopped from barring reenlistment based on homosexuality).

12.5.7.9 Communications by Decision-Maker Unknown to Servicemember

• P.12/29L, ¶ 2:

See Koster v. United States, 685 F.2d 407, 231 Ct. Cl. 301 (1982) (holding communication not a violation).

12.5.7.10 ADB Findings and Recommendations/Proper Basis for Decision

• P.12/29R, ¶ 2:

But see Lord v. Lehman, 540 F. Supp. 125, 10 MIL. L. REP. 2856 (E.D. Pa. 1982), discussed at Supp. § 12.4.2.d(2).

12.5.7.11 Relevant DRB Index Categories

12.5.7.12 Sample Contentions

12.5.8 Legal Review

12.5.8.1 General Rules

12.5.8.2 Relevant DRB Index Category

12.5.8.3 Sample Contentions

12.5.9 The Decision: Discharge Authority (DA)

12.5.9.1 General Rules

a. P.12/31L, n.220:

See 32 C.F.R. Part 41, App A, Part 3, § C, ¶ 6; BUPERSNOTE 1910, 3420188, Mar. 24, 1981.

b. P.12/31L, n.221:

See 32 C.F.R. Part 41, App A, Part 3, § C, ¶ 6; BUPERSNOTE 1910, 3420188, Mar. 24, 1981.

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[20]Case also discussed at Supp. §§ 12.5.7.8.4 and 12.9.3.2.c.

[21]*Garrett* also discussed at Supp. §§ 12.5.7.8.3 and 12.9.3.2.c. *See also* Cody v. Scott, 565 F. Supp. 1031 (S.D.N.Y. 1983) (illegally seized evidence admissible at service academy hearing).

[22]*See also* § 12.9.3.

[23]32 C.F.R. Part 41, App. A, Part 2, § A, ¶ 3.

[24]The court was sitting en banc.

c. P.12/31R, ¶ 5:

(1) There have been different restrictions at different times on when the DA can order a new ADB and on what type of discharge can result from the second ADB.[25] The DA has been permitted, at times to review a decision to retain the servicemember.[26] The changes in regulations that have occurred have created opportunities for "current standards" arguments.[27]

(2) *See Marsh v. Wolfe,* discussed at Supp. §§ 12.5.6.1 and 12.5.7.2 above.

(3) *See* FD 81-00429 (UD to HD; Board of Officers recommended retention because acts attributed to intoxication. The Secretary directed a UD. Under current standards, had the Board of Officers recommended retention, an HD or GD would be issued).

(4) *See also United States v. Siders,* 15 M.J. 272 (C.M.A. 1983) (servicemember had right to have his statement seeking clemency considered by Convening Authority).

(5) It has been reported that a Colonel at Camp Lejuene was approving administrative discharges without authority in 1974. It has also been reported that a Colonel Parson was doing the same thing at Paris Island for periods in the 1970s and 1980s. Cases concerning discharges at either of these locations during these periods should be carefully scrutinized.

12.5.9.2 Relevant DRB Index Categories

12.5.9.3 Sample Contentions

12.5.10 Discharge for the Good of the Service (GOS) to Avoid Trial By Court-Martial

• *See generally* Chapter 19.

12.5.10.1 General Rules

• P.12/33L, ¶ 2:

See Supp. § 19.2.2.3.c.

12.5.10.2 Relevant DRB Index Categories

12.5.10.3 Sample Contentions

[25]*See, e.g.,* BUPERSNOTE 1910, 3420181, ¶ 4.g, March 24, 1981:

> A member shall not be subjected to Administrative Discharge Board action based upon conduct which has previously been the subject of Administrative Discharge Board proceedings, when the evidence before the subsequent Board would be the same as the evidence before the previous Board, except in those cases where the findings of the previous Board favorable to the respondent are determined to have been obtained by fraud or collusion.

Where the DA orders a new ADB under current Air Force regulation, the DA may not subsequently order a discharge worse than that recommended by the first ADB. *See DF 80-01360.*

[26]*See, e.g.,* BUPERSNOTE 1910, 3420181, ¶ 4.d, March 24, 1981:

> In the event the Chief of Naval Personnel [DA for the Navy] does not concur in the recommendation of the Administrative Discharge Board that an individual be retained, the case with the Chief of Naval Personnel's endorsement will be forwarded to the Secretary of the Navy for resolution. The Secretary of the Navy will make final determination on retention or discharge. If a discharge is directed, the Secretary of the Navy will specify the type of discharge to be effected. (Honorable or General).

[27]*See* FD 80-01360 (1950 UD to GD; under current AF regulations, DA may set aside findings of ADB and order a new board but may not approve findings and recommendations less favorable to the servicemember than those of the first board. Here, first ADB recommended retention and second board recommended discharge. Upgraded pursuant to current standards).

12.6 Errors Relating to Failure to Discharge for Reasons Other Than Cause or to Acquire Jurisdiction Over a Servicemember

• P.12/33R, ¶ 1:

Note that the issues discussed in this section are also discussed extensively in Chapter 18.

12.6.1 Introduction

• P.12/33R, ¶ 2:

There is a third situation where a servicemember should have been separated but was not. That is where there is an unlawful extension of an enlistment by the service. In *Amidon v. Lehman,* 677 F.2d 17, 10 MIL. L. REP. 2645 (4th Cir. 1982), the Navy tried to retain two servicemembers beyond their separation date to keep them in Spain to be prosecuted by Spanish authorities for the murder of another servicemember.[28] There was a Navy manual provision authorizing such an extension. Since, however, the provision so significantly amended the Navy regulation published in the Code of Federal Regulations,[29] the court found the manual provision to be without effect as an unauthorized alteration to Navy regulations.[30] The court held the extension invalid.

See also United States v. Self, 13 M.J. 132, 10 MIL. L. REP. 2543 (C.M.A. 1982) (discussion of retention in National Guard for court-martial).

12.6.2 Failure to Discharge

• P.12/34L, ¶ 2:

Conduct occurring after application but before approval or denial of a CO discharge can be the basis for a non-CO discharge. Army and Navy regulations require suspension of processing of an application for a CO discharge until disciplinary action has been completed. If the disciplinary action results in a punitive discharge, processing of the CO application does not resume. The Marine Corps and the Air Force have the option of processing the CO application while disciplinary actions are pending but will not grant the discharge while a punitive discharge is outstanding (*i.e.,* has not been overturned, disapproved, etc.). *Cole v. Commanding Officer, U.S.S. L.Y. Spear (AS-36),* 747 F.2d 217 (4th Cir. 1984); See NAVPERSMAN, Arts. 3620230.5, 3610100; 32 C.F.R. § 75.6.

12.6.2.1 Wrongful Denial of Conscientious Objector Discharge or Noncombatant Status

Recent developments in Conscientious Objector law are described in the MILITARY LAW REPORTER. *See, e.g.,* 10 MIL. L. REP. 1082 (analysis of "willingness to serve" issue).

12.6.2.1.1 Introduction

a. P.12/34R, n.260:

See OpJAGAF 1983/9, February 15, 1983.

b. P.12/35L, n.266:

See Fox, *Conscientious Objections to War: The Background and a Current Appraisal,* 31 CLEVELAND STATE L. REV. 1 (1982).

[28]Courts-martial charges had been dismissed for lack of a speedy trial.

[29]32 C.F.R. § 730.4(e) was the applicable regulation.

[30]Such alteration violated 32 C.F.R. § 700.1201.

12.6.2.1.2 Scope of Review

• P.12/35R, ¶ 2:

See AD 80-10055 (DRB can determine propriety of CORB decision).

12.6.2.1.2.1 Basis in Fact

• P.12/36L, n.276:

Compare, OpJAGAF 1983/9, February 15, 1983 (a Board of Inquiry had determined that crystallization of the servicemember's objection to missile duty had occurred prior to entering the program and that he had failed to disclose his objection because the program was a way to get an officer's commission so that he could become a chaplain. The Judge Advocate General found the evidence to the contrary, finding that crystallization had occurred after admission into the program. Thus, the General Discharge under misconduct provisions was not approved by TJAG).

12.6.2.1.2.2 Procedural Error in the Processing of CO Discharge Application

12.6.2.1.3 Relief for Wrongful Denial of CO Discharge

• P.12/36R, n.341:

But see dictum in *Cole v. Commanding Officer, U.S.S. L.Y. Spear (AS-36),* 747 F.2d 217 (4th Cir. 1984) (conduct prior to processing for approval or denial of CO discharge may be basis for effective denial of CO discharge by processing for BCD instead).

12.6.2.1.4 Wrongful Obstruction of CO Application and Failure to Assign Temporarily to Noncombatant Duties

12.6.2.1.5 Review Boards' Treatment of CO Claims

12.6.2.2 Wrongful Denial of Hardship or Dependency Discharge and Compassionate Reassignment

12.6.2.2.1 Introduction

12.6.2.2.2 Scope of Review

12.6.2.2.3 Relief for Wrongful Denial of Hardship or Dependency Discharge

12.6.2.2.3.1 Introduction

12.6.2.2.3.2 Review Boards' Treatment of Hardship Claims

a. P.12/40R, n.360:

See AD 79-03430 (GD to HD. Hardship discharge approved but servicemember never received notification).

b. P.12/40R, ¶ 3:

As implied in MDU, even if there is no impropriety a board can find that the hardship itself is a mitigating circumstance which goes to the equity of the characterization of the discharge. See AD 82-05167 (UOTHC to UHC; personal and financial problems impaired ability to serve); AD 83-00618 (UHC to HD; family problems impaired ability to serve); AD 82-06022 (UD to UHC; family problems a factor in overall equity of characterization of discharge); AD 81-01095 (UOTHC to HD; family problems mitigate AWOL).

c. P. 12/41L, n.368:

See AD 81-16748 (UOTHC to UHC; there was a pressing need for the servicemember to be home and servicemember followed all of the appropriate Army procedures but was denied hardship discharge. These circumstances mitigate AWOLs).

d. P.12/41L, n.370:

See AD 83-03119 (UD to UHC; two and one-half month delay following approval of hardship discharge mitigates later indisciplines); *See also* AD 81-01095 (UOTHC to HD; Hardship discharge request not processed).

e. P.12/41L, n.371:

See AD 81-06960 (UOTHC to UHC; command failure to process hardship discharge and severe financial hardship mitigate AWOL); AD 81-05332 (UD to HD; Servicemember applied for compassionate reassignment or hardship discharge but "[f]or some reason, that escaped the Board, neither of these actions were approved. . . ." Subsequent AWOL excused).

f. P.12/41L, n.373:

See AD 81-07464 (UD to UHC; servicemember transferred while dependency hardship discharge pending and went AWOL. Discharge upgraded to Under Honorable Conditions because Army "did an injustice" to the servicemember by reassigning him during pendency of application).

12.6.2.3 Wrongful Denial of Medical Discharge

a. P.12/41L, ¶ 1:

The first sentence of this section should state:

> "Under service regulations, if it is determined within four months of enlistment that a servicemember does not meet entry medical standards,[374] *due to a condition or defect which existed prior to enlistment or induction,* (s)he is entitled to be discharged.[31]" (Emphasis added.)

b. P.12/41R, n.374:

Cite is now AR 40-501, Ch.2.

c. P.12/41R, n.375:

AR 635-200 cite is now ¶ 5-11.

d. P.12/41R, ¶ 1:

The discharge described is now For the Convenience of the Government by reason of failure to meet procurement medical fitness standards.[32] The characterization of service is either HD, GD, or an uncharacterized Entry Level Separation.[33]

e. P.12/41R, ¶ 3, • 1:

The duties which the servicemember has to have been able to perform have varied. For many years "fitness" was based on whether the member was physically fit to perform the duties of his office, grade, or rating. Under this standard, there were servicemembers who were seriously disabled, did not meet retention standards, but could be found fit and thus not quality for military disability benefits if the performance of the particular duties of his or her office, grade, or rating were not hampered. Also, there is a presumption of fitness. A servicemember who continues to do his duty is presumed to be fit and thus not eligible for military disability retirement.

In 1983, the Army changed its definition of "fit" to

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[31]AR 40-501, ¶ 2-2; AR 635-200, ¶ 5-11.

[32]AR 635-200, ¶ 5-11.

[33]AR 635-200, ¶ 5-5.

require that the servicemember be able to perform his duties "in such a way as to reasonably fulfill the purpose of his employment on active duty Army-wide field conditions. . . ."[34] Thus, some individuals who were previously found fit would currently be found unfit.[35]

f. P.12/41R, ¶ 3, • 2:

Under the new reasons for discharge, servicemembers being considered for separation for unsatisfactory performance, who do not meet medical retention standards, are medically discharged.[36] Servicemembers being considered for misconduct or fraudulent entry are processed through disability channels if "(1)The disability is the cause or substantial contributing cause of the misconduct. (2) Circumstances warrant disability processing instead of administrative processing."[37]

12.6.2.4 Miscellaneous Reasons for Early Discharge Upon Application of Servicemember

• P.12/42L, n.382:

See OpJAGAF 1983/11 (February 16, 1983) (where pregnant member had miscarriage a month before discharge actually accomplished, it is within the discretionary power of the BCMR to grant credit for service lost because of discharge).

12.6.2.5 Relevant DRB Index Categories

12.6.2.6 Sample Contentions

12.6.3 Failure of Jurisdiction

• P.12/43L:

See also § 20.6.1.

12.6.3.1 Introduction

• P.12/43L, ¶ 2:

Note that the United States Court of Military Appeals is taking a less rigid approach to enforcing technical jurisdictional defects that do not create substantial prejudice to the accused.

12.6.3.2 Improper Reservist Activation

12.6.3.2.1 Introduction

• P.12/44L, ¶ 1:

For discussion of National Guard "call-ups," *see United States v. Munnis,* 9 MIL. L. REP. 2753 (1981). *See also* § 12.9.5.

12.6.3.2.2 Activation Procedures

• P.12/44R, ¶ 3, 2d sentence:
See also nn. 401 and 402 on P.12/45.

12.6.3.2.3 Scope of Review

12.6.3.2.4 Procedural Errors

12.6.3.2.5 Waiver of Defects in Activation

12.6.3.2.6 Miscellaneous Errors

12.6.3.2.7 Sample Contentions

12.6.3.3 Erroneous Induction or Enlistment

12.6.3.3.1 General Rules

a. P.12/47L, n.420a

The new address for the Selective Service System is: 1023 31st St., N.W., Washington, D.C. 20435.

b. P.12/47R, add to end:

Regulations of the different services may have specific rules concerning the discharge of members who were erroneously enlisted: MARCORSEPMAN 6012 stated, for example:

> Any case [of erroneous enlistment] coming to a commander's attention which purports to be of this nature shall be investigated, and a complete report shall be made promptly to the Commandant of the Marine Corps.

The MARCORSEPMAN section also specifies authority and reason, and character, for discharges for erroneous enlistment. Discharge "for the convenience of the government" for "erroneous enlistment or extension of enlistment" is provided for with a characterization to be not "less favorable than under honorable conditions." In *Blassingame v. Secretary of the Navy,* 866 F.2d 556 (2d Cir. 1989), the court held that the failure to conduct the investigation under this regulation to be prejudicial error.[38] The court noted that:

> [b]ut for the Corps's initial improper induction and subsequent failure to investigate, Blassingame's record might have been spared the blemish of an "undesirable" discharge.
>
> . . .The NDRB held that, even assuming illegal induction, appellant could not show that he would have been granted an honorable or a general discharge. But Blassingame should not be required to bear this burden, any more than he should be charged with the responsibility of ensuring the Marine Corps follows its own regulations. . . .

12.6.3.3.2 Sample Contentions

12.6.3.3.3 Relevant DRB Index Categories

12.6.3.4 Minority Enlistments

12.6.3.4.1 Introduction

12.6.3.4.2 Entry Below the Minimum Age for Enlistment

a. P.12/48L, ¶ 4:

There can also be regulatory age limitations more restrictive than the statutory rules. For instance, the Vietnam era Project 100,000 program, which allowed enlistment for individuals who were below standards in aptitude tests, only accepted those over 17 years, eight months, even with parental consent.

b. P.12/48L, n.426:

See Blassingame v. Secretary of the Navy, 866 F.2d 556 (2d Cir. 1989) (discussed at Supp. § 12.5.1.2.a).

c. P.12/48R, ¶ 3:

See United States v. McDonagh, 14 M.J. 415 (C.M.A. 1983) (discussed at Supp. § 12.6.3.5.)

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[34]AR 635-40, ¶¶ 2-1, 4-11, 4-18a(1) (I03, Sept. 7, 1983).

[35]For further information, see *Military Disability in a Nutshell,* by Major Chuck R. Pardue, 109 MIL. L. REV. 149 (Summer 1985).

[36]AR 635-200, ¶ 1-35(a).

[37]AR 635-200, ¶ 1-35(b).

[38]Blassingame's aptitude scores precluded his entry into the Marine Corps. He enlisted, however, under Project 100,000 which allowed entry notwithstanding low scores. The regulations for the program only allowed entry for those over 17 years, 8 months old and only permitted a two-year enlistment. Blassingame was 17 years, 19 days old at the time of enlistment, and enlisted for three years.

12.6.3.4.3 Entry Without Parental Consent

12.6.3.4.4 Sample Contentions

12.6.3.4.5 Relevant DRB Index Category

12.6.3.5 Involuntary Enlistments and Enlistments Procured by Recruiter Fraud

12.6.3.5.1 General Rules

12.6.3.5.2 Involuntary Enlistments

a. P.12/49R, ¶ 5:

See United States v. Matthews, 13 M.J. 501, 10 MIL. L. REP. 2407 (A.C.M.R. 1982) (discusses distinctions in types of recruiter activity).

b. P.12/50L, n.442:

See United States v. McGinnis, 10 MIL. L. REP. 2613 (N.M.C.M.R. 1982).

12.6.3.5.3 Enlistments Procured by Recruiter Fraud

a. P.12/50L, n.445b:

See MD 80-02472.

b. P.12/50R, ¶ 1:

United States v. Buckingham, 11 M.J. 184 (C.M.A. 1981) (interprets what is a disqualifying civilian criminal offense under Air Force regulations); *United States v. McGinnis,* 10 MIL. L. REP. 2613 (N.M.C.M.R. 1982) (history of LSD usage disqualifying).

c. P.12/50R, ¶ 2:

United States v. McGinnis, 10 MIL. L. REP. 2613 (N.M.C.M.R. 1982) (holding second enlistment void as part of the same "integral process" as the first void enlistment[39]).

d. P.12/51L, ¶ 3:

United States v. McDonagh, 14 M.J. 415 (CMA 1983), held that the amendments to Article 2 of the U.C.M.J. are fully retroactive where the offense charged is not peculiarly military in nature. In *McDonagh,* the court found drug offenses to be not peculiarly military, the amendments to Article 2 to be retroactive, and the *Russo* jurisdictional defense unavailable.[40]

For a further discussion of *Russo* and the consequences of the amendment to Article 2 of the U.C.M.J., *see Woodrick v. Divich,* 24 M.J. 147 (C.M.A. 1987) and DAJA-CL 1984/6505 (Dec. 17, 1984) ("*Catlow* and *Russo* have little, if any, precedential value." Law returned to status as in *In re Grimley,* 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890) "which required compliance with only two factors before an enlistment would be considered valid: (1) capacity to understand the significance of enlistment in the armed forces; and (2) the voluntary taking of the oath of enlistment. *Grimley* further established the doctrine of constructive enlistment which validates a void enlistment where the enlistee later submitted voluntarily to military authority; met the mental competency and minimum age qualifications received military pay or allowances; and performed military duties.").

Consult with the MILITARY LAW REPORTER for further developments in this area.

[39]History of LSD usage was the disqualifying factor.

[40]In United States v. McGinnis, 10 MIL. L. REP. 2613 (N.M.C.M.R. 1982), the Navy-Marine Court of Military Review had held that the amendments did not apply where the offenses charged had occurred prior to the amendments. In United States v. Quintal, 10 M.J. 532 (A.C.M.R. 1980), the Army Court of Military Review had held that the amendments were fully effective even in a case where the trial had been completed prior to the amendments.

12.6.3.5.4 Sample Contentions

12.6.3.5.5 Relevant DRB Index Categories

12.7 Discharges Based on Improperly Considered Military Disciplinary Actions

12.7.1 Introduction

a. P.12/51R, ¶ 5:

Navy regulation requires that no "adverse matter" may be placed in a servicemember's personnel file unless the servicemember has had an opportunity to make a statement. Article 1110, U.S. Navy Regulations, 1973 provides that:

> Adverse matter shall not be placed in the record of a person in the naval service without his knowledge . . . such matters shall be first referred to the person reported upon for such statement as he may choose to make. If the person reported upon does not desire to make a statement, he shall so state in writing.

For discussion of what is "adverse matter," *see United States v. West,* 17 M.J. 627 (N.M.C.M.R. 1983); *United States v. Shelwood,* 15 M.J. 222 (C.M.A. 1982); *United States v. Anderson,* 12 M.J. 527 (N.M.C.M.R. 1981) (discussed below at Supp. § 12.7.7.3.b). Re: presumption of regularity and opportunity to make statement, *see United States v. Kline,* 14 M.J. 64 (C.M.A. 1982). *See also United States v. Brown,* 16 M.J. 36 (C.M.A. 1983).

b. P.12/51R, add after ¶ 5:

In general, military disciplinary actions from previous enlistments should not be considered.[41]

[41]*See* BUPERSNOTE 1910, 3420181, ¶ 5, Mar. 24, 1981:

> [*Characterization* of current enlistment] will be determined solely by the member's military record during that enlistment. . . . The following shall not be considered:
>
> a. Prior service activities including . . . records of conviction by court-martial, records of nonjudicial punishment, records of absence without leave or commission of other offenses for which punishment was not imposed.
>
> b. Preservice activities, excepting misrepresentations, including omission of facts which if known would have precluded, postponed, or otherwise affected the member's eligibility for enlistment or induction.
>
> [emphasis added]

and BUPERSNOTE 1910, 3420181, ¶ 6, Mar. 24, 1981:

> In determining whether a member should . . . be administratively separated, the member's entire military record may be evaluated.
>
> a. Include (1) records of nonjudicial punishment imposed during a prior enlistment or period of service, (2) all records of conviction by court-martial, and (3) any other factors which are material and relevant.
>
> b. [Those] making such determinations shall consider records of nonjudicial punishment imposed during a prior enlistment or period of service only if such records of punishments would have, under the particular circumstances of the case, a direct and strong probative value in determining whether retention or administrative separation is appropriate.
>
> c. Cases in which the circumstances may warrant use of such records shall ordinarily be limited to those involving patterns of conduct which would become manifest only over an extended period of time.
>
> d. When a record of nonjudicial punishment imposed during a current enlistment or period of service is considered, isolated incidents and events which are remote in time, or have no probative value in determining whether retention or administrative separation should be effected, shall have minimal influence on the determination.

12.7.2 Nonjudicial Punishment Under Article 15, U.C.M.J.

• P.12/51R:

See also § 7.3.2.

12.7.2.1 Introduction

• P.12/51R:

AR 27-10, Military Justice, was revised effective November 1, 1982. It superseded AR 27-10 of November 26, 1968. It prescribes policies and procedures pertaining to military justice left to the Army's discretion by the U.C.M.J. and the MANUAL FOR COURTS-MARTIAL. The changes are important with respect to persons who received NJPs since their adoption and for determining the current standards which apply for nonjudicial punishment. (*See* Chapter 21).

The revised AR 27-10:

- Provides guidance on when to use non-punitive measures (denials of passes, extra duty or training, counseling, reduction in grade, reprimands, etc.) to correct behavior that falls short of willful violations of the U.C.M.J. (¶ 3-3a). This guidance encourages commanders not to use nonjudicial punishment when more "instructional forms of command action" can be taken. For example, an Article 15 for a sloppy uniform would normally not be as appropriate as extra inspection or class attendance or wearing the uniform. Many pre-November 1, 1982 Article 15s in veterans records would not occur under these standards.
- Prohibits superior commanders from ordering a subordinate to impose an Article 15 or issuing guides or orders to suggest that certain offenses be disposed of by using Article 15s or that certain amounts of punishment are appropriate (¶ 3-4).
- Details Article 15 procedures, including a hearing to determine guilt or innocence, the right to counsel, the right to confront witnesses at that installation, and the right to demand trial any time before punishment is imposed (¶¶ 3-13 to 3-18 and App. B). Thus, the false notion that accepting an Article 15 precluded a defense is clearly rejected.
- Restrictions on amount of punishment by certain commanders. For example, reduction in grade must be within the promotion authority of a commander or a subordinate (¶ 3-19).

12.7.2.2 Punishable Offenses

12.7.2.3 Improper Processing of an Article 15

a. P. 12/52R, ¶ 1:

There have been a number of changes in the Army regulation, AR 27-10, governing Article 15s. These include new processing requirements. Failure to comply with these requirements may give rise to an impropriety or a current standards argument.[42]

AR 27-10 as revised:[43]

- Places limits on who may, and be delegated authority to, impose an Article 15 (¶ 3-7).
- Limits the use of separate Article 15s for minor offenses arising out of the same transaction (¶ 3-10).
- Applies the U.C.M.J. statute of limitations (Article 43(c)) and the standard of "beyond a reasonable doubt" for a finding of guilt to Article 15s and limits the use of Article 15s after a civilian trial for the same offense (¶¶ 3-12, 3-181, and 4-3).
- Makes clear that an appeal of an Article 15 can include the question of guilt (¶ 3-31).
- Restricts the use of an Article 15 or court-martial without the approval of an officer exercising general court-martial jurisdiction after a U.S. or foreign civilian trial (¶¶ 4-1 to 4-3).

b. P.12/52L, ¶ 4:

(1) In *United States v. Anderson,* 12 M.J. 527 (N.M.C.M.R. 1981), the court held that an Article 15 was inadmissible if the Notification of Intent to Impose Nonjudicial Punishment was signed by one officer, but the punishment was imposed by a succeeding commander. The A.F.C.M.R. held that AFR 111-9 ¶ 6 h(1-2) created a substantive right for the accused to be informed in writing that a different commander would impose punishment.

(2) In *United States v. Booker,* 5 M.J. 238 (C.M.A. 1977), the court held that a Nonjudicial Punishment could not be introduced in a court-martial proceeding if the servicemember was not informed, by a legally trained person, of the consequences of accepting the NJP instead of asking for a court-martial trial. The court held that due process considerations attach to nonjudicial punishments.[44]

(3) In *Fairchild v. Lehman,* 609 F. Supp. 287 (D.C. Va. 1985), *aff'd,* 814 F.2d 1555 (Fed. Cir. 1987), the court found that the BCNR erred in upholding an NJP where the servicemember had presented an affidavit stating that his military defense counsel had, incorrectly, told him that if he waived his right to trial and accepted his NJP that he would not be subject to a less than honorable discharge for his offense. The BCNR solicited a letter from the servicemember's defense counsel which stated that he could only assume that he had advised the servicemember correctly, but did not remember specifically. The court found that the BCNR had erred in upholding the NJP where the servicemember had, subsequent to accepting the NJP, been faced with discharge on the basis of the NJP offense.

c. P.12/53L, ¶ 1:

United States v. Stewart, 12 M.J. 143 (C.M.A. 1981), held that a form vacating a suspended Article 15 was inadmissible at a court- martial because of the absence of commander's legible signature.

12.7.2.4 Article 15s That by Regulation Should Not Have Been Considered

a. P.12/53L, ¶ 3:

AR 27-10 as revised:[45]

- Prohibits the filing in the permanent Official Military Personnel File of a first offense disposed of under Article 15 if it is "not indicative of a pattern of misconduct or does not indicate a serious character deficiency or breach of military discipline" (¶ 3-6). Thus, under current procedures some Article 15s considered in older discharge actions would not have been available to the discharge authority when the character of service was determined.
- Eliminates the restriction on the use of Article 15s at court-martial or administrative discharge proceedings regardless of where they are filed, except for "sum-

[42] *See* Chapter 21.

[43] *See also* Supp. § 12.7.2.1 above.

[44] *See* Fairchild v. Lehman, 609 F.Supp. 287 (D.C. Va. 1985), *aff'd,* 814 F.2d 1555 (Fed. Cir. 1987) (holding that BCNR must follow C.M.A. precedent).

[45] *See also* Supp. § 12.7.2.1.

marized" Article 15 proceedings contained on DA Form 2627-1 (¶ 3-44).

b. P.12/53L, n.465:

See United States v. Cisneros, 11 M.J. 48 (C.M.A. 1981) (record of punishment over two years old improperly considered by military judge at sentencing).

c. P.12/53L, ¶ 3:

In *United States v. Brown,* 11 M.J. 263 (C.M.A. 1981), the court held that, under AR 27-10, Article 15s from the soldier's first three years of service should have been destroyed and their admission in court-martial proceedings was prejudicial error. The court likewise concluded that the otherwise admissible document which referenced the Article 15s was inadmissible, holding that "what the government cannot successfully introduce into evidence through the front door it cannot successfully introduce through the back door. . . ."

d. P.12/53R, last ¶:

This paragraph refers to the regulations in effect from February 1, 1963 to December 15, 1971.

e. P.12/53R, n.472:

The ADRB SOP has been withdrawn. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments.

12.7.2.5 Miscellaneous Issues: Charleston, S.C., Naval Station Cases

• P.12/54L, ¶ 2:

The Legal Services functions of the National Veterans Law Center have been assumed by the National Veterans Legal Services Project.

12.7.2.6 Relevant Index Categories

12.7.3 Reprimands

a. P.12/54R, ¶ 3, last sentence:

But see United States v. Hagy, 12 M.J. 739 (A.F.C.M.R. 1981) (civilian offenses are not properly a subject of a letter of reprimand. MCM 1969, ¶ 75d; AFR 35-32; U.C.M.J., Article 32; 10 U.S.C. § 837.); *see also United States v. Boles,* 11 M.J. 195 (C.M.A. 1981).

b. P.12/54R, ¶ 4:

DAJA-AL 1983/1143 (Feb. 4, 1983) states that letters of reprimand may be issued by any supervisor of an enlisted member, not just a commander. The issuing supervisor must, however, refer the letter to the servicemember and then forward it to the commander, general officer, or general court-martial convening authority. In reporting this decision, the Army Lawyer noted that "[t]his interpretation is broader than the language of paragraph 2-4a(1), AR 600-37, which states that the authority to 'issue and direct filing of such letters in the [servicemember's personnel file] is restricted to the person's immediate commander or a higher commander in his chain of command.'" DA Pam 27-50-131.

c. P.12/54R, ¶ 5:

See United States v. Hill, 13 M.J. 948 (C.M.A. 1982), for discussion of AFR 35-32 and the admission into evidence of reprimands as "personnel records" for sentencing purposes at a court martial.

12.7.3.2.1 General Rules

12.7.3.2.2 Relevant Index Categories

12.7.4 Courts-Martial

12.7.5 Improper Disciplinary Actions, Loss of Good Time, and Other Adverse Actions Against Military Prisoners

• P.12/55L, n.480:

See United States v. Schmit, 13 M.J. 934 (A.F.C.M.R. 1982) (convening authority's designation of Rehabilitation Squadron as place of confinement in action on court-martial record, constitutes a proper exercise of sentence amelioration powers. Failure to assign servicemember to Rehabilitation Squadron constituted improper punishment).

12.7.6 Improperly Recorded Bad or Lost Time

• P.12/55, n.484:

The ADRB SOP has been withdrawn. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments.

12.7.7 Sample Contentions

12.8 Improper Performance Ratings

12.8.1 Introduction

a. P.12/56L, ¶ 1:

See AD 7X-06726B, on importance of ratings in the separation process.

b. P.12/56L, n.485:

(1) Note also that "[t]he date entered will be the effective date of occurrence and not the date the entry is actually made. In this respect, entries will be made on the date of occurrence or as soon thereafter as practicable." IRAM, MCO P 1070.8, ¶ 4007(2)(b), currently MCO P1070.12, ¶ 4008(3)(a).

(2) *See* NC 80-5457 (UHC to HD. Earlier discharge had been voided by the BCNR but separation evaluation report was still in records and brought the servicemember's overall ratings to below that required for an HD. The BCNR held that where a separation is voided, the separation evaluation report conducted pursuant to the voided discharge is itself void and the ratings should be recomputed to determine eligibility for HD).

c. P.12/56L, n.487:

See MD 80-00388 (UD to HD. Servicemember discharged for homosexuality. Record did not reveal any disciplinary infractions that would warrant the low marks. The majority found that the low marks were the result of the admission of homosexual acts and excluded them in a recalculation to determine qualification for HD); MD 78-04138; MD 77-02896 (Upgrade to HD; conduct mark of 2.0 on discharge had lowered overall average to below level for HD. Board found the final conduct mark not justified by any misconduct of record).

d. P.12/56L, n.489:

See NC 80-5457; *United States v. Anderson,* 12 M.J. 527 (N.M.C.M.R. 1981) (enlisted performance evaluation is inadmissible hearsay where neither servicemember's signature nor an explanation of its omission appears on the form and the signature is material to execution of the document); NAVREGS, 1973, Article 1110, discussed above at Supp. § 12.7.1.

12.8.2 Rating Policies of the Services

12.8.2.1 Army

12.8.2.2 Air Force

12.8.2.3 Navy

a. P.12/57L, ¶ 2:

(1) *See United States v. Kline,* 14 M.J. 64 (C.M.A. 1982) (adverse statements (low ratings) were placed in servicemember's record. Navy regulations require that adverse matter not be placed in the servicemember's record without an opportunity to comment or a statement in writing that he or she does not wish to comment. No comment or signed statement that the servicemember did not wish to comment was in the record. The adverse statements were found inadmissible in a court-martial because they were not prepared in accordance with regulations as required by ¶ 75d of the MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1969). For further discussion of *Kline, see* Supp. § 12.1.2.b. *See also United States v. West,* 17 M.J. 627 (N.M.C.M.R. 1983).

(2) Current MILPERSMAN 3610300 states that a UHC discharge is appropriate when the member's overall final trait average is below 2.8, or the member's military behavior mark is below 3.0. An HD is appropriate when the member's overall final trait average and military behavior marks upon separation are 2.8 and 3.0 respectively.

12.8.2.4 Marine Corps

• P.12/57L, ¶ 4:

The Marine Corps Separations and Retirement Manual (MCSM) ¶ 6003.1a states:

> In determining the character of a Marine's discharge, a commander will presume that an honorable discharge is warranted unless clearly demonstrated otherwise by the member's service record. . . .
>
> A Marine will not be denied an honorable discharge solely by reason of a specific number of convictions by courts-martial or punishments under U.C.M.J, Article 15, during his/her current enlistment or period of obligated service, including voluntary or involuntary extensions thereof. Such convictions will be, nevertheless, considered and weighed in relation to all other relevant aspects of the Marine's behavior and performance of duty. . . . When the commanding officer has determined that a Marine is ineligible for an honorable discharge upon normal expiration of enlistment, the commanding officer will personally inform the Marine concerned of his/her decision and the reason(s) for awarding other than an honorable discharge. An entry to this effect will be placed on page 11 of the service record book and signed by the Marine.

MCSM 6005.3 states:

> In the case of a corporal or below, when a Marine is being considered for discharge with a general discharge because his/her military record is not considered sufficiently meritorious to warrant an honorable discharge because of average conduct marks below those set forth in subparagraph 6003.1b, such marks should be clearly supported by entries on pages 11, 12, or 13, of the Marine's service record book. When such marks are not supported, or where the provisions of paragraph 6003.1 or 6003.3 are applicable, consideration should be given to awarding the Marine an honorable discharge.

MD 78-04138 (GD to HD; no page 11 entry regarding the reasons for GD. No supporting entries for two low marks which brought average down. "Considering applicant's total records of service, the minor nature of the offenses [an NJP for Drunk and Disorderly and an NJP for two hours UA] and the strict wording and guidance of the MCSM, the awarding of a General discharge was not in keeping with the MCSM 6003 and 6005.")

12.8.3 Errors in Calculation of Ratings

• P.12/57R, n.501:

See MD 80-3297 (GD to HD; recalculation of marks pursuant to IRAM ¶ 4008.5, requiring rounding off of final average to nearest tenth, yields ratings normally sufficient for HD).

12.8.4 Presumption of Regularity

12.8.5 Honorable Discharge Required When Discharge is for Unsuitability or Other Not-For-Cause Reason

12.8.5.1 Introduction

• P.12/58L, ¶ 1:

The general rule that ETS or EOS regulations govern characterization for other reasons for discharge is no longer valid as the Army and Air Force now require an HD at ETS. There are, however, general rules regarding characterization for most of the "miscellaneous" reasons for discharge discussed.[46]

12.8.5.2 Navy and Marines

12.8.5.3 Air Force

12.8.5.4 Army

12.8.6 Relevant Index Categories

12.8.7 Sample Contentions

12.9 Miscellaneous Propriety Issues

• P.12/58R, ¶ 2:

Many of the subjects discussed in this section are also discussed in § 12.5.

12.9.1 Introduction

12.9.2 Improper Use of the Administrative Process

12.9.2.1 Introduction

12.9.2.2 General Rules

• P.12/59R, ¶ 2:

See § 12.5.5.

12.9.2.3 Relevant DRB Index Category

12.9.2.4 Sample Contentions

12.9.3 Double Jeopardy or Multiple Board Proceedings[47]

12.9.3.1 Introduction

[46] 32 C.F.R. Part 41, App. A, Part 2, § A; AR 635-200, ¶¶ 3-7, 3-9.

[47] *See also* § 12.5.7.8.5.

12.9.3.2 General Rules

a. P.12/60, ¶ 1, add •:

United States v. Williams, 12 M.J. 1038 (A.C.M.R. 1982) presents an additional type of double jeopardy problem. In *Williams,* the command first tried administrative separation proceedings. When those proceedings resulted in retention, the command then initiated a special court-martial. The Williams court held that this was not double jeopardy.

b. P.12/60L, n.511:

See ND 80-02935 (cites to Navy policy against administrative discharges when a court-martial has not resulted in a punitive discharge, as reflected in Op JAGN 1957/339, February 18, 1957 and JAG opinion at 7 DIG OPS 153, but denied claim because the Secretary of the Navy had remitted the sentence so that the servicemember could be discharged UOTHC); MD 81-03124 (UD to GD; cites Navy policy. Found that UD increased the penalty of the Special Court-Martial sentence. *United States v. Miles,* 12 M.J. 377 (C.M.A. 1982) (a court-martial guilty plea is not improvident because the military judge fails to inform servicemember that he may receive an administrative discharge for the offenses to which he is pleading).

AR 27-10 as revised (*see* Supp. § 12.7.2.1 above) restricts the imposition of an Article 15 or court-martial without the approval of an officer exercising general court-martial jurisdiction after a U.S. or foreign civilian trial (4-1 to 4-3).

c. P.12/60R, n.512:

Section 6106.1 of Marine Corps Separation and Retirement Manual states that a person may not be separated from the Marine Corps for "[c]onduct that has been the subject of judicial proceedings resulting in an acquittal or action having the effect of an acquittal except . . . (a) when such action is based upon a judicial determination not going to the merits of the issue of factual guilt of the respondent. . . ." *See Garrett v. Lehman,* 751 F.2d 997, 1001 n. 5 (9th Cir. 1985) (dismissal after reversal of a conviction does not bar administrative discharge proceedings. Neither principles of double jeopardy nor res judicata apply).[48]

The current DoD discharge regulation states:

> A member may not be separated on the basis of the following:
>
> a. Conduct that has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof except in the following circumstances:
>
> (1) When such action is based upon a judicial determination not going to the guilt or innocence of the respondent; or
>
> (2) When the judicial proceeding was conducted in a State or foreign court and the separation is approved by the Secretary concerned. . . .[49]

d. P.12/60R, n.513:

The current DoD discharge regulation states:

> A member may not be separated on the basis of the following:
>
> a. . . .
>
> b. Conduct that has been the subject of a prior Administrative Board in which the Board entered an approved finding that the evidence did not sustain the factual allegations concerning the conduct except when the conduct is the subject of a rehearing ordered on the basis of fraud or collusion; or
>
> c. Conduct that has been the subject of an administrative separation proceeding resulting in a final determination by a Separation Authority that the member should be retained, except in the following circumstances:
>
> (1) When there is subsequent conduct or performance forming the basis, in whole or in part, for a new proceeding;
>
> (2) When there is new or newly discovered evidence that was not reasonably available at the time of the prior proceeding; or
>
> (3) When the conduct is the subject of a rehearing ordered on the basis of fraud or collusion.[50]

e. P.12/60R, n.515:

See 32 C.F.R. Part 41, App A, Part 2, § B. *See also* § 12.5.7.8.5.

12.9.3.3 Relevant DRB Index Category

12.9.3.4 Sample Contentions

12.9.4 Improper Confessions[51]

12.9.4.1 Introduction

a. P.12/61L, ¶ 1:

The *Ruiz* decision has been overturned. *See also* discussion at Supp. § 12.5.7.8.4 on developments in the applicability of the exclusionary rule to administrative discharges. Under recent developments in the law, even improperly obtained confessions may be admissible in administrative discharge hearings. Evidence of coercion or other factors which could have influenced the confession may, however, still be introduced to attack the reliability of the confession.

b. P.12/61L, add to end of section:

A confession which is inconsistent with other evidence can be challenged as inaccurate. The Air Force Judge Advocate General has, however, determined that absence of corroboration is not enough to exclude admission of the confession in an administrative session:

> The absence of any corroboration of the respondent's oral statement, coupled with the rather vague and indefinite character of the statement, presents a troublesome issue. Clearly, if this were a prosecution of the respondent under the Uniform Code of Military Justice, a conviction could not be obtained based solely upon his admission. For example, Rule 304 of the Military Rules of Evidence provides that an admission or confession may be considered on the question of guilt or innocence "only if independent evidence . . . has been introduced that corroborates the essential facts" established by the confession or admission. However, this is not a criminal prosecution, it is an administrative proceeding. The operative rule of evidence in this case is set forth in the introductory clause of paragraph 3c(2), AFR 36-2. It provides that the basis for separation "may include . . . statements" by the respondent. Therefore, we conclude that there is sufficient evidence to support the recommendation for discharge and that the case is legally sufficient to warrant the action recommended.

OpJAGAF 1982/17 (April 2, 1982).

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[48]Case discussed at Supp. §§ 12.5.7.8.3 and 12.5.7.8.4.

[49]32 C.F.R. Part 41, App. A, Part 2, § A, ¶ 3.

[50]32 C.F.R. Part 41, App. A, Part 2, § A, ¶ 3.

[51]*See also* § 12.5.5 on waiver of rights and § 12.5.7 on evidence.

12.9.4.2 Violations of Article 31

a. P.12/61R, ¶ 1:

See ND 81-02008 (UD to HD; Board believed testimony that admission of homosexual conduct had been coerced. Office of Naval Intelligence was investigating friend's sexual preference and questioned servicemember six times, threatened him with court-martial and disclosure to family and home town police as sex offender, if he did not confess).

b. P.12/61R, last ¶:

See Supp. § 12.5.

12.9.4.3 Relevant DRB Index Category

12.9.4.4 Sample Contentions

12.9.5 Erroneous Transfer From the National Guard

12.9.5.1 Introduction

12.9.5.2 Sample Contentions

12.9.6 Discharge After Expiration of Term of Service or After a Constructive Discharge

• P. 12/62R, ¶ 3:

See United States v. Bailey, 11 M.J. 730 (C.M.A. 1981) for discussion of effective date of discharge.

12.9.6.1 Introduction

• P.12/72, ¶ 3:

(1) Note that the military, as well as the veteran, can challenge the legality of a discharge. The military may want to do this if a discharge has been obtained through fraud and it wishes to obtain jurisdiction over the servicemember. *See United States v. Cole,* 24 M.J. 18 (C.M.A. 1987); *Wickham v. Hall,* 12 M.J. 145 (CMA 1981), *aff'd,* 706 F.2d 713 (5th Cir. 1983).

(2) There are regulations governing the effective dates of discharge. These regulations cannot be avoided by backdating a revocation of the discharge.[52]

12.9.6.2 Sample Contentions

12.10 Propriety Checklist

12.10.1 Introduction

• P.12/63R, n.529:

The ADRB SOP has been withdrawn. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments.

12.10.2 Checklist

12.10.2.1 Frequently Occurring Illegal Discharges

12.10.2.2 General Propriety Issues

12.10.2.3 Regulatory Errors

Appendix 12A

DRB/BCMR Decisions

Appendix 12B

Comparison of NDRB and ADRB Rating Policies

• Note that the ADRB SOP referred to in §§ B & C of this appendix has been withdrawn.

Appendix 12C

Miscellaneous Regulations

• Note that the ADRB SOP referred to in § A of this appendix has been withdrawn.

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[52]Machado v. Commanding Officer, Plattsburgh Air Force Base, 860 F.2d 542 (2d Cir. 1988).

CHAPTER 13
Alcohol Abuse

A. Overview

There have been many changes in the regulations concerning alcohol abuse. The trend toward treating it as improper conduct and as an illness, instead of as acceptable adult behavior, has continued.

B. Chapter Supplement

The services have issued new regulations governing alcohol and drug abuse, implementing DoD guidance. DoD DIR 1010.2, 32 C.F.R. § 41 App. A; 32 C.F.R. § 62a. The Air Force regulation is AFR 30-2, the Army regulation is AR 600-85, and the Navy regulation is OPNAVINST 5350.4A.

The Marine Corps Alcohol Abuse Administration and Management Program (AAAMP) is exemplary of these regulations.[1] The Marine Corps regulation emphasizes preventive education and deemphasises the glamor stereotypically associated with the use of alcohol. Alcohol abuse education is provided to Marines "within 60 days after arrival at each new permanent duty station and at command discretion thereafter."[2] The focus of the educational program is to provide "individuals with the requisite knowledge to make a responsible decision concerning alcohol use."[3] Moreover, alcohol use is to be "deemphasised to reduce the glamor often associated with [its] use and abuse."[4] The AAAMP emphasizes early detection and definition of alcohol abuse. Rather than overlook the possible relationship between drinking and poor performance or misbehavior, commanders are instructed to "use all means available to identify" Marines who are abusing alcohol.[5] In order to identify alcohol abusers, the AAAMP directs commanders to review, among other items, duty officer/NCO logbooks, medical incident reports, observations by commanders and supervisors of deteriorating performance or social behavior problems, and civil incident complaint reports.[6]

The definitions of terms in the services' regulations are important. They provide insight into how the service is approaching alcoholics and abusers of alcohol by their characterization of the different labels used in describing abusers. Often the definitions are critical in determining the treatment received by the servicemember. The Marine Corps regulation[7] defines some of the key terms as described below:

> a. *Alcoholism.* As used in this order, alcoholism is a disease which is characterized by psychological and/or physiological dependence on alcohol.
>
> b. *Alcoholic.* An individual who suffers from alcoholism, as defined above.
>
> . . .
>
> e. *Alcohol Abuse.* Any irresponsible use of an alcoholic beverage which leads to misconduct, unacceptable social behavior, or impairment of an individual's performance of duty, physical or mental health, financial responsibility, or personal relationships. Prolonged alcohol abuse may lead to alcoholism.
>
> f. *Problem Drinker.* A person who may or may not be an alcoholic, but who has a history of repeated incidents of alcohol abuse.

The categorization determines whether the servicemember will receive medical treatment, rehabilitation, or counseling:[8]

> 2. *Evaluation for Dependence.* All alcohol related incidents shall be scrutinized by the commander (or designated representative) for determination as to appropriate action. Should an evaluation for alcohol dependency be directed, the individual will be scheduled for a medical evaluation and an interview with a trained drug and alcohol counselor. Based upon the evaluation, and the opinions of the counselor, the medical officer will provide the individual's command with a determination of dependency. In cases determined to be an isolated or minor alcohol abuse incident, the commander may waiver the requirement for a medical evaluation and counseling interview. The individual should still be counseled, however, regarding the intemperate use of alcohol.

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[1] MCO 5370.6A, Enclosure (3).

[2] *Id.* Enclosure (3) ¶ 3.a.

[3] *Id.* ¶ 3.

[4] *Id.* ¶ 4.

[5] *Id.* Enclosure (2) ¶¶ 1,2,4.

[6] *Id.* ¶ 1.

[7] MCO 5370.6A, Enclosure (1) ¶ 1.

[8] See MCO 5370.6A, Enclosure (2) ¶¶ 2-3.

3. *Referral of Alcohol Abusers and Alcoholics*

a. *Alcoholics.* An individual identified as being alcoholic shall be referred for formal treatment by assignment to an Alcohol Rehabilitation Service (ARS) located at a nearby naval hospital, or by requesting disposition instructions from the Commandant of the Marine Corps (CMC).

b. *Alcohol Abusers.* Alcohol abusers who have shown a developing pattern of abuse incidents but who have been determined not to be alcoholic shall be assigned to an appropriate program of rehabilitation.

The Marine Corps program directs that Marines who are identified as alcoholics or as alcohol abusers be referred to an appropriate treatment or rehabilitation program.[9] Failure to participate in or complete such a program constitutes a basis for an administrative discharge.[10] The discharge may be characterized as honorable or general, "as warranted by the [service] member's military record."[11] In no case, however, is alcohol abuse or failure to complete a treatment or rehabilitation program a basis for a court-martial discharge.

This regulation and similar provisions for the other services represent a powerful basis for current standards arguments for those who had alcohol related problems[12] in the service. For those who are discharged after the effective date of the regulations, failure to follow many of these regulatory provisions (such as rehabilitation requirements) will constitute prejudicial error in the discharge process. Such an error can be the basis for finding of an impropriety requiring a discharge upgrade. At the least, a violation of the important principles contained in these regulations is inequitable and provides an equitable basis for upgrade.

C. Section Supplement

13.1 Introduction

13.1.1 Magnitude of the Problem

13.1.2 DOD Policy on Alcoholism Until 1972

13.1.3 Current Policy

a. P.13/2L:

See also Chapter Supplement above.

b. P.13/2L, ¶ 4:

Under the Laird Memorandum, it has become difficult for the military to discharge an individual whose record, despite severe alcoholism, shows adequate performance and who refuses rehabilitation. This has been identified in the Navy as a particular problem amongst officers because of the reluctance to damage a fellow officer's record for conduct related to alcoholism. Without bad performance or conduct ratings, or disciplinary actions, there is no way to compel treatment, and the service is left with an unreliable officer. Medical retirement for alcoholism is not available.[13]

c. P.13/2R, ¶ 1:

The authorization for discharges for alcohol abuse can, however, extend to "irresponsible use of an alcoholic beverage which leads to misconduct, unacceptable social behavior or impairment of an individual's performance of duty, physical or mental health, financial responsibility or personal relationships; or the failure through inability or refusal to participate in, cooperate in, or successfully complete an alcohol abuse treatment and rehabilitation program."[14]

d. P.13/2R, n.8:

The DRBs have been more reluctant to accept these arguments in recent years. This is partially because many current applicants have presumably already had the benefit of the more enlightened approach now taken by DoD toward alcohol problems. Another factor is the general deference now extended by DRBs to the command decisions made at discharge.

e. P.13/2R, ¶ 2:

Current regulations provide for either an Honorable or General Discharge for those who fail in an alcohol rehabilitation program.[15] The DoD regulation allows discharge for this reason where a servicemember referred to a rehabilitation program fails "through inability or refusal to participate in, cooperate in, or successfully complete . . ." the program and "(1) there is a lack of potential for continued military service; or (2) long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation." An uncharacterized "Entry Level Separation" is required if the servicemember is in "Entry Level Status."[16] A discharge for alcohol rehabilitation failure is no longer for "Unsuitability." The "Unsuitability" reason for discharge has been eliminated. "Alcohol or Other Drug Abuse Rehabilitation Failure" is now a separate basis for discharge.[17]

[9]MCO 5370.6A, Enclosure (2) ¶ 3. Note that Commanders can usually waive this requirement if they see no potential for further service. See, e.g., AR 600-85, IO2, ¶ 3D8c.

[10]MARCORSEPMAN 6016.1.e.

[11]MARCORSEPMAN 6002.2.f.

[12]*See* Chapter 21 and Supp. § 13.2.1 below.

[13]OTRD86, Enclosure (3).

[14]*See* BUPERSNOTE 1910, 3420184, ¶ 1.a, Mar. 24, 1981 (Procedures Unsuitability Discharges).

[15]32 C.F.R. Part 41, App. A, 1.J; AR 635-200, ¶ 9-4.

[16]Generally the first 180 days of service. 32 C.F.R. § 41.6(i).

[17]32 C.F.R. Part 41, App. A, 1.J; AR 635-200, Ch. 9.

The Army regulation, AR 635-200, ¶ 9-1, note 1, states that "offenses of alcohol . . . abuse may properly be the basis for discharge proceedings under Chapter 14." Chapter 14 of AR 635-200 provides for discharge for Misconduct. An Under Other Than Honorable Conditions discharge is presumed, a General Discharge is authorized if merited, but an Honorable Discharge can only be awarded under exceptional circumstances.[18] Thus, a discharge for alcohol abuse under this provision would be a large step away from treating alcohol abuse as a medical condition. Note, however, that Chapter 14 does not mention alcohol abuse specifically. Also, the requirements for a Misconduct discharge must still be met for a Misconduct discharge to be issued.[19]

Presumably, alcohol abuse can also be a basis for discharge for "Unsatisfactory Performance."[20] Both Honorable and General discharges are authorized for "Unsatisfactory Performance."[21]

13.2 Preparation of Cases

13.2.1 Discharges Officially for Alcohol Abuse

13.2.1.1 Case Theory

a. P.13/2R, n.12:

Current cite is 32 C.F.R. § 70.9(c)(1).

b. P.13/2R, ¶ 5:

There are now provisions for the waiver of rehabilitation requirements,[22] but it is expected that servicemembers be offered rehabilitation for alcohol abuse under most circumstances.[23]

13.2.1.2 Sample Contentions

• P.13/3R:

These contentions should be refined to include reference to the DoD regulations at 32 C.F.R. Part 62 and, if possible, appropriate service regulations.

13.2.1.2.1 Contention A (for All Post-March 1, 1972 General Discharges for Unsuitability Due to Alcohol Abuse)

13.2.1.2.2 Contention B (for All Pre-April 14, 1959 Undesirable Discharges Officially Specifying Alcoholism and All April 14, 1959 to March 1, 1972 General Discharges for Unsuitability Due to Alcohol Abuse)

13.2.1.2.3 Contention C (for All Pre-April 14, 1959 Undesirable Discharges for Unfitness Due to Chronic Alcoholism)

13.2.2 Discharges Not Officially For Alcohol Abuse

13.2.2.1 Case Theory

a. P.13/4L, ¶ 1:

The Secretary of the Navy took a very hard line in some of these cases in the early 1980s. In one case, the BCNR had recommended upgrading a BCD to a GD because alcohol abuse should have been recognized and rehabilitation offered. If rehabilitation had failed, the servicemember would have received an Unsuitability Discharge. The Board also found the offenses to be minor (four nonjudicial punishments, two summary courts-martial, and two special courts-martial). The Secretary, however, overruled the Board, finding that—

> [g]iven the nature of his offenses, it is improbable that any alcohol abuse problem would have been recognized by authorities in order that he could have been placed in a rehabilitation program. Even if an alcohol problem had been recognized, no responsible official would have recommended him for rehabilitation because of his poor potential for useful service. Even if many of his offenses were to be considered relatively minor, the number of offenses committed by Petitioner and the frequency of occurrence causes the bad conduct discharge to be an appropriate sentence in his case.

The Secretary in this decision is, in effect, relieving the servicemember's Commander from attempting to identify alcohol abusers where there are no offenses obviously attributable to alcohol abuse (such as drunk driving). Also, the Secretary is clearly not treating alcoholism as the treatable disease it is, concluding instead that an alcohol abuser who has committed several disciplinary infractions is not an appropriate candidate for rehabilitation.

Under the current discharge philosophy of the services, the emphasis in these cases should be on the Command's responsibilities under current regulations to identify alcohol abusers, the evidence that an in-service condition existed, and the connection between the alcohol abuse and the offenses.

b. P.13/4L, ¶ 1:

Current standards do not now mandate an Honorable Discharge.[24]

c. P.13/4L, n.21, ¶ 2:

"See" reference should be to § 9.3.3.

13.2.2.2 In-Service Evidence

a. P.13/4L, n.22:

See, e.g., AD 78-03824; FD 79-01523.

b. P.13/4L, n.25:

See AD 78-03824; FD 79-01523.

c. P.13/4L, ¶ 5, add after last •:

Civilian convictions for offenses such as public drunkenness or driving while intoxicated are also sometimes found in the veteran's military record.[25]

13.2.2.3 Post-service Evidence

13.2.2.4 Pre-service Evidence

13.2.2.5 Sample Contentions

13.2.2.5.1 Contention D (for Presenting Evidence of Alcohol Abuse)

13.2.2.5.2 Contention E (Retroactive Application of Current Standards, Post-March 1, 1972 Discharges)

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[18]AR 635-200, ¶ 14-3.

[19]*See* Supp. Chapter 17.

[20]AR 635-200, Ch. 13; Supp. § 16.17.

[21]AR 635-200, ¶ 13-11.

[22]*See, e.g.,* AR 600-85, IO2, ¶ 3-8c.

[23]*See* Chapter Supplement above.

[24]Discussed in Supp. § 13.1.3.

[25]*See* AD 78-03824.

13.2.2.5.3 Contention F (Retroactive Application of Current Standards, April 14, 1959 to March 1, 1972 Discharges)

13.2.2.5.4 Contention G (Retroactive Application of Current Standards, Pre-April 14, 1959 Discharges)

13.3 Extent of Relief

13.3.1 Honorable or General Discharge

a. P.13/5L, ¶ 1 of Section:

Now the Army as well.[26]

b. P.13/5L, n.43a:

See AC 79-06564 (UD upgraded; servicemember had a history of emotional instability, became excessively drunk and discharged a gun in very close quarters injuring two persons. Although the servicemember was angry and intended to discharge the gun, the Board recognized that the drinking caused the offense); FD 79-00560; FD 79-01460; FD 81-00067; FC 81-02415; FD 79-00099; FD 79-00120; FD 78-00490.

c. P.13/5L, ¶ 2:

Note that for all of the boards now, alcohol induced conduct may be treated as less serious, but will still often be considered a negative factor for the applicant.

d. P.13/5L, n.44:

See ,e.g., FD 79-00589; FC 81-02415; FD 79-01460; FD 79-00560; FD 79-00099; FD 81-00067; FD 81-00120; FD 80-01822.

e. P.13/5R, ¶ 1:

With the Army and Air Force now requiring Honorable Discharges at ETS, it is unclear what standard the boards follow when determining whether to upgrade to a General or Honorable Discharge. Clearly the boards reserve the right, and frequently exercise the right, to only upgrade to a General Discharge Under Honorable Conditions. The criteria followed appear to be the general DoD criteria for characterization decisions.[27]

13.3.2 Sample Contention H (Applicable to All Alcohol Abuse Cases)

13.3.3 Reason Changed to Unsuitability

• P.13/6L, ¶ 1:

(1) Unsuitability is no longer a reason for discharge. Under most circumstances, the servicemember should ask that the reason be changed to "Secretarial Authority,"[28] "Convenience of the Government"[29] or, if warranted, "Alcohol Abuse Rehabilitation Failure."[30]

(2) On the current versions of the forms, the appropriate boxes to make the request for change in reason for discharge are, at the BCMRs, Box 8 on the DD Form 149 and, at the DRBs, Box 3c on the DD Form 293.

13.3.4 Aggravating Factors

13.3.5 Problem at Correction Boards

a. P.13/6R, ¶ 3:

See discussion at Supp. § 13.3.3 on Unsuitability as a reason for discharge.

b. P.13/6R, ¶ 4:

With the general decline of the discharge upgrade rate at DRBs relative to BCMRs—expending exceptional energy and time at the DRB, as suggested in MDU, is no longer warranted in most cases. Research of recent DRB and BCMR cases can provide some insight into the best approach under the facts of a particular case.

Appendix 13A

Regulations

1. Army

July 20, 1984 to present: AR 635-200
Alcohol Rehabilitation Failure, Unsatisfactory Performance, Convenience of the Government, Misconduct. UD, GD, or HD.

2. Navy
3. Marine Corps
4. Air Force

Appendix 13B

Research Key

Appendix 13C

DRB/BCMR Decisions

A. Case Lists

Section 13.2.1: Discharges Officially for Alcohol Abuse
Section 13.2.2.2: In-service Evidence
AD 81-06907; AD 81-01440.
Section 13.2.2.3: Post-service Evidence
AD 81-06907.
Section 13.2.2.4: Pre-service Evidence
Section 13.3: Extent of Relief

B. Digests of Cases Relied Upon

1. Army
AD 81-01440 (Military commander and others' statements in military records show that acts of indiscipline all related to alcohol abuse); AC 79-06564 (UD upgraded; servicemember had a history of emotional instability, became excessively drunk and discharged a gun in very close quarters injuring two persons. Although the servicemember was angry and intended to discharge the gun, the Board recognized that the drinking caused the offense).

2. Navy
ND 81-03537 (1954 UD for unfitness/repeated military offenses to GD; applicant's testimony that disciplinary problems related to alcohol problem accepted by Board. Current standards that provide for early identification and rehabilitation of alcoholics applied).

3. Marine Corps

4. Air Force

• Some additional Air Force Board cases with broad applicability:

FD 84-00842 (1976 UD for GOS upgraded to GD; four AWOLS, 44 days lost time, civilian charges for DWI and reckless driving; DRB found misconduct to

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[26] *See* Supp. § 13.1.3.

[27] *See* 32 C.F.R. Part 41, App.A, Part 2, § C, ¶ 2.b. *See also* Supp. §§ 9.3.2.2 and 13.3.4.

[28] *See* 32 C.F.R. Part 41, App.A, Part 1, § O.

[29] *See* 32 C.F.R. Part 41, App.A, Part 1, § C.

[30] *See* 32 C.F.R. Part 41, App.A, Part 1, § J.

be alcohol-related, applicant had never been offered alcohol rehabilitation).

FD 83-00258 (1982 UD for misconduct, frequent involvement, upgraded to GD; four Art. 15s for FTR, assaulting a citizen, and drunk and disorderly, one SCM for passing bad checks; applicant refused to complete alcoholism rehabilitation program; DRB considered good post-service conduct, sincere attempts at rehabilitation, and excellent duty performance—considered misconduct alcohol related and an "aberration" from applicant's normal behavior).

FD 82-00391 (1952 UD for unfitness upgraded to GD; one SCM for drunk and disorderly, 15 days lost time, facts leading up to discharge unknown; alcoholism considered "mitigating factor" in applicant's misconduct, DRB also considered three prior honorable discharges).

FD 82-00124 (1943 Blue Discharge (habits and traits) upgraded to HD under current standards; 3 SCMs for disobeying order and AWOLS, promoted or demoted 22 times, 88 days lost time, DRB found indiscipline all directly related to alcohol abuse).

FD 80-01717 (UD to HD; current standards, offenses alcohol related).

FD 80-01153 (1959 UD for unfitness upgraded to GD under current standards; two Art 15s for AWOL and operating POV without valid operator's permit, two SCMs for AWOL and incapacitated due to intoxication; applicant had 13 years prior service with four honorable discharges).

FD 79-01243 (1948 UD (resignation) upgraded to HD under current standards; applicant had been diagnosed as chronic alcoholic but induced to separate for minor offenses of behavior connected with alcoholism).

CHAPTER 14
Homosexuality

A. Overview

The area of homosexuality in the military has not fundamentally changed since MDU. The AIDS epidemic, discussed in the Chapter Supplement below, has had its impact. The military has followed its traditional pattern with homosexuals in dealing with AIDS. It was first treated as a conduct problem but DOD moved toward treating it with more sympathy (with some pushing by Congress along the way). The issues in this area are, however, far from resolved.

There have also been some court cases and changes in regulations. The changes in regulation have not been very significant. Some of the court cases discussed have, however, weakened arguments for upgrades based on the lack of impact on service. Presumptions of a report of homosexuality and the adverse impact on service have been held valid. Other court cases have been more favorable to homosexual servicemembers.

B. Chapter Supplement

(1) The military's handling of the AIDS epidemic has been very controversial. Beginning in the fall of 1985, all recruits have been tested for the presence of HTLV-III antibodies. DoD policy is that individuals who test positive for the AIDS antibodies are rejected from service before induction. The Navy extended this policy to require the discharge of seamen who had been in the Navy less than six months prior to the discovery of the illness. This Navy policy has been challenged in a lawsuit. Particularly controversial was the Navy's first policy of issuing General, Under Honorable Conditions, Discharges to the servicemembers who were found to have AIDS. After the lawsuit was filed, the Navy changed its policy to provide Honorable Discharges with no mention of AIDS on the discharge documents. Veterans who received General Discharges under the earlier policy should be successful in seeking upgrades.

Another issue relating to AIDS is whether admissions of homosexual conduct to medical personnel during the course of diagnosis can be used as a basis for discharge. DoD policy was to allow such statements to be used as the basis for a Convenience of the Government discharge, but not a homosexuality discharge. This policy has been criticized for forcing those who are found to be carrying AIDS antibodies, and who want to continue their military career, to make difficult decisions about candor with their doctors. The decisions are particularly difficult where the servicemember tests positive for the antibodies but is not yet showing any symptoms of the disease. In § 705 of the National Defense Authorization Act of 1987, Congress amended 10 U.S.C. § 55 to prohibit any information procured during "questioning of a serum-positive member of the Armed Forces for purposes of medical treatment or counseling or for epidemiological or statistical purposes" to be used for adverse personnel actions. Prohibited use includes an involuntary discharge for other than medical reasons. Veterans discharged based on information disclosed in violation of this act should argue that their discharge was improper. Veterans discharged before this act became law, but under circumstances which would currently violate its provisions, should make a current standards argument.[1]

For further information on AIDS issues, contact:
National Military Project on AIDS
Military Law Task Force
1168 Union Street, Suite 201
San Diego, CA 92101
619-233-1701

(2) A useful general resource regarding homosexuals in the military is *Lesbian and Gay Draft, Military and Veteran Issues,* available from the Midwest Committee for Military Counseling, 421 South Wabash, Chicago IL 60605.

C. Section Supplement

[1]*See* Chapter 21.

14.1 Introduction

a. P.14/1L, ¶ 1, sentence 2:

The Circuit Court of Appeals for the District of Columbia has stepped back from this position. In *Gay Veterans Association, Inc. v. Secretary of Defense,* 850 F.2d 764 (D.C. Cir. 1988), the court held that homosexual conduct can be broadly presumed to be a "negative aspect" in a servicemember's record which may support issuance of a less than Honorable Discharge, including a UD. In *Doe v. Secretary of the Air Force,* 563 F. Supp. 4 (D.D.C. 1982), *aff'd without opinion,* 701 F.2d 221 (D.C. Cir. 1983), an Air Force major had been issued a less than Honorable Discharge based on a finding that he had engaged in homosexual activity with the fifteen-year-old son of another Air Force officer. The District Court upgraded the discharge to a GD, holding that the military must make a showing that homosexual conduct is service-related in order for the servicemember to be discharged UOTHC. The court found that a GD rather than an HD was warranted because the regulation at issue presumed homosexual activity on the part of an officer would have an impact on the overall effectiveness of the military. There is no such regulatory presumption for enlisted men in the Air Force.[2]

b. P.14/1, n.2:

Material cited is now at 32 C.F.R. Part 41, App.A, Part 1, § H.

c. P.14/1R, n.4:

(1) The Army did not appeal this decision. It did, however, amend its regulations to eliminate "homosexual tendencies" as a basis for discharge. The failing of that regulation in the eyes of the *Ben-Shalom* decision of 1980 was that the mere statement by a servicemember that they were *a* homosexual, or associated with homosexuals, provided grounds for discharge. This was held to violate the First Amendment right of free speech and association. The amended regulations are described in MDU § 14.3. Homosexual servicemembers who do not engage in homosexual acts are still discharged based only on their statements, but there is an added element of desiring to engage in homosexual acts.

The plaintiff in the *Ben-Shalom* case was reinstated through her litigation. Because of delays in getting the Army to abide by the court's ruling, her enlistment did not expire until 1988. She applied for reenlistment at that time. The Army denied her application based on regulations which bar reenlistment to one who "desires bodily contact between persons of the same sex, . . . with the intent of obtaining or giving sexual gratification."[3] Ben-Shalom again sought relief from the courts.

In *Ben-Shalom v. Marsh,* 881 F.2d 454 (7th Cir. 1989), the court held that the new standard was constitutional and upheld the Army's refusal to reenlist. The court found no First Amendment violation, holding that there was little, if any, restriction on speech:

> Ben-Shalom is free under the regulation to say anything she pleases about homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes. What Ben-Shalom cannot do, and remain in the Army is *be* a homosexual. Although that is, in some sense, speech, it is also an act of identification. And it is the identity that makes her ineligible for military service, not the speaking of it aloud. Thus, if the Army's regulation affects speech, it does so only incidentally, in the course of pursuing other legitimate goals.[4]

The court also rejected a claim based on constitutional Equal Protection grounds. The court held that there was a rational basis for the Army's policy.

The current viability of the original *Ben-Shalom* finding that the homosexual tendencies discharge was unconstitutional is somewhat ambiguous. That decision has not been overruled and still should be cited when arguing homosexual tendency cases. The reasoning in the latest *Ben-Shalom* decision, however, seems to greatly narrow the earlier decision's applicability.[5]

(2) *See also Watkins v. United States Army,* 847 F.2d 1329 (9th Cir. 1988), *withdrawn, reh'g en banc,* 875 F.2d 699 (1989), *cert. denied,* __U.S.__ (Nov. 5, 1990). The withdrawn opinion had held that "the Army's reenlistment regulations violate the constitutional guarantee of equal protection of the laws because they discriminate against persons of homosexual orientation and because the regulations are not necessary to promote a legitimate compelling governmental interest." 875 F.2d at 704. The rehearing en banc did not reach the constitutional issue. Thus, although the opinion has been withdrawn it does set out the grounds which underpin an equal protection challenge to homosexual orientation regulations.[6]

14.2 Preparation of Cases Involving Homosexual Acts

a. P.14/2R, n.11:

Cite is now 32 C.F.R. Part 41, App.A, Part 1, § H, ¶ 1.b.

b. P.14/3L, n.12:

Cite is now 32 C.F.R. Part 41, App.A, Part 1, § H, ¶ 2.

c. P.14/3L, n.13:

The quoted provision has been changed to read:

> "In another location subject to military control if the conduct had, or was likely to have had, an adverse impact on discipline, good order, or morale due to the close proximity of other members of the Armed Forces."[7]

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[2]For more discussion of these cases see Supp. § 12.4.2.d. *See also* Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978), and Secora v. Fox, No. C-3-83-799 (S.D. Ohio Dec. 1, 1989) (remand to AFBCMR for failure to give reasoned explanation why veteran not retained under "unusual circumstances" exception in old regulation.)

[3]AR 140-111, Table 4-2, Rule E. These are similar to the grounds for discharge for homosexuals who do not engage in homosexual acts.

[4]881 F.2d at 462.

[5]The court avoided directly addressing this point by noting that the regulations had been changed, that the issue was now reinstatement and not discharge and that some of the characteristics which the judge in the earlier case had found objectionable in the earlier regulation had been eliminated. That judge, for instance, had been concerned that under the old regulation, servicemembers could not meet with homosexuals and discuss matters relating to homosexuality, without risking discharge for homosexuality. The later court found this possibility eliminated under the new regulations.

[6]The decision en banc is discussed at Supp. § 14.3.b.

[7]AR 635-200, ¶ 15-4.a (7).

The omission of the language "under circumstances in which privacy cannot reasonably be expected" weakens the qualification to this aggravating circumstance. Now, acts committed in close proximity to other servicemembers can be considered aggravating whether they were done under circumstances where privacy could be expected or not. For example, an act committed in a securely locked, reasonably soundproof room would previously not have been considered aggravating. Now if other servicemembers are in close proximity it could be considered aggravating. Note, however, that the act must have been at least "likely to have had an adverse impact on discipline, good order, or morale." An act committed in privacy which no one knows about may arguably meet this criteria and should not be considered aggravating.[8] A UD based on such an act should be challenged as improper.

d. P.14/3L, ¶ 2, last sentence:

For the reasons discussed above in paragraph d, the listing of "acts committed in a servicemember's own room" may not be appropriate here if other servicemembers were in "close proximity." Of course, anyone discharged under the previous incarnation of the regulation still has a valid argument it was violated in their discharge. Also, it can be argued that at least some acts committed in the servicemember's room are not "likely to have had an adverse impact on discipline, good order, or morale" as required under current regulation.[9]

e. P.14/3L, n.14:

The Army provision is now at AR 635-200, ¶ 15-4.a.

f. P.14/3L, n.15:

Current regulations are as follows:

> 32 C.F.R. Part 41, App. A, Part 1, § H, ¶ 2:
> When the sole basis for separation is homosexuality, a characterization Under Other Than Honorable Circumstances may be issued only if such characterization is warranted under section C of Part 2 and there is a finding [of aggravating circumstances].

Section C of Part 2 of 32 C.F.R. Part 41, App. A provides general standards for characterization of discharges. Discharges Under Conditions Other Than Honorable may be issued under the following circumstances:

> *1* When the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of members of the Military Services.
>
> *2* When the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected of members of the Military Services. Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death, abuse of a special position of trust, disregard by a superior of customary superior-subordinate relationships, acts or omissions that endanger the security of the United States or health and welfare of other members of the Military Services and deliberate acts or omissions that seriously endanger the health and safety of other persons.

Since the aggravating conditions would generally also constitute behavior which is "a significant departure from the conduct expected of members of the Military Service," the existence of aggravating circumstances is what determines where a discharge Under Other Than Honorable Conditions is appropriate.

g. P.14/3L, n.17:

Cite is now 32 C.F.R. § 70.8(b)(8).

h. P.14/3R, ¶ 2:

See Supp. § 14.1 above.

i. P.14/3R, n.18:

See Doe v. Secretary of the Air Force, 563 F. Supp. 4 (D.D.C. 1982), *aff'd without opinion,* 701 F.2d 221 (D.C. Cir. 1983); *Wood v. Secretary of Defense,* 496 F. Supp. 192 (D.D.C. 1980).

j. P.14/3R, n.20:

Cite is now 32 C.F.R. § 70.9(c)(1).

k. P.14/3R, add n.20a at end of ¶ 4:

> 20a. Note, for example, that under BUPERSMAN C-10311 and SECNAVINST 1900.9 of 20 April 1964, when servicemembers undergoing administrative separation were found to have engaged in one or more homosexual acts in service, an Undesirable Discharge was normally given. The current regulations, SECNAVINST 1900.9D and MILPERSMAN 3630400 limit UOTHC discharges to when there is a finding that a servicemember's conduct involved one or more of the seven aggravating circumstances listed in 32 C.F.R. Part 41, Appendix A, Part 1, § H, ¶ 2. MILPERSMAN 3630400 states:
>
> > [S]eparation may not be characterized as under other than honorable conditions unless there is also a finding that during the current term of service the member attempted, solicited or committed a homosexual act under the following circumstances: (a) by using force, coercion, or intimidation; (b) with a person under 16 years of age; (c) with a subordinate in circumstances that violate customary naval superior-subordinate relationships; (d) openly in public view; (e) for compensation; (f) aboard a naval vessel or aircraft; or (g) in another location subject to naval control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

Under current Navy regulations, when the circumstances surrounding a member's homosexual acts do not fit any of the seven aggravating circumstances, then characterization of service is in accordance with MILPERSMAN 3610300 which is the general separation regulation.

Language nearly identical to that in MILPERSMAN 3630400 is found in SECNAVINST 1900.9D; AR 635-200, Ch. 15 (the Army homosexuality separation regulation); and 32 C.F.R. Part 41, Appendix A, Part 1.H.2 (the underlying DoD regulation).

See AD 82-00099 (UD to HD; current standards, no aggravating circumstances. Homosexual and disciplinary incidents were isolated and the result of marital problems. Two in-service NP evaluations recommended discharge for

[8] *See* ND 81-00037 (UD to HD; two homosexual acts occurred on military installation, but Board noted that there was "no indication of adverse impact on discipline and good order or morale caused by the applicant's homosexuality.")

[9] AR 635-200, ¶ 15-4.a(7).

Character and Behavior disorder); ND 82-00252 (UD to HD; "[T]he reason for discharge should not be changed because the applicant, by his admitted participation in homosexual acts, clearly demonstrated that he was unfit for further military service," and separation warranted under BUPERSMAN C-10311. No aggravating circumstances and overall service record warrants HD); ND 81-05764 (UD to HD; current standards. Admission of 250 pre-and in-service passive and active acts. No aggravation and no disciplinary record); ND 81-04930 (UD to HD; two homosexual acts in hotel rooms off-base, final military behavior and OTA marks of 3.0); ND 81-03466 (UD to HD; applicant issued UD for unfitness/homosexuality, pursuant to BUPERSMAN C-10311, after admitting to an NIS agent that he had engaged in numerous homosexual acts with civilians off base. Applicant was classified as a Class II homosexual. Applicant's marks exceeded the minimum 3.0 in military behavior and 2.8 in OTA. Applying current standards pertaining to discharges for homosexuality, the Board found his record sufficiently meritorious to warrant an upgrade to HD); ND 81-02945 (1952 UD to HD; current standards, no aggravating circumstances); ND 81-02433 (UD to HD; applicant issued UD in 1961 for homosexual acts under BUPERSMAN, Art. C-10311 then in effect, upgraded to HD under SECNAVINST 1900.9D); ND 81-01077 (UD to HD; applicant discharged in 1951 for homosexual tendencies under BUPERSMAN Art. C-10312 then in effect; changed to HD under BUPERSMAN, Art. 3420189 in 1981); ND 81-06510 (UD to HD; Current Standards, no aggravating circumstances or disciplinary record); ND 81-00252 (UD to HD; psychiatric examination classified applicant as Class II Homosexual, based on an in-service act with another Navy man. Military Behavior/Conduct rating was 3.0 and OTA, 2.95); ND 81-00037 (UD to HD; two homosexual acts occurred on military installation, but Board noted that there was "no indication of adverse impact on discipline and good order or morale caused by the applicant's homosexuality."); ND 81-00006 (UD to HD; applicant issued UD for homosexuality in 1967 under BUPERSMAN, Article C-10311 then in effect. In 1981, NDRB upgraded to HD under SECNAVINST 1900.9D): MD 82-01276 (UD to HD; current standards, no aggravating circumstances, good record); FD 81-00954 (UD to GD; current standards, no aggravating factors, and overall record); FD 80-02104 (UD to HD; current standards, records missing but relied on testimony of applicant that no aggravating factors); FD 81-00429 (UD to HD; board of officers recommended retention because acts attributed to intoxication. The Secretary directed UD. Under current standards, had the board recommended retention, an HD or GD would be issued); FD 80-02520 (UD to HD; current standards. Aggravating factors alleged at time of discharge, but applicant's testimony that the act did not occur accepted); FD 80-01286 (UD to HD; current standards, no aggravating factors, acts while intoxicated).

14.3 Preparation of Cases Involving Homosexual Tendencies

a. P.14/4L, n.26:

Cite is now 32 C.F.R. Part 41, App. A, Part 1, § H, ¶ 1.b(1).

b. P.14/4L, ¶ 7:

(1) As described in Supp. § 14.1.c, the *Ben-Shalom* case referenced in this paragraph has been limited in application to the earlier homosexual tendencies discharge which did not include the element of "desire." In a later case involving the same plaintiff, the court found the reenlistment regulation, which contains similar grounds as the discharge regulation, to be constitutional. *Ben-Shalom v. Marsh,* 881 F.2d 454 (7th Cir. 1989).[10]

(2) The other significant litigation development in this area is *Watkins v. United States Army,* 875 F.2d 699 (9th Cir. 1989). Upon being drafted in 1967, Watkins had admitted on his preinduction medical form that he had homosexual tendencies. In 1968 he signed an affidavit, as part of an Army criminal investigation into his sexual conduct, stating that he had been a homosexual since he was thirteen years old and that he had, since enlistment, engaged in sodomy with two other servicemen. The Army dropped the investigation because of insufficient evidence. Watkins reenlisted in 1970. In 1972, Watkins was denied a security clearance because of his homosexuality and was again investigated for allegedly committing sodomy. The investigation was again terminated for insufficient evidence. In 1974, Watkins again reenlisted. In 1975, a discharge board in Korea heard testimony about his homosexuality and that "everyone in the company knew [he] was homosexual . . . and [his] homosexuality had not caused any problems or . . . complaints." That board recommended retention and he was retained. In 1977, Watkins was granted a security clearance. In 1979, Watkins again reenlisted.

In 1980, in Germany, his security clearance was revoked based on his 1968 admissions of homosexual conduct and his performance as a female impersonator (with the permission of his commanding officer). In 1981, another discharge proceeding was convened and recommended an HD. This discharge was delayed by a federal court beyond the end of Watkins enlistment. The Army, however, denied Watkins reenlistment.

In this case, the court now has held that the Army was equitably estopped from denying Watkins enlistment. The court's holding was based on the Army's long standing knowledge of Watkin's sexual preference, his reliance on its tolerance in continuing his career, and the injustice of ending Watkins's career prematurely after so long.

c. P.14/4R, n.32:

See also § 12.5.1.3.

d. P.14/4R, add to end of section:

> Poor ratings received due to the alleged homosexual conduct should be ignored by the Board under the same current standard argument which precludes less than honorable discharges for those who have engaged in non-aggravated homosexual activity and whose record otherwise supports an HD.[11] Poor ratings are not generally authorized for mere homosexual conduct without something in the conduct being otherwise objectionable (*e.g.,* an "aggravating circumstance").

14.4 Sample Contentions

14.4.1 Contention A (for all Discharges for Homosexual Tendencies)

• P.14/4R, ¶ 1:

See discussion at Supp. § 14.1.c.

[10]*See* discussion at Supp. § 14.1.c.

[11]*See* MD-80-00388 (UD to HD; "The majority has seen fit to take issue with the assignment of applicant's conduct marks citing that the record of service . . . does not reveal any disciplinary infractions that would warrant the low conduct marks . . . [low marks due to homosexual conduct].")

14.4.2 Contention B (for all Discharges for Homosexual Tendencies or for Homosexual Acts)

a. P.14/5L, ¶ 1:

If the applicant has an UD/UOTHC discharge, add *Doe v. Secretary of the Air Force,* 563 F. Supp. 4 (D.D.C. 1982), *aff'd without opinion,* 701 F.2d 221 (D.C. Cir. 1983) to the case list.

b. P.14/5R, n.37:

See § 12.5.1.3.

14.4.3 Contention C (for Discharges for Homosexual Tendencies)

a. P.14/6L, ¶ 1:

The 32 C.F.R. § 70.6(c)(1) cite is now 32 C.F.R. § 70.9(c)(1).

b. P.14/6L, ¶ 2:

The 32 C.F.R. § 70.6(c)(1) cite is now 32 C.F.R. § 70.9(c)(1).

14.4.4 Contention D (for Discharges for Homosexual Acts not Involving Aggravating Circumstances)

a. P.14/6L, ¶ 1:

The current provisions state:

> When the sole basis for separation is homosexuality, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted . . . and there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:
>
> a. By using force, coercion, or intimidation;
> b. With a person under 16 years of age;
> c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;
> d. Openly in public view;
> e. For compensation;
> f. Aboard a military vessel or aircraft; or
> g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

32 C.F.R. Part 41, App. A, Part 1, § H, ¶ 2.

b. P.14/6R, ¶ 3:

Cite is now 32 C.F.R. Part 41, App. A, Part 1, § H.

c. P.14/6R, ¶ 4:

Cite is now 32 C.F.R. Part 41, App. A, Part 1, § H.

d. P.14/6R, ¶ 5:

(1) The 32 C.F.R. § 70.6(c)(1) cite is now 32 C.F.R. § 70.9(c)(1).
(2) The 32 C.F.R. § 41.13(c) cite is now 32 C.F.R. Part 41, App. A, Part 1, § H, ¶ 2.

14.5 Special Issues

14.5.1 Change of Reason for Discharge

14.5.2 Veteran Denies Being a Homosexual

a. P.14/7L, n.42:

See FC 80-03628 (1978 HD voided, back pay and allowances allowed, and RE Code upgraded to RE1 by AFBCMR; preponderance of evidence did not establish association with homosexuals).

b. P.14/7L, ¶ 4, add n.42a after 1st sentence:

42a. *E.g.,* Under Air Force Regulation, an administrative discharge may be based solely on the entirely uncorroborated, unrepeated statement by a servicemember to his commander that he had been "involved in a homosexual relationship." OpJAGAF 1982/17 (2 April 1982).

c. P.14/7R, n.44:

See report discussed in MD-80-00388 (UD to HD; homosexual act denied, psychiatrist said not homosexual "but willing to accept sexual gratification by any method available to him." Board found was homosexual and applied current standards upgrading to HD but leaving reason Unfitness.)

d. P.14/7R, n.44a:

AR 635-89 in the 1960's provided that:

> The following classes of persons will not be processed under the provisions of these regulations [governing discharge for homosexuality]:
>
> (1) Individuals who seek to avoid military service by an unverifiable assertion of homosexuality.
> (2) Those individuals who solely as a result of immaturity, curiosity, or intoxication have been involved in homosexual acts. . . .[12]

Under this regulation it is important for the psychiatrist to make specific findings of "immaturity, curiosity, or intoxication."[13]

e. P.14/7R, ¶ 2:

Finding of one of the listed items *does not* preclude a discharge for homosexuality as stated in the original text. The regulation uses the word "and," not "or," in linking the factors and a note in the Army regulation states that all five items must be found.[14]

f. P.14/7R, n.45:

Cite is now 32 C.F.R. Part 41, App. A, Part 1, § H, ¶ 1.c(1).

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[12]AR 635-89, ¶ 1.2.b.

[13]*See* Falk v. Secretary of the Army, 87 Civ. 2694 (S.D.N.Y. 1988) (Surgeon General finding of "Immature Personality Disorder" does not show "immaturity" within meaning of regulation), *aff'd,* 870 F.2d 941 (2d Cir. 1989).

[14]The note at AR 635-200, ¶ 15-3 states:

> To warrant retention of a member after finding that he or she engaged in or attempted to engage in a homosexual act, the board's findings must specifically include *all five* findings listed in a(1) through (5) above. (Emphasis in original)

The third finding required is omitted from the original text. It is:

> (c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

32 C.F.R. Part 41, App. A, Part 1, § H, ¶ 1.c(1)(c).

g. P.14/7R, n.46:

Cite is now AR 635-200, ¶ 15-3.a(2). At times a finding of immaturity or intoxication has been required to avoid discharge for homosexuality when a homosexual act has been committed.[15]

h. P.14/7R, n.47:

See, e.g., ND 81-02008 (UD to HD; admission of homosexual conduct made under duress).

i. P.14/7R, n.49:

See FD 80-02276 (Upgrade of 1944 UD denied; "In the opinion of the Board, a member who procures his discharge by fraud does not establish that the discharge received was improper or inequitable by even a persuasive showing that his conduct was motivated by a legitimate concern."). FD 79-00495 (1956 UD upgraded to GD; applicant's truthfulness admirable when he was aware that an upgrade would be likely under current standards for homosexuality, but fraud renders him undeserving of HD).

14.5.3 Preservice Conduct

• P.14/8L, n.51:

(1) Beware of the possibility of fraud on the applicant's enlistment documents if there had been homosexual acts prior to enlistment.[16]

(2) *See* ND 81-00147 (UD to HD; upgrade notwithstanding preservice acts).

14.5.4 Coerced Resignations

14.5.5 Confrontation with Accuser

14.5.6 Retention and Reinstatement

14.5.7 Constitutional Validity of a Discharge for Homosexual Acts

14.5.8 Regulatory Arguments

14.6 Special Review Board Procedures

14.6.1 Investigative Files

14.6.2 Tender Letters

• P.14/9L:

The tender letter procedure is now used by all boards—but rarely.[17]

14.7 VA Policy Towards Servicemembers Discharged for Homosexual Acts

• P.14/9R, n.66:

See § 6.3.

14.8 Relevant DRB Index Categories

Appendix 14A

Regulations

DoD: 32 C.F.R. Part 41, App. A, Part 1, § H; Army 635-200, Ch. 15 (July 20, 1984).

[15]*See* d above, this section.

[16]*See* § 14.5.1 and § 14.1 (Old Homosexual Category IV)

[17]*See also* § 9.2.7.5.5.

Appendix 14B

DRB/BCMR Decisions

A. Case Lists

1. Army BCMR
2. Army DRB
AD 82-00114.
3. Air Force DRB
4. Marine DRB
MD 81-05258; MD 81-03520; MD 81-03452.
5. Navy BCNR
6. Navy DRB
ND 81-04268.

B. Digests of Cases Relied Upon

1. Army

AD 82-00114 (UD to HD; acts with civilian in hotel. Excellent conduct and efficiency ratings);

AD 82-00099 (UD to HD; current standards, no aggravating circumstances. Homosexual and disciplinary incidents were isolated and the result of marital problems. Two in service NP evaluations recommended discharge for Character and Behavior disorder).

2. Navy

ND 82-00252 (UD to HD; "[T]he reason for discharge should not be changed because the applicant, by his admitted participation in homosexual acts, clearly demonstrated that he was unfit for further military service," and separation warranted under BUPERSMAN C-10311. No aggravating circumstances and overall service record warrants HD);

ND 81-05764 (UD to HD; current standards. Admission of 250 pre and in-service passive and active acts. No aggravation and no disciplinary record);

ND 81-04930 (UD to HD; two homosexual acts in hotel rooms off-base, final military behavior and OTA marks of 3.0);

ND 81-03466 (UD to HD; applicant issued UD for unfitness/homosexuality, pursuant to BUPERSMAN C-10311, after admitting to an NIS agent that he had engaged in numerous homosexual acts with civilians off-base. Applicant was classified as a Class II homosexual. Applicant's marks exceeded the minimum 3.0 in military behavior and 2.8 in OTA. Applying current standards pertaining to discharges for homosexuality, the Board found his record sufficiently meritorious to warrant an upgrade to HD);

ND 81-02945 (1952 UD to HD; current standards, no aggravating circumstances);

ND 81-02433 (UD to HD; applicant issued UD in 1961 for homosexual acts under BUPERSMAN, Art. C-10311 then in effect, upgraded to HD under SECNAVINST 1900.9);

ND 81-01077 (UD to HD; applicant discharged in 1951 for homosexual tendencies under BUPERSMAN Art. C-10312 then in effect; changed to HD under BUPERSMAN, Art. 3420189 in 1981);

ND 81-06510 (UD to HD; current standards, no aggravating circumstances or disciplinary record);

ND 81-04268 (1944 UD to HD; UD too harsh in light of overall service and no aggravating conditions).

ND 81-02008 (UD to HD; admission of homosexual conduct made under duress);

ND 81-00252 (UD to HD; psychiatric examination classified applicant as Class II Homosexual, based on an in-service act with another Navy man. Military Behavior/Conduct rating was 3.0 and OTA, 2.95);

ND 81-00147 (UD to HD; upgrade notwithstanding preservice acts);

ND 81-00037 (UD to HD; two homosexual acts occurred on military installation, but Board noted that there was "no indication of adverse impact on discipline and good order or morale caused by the applicant's homosexuality.");

ND 81-00006 (UD to HD; applicant issued UD for homosexuality in 1967 under BUPERSMAN, Article C-10311 then in effect. In 1981, NDRB upgraded to HD under SECNAVINST 1900.9D).

3. Marine Corps

MD 82-01276 (UD to HD; current standards, no aggravating circumstances, good record);

MD 81-05258 (UD to HD; overall record satisfactory, post-service record good, applicant viewed as intoxicated young victim of predatory NCO);

MD 81-03520 (1962 UD to GD; no aggravating circumstances in five off-base acts with civilians. Conduct and Proficiency marks of 3.4/3.5);

MD 81-03452 (UD to HD; no aggravating circumstances, good record, two passive homosexual acts with a Marine and a civilian while intoxicated).

4. Air Force

FD 81-00954 (UD to GD; current standards, no aggravating factors, and overall record);

FD 80-02104 (UD to HD; current standards, records missing but relied on testimony of applicant that no aggravating factors);

FD 81-00429 (UD to HD; board of officers recommended retention because acts attributed to intoxication. The Secretary directed UD. Under current standards, had the board recommended retention, an HD or GD would be issued);

FC 80-03628 (1978 HD voided, back pay and allowances allowed, and RE Code upgraded to RE1 by AFBCMR; preponderance of evidence did not establish association with homosexuals);

FD 80-02520 (UD to HD; current standards. Aggravating factors alleged at time of discharge, but applicant's testimony that the act did not occur accepted);

FD 80-02276 (Upgrade of 1944 UD denied; "In the opinion of the Board, a member who procures his discharge by fraud does not establish that the discharge received was improper or inequitable by even a persuasive showing that his conduct was motivated by a legitimate concern.");

FD 80-01286 (UD to HD; current standards, no aggravating factors, acts while intoxicated);

FD 79-00495 (1956 UD upgraded to GD; applicant's truthfulness admirable when he was aware that an upgrade would be likely under current standards for homosexuality, but fraud renders him undeserving of HD).

CHAPTER 15
Drug Abuse

A. Overview

There have been substantial changes in DoD and service regulations and the case law. Not only has there been substantial overall change since the 1982 edition of MDU, but in that period a number of regulatory provisions have come and gone or been changed several times. Thus, in presenting a drug case to a board, it is important to examine both the service regulations applicable at the time of discharge and current regulations. Many regulatory violations have occurred in these discharges, and with the changes in regulations, current standards arguments are often fruitful. In addition to the changes in regulations, there has been substantial controversy regarding the accuracy of drug tests administered by the military. Drug tests conducted before 1984 at certain laboratories, for instance, are particularly suspect and an upgrade is likely.

The most significant effect of the changes that have occurred since MDU has been that less than honorable discharges, including discharges under other than honorable conditions, are now routinely given for light, personal use of any illegal drug. This is discussed in detail throughout this chapter.

B. Chapter Supplement

1. The term "Drug Abuse" is used in this Supplement Chapter as it is defined in DoD Directive 1332.14:

> "Drug abuse . . . is the illegal, wrongful, or improper use, possession, sale, transfer or introduction on a military installation of any narcotic substance, intoxicating inhaled substance, marijuana, or controlled substance, as established by 21 U.S.C. 812.m. . . ."

2. This chapter in MDU has separate sections for discharges before July 1971 and after July 1971. Information in some parts of these sections, pertaining to specific subjects, § 15.2.4 Drug Sales, for example, may be useful in any case involving that subject, whether the discharge was before or after July 1971.

3. Note new sections on challenging urinalysis results based on regulatory violations in sample taking and processing, § 15.3.6, and the validity of the testing methodologies, § 15.3.7, and the new section on the use of urinalyses at courts-martial, § 15.3.8.

4. MDU § 15.4.3.1 is somewhat mis-titled as "Errors Related to Participation in Drug Rehabilitation Programs." In fact, it deals with exemption policies in a more general context than rehabilitation programs. The exemption policy is the set of regulatory restrictions which the services have adopted on the use of certain kinds of evidence of drug abuse. The evidence whose use is restricted is called "limited use evidence." Limited use evidence may include urinalysis results, evidence obtained through medical treatment, and evidence obtained as the result of self-referral to drug rehabilitation. Limited use evidence cannot be introduced in a U.C.M.J. proceeding and if introduced by the government in an administrative discharge proceeding, any discharge resulting from that proceeding must be characterized as honorable. The details of this policy are discussed at Supp. § 15.4.3.1.

5. Under DoD regulations, it is largely left to the discretion of the services when to discharge drug abusers, what reason to give for such discharges and how to characterize the service.[1] An exception to this is for those who have failed drug rehabilitation programs. A discharge for drug abuse rehabilitation failure is given when a servicemember has been referred to a rehabilitation program and has failed to complete the program through "inability or refusal to participate in, cooperate in" or other reason and:

> (1) There is a lack of potential for continued military service; or
>
> (2) Long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.[2]

---

[1]The DoD regulations did not become effective until they were implemented by the services. Because of delays in service implementation, preexisting DoD policy stayed in effect for a period after DoD had officially changed its policy. Of particular significance was the continuation for a period of the requirement that servicemembers identified as drug users by compelled urinalysis be given no less than an HD if discharged for drug use.

[2]32 C.F.R. Part 41, App. A, Part 1, § I, ¶ 1.

The characterization of service is either HD or GD.[3]

Servicemembers discharged for drug abuse who are not considered rehabilitation failures can be considered for discharge by reason of misconduct under service regulations. The discharge may be accomplished without prior rehabilitation.[4] Rehabilitation is, however, usually offered to servicemembers in grades E1-E4. The following servicemembers are normally discharged without further referral to rehabilitation:

(1) First-time drug offenders, grades E5-E9. Members in these grades will be processed for separation upon discovery of a drug offense.[5]

(2) Second-time drug offenders, grades E1-E9. All members must be processed for separation after a second offense.[6]

(3) Medically-diagnosed drug dependent members, grades E1-E9. All members will be processed for separation upon completion of actions required by AR 600-85.[7]

The characterization of service is usually Under Other Than Honorable Conditions (UOTHC) unless the exemption policy applies.[8]

6. In the 1982 amendments to the MANUAL FOR COURTS-MARTIAL (47 Fed. Reg. 42,317), ¶ 127c discusses constructive possession:

> "To possess" means to exercise control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item. An accused may not be convicted of possession of a con-

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[3]32 C.F.R. Part 41, App. A, Part 1, § I, ¶ 2. *See also* AFR 39-10, ¶ 1-21e(3), Oct. 1, 1982, which permitted a GD where evidence of drug abuse rehabilitation failure results from urinalysis.

[4]AR 600-85, ¶¶ 1-10.b, 3-8.c. and AR 635-200, ¶¶ 14-2.a(2), 14-12.d. AR 600-85, IO4, ¶ 1-10.f provides:

> Soldiers identified as nondependent illegal drug abusers, who in the opinion of their commander warrant retention, should be enrolled in the ADAPCP [rehabilitation program] when enrollment is recommended by the ADAPCP.

[5]AR 600-85, IO6, ¶ 1-10.c provides:

> Officers, Warrant Officers, and enlisted persons (E5-E9) who are identified as illegal drug abusers will be processed for separation from the service. These individuals have violated the special trust and confidence the Army has placed in them.

[6]AR 600-85, IO4, ¶ 1-10.d provides:

> Soldiers who have been identified in two separate instances occurring since 1 July 1983 as illegal drug abusers will be processed for separation from the service.

[7]AR 635-200, ¶ 14-12.d. AR 600-85, IO4, ¶ 1-10.e provides:

> Individuals diagnosed as physically drug dependent (other than alcohol) will not generally possess the potential for future service and will be processed for separation. These individuals will be detoxified, given medical treatment, and afforded the opportunity for rehabilitative treatment through the Veterans Administration, or a civilian program. . . .

[8]AR 635-200, ¶ 14-3. A GD is also authorized and an HD may be awarded under exceptional circumstances. *Id. See also* Supp. § 15.4.3.1. Note there have been several changes in drug regulations since MDU. For example, DoD Directive 1332.14 amended 32 C.F.R Part 41 between the publication of MDU and the later DoD directives which authorized the Army to issue the regulations described above. That directive provided a separate reason for discharge for Personal Abuse of Drugs:

> *Personal abuse of drugs other than alcoholic beverages.* Discharge with an honorable discharge, or general discharge as warranted by the member's military record, when based on evidence developed as a direct or indirect result of a urinalysis test administered for identification of drug abusers, or by a member's volunteering for treatment for a drug problem under the Drug Identification and Treatment Program administered by his or her particular Armed Force, and:
>
> (1) Member's record indicates lack of potential for continued military service; or
>
> (2) Long-term rehabilitation is determined necessary and member is transferred to a Veteran's Administration or civilian medical facility for rehabilitation, or
>
> (3) Member has failed, through inability or refusal, to participate in, cooperate in, or complete a drug abuse treatment and rehabilitation program.
>
> **Note.**—Nothing in this section precludes separation under any other provision of this Part in appropriate cases involving a member who has been identified through urinalysis or who has volunteered for treatment, subject to the limitations on characterization in the Deputy Secretary of Defense memorandum, "Alcohol and Drug Abuse," dated December 28, 1981 [Exemption Policy, *See* Supp. § 15.4.3.1]. *See also* BUPERSNOTE 1910, 3420183, ¶ 1, Mar. 24, 1981:
>
> 1. Members may be separated by reason of personal drug abuse with an [HD] because of personal use of drugs other than alcoholic beverages when evidenced, upon initial identification, by a urinalysis test administered for identification of drug abusers or upon volunteering for exemption and:
>
> a. The member's record indicates lack of potential for continued military service; or
>
> b. Long-term rehabilitation is determined necessary and the member is transferred to a Veterans Administration or civilian medical facility for rehabilitation; or
>
> c. The member has failed through inability or refusal to participate in, cooperate in, or complete a drug abuse treatment and rehabilitation program.

BUPERSNOTE, 3420185, ¶ 1.f, Mar. 24, 1981, provided that a discharge for drug abuse could not be "effected until the member has completed a 30-day period of counseling commencing when the member reports his or her drug abuse or when the member is formally warned by civil or military authorities that he or she is suspected of drug abuse. . . . If the drug abuse involves sale or trafficking, processing is mandatory." This is from the misconduct section and is not applicable when the evidence is from urinalysis or volunteering for treatment under exemption program.

trolled substance if the accused did not know that the substance was present under the accused's control. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.[9]

Thus, if an applicant has drugs in his possession, (s)he may challenge a discharge for "possession" on the grounds that his or her control of the drugs was not conscious and knowing.

C. Section Supplement

15.1 Introduction

a. P.15/2R, ¶ 2:

This Court of Military Appeals case was overturned in 1980.[10] The services have all changed their policies to permit less than honorable discharges based on urinalysis results.[11]

b. P.15/2R, n.11:

There is no longer a separate reason for discharge for drug use, except for those who have failed to complete a rehabilitation program.[12]

15.1.1 Summary of Current Policy

a. P.15/3L, ¶ 3:

There is still an emphasis on rehabilitation for lower-ranking enlisted members (E1-E4). Rehabilitation prior to discharge is now, however, not mandatory.[13]

There is a policy of zero tolerance for both commissioned and non-commissioned officers. A single positive urinalysis for any illegal drug will usually result in an administrative discharge—usually under other than honorable conditions (UOTHC). Courts-martial, though less common, are not unusual. Repeat offenders in the lower ranks are also likely to receive less than honorable discharges or a court-martial.[14]

b. P.15/3L, n.16:

In 1985 there were 14,017 discharges for misconduct—drug abuse. Of these, only 1,131 were honorable; 6,288 were general under honorable conditions and 6,265 were UOTHC. 324 were uncharacterized.[15]

c. P.15/3L, n.17:

This limitation on jurisdiction has been overruled.

15.1.2 Types of Cases

- P.15/3R, ¶ 1, Add •:
- Drug Rehabilitation Failure.

[9]The stated bases for this definition, in the DoD sectional analysis, were United States v. Aloyian, 16 U.S.C.M.A. 333, 36 C.M.R. 489 (1966) and paragraph 4-144, Military Judges' Guide, DA PAM 27-9 (May 1969). *See also* United States v. Wilson, 7 M.J. 290 (C.M.A. 1979), and cases cited therein concerning constructive possession.

[10]United States v. Armstrong, 9 M.J. 374, 8 MIL. L. REP. 2523 (C.M.A. 1980).

[11]*See* Supp. § 15.4.3.1.

[12]32 C.F.R., Part 41, App.A, Part 1, § I; AR 635-200, Ch.9.

[13]AR 600-85, IO2, ¶ 3-8.c; AR 635-200, ¶ 14-12.d. *See also* Chapter Supplement ¶ 5, *supra.*

[14]*See* Chapter Supplement ¶ 5, *supra.*

[15]These uncharacterized discharges were probably mostly Entry Level Separations given to members who had been in service less than 180 days.

15.2 Discharges Before July 1971

- For equity arguments related to discharges both before and after July 1971, *see also* § 15.4.4.

15.2.1 Time Frame Covered by the Laird Memo

15.2.2 Types of Drugs and Drug Use Covered by the Laird Memo

15.2.3 Discharges Covered By the Laird Memo

a. P.15/5R, ¶ 1:

Current Army and Air Force DRB and BCMR practice is to upgrade the discharge of servicemembers who received undesirable (under conditions other than honorable) discharges "issued solely on the basis of personal use of drugs or possession of drugs for such use" regardless of other conduct. The Navy DRB, however, denies upgrades on the grounds of other conduct which it finds aggravating.[16] Litigation was filed against the NDRB and a Federal District Court certified a class action and found the Laird Memo to be binding on the NDRB and consideration of "aggravating circumstances" to be improper when the criteria for a Laird Memo upgrade were met. On appeal, however, the appellate court held that the Laird Memo was a non-binding policy. The case was remanded to determine if the Navy Board's following of a different rule than the Army and Air Force Boards violated the statutory requirement that the boards follow uniform standards and the constitutional guarantee of equal protection. *Vietnam Veterans of America v. Secretary of the Navy,* 843 F.2d 528 (D.C. Cir. 1988). On remand, the District Court held that the policies were not equal as required but the court could not determine which policy was proper. Rulemaking would be required and it was feared that upon review the Laird Memo would be revoked. (*See* Supp. Appendix 15D for selected Laird Memo cases compiled to support the plaintiffs' case in this lawsuit.)

b. P.15/5R, n.36:

See AC 80-06196 ("Although [the board] does not condone offenses of absence without leave or breaking restriction, [it] considers these offenses relatively minor and related to the applicant's admitted drug abuse." The board found the case met the requirement that the reason for discharge must have been "solely on the basis of personal use of drugs.").

15.2.4 Drug Sales

a. P.15/6L, n.43:

See discussion at Supp. § 15.5.3.3.

b. P.15/6R, n.45:

See United States v. Foster, 13 M.J. 558, 10 MIL. L. REP. 2625 (A.F.C.M.R. 1982); *United States v. Fortney,* 12 M.J. 987, 10 MIL. L. REP. 2479 (A.F.C.M.R.), *petition denied,* 13 M.J. 495, 10 MIL. L. REP. 2476 (C.M.A. 1982).

[16]*See* Supp. Appendix 15D.4.

15.2.5 Extent of Relief Available Under the Laird Memo

a. P.15/6R, last ¶:

Applying current standards for character of service to the case of a veteran discharged for personal abuse of drugs is no longer necessarily a good idea. Under current standards, if the servicemember is to be discharged instead of sent to rehabilitation, a UOTHC discharge is possible, and common.[17] The exception to this is where limited use evidence was introduced on the character of service.[18]

b. P.15/6R, n.47:

See a, this section, *supra.*

c. P.15/7L, ¶ 1:

The issue of whether to ask for a hearing is largely moot today because the statute of limitations for applying to the DRBs has passed in all Laird Memo cases and BCMRs grant very few hearings.

d. P.15/7L, n.48:

An HD is no longer to be expected under these circumstances, although it is possible.

15.2.6 Sample Contentions

a. P.15/7L:

Since the statute of limitations for application to the DRBs has passed for Laird Memo applicants, only the BCMRs now consider these cases. Unlike the DRBs, the BCMRs are not under any compulsion to respond to contentions. Contentions are nevertheless useful as a clear step-by-step recitation of the logic of the argument presented.

b. P.15/7L, #5:

Since the statute of limitations has passed for application to DRBs in Laird Memo cases, the board specified should be the BCMR.

c. P.15/7R, #6:

The cite to 32 C.F.R. § 70.6(c)(1) is now 32 C.F.R. § 70.9(c)(1). This is, howver, a DRB regulation and no longer directly applicable in Laird Memo cases.[19] BCMRs are not required by regulation to apply current standards but often do so as a matter of equity. Also, as noted, the current standards have changed,[20] making the argument in this contention less viable.

In cases where no rehabilitation was offered, and the applicant's rank was below E5, the lack of available rehabilitation should be raised as a matter of equity, as follows:

> 6. At the time of Applicant's discharge, rehabilitation programs were not generally available.
>
> 7. Rehabilitation is now normally available to servicemembers of Applicant's rank prior to discharge.
>
> 8. Under current standards, Applicant would have received treatment and would have been able to continue his service to the end of his enlistment period at which time he would have been awarded an Honorable Discharge [cite to service regulation for characterization at ETS].
>
> 9. Applicant's discharge is inequitable and should be re-characterized to fully honorable because servicemembers in Applicant's situation now receive rehabilitation and Honorable Discharges.

15.3 Discharge Resulting From Urinalyses

• P.15/7R, last ¶:

(1) *See also* Supp. § 15.4.3.1 relating to the exemption policy for some urinalysis test results.

(2) The Army DRB telephone number is now (202) 692-4560.

15.3.1 Introduction

a. P.15/8L, ¶ 3:

The 1974 decision of the Court of Military Appeals, *United States v. Ruiz,* 22 C.M.A. 181, 48 C.M.R. 797, 2 MIL. L. REP. 2063 (1974), was overruled in *United States v. Armstrong,* 9 M.J. 374, 8 MIL. L. REP. 2523 (C.M.A. 1980). Thus, those receiving a less than honorable discharge pursuant to a compelled urinalysis, after the *Armstrong* decision, are not automatically entitled to an upgrade. Although the Article 31 channel of attack has been thwarted, challenge based on regulatory requirements and constitutional fourth amendment search and seizure attacks on compelled urinalysis are still possible.[21] The Supreme Court's holding concerning the limited applicability of the exclusionary rule in the administrative setting, however, makes this a difficult route in challenging administrative discharges, unless there is a specific remedy provided for in service regulations.[22]

After the reversal of *Ruiz,* the discharge regulations were revised to permit less than honorable discharges for drug abuse. Under current Army regulations, for instance, a misconduct discharge with a presumption of UOTHC is typical for first time offenders of grades E5–E9 and second-time offenders grades E1–E9.[23]

b. P.15/8R, n.61a:

The *Walters* case failed on statute of limitations grounds (725 F.2d 107 (D.C. Cir. 1983)).

15.3.2 *Giles* Class Defined

• P.15/8R, ¶ 2:

Veterans discharged after *Ruiz* was overturned and service regulations were changed are not members of the *Giles* class.

15.3.3 Expedited Review Procedures Under *Giles*

• P.15/9R, ¶ 1:

Note that the DRB statute of limitations does not effect the right to an upgrade by virtue of the *Giles* decision.

15.3.4 Navy, Marine Corps, and Air Force Discharges

a. P.15/9R, ¶ 2:

The litigation discussed in this paragraph failed on statute of limitations grounds.[24] For those who were discharged during the reign of *Ruiz,* the argument suggested in MDU should be followed in Navy, Marine Corps, and Air Force

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[17]*See* Chapter Supplement, ¶ 5, *supra.*

[18]*See* Supp. § 15.4.3.1.

[19]*See* a, this section, *supra.*

[20]*See* Supp. § 15.2.5, *supra.*

[21]The law in this area is still developing. Current trends appear to be towards making fourth amendment claims unlikely to succeed.

[22]*See* Chapter Supplement P.12/28R, ¶ 2, *supra; see* INS v. Lopez-Mendoza, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984).

[23]AR 635-200, ¶ 14-12.d. *See* Chapter Supplement, ¶ 5, *supra.*

[24]*See* Supp. § 15.3.1.b.

cases (*i.e.*, that Article 31, as applied at the time of discharge, was violated).

b. P.15/9R, ¶ 3:

This paragraph of MDU was placed incorrectly. It should be the last paragraph of § 15.3.3, *supra.*

15.3.5 Sample Contentions For Navy, Marine Corps, and Air Force Veterans

a. P.15/9R, #1:

The further qualification that the applicant was discharged prior to *Ruiz* being overturned should be added to this contention.

b. P.15/10L, #5 (continued):

(1) Cite to 32 C.F.R. § 70.6(c)(1) is now 32 C.F.R. § 70.9(c)(1).

(2) *See* Supp. § 15.2.6.c for further comments on the usefulness of this contention and a suggested alternative.

15.3.6 Violation of Regulations Governing the Handling of the Urine Sample and the Lab Tests

There are detailed regulations governing the taking of urine samples and their handling. These regulations govern every step from witnessing of the giving of the sample to preservation of the sample after it has been taken. In addition to the service-wide regulations, individual commands may have their own regulations governing the taking of samples and their transmittal to drug testing laboratories.[25] While violations of these regulations are often grounds for reversal of a court-martial conviction,[26] they are less frequently viewed as prejudicial by DRBs and BCMRs in administrative discharges. Examples of regulatory guidelines which may be violated are:

- Unauthorized test.[27]
- Breaks in, incorrect recordation of, or inappropriate personnel in chain of custody.[28]
- Improper storage of sample.[29]
- Delay in delivery to drug testing laboratory.[30]
- Insufficient quantity of urine taken in sample.[31]
- Destruction of urine sample before regulatory period has passed.[32]

Where any of these violations, or others, exist, it must be argued that the error was prejudicial. Breaks in the chain of custody, for example, mean that there is uncertainty that it was the applicant's urine sample that was tested. There may have been an opportunity for the true offender to swap samples or an unintentional mix-up. Premature destruction of urine samples may have denied the applicant the opportunity for a re-test.

If an Article 15 was offered and refused, and the command chose an administrative discharge instead of a court-martial, this may be an indication that the violation of regulations was thought to be serious enough to make conviction by court-martial difficult. There is sometimes evidence in the record that a court-martial was considered but ruled out because of regulatory violations in the taking or handling of the urine sample.

15.3.7 Validity of the Test

15.3.7.1 General Challenges to Procedures

There have been significant problems in the drug testing programs conducted by the military services. In general, it is important to try to identify the testing methodology used in the applicant's test. The labs that have conducted the tests often keep their records for several years. A FOIA request should be made of the lab, which can usually be indentified from the Chain of Custody form in the Military Personnel Record, for all records of any tests conducted on the servicemember. In addition to asking for all records of all tests, ask for the results of the specific test underlying the discharge, using the sample number and/or "ascension number" found on the Chain of Custody form.

Any positive result which was not made, or confirmed, by a Mass Spectrometry/Gas Chromatograph (MS/GC) test should be challenged.[33] All other tests are of questionable accuracy. This is widely known at the boards and throughout the military, but the fact that an MS/GC was not used does not guarantee an upgrade. Also, even if the MS/GC was used, a general challenge to the accuracy of drug testing as weighed against the consequences of its results should be made. Drug testing programs have been thrown out on these grounds in non-military contexts.[34] The military program has not been explicitly approved in the courts.

These general challenges to the validity of testing methodologies are unlikely to be accepted by the boards in most cases. In the context of a history of prior negative urinalysis results, convincing testimony, the urinalysis being the only evidence of drug abuse, and other favorable evidence, the weakness of the test may be a significant factor in an upgrade based on equity. Also, in some cases, there have been specific findings that certain groups of tests have been inadequate—in these cases, an upgrade should result.

Denial of a fair opportunity to challenge a drug test, at the time of discharge, through access to the documentation of the test and a hearing may violate the servicemember's constitutional rights. *See May v. Gray,* 708 F. Supp. 716 (E.D.N.C. 1988).

15.3.7.2 Tests Found to Be Inadequate

There have been several instances where specific groups of tests have been found to be inadequate.

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[25]This is common in Europe and other foreign installations. A copy of these "regulatory supplements" should be requested through the Freedom of Information Act. *See* Chapters 5 and 10.

[26]Or more frequently, the reason a court-martial conviction was not sought.

[27]The authorization for ordering a urinalysis is very broad, but where one is conducted pursuant to an unlawful order or an order by one not authorized to give it, or the test is not authorized, a discharge based on the illegally taken urine sample may be challenged as improper. *See* Supp. this chapter, note 39.

[28]*See* AR 600-85, App. E or H.

[29]*See* AR 600-85, Ch. 3.

[30]*See* AR 600-85, IO2, ¶ 3-18.d.

[31]*See* AR 600-85, IO2, ¶ 3-18.c.

[32]*See* AR 600-85. IO2, ¶¶ 3-15, 3-17(e). *See* AD 85-01013 (UOTHC to HD; premature destruction of sample was prejudicial error rendering discharge improper. Opportunity to prove innocence by re-testing denied. Reason changed to Secretarial Authority); *contra* AD 85-00823 (board appears to have misunderstood regulatory requirement—denied that violation occurred).

[33]*See, e.g.,* discussion of field tests at Supp. § 15.3.6.5.2.3, *infra.*

[34]*See, e.g.,* Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).

15.3.7.2.1 Tests at Army Drug Testing Laboratories Between April 1982 and November 1983

The largest scale discovery of inadequate tests was made in the REVIEW OF URINALYSIS DRUG TESTING PROGRAM—Report by a Panel of Army and Civilian Experts in Toxicology and Drug Testing Legal Issues; Dec. 12, 1983. The report indicated that many Army and Air Force urinalysis tests between April 1982 and November 1983 were not scientifically or legally supportable for use in disciplinary or administrative actions. Of 96,000 positive tests reviewed, 69,000 were found unsupportable.

As a result of this report, 80–90,000 letters have been sent to the servicemembers and veterans who received positive urinalysis test results between April 1982 and November 1983. The drug test results had become part of the servicemembers' permanent records and probably resulted in disciplinary actions or administrative discharges. The letter concedes that the test results may not be supportable and advises the individual of possible remedies. It advises its recipients to apply to the BCMR for a determination of the validity of the test and possible relief. The Army Board appears to be granting relief where the servicemember was prematurely separated from the Army solely for drug abuse in a separation proceeding in which the evidence of drug abuse relied on was a urinalysis test result which was found unsupportable. The Air Force Correction Board, however, has denied applications on the basis of disciplinary infractions which were not part of the original separation proceeding. This matter is currently being litigated by NVLSP in *Cooper v. Secretary of the Air Force,* No. 89-0927 (D.D.C. 1989).

An application to the ABCMR may not be the best route. The ABCMR is unlikely to award back-pay to which a member discharged pursuant to an unsupportable test is entitled. Thus, a filing in the Claims Court may be the advisable route if the veteran is still within the six-year statute of limitations.[35]

The ABCMR has, in cases where the test does not fall within the dates covered by the report, shown a tendency to grant upgrades on equitable grounds to veterans receiving bad discharges somewhat beyond November 1983. Since November 1983 merely represents the closing point of the study, not a date upon which there was any finding of improved testing, reference to the report should be made in cases at least through 1984.

15.3.7.2.2 Tests at All Laboratories Before Early 1982

Into the beginning of 1982, DoD had not certified any medical laboratories to issue legally valid urinalysis results for marijuana use. This reflects the weakness of testing methodologies employed before the use of more advanced technologies such as MS/GC. Any tests from these early years should be challenged as not having been done with sufficiently accurate equipment and methods to justify the severe penalty of a pre-ETS less than honorable discharge.

15.3.7.2.3 Early Air Force Testing

HQ USAF Message of July 23, 1982 (subj: status of urinalysis drug testing program) stated that forty-eight percent of positive urine tests from portable kits could not be confirmed after full scale laboratory analysis. Of those results, more than half were thought to be "low level marijuana users and non-users with body chemistry which mimics light marijuana use." Thus, any testing using field tests should not provide a basis for criminal or administrative action. Field tests are particularly unreliable, but any non-MS/GC test should be strongly challenged, especially if it was conducted in the early 1980s.[36]

15.3.8 Urinalyses at Courts-Martial

A complete discussion of the admissibility of urinalyses at a court-martial and how such tests might be challenged is beyond the scope of this manual. A mandatory urinalysis conducted pursuant to probable cause is admissible. *Murray v. Haldeman,* 16 M.J. 74 (C.M.A. 1983); *United States v. Armstrong,* 9 M.J. 374, 8 MIL. L. REP. 2523 (C.M.A. 1980). *See* 9 MIL. L. REP. 1085 for a discussion of urinalyses at courts-martial.

15.4 Discharges After July 1971

15.4.1 Introduction

a. P.15/10L, n.74:

Cite is now 32 C.F.R. § 70.9(b).

b. P.15/10L, n.75:

Cite is now 32 C.F.R. § 70.9(c).

c. P.15/10L, ¶ 5:

These favorable trends of the 1970s have generally been reversed.

d. P.15/10R, ¶ 2:

As discussed in Supp. § 15.3.2, the effectiveness of the Article 31 argument has been greatly limited.

15.4.2 Types of Cases

• P.15/10R, ¶ 4, add ¶:

• Drug abuse rehabilitation failure

15.4.3 Arguing That the Discharge Was Improper

a. P.15/11L, n.80:

The material quoted is now at 32 C.F.R. § 70.9(b)(1).

b. P.15/11L, ¶ 3:

This C.M.A. decision, *Ruiz,* has been overturned and the regulations revised to allow less than honorable discharges. See Chapter Supplement ¶ 5, *supra,* and Supp. § 15.3.1.

15.4.3.1 Errors Related to Participation in Drug Rehabilitation Programs

• RETITLE:

15.4.3.1 Errors Related to Exemption Policy and Drug Rehabilitation Programs

a. P.15/11L, add footnote 85a at end of § 15.4.3.1 heading:

85a For a detailed examination of the history of DoD and Air Force drug rehabilitation programs, *see* Judge Miller's concurring opinion in *United States v. Broady,* 2 M.J. 963 (A.F.C.M.R. 1982).

b. P.15/11L, add before ¶ 5:

There are two general ways in which an error related

[35] *See* Chapter 24.

[36] *See* Supp. § 15.3.6.5.1, *supra.*

to the exemption policy and drug rehabilitation can occur. First, there can be a failure to offer a servicemember rehabilitation required by regulation. Second, several types of errors can occur in the application of the limitations of the drug exemption policy.

The regulations have been rather fluid in the area of requiring rehabilitation, but generally there has been a requirement that enlisted men at the rank E4 or lower have an opportunity for rehabilitation before they are discharged unless there is a finding that they are poor candidates for rehabilitation. Failure to offer rehabilitation prior to discharge without a supportable reason is prejudicial error which should result in a full upgrade.[37]

c. P.15/11R, ¶ 2:

The current Army exemption policy prohibits the use of certain "limited use" evidence against a servicemember in actions under the U.C.M.J. or on the characterization of discharge in a separation proceeding.[38] This means, for instance, that where the sole evidence of drug abuse is "limited use" evidence, the servicemember may not be court-martialled, be given an Article 15, or be given a less than honorable discharge based on drug abuse. The servicemember may, however, be discharged with an HD based on the limited use evidence.

Under Army regulation, the following is limited use evidence:[39]

"(1) Mandatory urine or alcohol breath test results taken to determine a member's fitness for duty and to ascertain whether a member requires counseling, rehabilitation, or other medical treatment; or in conjunction with a member's participation in ADAPCP."[40] This category is usually applied where a commander ordered a urine test of a servicemember whom (s)he expected to test positive, but where the commander's belief is not supported by sufficient objective evidence to be probable cause for the drug test. An example is, where a servicemember is rumored to be using drugs, but no one can say that they have actually seen him ingesting them. The commander may order a urine test to "determine [the] member's fitness for duty," but the results of the test may not be used in a U.C.M.J. action or in support of a less than honorable administrative discharge. The servicemember may, however, be discharged with an HD based on the test result. This category also covers testing in rehabilitation programs.[41]

"(2) A member's self-referral to ADAPCP."[42] A servicemember who volunteers for treatment cannot have his or her self-referral or its immediate consequences[43] used in a U.C.M.J. proceeding or to support a less than honorable discharge. An exception to this is that rehabilitation failures can have their failure used against them in a discharge for Rehabilitation Failure or to show that further rehabilitation is unlikely to be worthwhile in support of a Misconduct discharge.[44]

"(3) Admissions and other evidence concerning illegal drug or alcohol use or possession of drugs incidental to personal use occurring prior to the date of initial referral to ADAPCP provided voluntarily by a member as part of his initial entry into ADAPCP."[45]

"(4) Admissions made by a member enrolled in ADAPCP to a physician or ADAPCP counselor at a scheduled interview, concerning illegal drug or alcohol use or possession of drugs incidental to personal use occurring prior to the date of his initial referral to ADAPCP."[46] Although the author is not aware of any case where it was significant, the use of the word "scheduled" is curious here. It appears that if a counselor were to start an unscheduled conversation with a servicemember in treatment, the servicemember's statements could be used against him.

"(5) Evidence concerning illegal drug or alcohol use

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[37]*See* § 12.5.1.3; *see also* § 15.4.4.1 concerning current standards approach.

[38]AR 600-85, IO2, ¶ 6-3.

[39]These Army regulations are based on a DoD policy which was issued on December 28, 1981. The policy did not go into effect until the services issued their implementing regulations. The DoD Summary of Changes stated:

> 2. *Guidelines for Use of Urinalysis for Drug Testing*
>
> a. Mandatory urinalysis testing for controlled substances may be conducted during—
>
> (1) An inspection under Military Rule of Evidence 313;
>
> (2) A search or seizure under Military Rule of Evidence 311-317;
>
> (3) An examination for a valid medical purpose under Military Rule of Evidence 312(f) to determine a member's fitness for duty; to ascertain whether a member requires counseling, treatment, or rehabilitation for drug abuse; or in conjunction with a member's participation in a DoD drug treatment and rehabilitation program; or
>
> (4) Any other examination for a valid medical purpose under Military Rule of Evidence 312(f).
>
> b. Subject to limitations in Section 3 [below], the results of mandatory urinalysis may be used to refer a member to a DoD treatment and rehabilitation program, to take appropriate disciplinary action, and to establish the basis for a separation and characterization. . . .
>
> 3. *Limitations on Use of Urinalysis Results*
>
> a. Results obtained from urinalysis under Section 2.a.(3) may not be used against the member in actions under the Uniform Code of Military Justice and on the issue of characterization in separation proceedings.
>
> b. A member's voluntary submission to a DoD treatment and rehabilitation program, and evidence provided voluntarily by the member as part of initial entry into such program, may not be used against the member in an action under the Uniform Code of Military Justice or on the issue of characterization in a separation proceeding.
>
> c. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States may not be introduced against the patient in a court-martial except as authorized by a court order issued under the standards set forth in 21 U.S.C. § 1175 (b)(2)(C).
>
> d. The limitations in this Section do not apply to—
>
> (1) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been first introduced by the member; and
>
> (2) Disciplinary or other action based on independently derived evidence, including evidence of drug abuse after initial entry into the treatment and rehabilitation program.

[40]AR 600-85, IO3, ¶ 6-3a(1). ADAPCP refers to the "Alcohol and Drug Abuse Prevention and Control Program"—in this context, rehabilitation programs.

[41]*See* AR 600-85, IO3, Table 6-1, note 2.

[42]AR 600-85, IO2, ¶ 6-3a(2).

[43]Statements made, results of urine or blood tests, etc.

[44]*See* AR 600-85, IO3, Table 6-1, note 3.

[45]AR 600-85, IO2, 6-3a(3); *see supra* (2) this section.

[46]AR 600-85, IO2, ¶ 6-3a(4); *see supra* (2) this section.

or possession of drugs incidental to personal use obtained as a result of a member's emergency medical care for an actual or possible drug or alcohol overdose, unless such treatment resulted from apprehension by law enforcement officials, military or civilian."[47] This category is dangerously limited. For instance, if a servicemember was in an accident and was being put under anesthesia for treatment of his injuries, he might be reluctant to apprise the doctor of the medically relevant existence of an illegal drug in his blood stream. Were he to do so, his admission would not be limited use evidence because the medical care was not for a drug overdose.[48]

Under Army regulations, the initial introduction of limited use evidence by the government in administrative discharge proceedings precludes a less than fully honorable discharge based on those proceedings.[49] This rule has no exceptions. Thus, even if other evidence of drug abuse or other misconduct which could support a bad discharge is also introduced, an HD must be issued.[50]

Evidence which is not limited use evidence under the Army regulations, which may be used in U.C.M.J. proceedings and on the issue of character of discharge in administrative proceedings, and introduction of which does not bar a less than honorable discharge, includes:

- Results of a urinalysis ordered on the basis of probable cause.[51]
- Evidence found in a legal search for drugs on the servicemember's person or elsewhere.[52]
- Results of a urinalysis ordered for an entire unit or portion of unit, not based on suspicion of any particular individual or individuals.[53]
- Discovery of drug use through medical treatment not related to emergency treatment for a drug overdose or expected drug overdose.[54]

The Navy and Air Force have similar regulatory schemes.[55]

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[47]AR 600-85, IO3, ¶ 6-3a(5).

[48]*See also* Air Force Regulation 30-2, Social Actions Program, ¶ 4-24, 8 Nov. 1976, Ch.1 (July 22, 1977) which provides:

> 4-24. *Incident to Medical Care.* Information about, or evidence of, drug abuse that is revealed incident to medical treatment requested by a member, which concerns the member's use of drugs or possession incident to personal use of drugs, may not be used in whole or in part to support punitive action or an administrative separation less than an Honorable Discharge. However, this paragraph does not exempt the member from disciplinary or other legal consequences resulting from violation of other laws or regulations, such as the sale or transfer of drugs or possession for such purposes. Evidence of drug use developed during emergency treatment may, in appropriate circumstances, be used to support punitive action.

In United States v. Broady, 12 M.J. 963 (A.F.C.M.R. 1982), the court held that admissions by a servicemember in an emergency room that he had taken "acid," were not admissible under AFR 30-2. The results of a search made because of these admissions were also found inadmissible.

[49]AR 635-200, ¶ 3-8a.

[50]*See also* United States v. Ouellette, 16 M.J. 911 (N.M.C.M.R. 1983) (If a test is ordered pursuant to an authorization which precludes use at courts-martial, then it is inadmissible even if probable cause existed and the test could have been ordered on that basis).

[51]*See* AR 600-85, Table 6-1: Search and Seizure Under Military Rules of Evidence 312, 314, 415, and 316. Note that MRE 312(f) and 313 provide authority for urine testing after a "flight mishap" of those "'individuals whose actions or inactions, in the commander's judgment, may have been factors in the mishap sequence.' AFR 127-4, ¶ #1-2d(2)(d)(1)(B)." OpJAGAF 1983/62, August 17, 1983.

[52]*Id.*

[53]*See* AR 600-85, Table 6-1: Military Inspection under Military Rules of Evidence 313. This is pursuant to the limitation in fourth amendment protection which has been carved out for "military inspections." The Army Court of Military Review has described a military inspection in the case of United States v. Hay, 3 M.J. 654, 655 (A.C.M.R. 1977):

> A military inspection is an examination or review of the person, property, and equipment of a soldier, the barracks in which he lives, the place where he works, and the material for which he is responsible. An inspection may relate to readiness, security, living conditions, personal appearance, or a combination of these and other categories. Its purpose may be to examine the clothing and appearance of the individual, the presence and condition of equipment, the state of repair and cleanliness of barracks and work areas, and the security of an area or unit. Except for the ceremonial aspect, its basis is military necessity.
>
> Any contraband found during such an inspection may be seized. Aides, such as drug detection dogs may used to assist with the search. United States v. Middleton, 10 M.J. 123 (C.M.A. 1981). Searches conducted with the intent to find evidence in a crime are generally not valid military inspections. United States v. Brown, 12 M.J. 420 (C.M.A. 1982). Some possessions of the servicemember may be beyond the scope of a permissible military inspection. United States v. Garcia, 10 M.J. 631 (A.C.M.R. 1980) (small purse). Military regulations allow the taking of urine samples as part of a military health and welfare inspection if conducted consistently with Military Rule of Evidence 313(b). Military Rule of Evidence 313(b) states:
>
> 313(b) Inspections. An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command, the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or air worthiness, sanitation and cleanliness, and that personnel are present, fit and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would affect adversely the security, and military fitness, or good order and discipline of the command and when (1) there is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command. An examination made for the primary purposes of obtaining evidence for use in trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. Inspections shall be conducted in reasonable fashion and shall comply with Rule 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

Note that MRE 312(f) and 313 provide authority for urine testing after a "flight mishap" of those "'individuals whose actions or inactions, in the commander's judgment, may have been factors in the mishap sequence.' AFR 127-4, 1-2d(2)(d) (1)(B)." OpJAGAF 1983/62, August 17, 1983.

[54]*See* AR 600-85, Table 6-1: Other Medical Purposes.

[55]ALNAV 015/82 dated February 1982 amended SECNAVINST 5300.28 to read as follows:

d. P.15/11R, n.88:

(1) An HD, GD or ELS is now authorized[56] under the new reason for discharge, "Drug Abuse Rehabilitation Failure."[57]

(2) Cite to 32 C.F.R. § 70.6(b)(1) is now 32 C.F.R. § 70.9(b)(1).

e. P.15/12L, n.90:

Cite in contention is now 32 C.F.R. § 70.9(b)(1).

f. P.15/12L, add after ¶ 3:

A servicemember who comes under suspicion of drug use because (s)he has called for emergency medical treatment for an overdose victim is given the opportunity to "volunteer" for rehabilitation, and thus receive the benefit of the exemption policy. The purpose of this exception to the rule that self-referral must come before an investigation is to ensure that overdose victims are not kept from treatment because of their drug abuser companions' fear for themselves.[58]

15.4.3.2 Errors Related to Discharge of Servicemembers Who Participated in a Rehabilitation Program

a. P.15/12L, n.94:

Cite is now AR 635-200, ¶ 3-8.a.

b. P.15/12R, n.95:

See, e.g., United States v. Cottle, 11 M.J. 572 (A.F.C.M.R. 1981) (letter of reprimand which revealed participation in drug rehabilitation program inadmissible under Air Force Regulations). *See also United States v. Hardy,* 12 M.J. 883 (A.F.C.M.R. 1981).

15.4.3.3 Miscellaneous Propriety Issues

a. P.15/12R, ¶ 4:

The 1982 amendments to the MANUAL FOR COURTS-MARTIAL (47 Fed. Reg. 42,317), ¶ 127c, redefined "distribute":

> *Distribute.* "Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship.

This definition appears to eliminate the agency defense. The DoD analysis of this section stated:

> *Distribute.* This subparagraph is based on 21 U.S.C. § 802(8) and (11). *See also* E. Devitt and C. Blackmar, 2 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 58.03 (3d ed. 1977).
>
> "Distribution" replaces "sale" and "transfer." This conforms with federal practice, *see* 21 U.S.C. § 841(a), and will simplify military practice by reducing pleading, proof, and associated multiplicity problems in drug offenses. *See e.g., United States v. Long,* 7 M.J. 342 (C.M.A. 1979); *United States v. Maginley,* 13 U.S.C.M.A. 445, 32 C.M.R. 445 (1963). Evidence of sale is not necessary to prove the offense of distributing a controlled substance. *See United States v. Snow,* 537 F.2d 1166 (4th Cir. 1976); *United States v. Johnson,* 1 M.J. 291 (C.M.A. 1976) ("procuring agent" defense abolished under 21 U.S.C §§ 801 *et seq.*). Evidence of a sale is admissible, of course, on the merits, or, in case of a guilty plea in aggravation, as "part and parcel" of the criminal transaction. *See United States v. Stokes,* 12 M.J. 229 (C.M.A. 1982). *Cf. United States v. Johnson,* 1 M.J. 291 (C.M.A. 1976). *See also* Mil. R. Evid. 404(b).

b. P.15/12R, n.97:

The reference should be to § 15.2.4.

15.4.4 Arguing That the Discharge Is Inequitable

15.4.4.1 Theory of Current Standards

a. P.15/13L, n.98:

Cite is now 32 C.F.R. § 70.9(c)(1).

b. P.15/13L, ¶ 2:

Applying current standards for character of service to the case of a veteran discharged for personal abuse of drugs is no longer necessarily a good idea. Under current standards, if the servicemember is to be discharged instead of sent to rehabilitation, a UOTHC discharge is possible, and common.[59] The exception to this is where limited use evidence was introduced on the issue of character of service.[60]

Current standards arguments are useful today to those who would probably have had the opportunity for rehabilitation under today's regulations but did not at the time of their discharge. This includes first time offenders grades E1 to E4. The argument should also be made for anyone who was

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[The following are circumstances under which mandatory urinalyses are taken:]

A. Inspections under Military Rule of Evidence 313 (includes unit sweeps and random sampling);

B. A search or seizure under Military Rule of Evidence 311-317 (specifically, probable cause);

C. An examination for a valid medical purpose under military rule of evidence 312(f): (1) to determine a member's fitness for duty or whether a member requires counseling, treatment, or rehabilitation for drug abuse (includes competence for duty exams and command-directed tests ordered on an individual basis in accordance with paragraphs 3B and 3C of enclosure (3) to Ref A); or (2) in conjunction with a member's participation in a DoD drug treatment and rehabilitation program; and

D. Any other examination for a valid medical purpose under Military Rule of Evidence 312(f).

The results of urinalysis testing conducted during (1) an inspection under military rule of evidence 313 (includes unit sweeps and random samplings); (2) a search or seizure under military rules of evidence 311-317 (specifically, probable cause); and (3) an examination conducted by medical personnel for purely medical reasons (not including competence for duty examinations) may be used to establish the basis for separation and the basis for characterization in the separation proceeding.

Results of urinalysis testing conducted: (1) to determine a member's fitness for duty or whether a member requires counseling, treatment, or rehabilitation for drug abuse; or in conjunction with a member's participation in a DoD drug treatment and rehabilitation program, may be used to establish the basis for separation in a separation proceeding but may not be used to establish the basis for discharge characterization, nor may they be used against the member in actions under the Uniform Code of Military Justice.

[56]32 C.F.R. Part 41, App. A, Part 1, § I, ¶ 2; AR 635-200, ¶ 9-4.

[57]32 C.F.R. Part 41, App. A, Part 1. § I. "Alcohol or Other Drug Abuse Rehabilitation Failure" in the Army. AR 635-200, Ch. 9.

[58]AR 600-85, IO2, ¶ 6-4c.

[59]*See* Chapter Supplement, ¶ 5, *supra.*

[60]*See* Supp. § 15.4.3.1.

issued a UD prior to 1971 since there was virtually no rehabilitation available then and the board may be sympathetic.[61] Other veterans likely to benefit from current standards arguments are those who received UDs for Unfitness due to drug rehabilitation failure, if based on entry into but failure to complete a drug treatment program.[62]

c. P.15/13L, n.99:

This directive is no longer in force.

d. P.15/13L, ¶ 3:

Small-quantity cannabis users are no longer treated as minor offenders. Lower ranking enlisted personnel will usually be offered rehabilitation. Noncommissioned and commissioned officers will usually be discharged. Thus, this current standard argument is no longer viable in all circumstances.

15.4.4.2 Sample Contentions

a. P.15/13R, #1:

(1) The cite to 32 C.F.R. § 70.6(c)(1) is now § 70.9(c)(1).
(2) The DoD directive cited should be replaced by the individual service's drug and discharge regulations, *e.g.*, AR 600-85 and AR 635-200.

b. P.15/13R, #1, first •:

This must be qualified to specify the circumstances surrounding the urinalysis to show if it is within the exemption policy.[63]

c. P.15/13R, #1, second •:

The word "and" at the end of the 1st sentence should be removed along with paragraphs a, b, and c.

d. P.15/14L, ¶ 1:

This contention is no longer viable.

15.4.4.3 Theory That Discharge Was Too Harsh

• P.15/14L, n.108:

This note should say, "A discharge may be considered inequitable if, at the time of issuance, the discharge was inconsistent with standards of discipline in the service of which the applicant was a member."[64]

15.4.4.4 Sample Contentions

• P.15/14L, #1:

Cite is now 32 C.F.R. § 70.9(c)(2).

15.4.4.5 Theory That Quality of Service Outweighs the Offense

a. P.15/14R, n.114:

The successor and substantially identical regulation is at 32 C.F.R. § 70.9(c)(3)(i).

b. P.15/15L, n.115, ¶ 1:

Cite is now 32 C.F.R. § 70.9(c)(3)(i).

c. P.15/15L, n.115, ¶ 2:

Army regulations are now at AR 635-200, ¶ 4-4.

d. P. 15/15L, n.115:

See also § 12.8.5.

e. P.15/15L, ¶ 1:

The boards will sometimes apply the general DoD discharge characterization criteria, vague though they are.[65]

15.4.4.6 Sample Contentions

• P.15/15L, #1:

Cite should be 32 C.F.R. § 70.9(c)(3)(i).

15.4.4.7 Theory That Drug Use Impaired Capabilities

a. P.15/15R, ¶ 1 of section:

This argument is much less successful today as drug abuse is treated more as misconduct than previously. Thus, the recasting from the specific acts to the underlying cause may only compound the problem by adding another level of misconduct. The board may take the attitude that not only did the servicemember commit these acts of misconduct, but he was also an abuser of drugs which makes him worse. Despite this risk, this argument still should be made where the servicemember was lower ranking and would have been a likely candidate for rehabilitation. The likelihood that rehabilitation would have solved the applicant's problems had it been available should be emphasized. It must also be shown that rehabilitation either should actually have been offered under the regulations applicable at the time of discharge or would have been under the regulations now in effect (the current standards).

b. P.15/15R, n.119:

The current, substantively identical provision is now at 32 C.F.R. § 70.9(c)(3).

15.4.4.8 Sample Contention

• P.15/16, #1:

Cite is now 32 C.F.R. § 70.9(C)(3)(ii)(A).

15.4.4.9 Miscellaneous Equity Issues

15.5 Special Issues

15.5.1 Arguing That the Veteran Should Have Been Discharged for Drug Abuse

• P.15/16R, ¶ 1:

The problem with this argument today is that drug abuse is treated as misconduct. Thus, attributing the veteran's difficulties to drug use will not necessarily cause less severe standards to be applied under current policy. There is no longer a category of discharge of Personal Abuse of Drugs Other Than Alcoholic Beverages. One of three things generally happens to drug-using servicemembers today:

1. They go into rehabilitation and succeed.
2. They go into rehabilitation and fail, then are discharged as drug rehabilitation failures with an HD or GD; or
3. They are discharged (usually for misconduct).

---

[61] *See* § 15.1.

[62] Under current regulations, no worse than a General Under Honorable Conditions discharge may be issued under these circumstances. 32 C.F.R. Part 41, App. A, Part 1, § I.

[63] *See* Supp. § 15.4.3.1.

[64] 32 C.F.R. § 70.9(c)(2).

[65] *See* Supp. § 9.3.2.2.

Thus, the argument must be made that the veteran would have had the benefit of rehabilitation and recovered, leading to an HD, or he would have failed rehabilitation and gotten either an HD or GD. Also, it must be shown that the veteran would not have been discharged for misconduct by establishing that the veteran would have been considered a likely candidate for rehabilitation (which is the presumption for lower ranking servicemembers).[66]

For those servicemembers discharged before July 1971, the lack of rehabilitative opportunities should be stressed.[67]

15.5.2 Arguing That a Less Than Honorable Discharge Is Unlawful

• P.15/16R, ¶ 4:

See also § 12.4.

15.5.3 Sample Contentions

15.6 Special Review Board Procedures

15.6.1 Obtaining Drug Rehabilitation Records

• P.15/17R, n.135:

Cite is now 32 C.F.R. § 70.8(c)(9)(iv). The information obtained must be shared with the applicant upon request.

15.6.2 Obtaining Investigative Records

[66]AR 635-200, Ch. 14.

[67]*See* AC87-08892 (UD to GD; drug problem recognized but no rehabilitation available and discharge for unfitness based on frequent acts of shirking: "Even though the applicant is not without fault, the institutional duty of the organization creates an inherent obligation, upon recognizing and acknowledging the individual's problem, to provide or offer corrective action. It is this failure of responsibility and in the spirit of the Laird Memorandum that would seem to warrant the upgrade of the applicant's discharge to general.").

Appendix 15A

Regulations

a. P.15A/3:

Current Army drug program is AR 600-85 (Jan 1, 1982); Changes through IO12 (Apr. 17, 1988). AR 635-200 (July 20, 1984), ¶ 3-8 (exemption), Ch. 9 ("Alcohol or Other Drug Abuse Rehabilitation Failure"), and Ch. 14 (Misconduct).

b. P.15A/4:

Replace with Table 6-1 of AR 600-85, IO3.

Appendix 15B

Research Key

1. Army

AD 81-10356 (UD to GD; Laird Memo, board found that drug abuse was the causative factor in disciplinary problems).

2. Air Force

3. Marine Corps/Navy

ND 81-01723 (UD to GD; board believed veteran's testimony that in-service admission of drug abuse had been a lie because he had just gotten married, was confused, and wanted out of the military).

Appendix 15C

DRB/BCMR Decisions

A. Case Lists

B. Digests of Cases Relied Upon

Appendix 15D

Selected "Laird Memo" Cases [See P. 15S/12]

1. KEY TO CASE LIST
2. ARMY
3. AIR FORCE
4. NAVY

APPENDIX 15D

SELECTED "LAIRD MEMO" CASES

1. KEY TO CASE LIST[1]

Discharge Type/DRB Decision

UD:	Undesirable Discharge
GD:	General (Under Honorable Conditions) Discharge
HD:	Honorable Discharge

Service-Tour

RVN:	Republic of Vietnam
KOR:	Korea
USA:	United States of America

Service - Length

2.09:	2 years, 9 months creditable service

Record

Art 15:	Non-judicial punishment pursuant to Article 15 of the Uniform Code of Military Justice
SCM:	Conviction by summary court-martial
SPCM:	Conviction by special court-martial

*:	Case following a misindexed case chosen to complete the sample

[1] This list was compiled to support the plaintiffs' contentions in the case discussed at Supp. § 15.2.3.

2. ARMY

	CASE NUMBER	DISCHARGE DATE	DISCHARGE TYPE	REVIEW DATE	SERVICE TOUR	SERVICE LENGTH	RECORD ART 15	RECORD / SCM	RECORD /SPCM	DRB DECISION
	AD-7804294	19-Jul-71	UD	16-May-80	RVN	NA		1		HD
	AD-7905160	24-Jan-69	UD	11-Mar-80		1.02	1			HD
	AD-8003038	27-Apr-71	UD	04-May-81	RVN	2.03				HD
	AD-8006050	04-Nov-63	UD	08-Oct-80	KOR	1.07	3			HD
	AD-8009039	14-Oct-66	UD	08-Sep-80		0.04				HD
	AD-8009163	28-Mar-67	UD	12-Sep-80	USA	NA	1		1	HD
	AD-8009179	16-Feb-78	UD	12-Sep-80	RVN	2.11	3	1	1	HD
	AD-8009206	30-Jun-71	UD	18-Sep-80	USA	NA	3			HD
	AD-8009294	22-Sep-69	UD	26-Sep-80	KOR	NA	1	1		HD
	AD-8009311	08-Jul-69	UD	19-Sep-80	RVN	NA	3			HD
	AD-8009363	12-Dec-66	UD	03-Oct-80	USA	NA				HD
	AD-8009377	16-Aug-66	UD	03-Oct-80	USA	NA			1	HD
	AD-8009393	03-May-71	UD	29-Sep-80	RVN	3.03	2			HD
	AD-8009428	03-Dec-70	UD	02-Oct-80	USA	NA				HD
	AD-8009448	26-Jun-68	UD	26-Jun-80	USA	NA	1			HD
	AD-8009488	31-Dec-69	UD	30-Sep-80	RVN	NA	1			HD
	AD-8009529	09-Jul-71	UD	10-Oct-80	RVN	NA	1			HD
	AD-8009664	07-Dec-67	UD	17-Oct-80	RVN	NA	4			HD
	AD-8009742	18-Jun-69	UD	17-Oct-80	RVN	0.05	1			HD
	AD-8011260	08-Jul-60	UD	22-Mar-82		NA				HD
	AD-8108108	17-Jun-71	UD	20-Nov-81		NA	1			HD
*	AD-7702324	17-Mar-70	UD	08-Aug-78	RVN	NA	4		1	GD
*	AD-7712360	23-Jun-71	UD	31-Aug-78		NA	2			GD
	AD-7801067	23-May-60	UD	21-May-79	KOR	NA	2	1	1	GD
	AD-7804507	29-Jan-69	UD	22-May-79	KOR	2.01	3			GD
	AD-7903566	22-Apr-71	UD	13-Nov-79	RVN	1.03				GD
	AD-7904312	21-May-71	UD	26-Jun-79	RVN	1.07			1	GD
	AD-7907794	07-Oct-70	UD	21-Oct-80		NA	1			GD
*	AD-7X18497	08-Dec-68	UD	18-Sep-78		1.06	3	1		GD
*	AD-7X25027	26-Dec-70	UD	05-Jun-78	RVN	1.01	1			GD
	AD-8001474	28-Mar-44	UD	20-Jun-80		NA		1		GD
	AD-8009025	06-Dec-70	UD	28-Aug-80	USA	NA			1	GD
	AD-8009059	14-Apr-67	UD	18-Sep-80	USA	1.03	3	1	1	GD
	AD-8009076	11-Jun-70	UD	02-Sep-80	USA	0.05	1	1	2	GD
	AD-8009092	08-Mar-71	UD	02-Sep-80	USA	NA		1	1	GD
	AD-8009109	23-Mar-71	UD	08-Sep-80	USA	0.001			1	GD
	AD-8009129	15-Oct-70	UD	08-Sep-80	USA	NA			1	GD
	AD-8009148	15-Oct-70	UD	18-Sep-80	USA	NA	2	1	2	GD
	AD-8009191	12-Feb-70	UD	10-Sep-80	RVN	NA			1	GD
	AD-8009229	14-Aug-70	UD	19-Sep-80	USA	NA	3			GD
	AD-8009246	05-Sep-68	UD	18-Sep-80	USA	NA	2			GD

AD-8009261	15-Apr-71	UD	26-Sep-80	USA	1.01	1	1		GD
AD-8009277	03-Oct-67	UD	18-Sep-80	USA	NA			1	GD
AD-8009330	20-Nov-69	UD	25-Sep-80	RVN	1.01	3			GD
AD-8009347	30-Jul-65	UD	28-Sep-80	USA	NA			1	GD
AD-8009410	20-Nov-69	UD	30-Sep-80	USA	NA			1	GD
AD-8009470	02-May-67	UD	06-Oct-80	RVN	2.06	3		1	GD
AD-8009511	10-Jun-70	UD	19-Oct-80	KOR	NA	3	2		GD
AD-8009545	23-Apr-71	UD	09-Oct-80	USA	NA	1			GD
AD-8009562	05-Jun-70	UD	10-Oct-80	USA	0.09	1		2	GD
AD-8009576	04-May-71	UD	14-Oct-80	USA	NA			2	GD
AD-8009592	14-Jun-66	UD	09-Oct-80	USA	NA	1		1	GD
AD-8009610	09-Apr-69	UD	17-Oct-80	KOR	NA	2	1	1	GD
AD-8009643	07-Sep-65	UD	17-Oct-80	USA	NA			1	GD
AD-8009684	12-Apr-71	UD	17-Oct-80	USA	0.03	2		1	GD
AD-8009715	09-Dec-67	UD	21-Oct-80	USA	NA	3			GD
AD-8011158	02-Mar-62	UD	10-Feb-81	USA	0.06			2	GD
AD-8012614	24-May-56	UD	20-Oct-81	USA	1.06	NA			GD
AD-8101341	17-Sep-69	UD	08-Oct-81	GER	NA	3		2	GD
AD-8101611	24-May-71	UD	30-May-81	RVN	3.08	2		1	GD
AD-8111215	23-Jan-52	UD	17-Feb-82	KOR	2.09	1	1		GD
AD-8200400	09-Feb-71	UD	23-Apr-82	RVN	1.04	4			GD
AD-8201988	26-May-70	UD	08-Nov-83	RVN	1.07	1		1	GD
AD-8203449	18-Nov-70	UD	15-Nov-82	RVN	1.10		1		GD

3. AIR FORCE

	CASE NUMBER	DISCHARGE DATE	DISCHARGE TYPE	REVIEW DATE	SERIVCE LENGTH	RECORD ART 15 / SCM /SPCM			DRB/BCMR DECISION
	FD-7801615	28-Jan-54	UD	17-Oct-78	2.05	1			HD
	FD-7801670	30-Sep-68	UD	12-Dec-78	4.01				HD
	FD-7801781	22-Aug-47	UD	02-Nov-78	2.06		1		HD
	FD-7900422	11-Jan-52	UD	12-Sep-79	2.05		2		HD
	FD-8001040	14-Apr-60	UD	14-May-80	2.09				HD
	FC-8103642	28-Mar-60	UD	26-Jan-82	NA	3			GD
	FD-7801671	07-Feb-55	UD	27-Mar-79	2.03		1	2	GD
	FD-8001832	26-Sep-51	UD	04-Dec-80	1.06	2	1		GD
*	FD-8100722	09-Nov-51	UD	30-Jun-82	3.01		1		GD
	FD-8101500	23-Dec-65	UD	26-Mar-82	0.11				GD
	FD-7801659	14-Jun-57	UD	18-May-79	3.03		1	1	NC

4. NAVY

CASE NUMBER	DISCHARGE DATE	DISCHARGE TYPE	REVIEW DATE	SERVICE LENGTH	SERVICE RECORD ART 15	/SCM/ SPCM	/ GCM	DRB DECISION
ND-78-01229	19-Apr-68	UD	25-Jan-79	1.05			1	HD
ND-78-00193	04-Dec-69	BC	26-Jul-78	2.00			1	GD
ND-78-00252	23-Jul-71	UD	17-Jan-79	0.11	1			GD
ND-78-01418	11-Dec-68	UD	19-Jun-79	3.09	1			GD
ND-78-01552	19-Apr-68	UD	31-Jan-79	0.03				GD
ND-78-01850	21-Sep-70	UD	27-Jun-79	1.08	6			GD
ND-78-02757	28-Jun-68	UD	25-Jul-79	3.05	1		1	GD
ND-79-00335	01-Feb-68	UD	21-Aug-79	1.05	2			GD
ND-79-00933	13-Nov-69	UD	29-Oct-79	1.05	1			GD
ND-79-01199	29-Apr-60	UD	27-Nov-79	2.00	1	2		GD
ND-79-01419	16-Sep-55	UD	30-Aug-79	1.01	2	1		GD
ND-79-01554	01-Dec-69	UD	29-Aug-79	0.08	1			GD
ND-79-01775	20-May-68	UD	25-Oct-79	2.11	5		1	GD
ND-80-00753	26-Jun-68	UD	17-Apr-80	3.05	1			GD
ND-80-01109	05-Oct-67	UD	24-Jul-80	1.09	6			GD
ND-80-01838	05-Feb-69	UD	27-Mar-80	1.09	1		1	GD
ND-81-01045	29-Apr-69	UD	11-Jan-82	0.07				GD
*ND-81-03070	29-May-68	UD	01-Mar-82	2.00	2			GD
*ND-81-03500	19-Jul-68	UD	02-Feb-82	2.04	2			GD
ND-81-05311	19-Apr-61	UD	18-May-82	1.10	2	1		GD
ND-81-05938	18-Aug-70	UD	28-Jul-82	0.09			1	GD
ND-81-07115	21-Nov-67	UD	22-Oct-82	0.04				GD
ND-82-03791	24-Jun-68	UD	06-Jun-83	0.04				GD
ND-82-04047	02-Aug-68	UD	14-Sep-83	0.09				GD
ND-82-04382	15-Jan-69	UD	05-May-83	1.07	2			GD
ND-82-04859	30-Apr-69	UD	05-Jan-83	2.10	3			GD
ND-83-02517	16-Apr-70	UD	17-Jan-84	0.02				GD
ND-84-01086	03-Jul-69	UD	09-Mar-84	1.03	2			GD
ND-78-00358	11-Aug-70	UD	10-May-79	2.11	1	1		NC
ND-78-00956	28-Aug-67	UD	16-May-79	4.08	1		2	NC
ND-78-01674	13-Oct-67	UD	09-Jul-79	3.09	3		2	NC
ND-78-02755	05-Jun-70	UD	24-Sep-79	2.05	3		2	NC
ND-79-00214	24-Jun-68	UD	13-Nov-73	1.00		1	1	NC
ND-79-00766	31-Oct-68	UD	25-Oct-79	1.03				NC
ND-79-01587	19-Jan-68	UD	10-Dec-79	1.11	7	1	1	NC
ND-79-02038	19-Feb-70	UD	21-Feb-80	0.06	1		1	NC
ND-79-02647	06-Feb-68	UD	15-Feb-80	3.06	9	2		NC
ND-7X-05977	28-Jun-68	UD	22-Jun-78	1.08	1		1	NC
ND-80-02759	24-Mar-71	UD	17-Oct-80	2.00		2		NC
ND-80-03130	01-Mar-71	UD	10-Nov-80	1.09				NC
ND-81-02223	20-Jan-56	UD	21-Sep-81	3.06	4	1	1	NC
ND-81-02939	11-Jun-69	UD	04-Nov-81	1.01	2			NC
*ND-81-03568	22-Jul-68	UD	29-Oct-81	0.08				NC
ND-81-03854	25-Jun-63	UD	15-Jan-82	2.09	3	2	1	NC

ND-81-05126	30-Sep-66	UD	28-Jul-81	2.08	1			NC
ND-81-05722	21-Dec-67	UD	23-Sep-82	2.00	5			NC
*ND-82-00888	29-Dec-69	UD	04-Dec-81	1.00			1	NC
ND-82-02012	29-Mar-68	UD	12-Feb-82	0.10				NC
ND-82-02721	27-Sep-67	UD	03-Aug-82	3.05	3	2	1	NC
ND-84-02619	16-Jul-70	UD	20-Aug-84	3.00	2		1	NC

CHAPTER 16
Discharges for Unsuitability, Marginal Performance, and Training Failure

A. Overview

The discharge for Unsuitability has been eliminated. The introduction to the DoD directive eliminating the Unsuitability category and generally restructuring the set of reasons for administrative discharges states:

> The term "unsuitability" no longer is used as a reason for separation, but the circumstances which provided a basis for an unsuitability separation under the old rule might provide a basis for separation under the new rule for Convenience of the Government, Entry Level Performance and Conduct, Unsatisfactory Performance, Alcohol Abuse Rehabilitation Failure, or Misconduct, depending on the facts of the case and the standards set forth in the new rule. 47 Fed. Reg. at 10,164 (DoD Directive 1332.14, Jan. 28, 1982, codified at 32 C.F.R. Part 41).

The strategies employed for seeking an upgrade of a discharge which previously would have been by reason of "Unsuitability," described in this chapter, are generally still valid under the new regulations. Note, however, that there may be circumstances under which a servicemember would have been entitled to at least a General Discharge Under Honorable Conditions under the old Unsuitability regulations, but now may receive a UOTHC discharge.

B. Chapter Supplement

1. The entire original chapter must be read with the understanding that Unsuitability is no longer a reason for discharge. Thus, whenever the word "unsuitability" is used to describe "current" discharge regulations, it should be read as descriptive of a class of cases but not as a technical legal term with a present meaning. The specifics of the case must govern the use of the approaches described in MDU. Sample contentions, for instance, that mention Unsuitability in a current standards context must be amended to fit the circumstances of the case.[1]

2. Note new section 16.16 describing the new category of "Unsatisfactory Performance."

3. Appendix B has been significantly supplemented to provide a guide to the way servicemembers are being discharged under the new regulatory scheme.

4. On December 17, 1982, the Army Discharge Review Board (DRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the SOP. The other boards have never had an SOP or equivalent guidelines.

C. Section Supplement

16.1 Introduction and Overview

16.2 History of Procedures and Types of Discharges Authorized

16.3 Current Standards Approach, with Sample Contentions

a. P.16/2 to 16/3:

The application of current standards in an Unsuitability case has become more complicated with the elimination of Unsuitability as a discharge category. Generally, the instructions in the original text which depend on specific regulatory standards in effect at the time of its writing are invalid.

A two step process must now be followed in making a current standards argument. First, the category under which the applicant would have been discharged under current regulations must be determined. The new regulations do not make this obvious for many of the old Unsuitability reasons for discharge.[2] The new category which best fits and which has the most favorable current standards should be selected. Some of the reasons for discharge under the new regulations and the basic standards for their imposition are discussed later in this Supplement chapter.

The second step is to apply the current standards. This is generally a relatively straightforward process. The most obvious area of complication is the application of the new uncharacterized discharges. Under current standards, an uncharacterized "Entry Level Separation" is prescribed in a number of different discharge situations—usually whenever discharge is being accomplished within 180 days of entry onto

[1] *See* Supp. § 16.3.

[2] *See* discussion under different Unsuitability reasons later in this Supplement chapter.

Active Duty. The DoD uniform DRB regulations, however, state that:

> Only a person separated on or after 1 October 1982 while in entry level status may request a change from Other Than Honorable Discharge to Entry Level Separation.

Thus, how to apply a current regulation that would have required an Entry Level Separation (ELS) to veterans discharged before October 1, 1982 is unclear. The boards appear to apply the general criteria for characterizing discharges found at 32 C.F.R. Part 41, App. A., Part 2. Reference to the fact that the veteran would have received an ELS is advisable. This will emphasize that the policy is now more sympathetic, even though it can not be directly applied.

Where the old Unsuitability reason for discharge does not clearly fit in any of the new categories,[3] an argument can sometimes be made that under current standards, the applicant would not have been discharged at all.

b. P.16/3L, ¶ 3, #1:

Cite is now 32 C.F.R. § 70.9(c)(1).

c. P.16/3L, ¶ 3, #2:

Cite is now 32 C.F.R. § 70.9(c)(1).

16.4 Other General Approaches, with Sample Contentions

• P.16/3, n.7:

The situation described in this case would probably now result in an uncharacterized "Entry Level Separation" (ELS) regardless of the reason which was used as the basis for discharge.[4] But note that if the original discharge was UOTHC, it would not be changed to an ELS by the DRB by application of current standards because the discharge was before October 1, 1982. 32 C.F.R. § 70.8 (a)(3)(i) provides that "[o]nly a person separated on or after 1 October 1982 while in an entry level status may request a change from Other than Honorable Discharge to Entry Level Separation."[5] Thus, an HD may still be possible for pre-1982 cases.

16.5 Improperly Recorded Reason for Discharge

16.6 Specific Reasons for Unsuitability Discharges

16.7 Character and Behavior Disorder (Personality Disorder) Discharges

• Discharges based on personality disorders are now issued under the "Convenience of the Government" reason.[6] Significantly, the new regulation provides that the military departments should only separate a servicemember for a personality disorder when there is no other appropriate reason for separation, *i.e.,* only as a last resort. The new regulation provides:

> Separation for personality disorder is not appropriate when separation is warranted under [any of the other reasons for separation]. . . . For example, if separation is warranted on the basis of unsatisfactory performance . . . or misconduct . . . , the member should not be separated under this section regardless of the existence of a personality disorder.[7]

Thus, members suffering from personality disorders whose poor conduct is due to their personality disorder are apparently to be discharged for their misconduct, not their disorders.

Those who are discharged for a personality disorder, however, will benefit from a presumption of an HD. Under the previous regulations, the only presumption of a character of discharge arose from the *Lipsman* case and was only applicable in Army cases (discussed in the main text at § 16.7.2).

16.7.1 Medical Nature of Personality Disorders

16.7.2 *Lipsman* Settlement and Army Cases, With Sample Contentions

a. P.16/5R, 3rd •:

Current Army regulations authorize an uncharacterized "Entry Level Separation" where the servicemember is in entry level status, as well as an HD (usually the first 180 days of service).[8]

b. P.16/5R, ¶ 4, #3:

The ADRB SOP has been withdrawn and should not be cited in this contention.

c. P.16/6L, n.22:

See also AD 79-02402 (DRB characterized AR 635-200 ¶ 13-15, which provided that a servicemember discharged for a character and behavior disorder must be given an Honorable Discharge unless he or she has been convicted by a general court-martial or more than one special court-martial, as substantially enhancing the applicant's rights); AD 77-7417 (GD to HD; discharge for personality disorder).

d. P.16/6L, #5 (continued):

Cite is now AR 635-200, ¶ 5-13.

e. P.16/6L, #8:

Cite is now 32 C.F.R. § 70.9(c)(1).

16.7.3 *Lipsman* Settlement and Navy, Marine, and Air Force Cases, With Sample Contentions

a. P.16/6R, ¶ 1:

(1) The current DoD discharge regulation, which includes personality disorders in "Convenience of the Government" discharges, presumes an HD, although a GD is also authorized.[9]

(2) To the extent that Air Force, Navy, and Marine Corps regulations now require diagnosis by a psychiatrically trained examiner,[10] a current standards argument should be made. The board may, of course, find that even had the examiner been psychiatrically trained, the same diagnosis would have ensued. The current standards argument will, however, emphasize that fault has been found in the former practice and will buttress an argument that the veteran does not suffer from a personality disorder.

b. P.16/6R, n.23:

But see FC 83-04026 (GD to HD; unsuitability discharge

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[3] *E.g.,* "Financial Irresponsibility" (*See* Supp. § 16.11).

[4] *See* 32 C.F.R. Part 41, App. A, Part 2, § C, ¶ 3.a.

[5] *See* Supp. § 16.3.a, *supra.*

[6] 32 C.F.R. Part 41, App. C, Part 1, § A, ¶ 4.h.

[7] *Id.* at C, ¶ 4.h(4).

[8] AR 635-200, ¶ 15-3.h.

[9] 32 C.F.R. Part 41, App. A, Part 1, § C, ¶ 2.

[10] *See, e.g.,* BUPERSNOTE 1910, 3420184, ¶ 1.c, Mar. 24, 1981.

for character and behavior disorder. Upgrade based on current standards).

c. P.16/6R, #1:

The citation to 32 C.F.R. § 70.6(c)(1) should now be 32 C.F.R. § 70.9(c)(1).

d. The AFBCMR apparently decided that the standards of Lipsman should apply in a 1963 discharge case before it. FC 82-05040. The Board concluded that the applicant was diagnosed by a trained psychiatrist.

In *Weber v. Weinberger,* (W.D. Mich. Feb. 5, 1986), the court held that the record was devoid of such a diagnosis and that the decision of the AFBCMR was arbitrary and capricious. On remand, the applicant received an HD. This case is on file with NVLSP.

16.7.4 Propriety Approaches

16.7.4.1 General Strategy

• P.16/7L:

Many unsuitability discharges were without benefit of a predischarge predetermination hearing. The propriety of this has been called into question in a recent decision. *May v. Gray,* 708 F. Supp. 716 (E.D.N.C. 1988).

16.7.4.2 There Was No Disorder, with Sample Contentions

16.7.4.3 There Was No Psychiatric Examination, with Sample Contention

16.7.4.4 The Examination Was Improper, with Sample Contention

16.7.4.5 The Psychiatric Diagnosis Was an Illegally Obtained Statement, with Sample Contention

• P.16/8L, ¶ 4:

Ruiz has been overturned. This contention is no longer viable.

16.7.4.6 Other Propriety Approaches

a. P.16/8R, n.36:

See BUPERSNOTE 1910, 3420184, ¶ 3, Mar. 24, 1981:

> [A personality disorder is not] total justification for immediate processing for discharge unless the member's disorder is of such severity as to render the member incapable of serving adequately as evidenced by a reduction in performance marks, minor disciplinary infractions, etc., which persist in spite of a reasonable attempt by the command to assist the member in correcting said deficiencies through leadership, nonmedical counselling, and, when appropriate, disciplinary action. (An exception to the prescribed policy will be in those instances wherein a medical doctor has evaluated a member as being self destructive and or a danger to others). . . .

and BUPERSMAN 3420184.1c; NAVMILPERSCOMINST 1910.1, ¶ 3g(3); See also AR 635-200, ¶ 5-13c:

> Separation because of personality disorder is authorized only if the diagnosis concludes that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired. Separation for personality disorder is not appropriate when separation is warranted under chapters 4 [ETS], 5 [convience of the government[11]], 7 [defective enlistment], 9 [drug or alcohol rehabilitation failure], 10 [GOS], 11 [entry level discharge], 13 [unsatisfactory performance], 14 [misconduct], or 15 [homosexuality]; AR 604-10; or AR 635-40 [medical and retirement].

The Army regulation virtually precludes a discharge for personality disorder where there has been any significant effect on conduct or performance. This is particularly true of servicemembers in their first 180 days of service who come under the entry level discharge program. This program permits discharge where there have been performance or conduct problems and improvement is found to be unlikely.[12]

b. P.16/8R, n.37:

See AD 77-10405.

16.7.5 Equity Approaches

• P.16/8, n.39:

See AD 79-05765, AD 79-05253.

16.8 Inaptitude

a. P.16/8R, ¶ 6:

Those who were previously discharged for Unsuitability/Inaptitude are now discharged for "Unsatisfactory Performance"[13] or "Entry Level Performance and Conduct."[14] These categories are discussed at Supp. §§ 16.15 and 16.16.

b. P.16/8R, n.40:

See also BUPERSNOTE 1910, 3420184, ¶ 1.e, Mar. 24, 1981 ("considered most applicable to nonrated members in their first six months of initial enlistment in the Navy").

c. P.16/9L, ¶¶ 1 & 2:

The EDP and TDP programs have been supplanted by the "Entry Level Performance and Conduct" reason for discharge and the uncharacterized discharge of "Entry Level Separation," which is generally awarded in an inaptitude situation within the first 180 days of service.

d. P.16/9L, n.43:

(1) Cite to 32 C.F.R. § 70.6(c)(3)(ii)(A) is now 32 C.F.R. § 70.9(c)(3)(ii)(A).

(2) The ADRB SOP has been withdrawn. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the SOP was. The other boards have never had an SOP or any equivalent guidelines.

16.9 Apathy

a. P.16/9R, ¶ 1:

(1) Those who were previously discharged for Unsuitability/Apathy, are now discharged for "Unsatisfactory Performance,"[16] "Entry Level Performance and Conduct,"[17] "Misconduct,"[18] "Convenience of the Govern-

[11] What this means is unclear since personality disorder is a Convenience of the Government discharge under this Army regulation.

[12] *See* Supp. § 16.15.

[13] *See* 32 C.F.R. Part 41, App. A, Part 1, § G., AR 635-200, Ch. 13.

[14] *See* 32 C.F.R. Part 41, App. A, Part 1, § F., AR 635-200, Ch. 11.

[15] *See* Supp. §§ 4.2, 16.15.

[16] *See* 32 C.F.R. Part 41, App. A, Part 1, § G; AR 635-200, Ch. 13.

[17] *See* 32 C.F.R. Part 41, App. A, Part 1, § F; AR 635-200, Ch. 11.

[18] *See* 32 C.F.R. Part 41, App. A, Part 1, § K; AR 635-200, Ch. 14.

ment,"[19] "Alcohol Abuse Rehabilitation Failure,"[20] or "Drug Abuse Rehabilitation Failure."[21]

Unsatisfactory performance and entry level performance and conduct are discussed at Supp. §§ 16.15 and 16.16. Misconduct is discussed in Chapter 17, drug abuse rehabilitation Failure in Chapter 15, and alcohol abuse rehabilitation failure in Chapter 13.[22] Apathy had sometimes been used by commanders as a reason for separation where there was a basis for a Misconduct discharge but some factor had aroused sympathy. A commander still has the option of an Unsatisfactory Performance discharge to accomplish this, but may not feel that reason for discharge is sufficiently pejorative. Also, some flaw in duty performance must be found to justify this reason for discharge.

The Army may discharge for convenience of the government by reason of "Failure to Meet Army Weight Control Standards."[23] Failure to meet weight standards had previously been a basis for an apathy discharge.[24] There is a presumption of an Honorable Discharge (HD) for Convenience of the Government discharges, but General Discharges Under Honorable Conditions (GD) and Entry Level Separations (ELS) are also authorized.

Servicemembers who had not expended sufficient efforts or been able to rehabilitate themselves from drug or alcohol dependency or abuse had been discharged for apathy. Alcohol and drug rehabilitation failure are now separate reasons for discharge under DoD discharge regulations.[25] HDs, GDs, and ELSs are authorized.

(2) BUPERSNOTE 1910, 3420184, ¶ 1.f, Mar. 24, 1981 described apathy, defective attitudes, and inability to expend efforts constructively as "a significant observable defect, apparently beyond the control of the member, and elsewhere not readily describable."

(3) Shortly before the new reasons for discharge went in effect, apathy was being used as the reason for discharge for a servicemember who failed to meet weight standards. In one case a servicemember had failed the weight standard many times, but between notification of the discharge action and discharge, he brought his weight into compliance. A JAG opinion found that the fact that he was able to get his weight down in the end actually justified the discharge for "apathy and defective attitude" because it showed he could have done it all along if he had sufficient motivation and an appropriate attitude.[26] Comparison of this analysis with the description of apathy in (2) above and in DoD Dir. 1332.14 serves to highlight the ambiguities in this reason for discharge. Note that under Army regulations, failure to meet weight standards is now a separate basis for discharge within the Convenience of the Government reason for discharge.[27]

16.9.1 Army and Air force Apathy Cases

16.9.2 Navy and Marine Apathy Cases

16.10 Enuresis (Bed-Wetting)

a. P.16/10L, ¶ 2:

DoD now suggests that enuresis be the basis of a Convenience of the Government discharge.[28] The Army, however, does not list enuresis as a reason for discharge under Convenience of the Government. The Army does list enuresis as a disability barring enlistment or induction.[29] Thus, if the problem is discovered within four months of entry onto active duty, a discharge for Convenience of the Government by reason of failure to meet procurement medical fitness standards is generally appropriate.[30] The service will, barring exceptional circumstances,[31] be characterized as an "Entry Level Separation."[32]

The Army also lists "incontinence of urine" as rendering a servicemember unfit for duty if the condition is not amenable to treatment and is "of such severity as to necessitate recurrent absences from duty."[33] Thus, enuresis can be the basis for a medical discharge.

If an Army veteran was discharged beyond his first four months of active duty and enuresis did not "necessitate recurrent absences from duty," (s)he would not have been discharged under current standards. If, however, (s)he does meet one or the other of these criteria, (s)he would have been discharged under the standards described.[34]

b. P.16/10L, n.54:

Cite is now 32 C.F.R. § 70.9(c)(1).

16.11 Financial Irresponsibility

a. P.16/10L:

(1) Financial irresponsibility is no longer a specific reason for discharge. Financial difficulties can, however, be part of a pattern of misconduct, or if a continuing problem, can be the pattern of misconduct underlying a misconduct discharge.[35] Although the standards for a misconduct discharge are vague, only the most serious situations of financial irresponsibility that have persisted despite counseling meet the regulatory criteria.[36]

Financial irresponsibility does not appear to fit into any other category under the new discharge regulations. If, however, financial difficulties affect performance of duties, a discharge for "Unsatisfactory Performance" is possible.[37] Because there is no clear current version of a discharge for financial irresponsibility, an argument that the applicant would not have been discharged at all under current standards can often be made. Unless the conduct forming the basis for the discharge rose to the level of misconduct or affected duty performance, this is a viable argument.

(2) A discharge for financial irresponsibility was appropriate under Navy regulations when a "member's expenses exceeded income and debt structure continued to increase."[38] This provision was applied where the failure to

[19]*See* 32 C.F.R. Part 41, App. A, Part 1, § C; AR 635-200, Ch. 5.

[20]*See* 32 C.F.R. Part 41, App. A, Part 1, § J; AR 635-200, Ch. 9.

[21]*See* 32 C.F.R. Part 41, App. A, Part 1, § I; AR 635-200, Ch. 9.

[22]*See also* digest of separation regulations in Chapter 5.

[23]AR 635-200, ¶ 5-15.

[24]*See* (3), this section.

[25]32 C.F.R. Part 41, App. A, Part 1, §§ I and J. The Army has combined these into one category: "Alcohol or Other Drug Abuse Rehabilitation Failure." AR 635-200, Ch.9.

[26]OpJAGAF 1983/23, March 28, 1983.

[27]AR 635-200, ¶ 5-15.

[28]32 C.F.R. Part 41, App. A, Part 1, C, ¶ 4.h.

[29]AR 40-501, ¶ 2-15.c.

[30]AR 635-200, ¶5-11.

[31]*See* AR 635-200, ¶ 3-9.a(1)(a) & (b).

[32]AR 635-200, ¶ 3-9(a)(1).

[33]AR 40-501, ¶ 3-17.e.

[34]Note that a DRB cannot change a discharge to an ELS if the servicemember was discharged UOTHC before October 1, 1982. See § 16.3, *supra.*

[35]*See* 32 C.F.R. Part 41, App. A, Part 1, § K; AR 635-200, Ch. 14, § 3.

[36]*Id.*

[37]*See* § 16.16, *infra.*

[38]BUPERSMAN 3420184.1b; BUPERSNOTE 1910, 3420184, ¶ 1b, Mar. 24, 1981; NAVMILPERSCOMINST 1910.1, ¶ 3g(2).

meet financial obligations was negligent. Willful failure was and is dealt with through the misconduct provisions.[39]

b. P.16/10R, n.58:

Cite is now 32 C.F.R. § 70.9(c)(1).

16.12 Unsanitary Habits

• Unsanitary habits is no longer a specific reason for discharge. The conduct which previously gave rise to discharges for unsanitary habits can be part of a pattern of misconduct, or can be a pattern of misconduct, underlying a misconduct discharge.[40] Although the standards for a misconduct discharge are vague, repeated contractions of VD, the most common basis for an unsanitary habits discharge, meet the regulatory standards for a misconduct discharge only if the incidents are repeated frequently and persist after counseling efforts.[41]

"Unsanitary habits" can also be the basis for a discharge for unsatisfactory performance if they affect the servicemember's performance of duty.[42] Those who have received discharges for unsanitary habits who would not be discharged under today's misconduct or unsatisfactory performance regulations should argue that under current standards they would not be discharged.[43]

16.13 Homosexual Tendencies

• P.16/10R:

(1) Homosexuality is now a separate category of discharge.[44]

(2) Note that the unsuitability category of "Aberrant Sexual Tendencies" survived the demise of homosexuality as an unsuitability category.[45] It is not, however, a category under the new discharge regulations.

16.14 Alcoholism or Treatment Program Failure

• Alcohol abuse rehabilitation failure is now a separate category of discharge.[46]

16.15 Expeditious Discharge of Marginal Performers

• Entry level performance and conduct is now a separate category of discharge.[47] A discharge for entry level performance and conduct is authorized when the servicemember is in Entry Level Status[48] and is deemed unqualified for military service "by reason of unsatisfactory performance or conduct (or both), as evidenced by inability, lack of reasonable efforts, failure to adapt to the military environment or minor disciplinary infractions."[49]

Rehabilitation attempts are required prior to discharge.[50] The service is uncharacterized as an Entry Level Separation.[51]

Failure to allow an opportunity of rehabilitation or discharge outside of the time period allowed make this discharge improper. The equitable arguments suggested for the expeditious discharge program in the main text are still valid arguments.

Persons discharged under other provisions prior to creation of the entry level performance and conduct discharge within 180 days of entering service may argue that they would have received this discharge under current standards. Characterization of the discharge will not, however, be changed from UOTHC to ELS. DRB regulations bar this change in characterization where the discharge was before October 1, 1982.[52] Note also that processing under this reason for discharge is not mandatory:

> When separation of a member in entry level status is warranted by unsatisfactory performance or minor disciplinary infractions (or both), the member normally should be separated under this section. Nothing in this provision precludes separation under another provision of this Directive when such separation is authorized and warranted by the circumstances of the case.[53]

16.15.1 Army Programs

16.15.1.1 Propriety Approaches

16.15.1.2 Equity Approaches

16.15.2 Navy Programs

16.15.3 Marine Programs

16.16 Unsatisfactory Performance

The new DoD regulations create a new reason for separation called "Unsatisfactory Performance."[54] This reason for discharge is not clearly defined, but the DoD introduction to the directive creating it explains it as "the objective manifestation of unsatisfactory performance," in apparent contrast to only a commander's opinion that performance is unsatisfactory.[55] The new regulation specifically requires that:

> A member may be separated when it is determined under the guidance set forth in section A of Part 2 that the member is unqualified for further military service by reason of unsatisfactory performance.[56]

The guidance in the referred to section provides, *inter alia:*

> The following factors may be considered on the issue of retention or separation, depending on the circumstances of the case:
>
> (1) The seriousness of the circumstances forming the basis for initiation of separation proceedings, and the effect of the member's continued retention on military discipline, good order, and morale.
>
> (2) The likelihood of continuation or recurrence of

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[39]BUPERSNOTE 1910, 3420184, ¶ 1b, Mar. 24, 1981.

[40]*See* 32 C.F.R. Part 41, App. A, Part 1, § K, AR 635-200, Ch. 14, § 3.

[41]*See* Chapter 17.

[42]*See* 32 C.F.R. Part 41, App. A, Part 1, § G; AR 635-200, Ch. 13; Supp. § 16.16, *infra.*

[43]*See* Chapter 21.

[44]32 C.F.R. Part 41, App. A, Part 1, § H; AR 635-200, Ch. 15. *See* Chapter 14.

[45]BUPERSNOTE 1910, 3420184, ¶ 1d, Mar. 24, 1981.

[46]32 C.F.R. Part 41, App. A, Part 1, §§ H and J; AR 635-200, Chs. 9 and 15. See Chapter 13.

[47]32 C.F.R. Part 41, App. A, Part 1, § F; AR 635-200, Ch. 11.

[48]Generally the first 180 days of service. 32 C.F.R. § 41.6(i).

[49]32 C.F.R. Part 41, App. A, Part 1, § F, ¶ 1.a.

[50]32 C.F.R. Part 41, App. A, Part 1, § F, ¶ 2.

[51]32 C.F.R. Part 41, App. A, Part 1, § F, ¶ 3. *See supra* Supp. § 16.3.

[52]*See supra* Supp. § 16.3.

[53]32 C.F.R. Part 41, App. A, Part 1, § F, ¶ 1.b.

[54]32 C.F.R. Part 41, App. A, Part 1, § G; AR 635-200, Ch. 13.

[55]*See* 47 Fed. Reg. 10,165 (1982).

[56]32 C.F.R. Part 41, App. A, Part 1, §G, ¶ 1.

the circumstances forming the basis for initiation of separation proceedings.

(3) The likelihood that the member will be a disruptive or undesirable influence in present or future duty assignments.

(4) The ability of the member to perform duties effectively in the present and in the future, including potential for advancement or leadership.

(5) The member's rehabilitative potential.

(6) The member's entire military record. . . .[57]

Thus, there is no clear explanation of what performance is sufficiently "unsatisfactory" to warrant a discharge under this category. There is only a list of factors to be considered in deciding on separation or retention, after the determination has already been made that there is a problem in performance. The seeming unfairness of a category of discharge based on unstated performance standards is somewhat mitigated by the counseling and rehabilitation requirements:

> Separation processing [for unsatisfactory performance] may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are of particular importance with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when unsatisfactory performance is the sole reason unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.[58]

Thus, the servicemember is protected from being discharged without knowing that his performance was being found unsatisfactory.

A member discharged for unsatisfactory performance must receive either an Honorable or General Discharge. There is no presumption concerning which is more appropriate.

This reason for discharge may not be used when a servicemember is in Entry Level Status.[59] This provides the small protection for new servicemembers of avoiding the stigma of being labelled "unsatisfactory" when they were unable to adapt to military life. A discharge for unsatisfactory performance may not be issued where the servicemember does not meet medical retention standards.[60]

Strategies for seeking an upgrade of a discharge for unsatisfactory performance will depend on the underlying circumstances. The issues discussed in MDU and in this Supplement with regard to inaptitude and apathy discharges are particularly applicable.

Appendix 16A

***Lipsman:* Settlement**

Appendix 16B

Types of Discharges Issued in FY [83-85] For Selected Reasons of Unsuitability

[*See* DoD Discharge Statistics Table, P.16S/7.]

Appendix 16C

Chronological Development of Current Standards for Unsuitability Discharges

Note the changes in reasons for discharge discussed above.

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[57]32 C.F.R. Part 41, App. A, Part 2, § A, ¶ 2.d.

[58]32 C.F.R. Part 41, App. A, Part 1, § G, ¶ 2.

[59]32 C.F.R. Part 41, App. A, Part 1, § G, ¶ 1. A servicemember is usually in Entry Level Status for the first 180 days on active duty. 32 C.F.R § 41.6(i).

[60]AR 635-200, ¶ 1-35a.

Appendix 16B
DoD Discharge Statistics

Reason	FY83 No./%	FY84 No./%	FY85 No./%
ETS	137,457/42%	130,985/41%	136/152/43%
COG	48,325/15%	50,691/16%	54,897/17%
—Early Release/Demob.	17,903/6%	19,054/6%	19,695/6%
—Entry Into Officers Prog.8,	607/3%	7,773/2%	7,953/3%
—Hardship/Dependency	2,540/1%	3,100/1%	2,808/1%
—Pregnancy/Child birth	5,294/2%	5,020/2%	4,853/2%
—Parenthood	1,030/0%	1,081/0%	1,069/0%
—Other	12,951/4%	14,653/5%	18,579/6%
DISABILITY	5,824/2%	7,510/2%	8,620/3%
DEFECTIVE ENLISTMENT	6,851/2%	7,452/2%	8,078/3%
ENTRY LEVEL PERF.	20,624/6%	21,441/7%	14,228/5%
UNSATISFACTORY PERF.	18,250/6%	16,180/5%	10,191/3%
HOMOSEXUALITY	1,800/1%	1,801/1%	1,644/1%
DRUG REHAB. FAILURE	5,811/2%	3,747/1%	2,250/1%
ALCOHOL REHAB. FLR	4,456/1%	3,582/1%	2,625/1%
MISCONDUCT	28,789/9%	33,087/10%	31,995/10%
—Minor Infractions	4,576/1%	3,858/1%	3,254/1%
—Pattern of Misconduct	11,872/4%	12,538/4%	10,585/3%
—Serious Offense	1,327/0%	2,245/1%	3,243/1%
—Civilian Conviction	785/0%	921/0%	886/0%
—Drug Abuse	9,877/3%	13,515/4%	14,017/4%
IN LIEU OF C-M	10,225/3%	8,543/3%	7,370/2%
OTHER ADMIN.	294/0%	198/0%	317/0%
COURT-MARTIAL	5,944/2%	5,935/2%	5,237/2%
RETIREMENT	26,793/8%	28,157/9%	28,759/9%
DEATH	1,841/1%	1,906/1%	1,702/1%
UNSUITABILITY (TRANSITION)	1,758/1%	11/0%	12/0%
SUB-TOTALS	325,072	321,236	314,107
IMMED REENLISTMENT	206,325	196,651	190,731
TOTALS	531,398	517,897	504,838

CHAPTER 17
Discharges for Unfitness or Misconduct

A. Overview

The DRBs, in recent years, have tended to treat each case in isolation, with no new distinguishable trends for different types of Misconduct cases. Note that new regulations have eliminated the reasons for discharge that previously existed within the Misconduct category. There are now four broad types of Misconduct discharges.[1] They are described in the Chapter Supplement, *infra*. These new regulations are primarily of significance to those who have been discharged since their adoption. They may, however, also be used in current standards arguments for older cases. Overall, the strategies for upgrading the different reasons for discharge are the same under the new regulations as under the old.

B. Chapter Supplement

(1) The bases for Misconduct discharges are different than they were in the past. The arguments for an upgrade suggested in this chapter are, however, still valid. In advocating for upgrades of discharges under the new regulations, the arguments suggested for discharges under the old regulations for similar circumstances should be applied.

DoD regulations list the following reasons for Misconduct discharges:[2]

(1) *Minor disciplinary infractions.* A pattern of misconduct consisting solely of minor disciplinary infractions. If separation of a member in entry level status is warranted solely by reason of minor disciplinary infractions, the action should be processed under Entry Level Performance and Conduct. . . .[3]

(2) *A pattern of misconduct.* A pattern of misconduct consisting of (a) descreditable [sic] involvement with civil or military authorities or (b) conduct prejudicial to good order and discipline.[4]

(3) *Commission of a serious offense.* Commission of a serious military or civilian offense if in the following circumstances:

(a) The specific circumstances of the offense warrant separation;[5] and

(b) A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial. . . .

(4) *Civilian Conviction.*[6] (a) Conviction by civilian authorities or action taken which is tantamount to a finding of guilty, including similar adjudications in juvenile proceedings, when the specific circumstances of the offense warrant separation, and the following conditions are present:[7]

1 A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial; or

2 The sentence by civilian authorities includes confinement for six months or more without regard to suspension or probation.

(b) Separation processing may be initiated whether or not a member has filed an appeal of a civilian conviction or has stated an intention to do so. Execution of an approved separation should be withheld pending outcome of the appeal or until the time for appeal has passed, but the member may be separated prior to final action on the appeal upon request of the member or upon direction of the Secretary concerned.[8]

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[1] *See* Supp. Appendix 16B for statistical breakdown of how these discharges are being issued.

[2] 32 C.F.R. Part 41, App. A, Part 1, § K, ¶ 1.a.

[3] AR 635-200, ¶ 14-12.a specifies that the behavior underlying this reason for a Misconduct discharge must consist of "minor *military* disciplinary infractions."

[4] AR 635-200, ¶ 14-12.b states: "Discreditable conduct and conduct prejudicial to good order and discipline includes conduct violative of the accepted standards of personal conduct found in the UCMJ, Army regulations, the civil law, and time-honored customs and traditions of the Army."

[5] AR 635-200, ¶ 14-12.c states: "An absentee returned to military control from a status of [AWOL] or desertion may be separated for commission of a serious offense."

[6] AR 635-200, ¶ 14-5.b states that "[i]nitiation of separation action is *not* mandatory. Although the conditions established [in *1* and *2*, below] are present, the immediate commander also must consider whether the specific circumstances of the offense warrant separation." Emphasis in original.

[7] AR 635-200, ¶ 14-5.a notes that adjudications in juvenile proceedings are included. AR 635-200, ¶ 14-5.a(2) notes that "[a]djudication in juvenile proceedings includes adjudication as a juvenile delinquent, wayward minor, or youthful offender."

[8] AR 635-200, ¶ 14-6 states: "Upon request of the member, or when the member is present for duty and the commander believes his or her presence is detrimental to good order and discipline or the member presents a threat to the safety and welfare of other members of the organization, it may be appropriate to discharge a member prior to final action on an appeal. In such cases, the entire file will be forwarded to [Army Headquarters] for a final decision."

With the exception of Civilian Court Convictions, these reasons for discharge are much broader than before. Neither DoD nor service regulations provide further specificity.[9] The regulatory changes have resulted in a much broader category of Misconduct. With the elimination of the Unsuitability category and only relatively narrow categories to replace it, servicemembers who in the past would have been discharged for Unsuitability are now being discharged for Misconduct. Even the relatively broad category of Unsatisfactory Performance which has been added appears confined to discharging members whose performance of duties has been poor. Those with exclusive conduct problems no longer have vague Unsuitability categories such as Apathy under which they can be discharged—Misconduct, with its presumption of an UOTHC discharge, is all that's left.

2. On December 17, 1982, the Army Discharge Review Board (DRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the SOP was. The other boards have never had an SOP or equivalent guidelines.

C. Section Supplement

17.1 Introduction and Overview

• P.17/1L, ¶ 2:

Misconduct discharges are now given by reason of:[10]

- Minor disciplinary infractions
- A pattern of misconduct
- Commission of a serious offense
- Civilian court conviction

17.2 Historical Summary of Procedures and Types of Discharges Authorized

a. P.17/2R, ¶ 1:

Current DoD regulations provide:

> Characterization of service normally shall be Under Other Than Honorable Conditions, but characterization as general (under honorable conditions) may be warranted under [broad characterization guidelines contained in regulation[11]]. For respondents who have completed entry level status, characterization of service as Honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate and the separation is approved by a commander exercising general court-martial jurisdiction or higher authority as specified by the secretary concerned.[12]

b. P.17/2R, ¶ 4:

A federal district court has recently ruled that the Army regulatory provision denying a hearing in a "Misconduct—abuse of illegal drugs" case to those with less than six years service and carrying a General, Under Honorable Conditions, Discharge, is a violation of constitutional due process and equal protection rights. *May v. Gray,* 708 F. Supp. 716 (E.D.N.C. 1988).

c. P.17/2R, n.2, add to end of note:

See 32 C.F.R. Part 41, App. A, Part 2, § C, ¶ 2.c(4):

> When the sole basis for separation is a separate offense which resulted in a conviction by court-martial that did not impose a punitive discharge, the member's service may not be characterized Under Other Than Honorable Conditions unless approved by the Secretary concerned.[13]

d. P.17/2R, n.4:

Cite to 32 C.F.R. § 70.6(c)(1) is now 32 C.F.R. § 70.9(c)(1).

17.3 General Case Approaches

a. P.17/2R, ¶ 1:

(1) "Unsuitability" is no longer a discharge category.[14] The principles discussed in this section are, however, still valid. If Unsuitability was still a category at the time of applicant's discharge, it can be argued that the discharge should have been for Unsuitability. If Unsuitability was not a category at the time of discharge, or a current standards argument is to be made, refer to the most appropriate category of discharge described in this supplement at Chapter 16, supra, which has replaced Unsuitability.

(2) *See* ND 81-03332 (1980 UOTHC for frequent involvement upgraded to GD for unsuitability/character and behavior disorder).

b. P.17/3L, n.5:

The current Army regulation is AR 635-200, ¶ 1-34.b which provides that after referral to a medical board,

> "[t]he commander exercising general court-martial jurisdiction will direct the member to be processed through disability channels . . . when it is determined that—
>
> (1)The disability is the cause or substantial cause of the misconduct.
>
> (2)Circumstances warrant disability processing instead of administrative processing."[15]

c. P.17/3R, ¶ 1:

Written Navy policy has been that "[b]ecause of the

---

[9]With the exception of drug cases in the Army. *See* AR 635-200, ¶ 14-12.d.

[10]32 C.F.R. Part 41, App. A, Part 1, § K, ¶ 1.a; AR 635-200, Ch. 14.

[11]32 C.F.R. Part 41, App. A, Part 2, § C, ¶ 2.b.

[12]32 C.F.R. Part 41, App. A, Part 1, § K, ¶ 3. A servicemember in entry level status, usually servicemembers in their first 180 days of service, will receive an uncharacterized Entry Level Separation if an UOTHC discharge is not warranted. *Id. See also* 32 C.F.R. § 41.6(i).

[13]*See also* Army implementation at AR 635-200, ¶ 14-3.

[14]*See* Supp. Ch. 16.

[15]See also AR 635-200, ¶ 14-2.a(3).

serious consequences of [a misconduct] discharge, extreme care in processing and strict adherence to policy is essential." It can be argued that, based on this policy and the principle it adopts, even minor violations of regulations in Misconduct cases should be treated as prejudicial error.

d. P.17/3R, ¶ 1:

In some cases, dischargees were not given the right to a predischarge predetermination hearing. A recent court decisions has questioned the propriety of this procedure. *May v. Gray,* 708 F. Supp. 716 (E.D.N.C. 1988).

17.4 Discharges for Frequent Involvement or Habits and Traits

• P.17/3R:

(1) *See* Chapter Supplement, *supra,* for a discussion of the current analog of Frequent Involvement and the other types of Misconduct discharges.

(2) For a Navy discharge for reason of Frequent Involvement of a discreditable nature with civil and/or military authorities, regulations at one time required:

> (1) A minimum of three or more minor civil convictions (misdemeanors), or three or more punishments under the UCMJ or combination thereof within the past year; or
>
> (2) two courts-martial within the past year; or
>
> (3) five or more minor civil convictions (misdemeanors), or five or more punishments under the UCMJ or combinations thereof within the past two years; or
>
> (4) three courts-martial within the past two years.[16]

17.4.1 Equitable Considerations

a. P.17/4L, n.7:

See also AD 82-00470 (UOTHC to GD; nineteen months good service followed by Article 15 for marijuana possession, followed by ten months good service, followed by SPCM for DOLO and disrespect to NCO).

b. P.17/4L, 1, 5th:

Current regulations state:[17]

> Commanders will consider soldiers meeting criteria [for discharge for acts or patterns of misconduct], and convicted by court-martial, but not sentenced to a punitive discharge, for administrative separation [for Misconduct], when the underlying misconduct warrants separation. When appropriate, commanders may initiate separation action while the member is serving a sentence to confinement at the installation detention facility.

Thus, under current regulations, a discharge for Misconduct following a court-martial sentence which did not include a punitive discharge is permitted.[18]

c. P.17/4R, n.12:

See also ND 81-03332 (1980 UOTHC for frequent involvement upgraded to GD for unsuitability/character and behavior disorder); AC 79-00980; AC 79-06291; AD 79-04089.

d. P.17/4R, n.13:

See also AC 77-05387.

e. P.17/4, 2nd:

The discharge upgrade rate at the NDRB is very low, particularly in cases where it is argued that an Undesirable Discharge was too harsh in light of current standards.

f. P.17/4R, n.15:

Cross reference should be to § 17.4.2.

g. P.17/4R, last:

Arguments that Article 15s were for minor offenses are often dealt with by the DRBs by citing to the level of punishment available under the U.C.M.J. The DRB will state that since, under the U.C.M.J., the punishment for the offense could be five years confinement, the offense could not be minor. The flaw in this position is that the maximum possible punishment for an offense is only a very rough guide of the seriousness of a particular act. The minimum possible punishment is just as good a guide. That minimum can often be as little as a reprimand or forfeiture of pay.

h. P.17/4R, n.16, ¶ 1:

See AD 79-04089.

17.4.2 Propriety Considerations

a. P.17/5L, 1st:

See AR 635-200, ¶ 1-34.b (mental Status Evaluation required for Misconduct discharge except where for Civilian Court Conviction).

b. P.17/5L, 2nd:

(1) Current regulations state that processing for a discharge for Misconduct by reason of Minor Disciplinary Infractions or A Pattern of Misconduct,[19]

> "may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records."[20]

The requirement that the counseling be included in the records is significant because the presumption of regularity applied by the DRBs and BCMRs is not applicable when required records are missing.[21]

(2) *See* AR 635-200, ¶ 1-18 for specific requirements under Army regulations for counseling and rehabilitation, including rehabilitative transfer.

(3) There is no counseling or rehabilitation requirement under current regulations for Misconduct discharges by reason of A Serious Offense, or Civilian Court Conviction.

17.5 Shirking

a. P.17/5L, ¶ 1:

The distinction between acts of omission and commission represented by the Shirking reason for discharge has been eliminated. Acts of omission are now dealt with in terms of the Unsatisfactory Performance Discharge category or the charges which the acts of omission give rise.[22] Accumula-

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[16]BUPERSNOTE 1910, 3420185, 1, Mar. 24, 1981.

[17]AR 635-200, ¶ 14-2g.

[18]*But see* Supp. § 17.2.6.

[19]*See* Chapter Supplement, *supra.*

[20]32 C.F.R. Part 41, App. A, Part 1, § K, ¶ 2.

[21]*See* Supp. §§ 9.3.3 and 12.1.2.

[22] *E.g.,* "Failure to Obey a Lawful Order" (FOLO).

tion of several of these charges may give rise to discharges by reason of Minor Disciplinary Infractions or A Pattern of Misconduct.[23]

b. P.17/5, n.20:

BUPERSNOTE 1910, 3420185, ¶ 1.b, Mar. 24, 1981.

17.6 Discharges Based on Civilian Court Convictions

a. P.17/5R, ¶ 1:

See Chapter Supplement, *supra,* for discussion of current regulations concerning discharge for Misconduct by reason of Civilian Court Convictions.

b. P.17/5R, ¶ 2, 1st sentence:

Army regulations specifically state that juvenile proceedings are treated as civilian convictions.[24]

17.6.1 Equitable Approaches

a. P.17/5R, n.26:

See AD 80-13163; AD 80-10659; AD 80-02603; ND 77-01889 (UD to GD; Armed Robbery); FD 81-00638 (UD to HD; prior honorable service with combat duty. Good ratings. Sentence for writing bad checks suspended for restitution (which was accomplished prior to conviction) and probation. Mitigated by family illness, flood, and PCS); FD 80-02590 (UD to GD; eleven years of prior honorable service, with combat duty and awards. Civil conviction for writing a bad check for $42.65).

b. P.17/6L, n.27:

See FD 81-00638 (UD to HD; prior honorable service with combat duty. Good ratings. Sentence for writing bad checks suspended for restitution (which was accomplished prior to conviction) and probation. Mitigated by family illness, flood, and PCS).

c. P.17/6L, n.28:

ND 81-06866 (UD to HD; civil conviction fully pardoned by governor).

d. P.17/6L, n.30:

ND 81-06733 (UD to GD; civil conviction for marijuana possession. If processed under UCMJ, would probably not have resulted in discharge and the Laird Memo would have been applicable.)

e. P.17/6L, n.31:

See AD 80-02603.

f. P.17/6L, Add new •:

• Act upon which conviction based was an impulsive act rather than one having felonious intent and/or did not reflect servicemember's true character.[25]

g. P.17/6L, 1st •:

Many states have adopted laws which allow the expungment of convictions which were for small amounts of marijuana. Expungment is a good basis for seeking DRB review of a discharge based on a civilian court conviction.

17.6.2 Propriety Considerations

a. P.17/6L, n.34:

Where the regulation so provides, discharge should not be accomplished until after appeals are complete. For example, BUPERSNOTE 1910, 3420181, ¶ 4.e, Mar. 24, 1981, provides:

> A member subject to discharge because of conviction by civil court will be processed for discharge notwithstanding the fact that he/she has filed an appeal or has stated his/her intention to do so. It will be the general policy of the Chief of Naval Personnel to withhold final action pending outcome of the appeal unless otherwise directed by the Secretary of the Navy.

See also DoD regulations quoted in Chapter Supplement, *supra,* and AR 635-200, ¶ 14-6.

b. P.17/6R, n.35:

See AR 635-200, ¶ 2-14.

c. P.17/6R, 4th •:

This requirement now has exceptions. See AR 635-200, ¶ 1-21.

d. P.17/6R, n.37:

This provision no longer exists. Present relevant regulatory provisions are at AR 635-200, ¶ 1-21.

e. P.17/6R, last •:

In *Kalista v. Secretary of the Navy,* 560 F. Supp. 608, 615 (D. Colo. 1983), the court held that it was not a denial of the servicemember's rights where he was not afforded the opportunity to appear at his discharge hearing while in civilian confinement, although the civilian authorities had authorized his attendance at the hearing, where the Marine Corps regulation provided the servicemember the right to appear at the ADB" [s]ubject to his availability (i.e., not in civil confinement or on unauthorized absence)."

f. *See Maghe v. United States,* 710 F.2d 503 (9th Cir. 1983) (Discussing writ of coram nobis challenging validity of old conviction and relevance to discharge upgrade).

g. P.17/7L, last •:

In *Austin v. Lehman,* 10 MIL. L. REP. 2305 (N.D. Tex. 1982), the court held that the BCNR was obligated to consider the constitutionality of a Mexican civilian court conviction which was the basis for an administrative discharge.

17.7 Dishonorable Failure to Pay Just Debts or Support Dependents

a. P.17/7L, ¶ 2:

Individuals formerly discharged for "Dishonorable Failure to Pay Just Debts or Support Dependents" would probably now be discharged by reason of "A Pattern of Misconduct" or possibly "Commission of a Serious Offense."[26]

b. P.17/7R, n.45:

See generally Parker v. Levy, 417 U.S. 733, 743-48 (1974), on development of Article 134.

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[23]*See* Chapter Supplement, supra, for a discussion of the current reasons for discharge under Misconduct.

[24]AR 635-200, ¶ 14-5.a.

[25]*See* ND 81-06866 (UD to HD; "Actions which led to the applicant's civil conviction were not typical of his normal behavior." Civil conviction was pardoned by governor); ND 79-01828 (UD to GD; "[UD was] an '[i]nequitable and an unwarranted burden in light of the circumstances.'").

[26]*See* Chapter Supplement, *supra.*

c. P.17/7R, insert after text at note 45:

The failure to pay must be "dishonorable." *Krzeminski v. United States,* 13 Cl. Ct. 430 (1987). The Manual for Courts-Martial, part IV, 71, describes *dishonorable* failure to pay a just debt as: "[m]ore than negligence in nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude towards one's just obligations." There are many military court cases interpreting the offense "dishonorable failure to pay just debts" under Article 134. The court in *Krzeminski* held that these courts' interpretations "carry considerable weight" in a review of an administrative discharge.

Among the cases are: *United States v. Kirksey,* 6 C.M.A. 556, 20 C.M.R. 272 (1952) ("[u]nless the failure to liquidate an obligation was characterized by some act of willful evasion, bad faith, or false promise, the conduct is not regarded as dishonorable—and therefore not an offense under the Uniform Code." 6 C.M.A. at 560. The court concluded that "an affirmatively culpable conduct or attitude" must be present. 6 C.M.A. at 561); *Stewart v. United States,* 197 Ct. Cl. 472, 501 (1972) (quoting a BCNR report which concludes that a dishonorable failure to pay just debts requires an intent on the part of the accused to deceive or defraud his creditor); *United States v. Bethea,* 3 M.J. 526, 528 (1977) ("The term 'dishonorable' connotes a mental element closely related to that of a specific intent."); *United States v. Gibson,* 1 M.J. 714, 718 (1975); *United States v. Stevenson,* 30 C.M.R. 769, 774 (1960) ("to make the failure dishonorable, the debt must have been contracted under false representations or the failure to pay characterized by deceit, evasion, or false promises, and the failure to discharge the obligation continues for an unconscionable period."). The simple failure to pay does not establish the required dishonor. *United States v. Cummins,* 9 C.M.A. 669, 674 (1985); *United States v. Atkinson,* 10 C.M.A. 60, 62 (1958); *United States v. Smith,* 1 M.J. 703, 706 (1975) ("mere negligent nonpayment, even over a long period of time, does not itself establish the element of dishonorableness, and one's inability to discharge a debt, contracted without wrongful intention, is a defense to the charge."); *United States v. Schneiderman,* 12 C.M.A. 494, 496 (1961); *United States v. Gibson,* 1 M.J. 714, 718 (1975) (mere failure to keep promise to pay not in itself dishonorable). *See also United States v. Borner,* 25 M.J. 551 (A.F.C.M.R. 1986); *United States v. Duckworth,* 25 M.J. 550 (A.F.C.M.R. 1986).

17.8 Homosexuality and Sexual Perversion

• P.17/7R, 1:

(1) Servicemembers formerly discharged for Sexual Perversion would now be discharged by reason of "A Pattern of Misconduct" or "Commission of a Serious Offense."[27]

(2) The Navy has described "sexual perversion" as "including but not limited to (1) lewd and lascivious acts; (2) sodomy; (3) indecent exposure; (4) indecent acts with or assault upon a child; (5) other indecent acts or offenses."[28] Processing for discharge was mandatory for these "sexual perversions" in the Navy.[29]

[27]*See* Chapter Supplement, *supra.*

[28]BUPERSNOTE 1910, 3420185, ¶ 1.e, Mar. 24, 1981.

[29]*Id.*

17.9 Unsanitary Habits

a. P.17/8L, ¶ 1:

It was not uncommon for relapses of Venereal Disease to be mistaken for repeated contractions of the disease. If a board accepts this an upgrade may ensue.[30]

b. P.17/8L, n.54:

See MD 81-01148 (UD to GD; changed to Unsuitability based on current standards. 3.5 final average conduct rating, and 3.7 final average proficiency rating).

17.10 Drug Abuse

• P.17/8L, n.55:

Delete all after citation in this note.

17.11 Prolonged Absences

a. P.17/8L, last •:

Where authorized by regulation, a discharge under these circumstances may be accomplished in abstentia.[31]

b. P.17/8R, 1st •:

See AC 78-00670 ("[C]onsideration should be given to the applicant's prior honorable service, his Korean service, and the fact that family problems apparently led to his absence without leave."); AD 82-01893 (UOTHC to GD; AWOL related to family problems); AD 81-03649 (UD to UHC; AWOLs partly mitigated by difficulties adapting to new MOS); AD 80D08910 (Applicant was tried and found not guilty of possession of marijuana after which his commander used him "as a duty soldier in demeaning jobs." When applicant found his efforts to correct the situation futile, he went AWOL for four months. The board found that he merited an upgrade to a GD because he had tried to correct his situation but was faced with a difficult superior); FD 80-02077 (UD to GD; Deprived background, knee injury, homesickness, and medical problems mitigate two SCMs in five months service).

c. P.17/8R, 2nd •:

(1) There has been a minimum length of absence required for processing for misconduct. BUPERSNOTE 1910, 3420185, ¶ 1.l, Mar. 24, 1981 (continuous absence of one year or more required for processing for misconduct).

(2) See AD 80-07961A (Upgrade granted; 178 days lost); AD 80-05815 (Upgrade granted; 68 days lost); AD 80-00475 (Upgrade granted; 288 days lost); AD 79-06130; Upgrade granted; 96 days lost); AD 78-03974 (Upgrade granted; 160 days lost); AD 78-01023A (Upgrade granted; 26 days lost); AC 58-01715-B (Two absences, 16 and 48 days. The board stated "[t]hat notwithstanding the seriousness of the offense of absence without leave at the time, consideration should now be given contemporary policies relative to absences of such short duration. . . ."). AD 80-10836 (UD to GD; 33 day AWOL).

17.12 Unfitness/Misconduct Checklist

• P.17/8R, n.60:

See Chapter Supplement, *supra.*

[30]*See* ND 81-04165 (UD to GD; Board accepted veteran's contention that at least two of four diagnosed infections with VD were relapses); MD 81-03527 (UD to GD; Chance that two VD cases were the same occurrence. Overall record warranted upgrade).

[31]*See* BUPERSNOTE 1910, 3420181, ¶ 4.i, Mar. 24, 1981; NAVMILPERSCOMINST, 1910.1, ¶ 4g(7).

Appendix 17A

DRB/BCMR Decisions

A. Case Lists Arranged by Reason for Discharge and Primary Reason for Upgrade

1. Frequent Involvement/Habits and Traits

Overall Record Warrants Upgrade

AD 81-07451; FD 81-00710; FD 80-02369; FD 80-01673.

Too Harsh/Minor Offenses Warrant Upgrade

AD 81-14526; AD 81-02561; FD 81-00710; FD 80-02367.

Current Standards Warrant Upgrade

FD 81-00710; FD 80-02494; FD 80-01360.

Psychiatric Problems or Unsuitability Discharge More Proper

AD 81-14862; AD 81-06907; AD 81-02561; AD 81-00488; AD 81-00325; AD 81-00044; ND 81-05190; FD 80-02214; FD 80-01462.

Immaturity/Lack of Capability to Serve

AD 81-00044.

Insufficient Rehabilitation Attempted

Miscellaneous/Mixed Reasons

AD 81-14862; AD 81-02828; FD 80-02077.

Impropriety

2. Shirking

General

Psychiatric

AD 81-14592.

Overall Record Warrants Upgrade or UD Too Harsh

AD 81-14592.

Insufficient Rehabilitation

3. Civil Court Convictions

Immaturity

Too Harsh/Overall Record

MD 81-01676; FD 81-00638.

Current Standards

ND 81-06733.

General Equity

AD 82-00448; ND 81-06733; FD 81-00638; FD 80-02481.

Impropriety

4. Failure to Pay Debts

Overall Record/UD Too Harsh

Current Standards

5. Sexual Perversion

B. Digests of Cases Relied Upon

1. Army

a. P.17A/10, AD 79-09434:

Digest states that an HD was granted. This is incorrect. No relief was granted.

b. additional cases:

AD 82-00448 (UD to GD; Drug abuse and personal problems (spouse abandoned applicant and child) mitigates civil conviction for sale of drugs);

AD 81-14862 (UD to GD; Repeated AWOLs for "girlfriend" problem);

AD 81-14592 (UD to GD; Minor offenses (three SCMs: DOLO, AWOL, disrespectful behavior and absent from duty) and diagnosis of personality disorder);

AD 81-14526 (UD to GD; UD too harsh in light of offenses—three SCMs for missing bed check, absent from hard labor detail, absent from place of duty for over one day);

AD 81-07451 (UD to GD; Prior Honorable Service, Combat in Korea, Purple Heart, and CIB mitigate SPCMs for AWOLs totalling 260 days);

AD 81-06907 (UD to HD; Alcoholism diminished ability to serve);

AD 81-02561 (UD to GD; Three SCMs for leaving place of duty (two counts), AWOL for one day, operating truck while drunk, wrongful appropriation of 2-1/2 ton truck—all within nineteen-day span following receipt of "Dear John" letter. Board found behavior atypical and UD too harsh);

AD 81-00488 (UD to HD; Personality disorder made it impossible for servicemember to change behavior);

AD 81-00325 (UD to GD; Personality disorder mitigates three article 15s for AWOL, possession of unauthorized absence slip, FTR/missed reveille);

AD 81-00044 (UD to GD; Personality disorder and youth, immaturity, family background and post-service conduct mitigated indisciplines).

2. Air Force

FD 81-00710 (UD to GD; Five days AWOL and sixty-five days confinement in three years. Five SCMs for minor offenses. Ratings generally excellent, with some satisfactory or poor, and one unsatisfactory);

FD 81-00638 (UD to HD; Prior honorable service with combat duty. Good ratings. Sentence for writing bad checks suspended for restitution (which was accomplished prior to conviction) and probation. Mitigated by family illness, flood, and PCS);

FD 80-02494 (UD to GD; Personality disorder and possible drinking problem. Not enough to fully mitigate misconduct);

FD 80-02481 (UD to HD; Civil conviction for stealing beer related to undiagnosed alcoholism);

FD 80-02369 (UD to GD; Honorable prior service. One Article 15, and three SCMs);

FD 80-02367 (UD to GD; Three article 15s, one SCM, and three cases of VD in three years of service. Bad ratings. Upgrade based on minor misconduct and overall record);

FD 80-02214 (UD to GD; Personality disorder and mental category IV basis for upgrade);

FD 80-2077 (UD to GD; Deprived background, knee injury, homesickness, and medical problems mitigate two SCMs in five months service);

FD 80-2045 (UD to GD; Personality disorder impaired ability to serve. Numerous recommendations for discharge for Character and Behavior disorder);

FD 80-01462 (Blue to GD; Personality may have impaired ability to serve);

FD 80-01360 (UD to GD; Under current regulations, DA may set aside findings of ADB and order a new board but may not approve findings and recommendations less favorable to the servicemember than those of the first board.

Here, first ADB recommended retention and second board recommended discharge. Upgraded pursuant to current standards);

FD 80-01673 (UD to GD; Repeated contractions of VD in fifteen month period, four SCMs for AWOL. Three-year period of productivity mitigating).

3. Navy/Marine Corps

ND 81-06733 (UD to GD; Civil conviction for marijuana possession. If processed under UCMJ would probably not have resulted in discharge and the Laird Memo would have been applicable if he had);

ND 81-05190 (UD to GD; Diminished capacity to serve based on hospitalization at psychiatric facility immediately after discharge and extremely low AFQT and GCT scores);

MD 81-01676 (UD to HD; Civilian conviction for streaking on college campus in 1962. Conduct was induced by atypical drunkenness).

Appendix 17B

Manual For Courts-Martial 1951

• This Appendix contains only the Table of Maximum Punishments, not the entire MCM.

Table of Maximum Punishments, MCM 1984
[*See* Insert on page 17S/8]

Appendix 17C

Chronological Development of Current Standards for Unfitness/Misconduct Discharges

Note the changes in reasons for discharge discussed above.

APPENDIX 17B

Appendix 12 from the 1984 *Manual for Courts-Martial*

MAXIMUM PUNISHMENT CHART

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
77	Principals (*see* Part IV, ¶ 1 and pertinent offenses)			
78	Accessory after the fact (*see* Part IV, ¶ 3.e.)			
79	Lesser included offenses (*see* Part IV, ¶ 2 and pertinent offenses)			
80	Attempts (*see* Part IV, ¶ 4.e.)			
81	Conspiracy (*see* Part IV, ¶ 5.e.)			
82	Solicitation			
	If solicited offense committed, or attempted, see Part IV, ¶ 6.e.			
	If solicited offense not committed:			
	Solicitation to desert*	DD, BCD	3 yrs.*	Total
	Solicitation to mutiny*	DD, BCD	10 yrs.*	Total
	Solicitation to commit act of misbehavior before enemy*	DD, BCD	10 yrs.*	Total
	Solicitation to commit act of sedition*	DD, BCD	10 yrs.*	Total
83	Fraudulent enlistment, appointment	DD, BCD	2 yrs.	Total
	Fraudulent separation	DD, BCD	5 yrs.	Total
84	Effecting unlawful enlistment, appointment, separation	DD, BCD	5 yrs.	Total
85	Desertion			
	Intent to avoid hazardous duty, shirk important service*	DD, BCD	5 yrs.*	Total
	Other cases			
	Terminated by apprehension	DD, BCD	3 yrs.*	Total
	Otherwise terminated	DD, BCD	2 yrs.*	Total
86	Absence without leave, etc.			
	Failure to go, going from place of duty	None	1 mo.	2/3 1 mo.
	Absence from unit, organization, etc.			
	Not more than 3 days	None	1 mo.	2/3 1 mo.
	More than 3, not more than 30 days	None	6 mos.	2/3 6 mos.
	More than 30 days	BCD	1 yr.	Total
	More than 30 days and terminated by apprehension	DD, BCD	1 yr., 6 mos.	Total
	Absence from guard or watch	None	3 mos.	2/3 3 mos.
	Absence from guard or watch with intent to abandon	BCD	6 mos.	Total
	Absence with intent to avoid maneuvers, field exercises	BCD	6 mos.	Total

*Suspended in time of war

Article	Offenses	Discharge	Confinement	Forfeitures
87	Missing movement			
	Through design	DD, BCD	2 yrs.	Total
	Through neglect	BCD	1 yr.	Total
88	Contempt toward officials	Dismissal	1 yr.	Total
89	Disrespect toward superior commissioned officer	BCD	1 yr.	Total
90	Assaulting, willfully disobeying superior commissioned officer			
	Striking, drawing or lifting up any weapon or offering any violence toward superior commissioned officer in execution of duty*	DD, BCD	10 yrs.*	Total
	Willfully disobeying lawful order of superior commissioned officer*	DD, BCD	5 yrs.*	Total
91	Insubordinate conduct toward warrant, noncommissioned, petty officer			
	Striking or assaulting:			
	Warrant officer	DD, BCD	5 yrs.	Total
	Superior noncommissioned officer	DD, BCD	3 yrs.	Total
	Other noncommissioned or petty officer	DD, BCD	1 yr.	Total
	Willfully disobeying:			
	Warrant officer	DD, BCD	2 yrs.	Total
	Noncommissioned or petty officer	BCD	1 yr.	Total
	Contempt, disrespect toward:			
	Warrant Officer	BCD	9 mos.	Total
	Superior noncommissioned or petty officer	BCD	6 mos.	Total
	Other noncommissioned or petty officer	None	3 mos.	2/3 3 mos.
92	Failure to obey order, regulation			
	Violation, failure to obey general order or regulation**	DD, BCD	2 yrs.	Total
	Violation, failure to obey other order**	BCD	6 yrs.	Total
	Dereliction in performance of duties			
	Through neglect, culpable inefficiency	None	3 mos.	2/3 3 mos.
	Willful	BCD	6 mos.	Total
93	Cruelty, maltreatment of subordinates	DD, BCD	1 yr.	Total
94	Mutiny & sedition	Death, DD, BCD	Life	Total
95	Resisting apprehension, breach of arrest; escape			
	Resisting apprehension	BCD	1 yr.	Total
	Breaking arrest	BCD	6 mos.	Total
	Escape from custody or confinement	DD, BCD	1 yr.	Total
96	Releasing prisoner without proper authority	DD, BCD	2 yrs.	Total
	Suffering prisoner to escape through neglect	BCD	1 yr.	Total
	Suffering prisoner to escape through design	DD, BCD	2 yrs.	Total

*Suspended in time of war

**See paragraph 16e(1) & (2) Note, Part IV

Article	Offenses	Discharge	Confinement	Forfeitures
97	Unlawful detention	DD, BCD	3 yrs.	Total
98	Noncompliance with procedural rules, etc.			
	Unnecessary delay in disposition of case	BCD	6 mos.	Total
	Knowingly, intentionally failing to comply, enforce code	DD, BCD	1 yr.	Total
99	Misbehavior before enemy	Death, DD, BCD	Life	Total
100	Subordinate compelling surrender	Death, DD, BCD	Life	Total
101	Improper use of countersign	Death, DD, BCD	Life	Total
102	Forcing safeguard	Death, DD, BCD	Life	Total
103	Captured, abandoned property; failure to secure, etc.			
	Of value of $100.00 or less	BCD	6 mos.	Total
	Of value of more than $100.00	DD, BCD	5 yrs.	Total
	Looting, pillaging	DD, BCD	Life	Total
104	Aiding the enemy	Death, DD, BCD	Life	Total
105	Misconduct as prisoner	DD, BCD	Life	Total
106	Spying	Mandatory Death, DD, BCD	Not applicable	Total
107	False official statements	DD, BCD	5 yrs.	Total
108	Military property; loss, damage, destruction, disposition			
	Selling, otherwise disposing			
	Of value of $100.00 or less	BCD	1 yr.	Total
	Of value of more than $100.00	DD, BCD	10 yrs.	Total
	Any firearm, explosive, or incendiary device	DD, BCD	10 yrs.	Total
	Damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed:			
	Through neglect, of a value of:			
	$100.00 or less	None	6 mos.	2/3 6 mos.
	More than $100.00	BCD	1 yr.	Total
	Willfully, of a value of:			
	$100.00 or less	BCD	1 yr.	Total
	More than $100.00	DD, BCD	10 yrs.	Total
	Any firearm, explosive, or incendiary device	DD, BCD	10 yrs.	Total
109	Property other than military property of U.S.; loss, damage, destruction, disposition:			
	Wasting, spoiling, destroying, or damaging property of value of:			
	$100.00 or less	BCD	1 yr.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
110	Hazarding a vessel			
	Willfully and wrongfully	Death, DD, BCD	Life	Total
	Negligently	DD, BCD	2 yrs.	Total

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
111	Drunken driving			
	Resulting in personal injury	DD, BCD	1 yr., 6 mos.	Total
	Other cases	BCD	6 mos.	Total
112	Drunk on duty	BCD	9 mos.	Total
112A	Wrongful use, possession, etc. of controlled substances*			
	—Wrongful use, possession, manufacture, or introduction of:			
	—Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	DD, BCD	5 yrs.	Total
	—Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances	DD, BCD	2 yrs.	Total
	—Wrongful distribution of, or, with intent to distribute, wrongful possession, manufacture, introduction, or wrongful importation of or exportation of:			
	—Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	DD, BCD	15 yrs.	Total
	—Phenobarbital and Schedule IV and V controlled substances	DD, BCD	10 yrs.	Total
113	Misbehavior of sentinel or lookout			
	In time of war	Death, DD, BCD	Life	Total
	In other time:			
	While receiving special pay under 37 U.S.C. 310	DD, BCD	10 yrs.	Total
	Other places	DD, BCD	1 yr.	Total
114	Dueling	DD, BCD	1 yr.	Total
115	Malingering			
	Feigning illness, etc.			
	In time of war, or while receiving special pay under 37 U.S.C. 310	DD, BCD	3 yrs.	Total
	Other	DD, BCD	1 yr.	Total
	Intentional self-inflicted injury			
	In time of war, or while receiving special pay under 37 U.S.C. 310	DD, BCD	10 yrs.	Total
	Other	DD, BCD	5 yrs.	Total
116	Riot	DD, BCD	10 yrs.	Total
	Breach of peace	None	6 mos.	2/3 6 mos.
117	Provoking speech, gestures	None	6 mos.	2/3 6 mos.

*When any offense under paragraph 37, Part IV, is committed while on duty, onboard a vessel or aircraft used by or under the control of the armed forces, or while receiving special pay under 37 U.S.C. 310, the maximum period of confinement and forfeiture of all pay and allowances is increased by 5 years.

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
118	**Murder**			
	Article 118(1) or (4)	Death, mandatory minimum life, DD, BCD	Life	Total
	Article 118(2) or (3)	DD, BCD	Life	Total
119	**Manslaughter**			
	Voluntary	DD, BCD	10 yrs.	Total
	Involuntary	DD, BCD	3 yrs.	Total
120	**Rape**	Death, DD, BCD	Life	Total
	Carnal knowledge	DD, BCD	15 yrs.	Total
121	**Larceny**			
	Of value of $100.00 or less	BCD	6 mos.	Total
	Of value of more than $100.00, or of aircraft, vessel, vehicle	DD, BCD	5 yrs.	Total
	Wrongful appropriation			
	Of value of $100.00 or less	None	3 mos.	2/3 3 mos.
	Of value of more than $100.00	BCD	6 mos.	Total
	Of vehicle, aircraft, vessel	DD, BCD	2 yrs.	Total
122	**Robbery**			
	Committed with a firearm	DD, BCD	15 yrs.	Total
	Other cases	DD, BCD	10 yrs.	Total
123	**Forgery**	DD, BCD	5 yrs.	Total
123A	**Checks, etc., insufficient funds, intent to deceive**			
	To procure anything of value of:			
	$100.00 or less	BCD	6 mos.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
	For payment of past due obligation, and other cases	BCD	6 mos.	Total
124	**Maiming**	DD, BCD	7 yrs.	Total
125	**Sodomy**			
	By force and without consent	DD, BCD	20 yrs.	Total
	With child under age of 16 years	DD, BCD	20 yrs.	Total
	Other cases	DD, BCD	5 yrs.	Total
126	**Arson**			
	Aggravated	DD, BCD	20 yrs.	Total
	Other cases, where property value is:			
	$100.00 or less	DD, BCD	1 yr.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
127	**Extortion**	DD, BCD	3 yrs.	Total
128	**Assaults**			
	Simple assault	None	3 mos.	⅓ 3 mos.

Article	Offenses	Discharge	Confinement	Forfeitures
	Assaults (cont'd)			
	Assault consummated by battery	BCD	3 mos.	2/3 3 mos.
	Assault upon commissioned officer of U.S. or friendly power not in execution of office	DD, BCD	3 yrs.	Total
	Assault upon warrant officer, not in execution of office	DD, BCD	1 yr., 6 mos	Total
	Assault upon noncommissioned or petty officer not in execution of office	BCD	6 mos.	Total
	Assault upon, in execution of office, person serving as sentinel, lookout, security policeman, military policeman, shore patrol, master at arms, or civil law enforcement	DD, BCD	3 yrs.	Total
	Assault consummated by battery upon child under age of 16 yrs.	DD, BCD	2 yrs.	Total
	Assault with dangerous weapon or means likely to produce grievous bodily harm or death:			
	Committed with loaded firearm	DD, BCD	8 yrs.	Total
	Other cases	DD, BCD	3 yrs.	Total
	Assault in which grievous bodily harm is intentionally inflicted:			
	With a loaded firearm	DD, BCD	10 yrs.	Total
	Other cases	DD, BCD	5 yrs.	Total
129	Burglary	DD, BCD	10 yrs.	Total
130	Housebreaking	DD, BCD	5 yrs.	Total
131	Perjury	DD, BCD	5 yrs.	Total
132	Frauds against the United States			
	Offenses under article 132(1) or (2)	DD, BCD	5 yrs.	Total
	Offenses under article 132(3) or (4)			
	$100.00 or less	BCD	6 mos.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
133	Conduct unbecoming officer (*see* Part IV, para. 58e)	Dismissal	1 yr. or as prescribed	As prescribed
134	Abusing public animal	None	3 mos.	2/3 3 mos.
	Adultery	DD, BCD	1 yr.	Total
	Assault, indecent	DD, BCD	5 yrs.	Total
	Assault			
	—With intent to commit murder or rape	DD, BCD	20 yrs.	Total
	—With intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary	DD, BCD	10 yrs.	Total
	—With intent to commit housebreaking	DD, BCD	5 yrs.	Total
	Bigamy	DD, BCD	2 yrs.	Total
	Bribery	DD, BCD	15 yrs.	Total
	Graft	DD, BCD	2 yrs.	Total
	Burning with intent to defraud	DD, BCD	10 yrs.	Total
	Check, worthless, making and uttering—by dishonorably failing to maintain funds	BCD	6 mos.	Total
	Cohabitation, wrongful	None	4 mos.	2/3 4 mos.
	Correctional custody, escape from	DD, BCD	1 yr.	Total
	Correctional custody, breach of	BCD	6 mos.	Total
	Debt, dishonorably failing to pay	BCD	6 mos.	Total
	Disloyal statements	DD, BCD	3 yrs.	Total

Article	Offenses	Discharge	Confinement	Forfeitures
134	Disorderly conduct			
	—Under such circumstances as to bring discredit	None	4 mos.	2/3 4 mos.
	—Other cases	None	1 mo.	2/3 1 mo.
	Drunkenness			
	—Aboard ship or under such circumstances as to bring discredit	None	3 mos.	2/3 3 mos.
	—Other cases	None	1 mo.	2/3 1 mo.
	Drunk and disorderly			
	—Aboard ship	BCD	6 mos.	Total
	—Under such circumstances as to bring discredit	None	6 mos.	2/3 6 mos.
	—Other cases	None	3 mos.	2/3 3 mos.
	Drinking liquor with prisoner	None	3 mos.	2/3 3 mos.
	Drunk prisoner	None	3 mos.	2/3 3 mos.
	Drunkenness—incapacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs	None	3 mos.	2/3 3 mos.
	False or unauthorized pass offenses			
	—Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling	DD, BCD	3 yrs.	Total
	—All other cases	BCD	6 mos.	Total
	False pretenses, obtaining services under			
	—Of a value of $100.00 or less	BCD	6 mos.	Total
	—Of a value of more than $100.00	DD, BCD	5 yrs.	Total
	False swearing	DD, BCD	3 yrs.	Total
	Firearm, discharging—through negligence	None	3 mos.	2/3 3 mos.
	Firearm, discharging—willfully, under such circumstances as to endanger human life	DD, BCD	1 yr.	Total
	Fleeing scene of accident	BCD	6 mos.	Total
	Fraternization	Dismissal	2 yrs.	Total
	Gambling with subordinates	None	3 mos.	2/3 3 mos.
	Homicide, negligent	BCD	1 yr.	Total
	Impersonation			
	—With intent to defraud	DD, BCD	3 yrs.	Total
	—All other cases	BCD	6 mos.	Total
	Indecent act, liberties with child	DD, BCD	7 yrs.	Total
	Indecent exposure	None	6 mos.	2/3 6 mos.
	Indecent language			
	—Communicated to child under 16 yrs.	DD, BCD	2 yrs.	Total
	—Other cases	DD, BCD	1 yr.	Total
	Indecent acts with another	DD, BCD	5 yrs.	Total
	Jumping from vessel into the water	BCD	6 mos.	2/3 6 mos.
	Kidnapping	DD, BCD	Life	Total
	Mail, taking, opening, secreting, destroying, or stealing	DD, BCD	5 yrs.	Total
	Mails, depositing or causing to be deposited obscene matters in	DD, BCD	5 yrs.	Total
	Misprison of serious offense	DD, BCD	3 yrs.	Total
	Obstructing justice	DD, BCD	5 yrs.	Total

Article	Offenses	Discharge	Confinement	Forfeitures
134	Pandering	DD, BCD	5 yrs.	Total
	Prostitution	DD, BCD	1 yr.	Total
	Parole, violation of	BCD	6 mos.	2/3 6 mos.
	Perjury, subornation of	DD, BCD	5 yrs.	Total
	Prisoner, allowing to do unauthorized act	None	3 mos.	2/3 3 mos.
	Public record, altering, concealing, removing, mutilating, obliterating, or destroying	DD, BCD	3 yrs.	Total
	Quarantine, breaking	None	6 mos.	2/3 6 mos.
	Refusing, wrongfully, to testify	DD, BCD	5 yrs.	Total
	Requesting commission of an offense, wrongful communication of language	None	4 mos.	2/3 4 mos.
	Restriction, breaking	None	1 mo.	2/3 1 mo.
	Seizure, destruction, removal, or disposal of property to prevent	DD, BCD	1 yr.	Total
	Sentinel, lookout, offenses against or by	None	3 mos.	2/3 3 mos.
	Soliciting another to commit an offense (*see* Part IV, para. 109e)			
	Stolen property, knowingly receiving, buying, concealing			
	Of a value of $100.00 or less	BCD	6 mos.	Total
	Of a value of more than $100.00	DD, BCD	3 yrs.	Total
	Straggling	None	3 mos.	2/3 3 mos.
	Threat, bomb, or hoax	DD, BCD	5 yrs.	Total
	Threat, communicating	DD, BCD	3 yrs.	Total
	Unlawful entry	BCD	6 mos.	Total
	Weapon, concealed, carrying	BCD	1 yr.	Total
	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	None	6 mos.	2/3 6 mos.

CHAPTER 18
Fraudulent Enlistment and Void Discharges

A. Overview

As described in the Chapter Supplement, there is now a separate category of discharge, "Defective Enlistments and Inductions," which includes most of the discharges given under the circumstances described in this chapter. This new category can be used as the basis for current standards arguments where it is advantageous to those discharged under Misconduct, or other categories of discharge previously used.

There is now an uncharacterized discharge called "Void Enlistment or Induction" which is used in some situations where void discharges or characterized (Honorable, General UHC, or UOTHC) discharges were issued under the circumstances discussed in this chapter.[1]

B. Chapter Supplement

1. Under current DoD regulations, there is a new category of discharge, separate from Misconduct or any other category, called "Defective Enlistments and Inductions."[2] The category has four reasons for discharge. These are:[3]

1. *Minority.*

(1) Under age 17. If a member is under the age of 17, the enlistment of the member is void, and the member shall be separated. The discharge is uncharacterized as a Void Enlistment or Induction.

(2) *Age 17.* Except when the member is retained for the purpose of trial by court-martial, he or she shall be separated where

(a) The member is under age 18;

(b) The member enlisted without written consent of a parent or guardian; and

(c) An application for the member's separation is submitted to the Secretary concerned by the parent or guardian within 90 days of the member's enlistment.

2. *Erroneous.*

A member may be separated on the basis of an erroneous enlistment, induction, or extension of enlistment, after consideration of the possible effects of counseling and rehabilitation on the member's ability to serve.[5] An enlistment, induction, or extension is erroneous if it is defective and:

(1) It would not have occurred had the relevant facts been known by the government or had appropriate directives been followed;

(2) It was not the result of fraudulent conduct on the part of the member; and

(3) The defect is unchanged in material respects.

The discharge is characterized as Honorable unless an uncharacterized Entry Level Separation (ELS),[6] or Void Enlistment or Induction (VEI) is required.[7]

If the command recommends retention, the member can be retained if the defect is no longer present or is waivable and a waiver is obtained.

3. *Defective Enlistment Agreements.*

A defective enlistment agreement exists where:

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[1] *See* § 18.6.

[2] 32 C.F.R. Part 41, App. A, Part 1, § E.

[3] *Id.*

[4] Note that no provision is made for discharge for minority for 17 year olds after 90 days in service.

[5] *See* 32 C.F.R. Part 41, App. A, Part 2, § A.

[6] ELS usually within the first 180 days of service. See 32 C.F.R. Part 41, App. A, Part 2, § C.

[7] 32 C.F.R. Part 41, App. A, Part 2, § C, ¶ 3.b describes the circumstances under which an uncharacterized VEI is given:

(1) An enlistment is void in the following circumstances:

(a) If it was effected without the voluntary consent of a person who has the capacity to understand the significance of entering the Military Services, including enlistment of a person who is intoxicated or insane at the time of enlistment.

(b) If the person is under 17 years of age.

(c) If the person is a deserter from another Military Service.

(2) Although an enlistment may be void at its inception, a constructive enlistment shall arise in the case of a person serving with a Military Service who:

(a) Submitted voluntarily to military authority;

(b) Met the mental competency and minimum age qualifications at the time of voluntary submission to military authority;

(c) Received military pay or allowances; and

(d) Performed military duties.

See also Chapter Supplement 2, *infra.*

(1) Through a misrepresentation by a recruiter, enlistment is induced by a commitment for which the enlistee is not qualified;

(2) A written commitment was given to the enlistee by a recruiter and the commitment cannot be fulfilled by the Military; or

(3) The enlistment was involuntary. The discharge is characterized as Honorable unless an uncharacterized Entry Level Separation is required,[8] or a Void Enlistment or Induction is required.[9]

This reason for discharge does not cause a bar to disciplinary action or other administrative separation. A discharge by reason of Defective Enlistment Agreement can only be issued where:

(1)The member did not knowingly participate in creating the defective enlistment;

(2)The member notifies appropriate authorities of the defect within 30 days after the member discovers the defect or should reasonably have discovered it; and

(3) The member requests separation.

4. *Fraudulent entry into military service.*

A member may be separated on the basis of procurement of a fraudulent enlistment, induction, or period of military service through any deliberate material misrepresentation, omission, or concealment which, if known at the time of enlistment, induction, or entry onto a period of military service, might have resulted in rejection.[10] The discharge is characterized in accordance with DoD characterization guidelines.[11] If the fraud involves concealment of a prior separation in which service was not characterized as Honorable, however, characterization is normally UOTHC.[12]

The command may recommend retention and the servicemember may be retained where the defect no longer is present, or the defect is waivable and is appropriately waived.

2. The Void Enlistment or Induction discharge, an "uncharacterized" discharge, is now issued whenever an enlistment or induction is void and no constructive enlistment has occurred.[13] This may provide relief as a current standards argument. It is generally issued, however, when an HD would have been issued under the prior regulations.

3. Fraudulent enlistment and related issues are also discussed in some detail in Chapters 7 and 12. These chapters should be reviewed when dealing with these subjects.

4. Note new section in Appendix for BCNR decisions.

5. On December 17, 1982, the Army Discharge Review Board (ADRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the past SOP. The other boards have never had an SOP or equivalent guidelines.

C. Section Supplement

18.1 Introduction and Overview

a. P.18/1L, ¶ 1:

(1) Fraudulent enlistment is now a separate reason for discharge. "Fraudulent entry into military service" falls under the new discharge category of "Defective Enlistments and Inductions."[14] It is no longer a specific reason for discharge under misconduct but is, however, still a UCMJ violation which could theoretically be the basis for a misconduct discharge as an act of misconduct.[15]

(2) *See* AR 635-200, ¶ 7-23.c:

> The offense of fraudulent enlistment (10 U.S.C. § 833; Art 83, UCMJ) occurs when the member accepts pay or allowances following enlistment procured by willful and deliberate false representation or concealment of his or her qualifications. Thus, upon receipt of pay and allowances, it becomes an in-service activity by the member and may be considered in characterizing his or her period of service, even though he or she is not tried for the offense.

b. P.18/1L, ¶ 3:

Current DoD regulations provide that for fraudulent entry:

> "Characterization of service or description of separation shall be in accordance with [DoD guidelines on characterization[16]]. If the fraud involves concealment of a prior separation in which service was not

[8]ELS usually within the first 180 days of service. *See* 32 C.F.R. Part 41, App. A, Part 2, § C.

[9]*See* note 7, *supra.*

[10]*See* 32 C.F.R. Part 41, App. A, Part 2, § A.

[11]32 C.F.R. Part 41, App. A, Part 2, § C.

[12]32 C.F.R. Part 41, App. A, Part 1, § E, ¶ 4.b.

[13]32 C.F.R. Part 41, App. A, Part 2, § C, ¶ 3.b; AR 635-200, ¶ 3-9.b.

[14]32 C.F.R. Part 41, App. A, Part 1, § E, ¶ 4. *See* Chapter Supplement, *supra.*

[15]*See* (2) *infra,* and Chapter 17.

[16]Found at 32 C.F.R. Part 41, App. A, Part 2, § C.

characterized as Honorable, characterization shall be Under Other Than Honorable Conditions."[17]

c. P.18/2L, n.6:

See MD 81-01212 (UD to HD; applicant had disclosed his "civil involvement" and the induction was "erroneous," not fraudulent).

18.2 Propriety Approaches

• P.18/2R, n.9:

Current regulations usually do not give the right to a hearing unless a UOTHC discharge is issued or the servicemember has six or more years total service.[18]

18.2.1 Discharge Should Be Based on Character of Service

a. P.18/2R, ¶ 2:

Current Army regulations provide for the application of the universal discharge characterization standards[19] and three additional factors:[20]

a. Evidence of preservice misrepresentation which would have precluded, postponed, or otherwise affected the member's eligibility.

b. If the fraud involves concealment of a prior separation in which service was not characterized as honorable, characterization normally shall be under other than honorable conditions.

c. The offense of fraudulent enlistment (10 U.S.C. § 833; Art. 83, UCMJ) occurs when the member accepts pay or allowances following enlistment procured by willful and deliberate false representation or concealment of his or her qualifications. Thus, upon receipt of pay and allowances, it becomes an in-service activity by the member and may be considered in characterizing his or her period of service, even though her or she is not tried for the offense.

b. P.18/2R, n.11:

MD 80-00425.

18.2.2 Withholding of the Information Was Not Fraudulent

a. P.18/2R, ¶ 1:

Current Army regulations define fraudulent entry as:[21]

"the procurement of an enlistment, reenlistment, or period of active service through any deliberate material misrepresentation, omission or concealment of information which, if known and considered by the Army at the time of enlistment or reenlistment, might have resulted in rejection. This includes all disqualifying information requiring a waiver."

The Army regulation excludes enlistment of a minor from the definition and provides a two-part test for determining whether an enlistment or reenlistment was fraudulent. Under this test, the commander must determine whether a disqualifying condition actually exists under current regulations. Waivable or nonwaivable disqualifications which are "concealed, omitted, or misrepresented" constitute fraudulent entry. That there was recruiter connivance does not relieve the servicemember of responsibility. Completion of the investigations within 30 days is considered reasonable.[22]

The Army regulation also lists, and describes in some detail, the following examples of fraudulent entry:[23]

(1) Concealment of prior service.
(2) Concealment of true citizenship status.
(3) Concealment of conviction by civil court.
(4) Concealment of record as a juvenile offender.
(5) Concealment of medical defects.
(6) Concealment of an absence without leave or desertion from prior service.
(7) Concealment of preservice homosexuality.
(8) Misrepresentation of intent with regard to legal custody of children.
(9) Concealment of other disqualifications.

b. P.18/3L, n.14:

BUPERSNOTE 1910, 3420185, ¶ 1.h, Mar. 24, 1981, and NAVMILPERSCOMINST 1910.1, ¶ 4g(6), Dec. 30, 1980, stated, however, that where the concealed arrest is for sale or trafficking in drugs, processing for misconduct is mandatory.

c. P.18/3L, third ¶:

See United States v. Buckingham, 11 M.J. 184 (C.M.A. 1981) (interprets juvenile offense). *See also* § 12.6.3.5.3.

18.2.3 What Information Has to Be Disclosed

18.2.4 Recruiter Connivance

a. P.18/3L, ¶ 5:

Current Army regulations allow for a discharge for fraudulent entry even where there was recruiter connivance. Recruiter connivance[24] is, however, still a powerful equitable factor for servicemembers discharged under the current regulation.

b. P.18/3R, n.18:

MD 81-04188.

c. P.18/3R, n.19:

There have been more recent incidents where recruiters and recruiting stations have been disciplined for improper practices. For example, 20 Army recruiters in the Minneapolis area were disciplined for conduct occurring in 1985 and 1986. Recruiters were found to have forged high school diplomas, used imposters to take entrance exams, and failed to include criminal, medical, and drug dependency information that could have disqualified the applicants. There were also several incidents of recruiters having sexual relations with their applicants. *See The Objector,* March 1987; *Minneapolis Star and Tribune,* January 11, 1987.

18.2.5 Discharge Should Have Been for Minority

18.2.6 Constructive Waiver

a. P.18/4R, ¶ 2:

See Supp. n.7, this chapter.

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[17]32 C.F.R. Part 41, App. A, Part 1, § E, ¶ 4.b. A UOTHC discharge may not be issued, however, unless a hearing before an Administrative Discharge Board is made available. 32 C.F.R. Part 41, App. A, Part 1, § E, ¶ 4.c(1).

[18]*See* 32 C.F.R. Part 41, App. A, Part 1, § E, ¶ 4.c.

[19]Found at AR 635-200, Ch.3.

[20]AR 635-200, ¶ 7-23.

[21]AR 635-200, ¶ 7-17.a.

[22]*Id.*

[23]AR 635-200, ¶ 7-17.b.

[24]*See* AR 635- 200 ¶ 7-17.

b. P.18/5L, n.25:

See also MD 78-03281 (UD for fraudulent enlistment upgraded; civilian conviction for indecent exposure while in reserves, USMC notified, but no adverse action taken. Subsequently applied and accepted onto active duty. "[T]he subsequent processing for fraudulent enlistment for the same offense is not considered proper").

18.2.7 Miscellaneous Propriety Issues

18.3 Equity Approaches

a. P.18/5L, n.31:

See MD 81-01212 (UD to HD; applicant had disclosed his "civil involvement" and the induction was "erroneous," not fraudulent); MD 80-00425 (UD to GD; that fraudulent enlistment was perpetrated by recruiter with applicant's knowledge, but not at his request, is mitigating. GD based on ratings).

b. P.18/5R, ¶ 1:

In addition to the specific equitable arguments listed, and despite the general principle that intentional fraud is not condoned, there may be unique circumstances which will garner the sympathy of a board.[25]

18.4 Concealment of Pre-Service Homosexual Acts

• P.18/5R, ¶ 2:

Current regulations allow for discharge for fraudulent entry for concealing homosexual acts, but the procedures and guidelines applicable to discharge for homosexuality are followed.[26]

18.5 The Current Standards Approach

a. P.18/5R, ¶ 4:

Although discharges for fraudulent entry are no longer made under the misconduct category of discharge, the procedural rights attendant to a misconduct discharge have mostly been preserved.[27]

b. P.18/5R, n.39:

(1) MD 80-00425.
(2) *See* Supp. § 18.1, *supra.*

c. P.18/6, n.41:

See, e.g., AD 82-00694 (UD to HD; fraudulent enlistment, concealment of juvenile record. Upgrade based on current standards and overall record).

18.6 Voided Discharges

a. P.18/6L, ¶ 2:

Current DoD regulations provide for void discharges where there are minority enlistments, erroneous enlistments and defective enlistment agreements. *See* Chapter Supplement, *supra.*

b. P.18/6R, n.45:

(1) The ADRB SOP has been withdrawn.[28]

(2) *See* Chapter Supplement, *supra,* for description of "Defective Enlistment Agreement" discharge.

(3) Further remarks concerning this footnote are included below, identified by the paragraph of the footnote to which they reference.

c. P.18/6R, n.45, ¶ 2:

See NC 78-2819; NC 77-5907.

d. P.18/6R, n.45, ¶ 3, last sentence:

Add JAG letter: JAG:131.1:TDK:cse ser 13/5631 of January 18, 1979, to relevant JAG opinions listed at end of note.

e. P.18/6R, n.45, add to end of note:

DoD Dir. 1332.14 of December 29, 1976 also enunciates the corollary that a servicemember who served due to recruiter misconduct must be given credit for actual time served. *See* MC 79-1365 (GCM dismissed the charges against the servicemember for lack of jurisdiction due to recruiter misconduct. Petitioner was subsequently separated from the Marine Corps by reason of void enlistment on December 14, 1977. In accordance with the directive, the board gave the applicant credit for the actual time served due to recruiter misconduct by issuing a GD); MC 78-3043 (Servicemember enlisted in the Marine Corps on November 26, 1975. He was never tried for his offense after it was determined that the government would not be able to rebut petitioner's allegation that he enlisted through recruiter misconduct. He was subsequently released with a void enlistment. Giving credit for the actual time served due to recruiter misconduct, the board issued the petitioner a GD); MC 78-3042 (Applicant enlisted in the Marine Corps on May 1, 1973. He received a BCD pursuant to an SPCM on December 4, 1974. The sentence was set aside after it was determined that he was serving a void enlistment due to recruiter misconduct. The Board, in accordance with the directive, issued a GD); MC 78-2326 (Disciplinary action against the servicemember for several offenses was not taken because it was discovered that his enlistment was void due to recruiter misconduct. He was released with a void enlistment on November 18, 1976. The board issued the applicant a GD in accordance with the directive); MC 77-5432 (Charges brought against servicemember in an SPCM were dismissed for lack of jurisdiction in accordance with *United States v. Russo*[29] (*See* § 12.6.3.5.3). The servicemember was subsequently separated by reason of void enlistment. The board, in accordance with the directive, found that the applicant had to be given credit for the actual time served due to recruiter misconduct and issued a general discharge by reason of convenience of the government); MC 77-2791 (Servicemember enlisted in the Marine Corps on October 19, 1973. At an SPCM in August 1976, the servicemember was charged with a UA of 106 days and possession of alcoholic beverages in the barracks. The charges were dismissed for lack of jurisdiction due to recruiter misconduct. The servicemember was subsequently released with a void enlistment. Giving credit for the actual time served, the board issued the applicant a GD).

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[25]See AD 81-00400 (UD to GD; servicemember did not disclose having a dependent daughter. Servicemember placed child in mother's care and fraud only came to light when mother became ill and could no longer care for child); MD 81-03430 (UD to GD; concealed prior service with two GDs for inaptitude and enuresis. Wanted to serve the country).

[26]*See* 32 C.F.R. Part 41, App. A, Part 1, § E, ¶ C(4); AR 635-200, ¶ 7-17.b(7).

[27]*See* Supp. § 18.1, a (1).

[28]*See* Chapter Supplement, *supra.*

[29]1 M.J. 134, 23 C.M.A. 5111, 50 C.M.R. 560, 3 MIL. L. REP. 2332 (1974), *aff'd,* 5 M.J. 470, 6 MIL. L. REP. 2393.

Appendix 18A

DRB/BCMR Decisions

A. Case Lists

1. Army

AD 82-00694.

2. Air Force

3. Navy

B. Digests of Cases Relied Upon

1. Army BCMR

2. Army DRB

AD 82-00694 (UD to HD; fraudulent enlistment, concealment of juvenile record. Upgrade based on current standards and overall record).

3. Air Force BCMR

4. Air Force DRB

5. Navy DRB

MD 81-01212 (UD to HD; applicant had disclosed his "civil involvement" and the induction was "erroneous," not fraudulent).

MD 80-00425 (UD to GD; that fraudulent enlistment was perpetrated by recruiter with applicant's knowledge, but not at his request, is mitigating. GD based on ratings).

MD 78-03281 (UD for fraudulent enlistment upgraded; civilian conviction for indecent exposure while in reserves, USMC notified, but no adverse action taken. Subsequently applied and accepted onto active duty. "[T]he subsequent processing for fraudulent enlistment for the same offense is not considered proper.").

6. BCNR

NC 78-2819 (Void Enlistment to GD for misconduct; recruiter connivance at suppressing matters which would have otherwise hindered enlistment. Reference to JAG letter: JAG:131.1:TDK:cse ser 13/5631 of January 18, 1979).

NC 77-5907 (Void Enlistment to GD for misconduct; recruiter connivance at suppressing matters which would have otherwise hindered enlistment).

CHAPTER 19
Discharges for Good of the Service (in Lieu of Court-Martial)

A. Overview

The regulations governing discharges for the Good of the Service have been revised; but the principles underlying this category of discharge are unchanged, as are the basic upgrade strategies.

B. Chapter Supplement

On December 17, 1982, the Army Discharge Review Board (ADRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the SOP. The other boards have never had an SOP or equivalent guidelines.

The District of Columbia Circuit has decided a significant case in this area. *See* discussion at 17 MIL. L. REP. 1095.

C. Section Supplement

19.1 Introduction and Overview

a. P.19/1R, n.2:

The number of GOS discharges has declined significantly since the end of the Vietnam War. In 1985, for instance, there were 7,370 GOS discharges issued by all services combined. This represented 2.35% of all discharges issued.

b. P.19/2L, ¶ 1:

The GOS discharge has declined in popularity. In 1985, for example, GOS discharges represented 31% of the UOTHC discharges issued DoD wide. The decline from the 82% reported in 1977 in MDU is probably due to the decline in discharges for absence offenses, often processed as GOS discharges, and the increase in drug-related discharges, usually processed as misconduct discharges.

19.2 Propriety Approaches

19.2.1 General

19.2.2 Specific Propriety Considerations

19.2.2.1 Voluntary Request

a. P.19/3L, add •:

• The servicemember was not aware of a defense available to him. For example, an insanity defense (*see,* § 19.2.2.6). Thus, the waiver was not "knowing."

b. P.19/3R, n.19:

It was the routine practice at Fort Dix and other installations to counsel servicemembers in large groups in the early 1970s. Individual counseling, and a close examination of the records by counsel, were only done upon specific request by the member. Thus, servicemembers who had psychiatric problems, or who were not aware of their rights, frequently were discharged without having their cases reviewed by counsel.

19.2.2.2 Timing of the Request

• P.19/3R, n.24:

See 32 C.F.R. Part 41, App. A, Part 1, § L, ¶ 1 (request for GOS discharge must be made after preferral of charges).

19.2.2.3 Offense Must Be Punishable by a Punitive Discharge

a. P.19/3R, ¶ 5:

See White v. Secretary of the Army, 878 F.2d 501, 17 MIL. L. REP. 2593 (D.C. Cir. 1989) (special court-martial where no reporter authorized cannot issue punitive discharge; erroneous advice by counsel in permitting servicemember to sign form indicating that a punitive discharge could be issued voids discharge; upgrade directed).

b. P.19/3R, last ¶:

This sentence, continued to P.19/4L, should read:

"Second, it is improper to accept a request for a GOS discharge when the offense itself could not result in a punitive discharge under the Table of Maximum Punishments (TMP)."

19.2.2.4 Not Guilty of the Offense

a. P.19/4L, n.30:

32 C.F.R. 70.5(b)(12)(vi) is now 32 C.F.R. 70.8(b)(12)(vi).

b. P.19/4L, ¶ 2:

A 62-page Guilty Plea Checklist is available from:

US Army Legal Service Agency
Defense Appellate Division
Attn: Case Notes Editor
The Advocate
Nassif Bldg.
Falls Church, VA 22041

It is a comprehensive checklist of issues that may arise during a military criminal proceeding. Any errors may be grounds for arguing that a GOS was not appropriate.

19.2.2.5 Improper Counsel

a. P.19/4R, ¶ 2:

Current Army regulations require counsel to advise the servicemember concerning:[1]

[1]AR 635-200, ¶ 10-2.b.

(1) the elements of the offense charged,
(2) burden of proof,
(3) possible defenses,
(4) possible punishments,
(5) provisions of chapter 10,
(6) requirements of voluntariness,
(7) type of discharge normally given under chapter 10,
(8) right to withdraw his request,
(9) loss of veterans benefits, and
(10) prejudice in civilian life due to a bad discharge.

b. P.19/4R, n.37:

The DoD discharge regulation states that "[t]he member should be afforded the opportunity to consult with counsel qualified under Article 27(b)(1) of the UCMJ."[2]

c. P.19/4R, n.40:

White v. Secretary of the Army, 878 F.2d 501, 17 MIL. L. REP. 2593 (D.C. Cir. 1989). *See* Supp. P.19/3R, ¶ 5.

19.2.2.6 Medical or Psychiatric Examination

• P.19/4R, ¶ 3:

AR 635-200, ¶ 10-6, provides that a medical examination or mental status evaluation is not required before a GOS discharge unless requested by the servicemember. If a medical examination is requested, a mental status evaluation must be conducted.

19.2.2.7 Withdrawal of the Request

• P.19/5L, ¶ 2:

See AR 635-200, ¶ 10-5, which states:

"Unless trial results in an acquittal or the sentence does not include a punitive discharge, even though one could have been adjudged by the court, a request for [a GOS discharge] may be withdrawn only with the consent of the commander exercising general court-martial jurisdiction."

19.2.2.8 Acceptance of the Request After Trial

• P.19/5L, ¶ 3:

(1) *See* AR 635- 200, ¶ 10-1.c, which states:

If disciplinary proceedings are not held in abeyance, the general court-martial convening authority may approve the member's request for discharge for the Good of the Service after the member has been tried. In this event, the officer who convened the court, in his or her action on the case, should not approve any punitive discharge adjudged. The officer should approve only so much of any adjudged sentence to confinement at hard labor or hard labor without confinement as has been served at the time of the action.

(2) The Court of Military Appeals has held that where a request for Resignation in Lieu of Court-Martial is made by an officer in a timely fashion, but is not approved until after a conviction by court-martial, it is proper to execute that discharge and the findings of the court-martial and sentence should be set aside.[3]

19.2.2.9 Statement of the Servicemember

• P.19/5R, ¶ 1:

See United States v. Siders, 15 M.J. 272 (C.M.A. 1983).

19.2.2.10 The Legal Review

19.2.2.11 Information Presented to the Convening Authority

19.3 Equity Approaches

19.3.1 General

• P.19/6R, ¶ 1:

See United States v. Cowan, 13 M.J. 906 (N.M.C.M.R. 1982).

19.3.2 Mitigating Factors and Overall Record Approach

a. P.19/7L, n.60:

See also AD 81-01181.

b. P.19/7L, n.61:

See also AD 81-01181; AD 77-9411.

c. P.19/7L, n.65:

AD 82-01893 (UOTHC to GD; AWOL related to family problems); AD 81-01634 (UD to GD; family and marital problems mitigate AWOL).

d. P.19/7L, n.66:

See AD 81-06877 (UD to GD; UD given despite recommendation for GD from immediate commander).

19.3.3 A Punitive Discharge Would Likely Not Have Resulted Had There Been a Court-Martial

• P.19/7R, n.73:

AD 79-01967 (1976 UD upgraded to GD because UD too harsh considering offense and overall service).

19.3.4 Servicemember Was Not Guilty of the Offense Charged

19.3.5 Approaches in AWOL Cases

19.3.5.1 General

19.3.5.2 1974–75 Ford Clemency Program Cases

19.3.6 A Discharge for Unsuitability or as a Trainee Failure Was More Appropriate

• P.19/8R, ¶ 1:

If the applicant was discharged under current regulations, the argument cannot be that (s)he should have been discharged for unsuitability, as that reason for discharge has been eliminated. The new categories of discharge discussed at Supp. Chapter 16, *supra,* may, however, have been more appropriate than a GOS or misconduct discharge.

19.3.7 Current Standards Approach

a. P.19/8R, n.89:

(1) The reference should be to § 16.15.
(2) *See* AD 81-02450.

b. P. 19/8R, ¶ 2, last •:

Army regulations do not now require a mental status evaluation unless the servicemember requests a medical examination. Thus, this current standards argument is only valid now if the servicemember requested a mental status evaluation or medical examination and no mental status evaluation was done.

[2]32 C.F.R. Part 41, App. A, Part 1, § L, ¶ 3.b.

[3]United States v. Woods, 26 M.J. 372 (C.M.A. 1988).

c. P.19/8R, add to end of section:

The policies and procedures involving counseling before submitting a request for a GOS discharge have changed over the years. For example, in 1970 AR 635-200, ¶ 10-2 required that "the serviceman have a reasonable time (not less than 48 hours) to consult with counsel and to consider the wisdom of submitting a request for a discharge." Under today's regulations, AR 635-200, ¶ 10-2, the servicemember is give 72 hours to consult with counsel and there is a check list of things the counsel must advise the member about:

(1) the elements of the offense charged,
(2) burden of proof,
(3) possible defenses,
(4) possible punishments,
(5) provisions of chapter 10,
(6) requirements of voluntariness,
(7) type of discharge normally given under chapter 10,
(8) right to withdraw his request,
(9) loss of veterans benefits, and
(10) prejudice in civilian life due to a bad discharge.

Further, the form the servicemember must sign prior to the GOS discharge includes a statement of the benefits that will be lost by accepting the GOS and the statement, "Under no circumstances do I desire further rehabilitation, for I have no desire to perform further military service."[4]

Thus, under current standards, a servicemember must be counseled as to both the effects of such a request and his/her prospects before a court-martial. To ensure that the counseling has been understood, the servicemember is required to sign a form attesting to the facts (s)he has been told. It can be argued that this change in policy was to prevent the pressures attendant to a GOS situation from causing a servicemember to do something against his/her interests and which (s)he does not truly want to do. It can be argued that these changes are "substantial" and raise a "substantive doubt" as to whether the GOS discharge would had been accepted had current standards been applicable.[5]

Appendix 19A

DRB/BCMR Decisions

A. Case Lists

1. Army

AD 82-01893; AD 77-09411; AD 77-07229.

2. Navy

3. Marines

• P.19A/1, Add:

MD 83-02913.

4. Air Force

B. Digests of Cases Relied Upon

1. Army

AD 82-01893 (UOTHC to GD; excellent ratings, only offense was 41-day AWOL which was related to family problems);

AD 77-09411 (UD to HD; 1973 UD upgraded because servicemember had a "drinking problem" and the offenses of four Article 15s and a total lost time of 13 days were "minor");

AD 77-07229 (UD to GD; 1975 UD upgraded because offenses of SPCM for AWOL, four Article 15s for AWOL and FTG were "relatively minor").

2. Navy

3. Marines

MD 83-02913 (UD to GD; 1970 UD upgraded because UD too harsh for three days UA and DOLO for not waiting outside office when told to wait outside office).

4. Air Force

[4]AR 635-200, Figure 10-1. The statement also includes, *inter alia*, an acknowledgement of guilt.

[5]*See* Chapter 21.

CHAPTER 20
Upgrading Court-Martial Awarded Discharges and Appealing Court-Martial Convictions

A. Overview

The Court of Military Appeals has generally taken positions less favorable to convicted servicemembers in recent years. The rights of servicemembers have been narrowed and there are fewer propriety bases upon which to challenge punitive discharges. The basic processes for challenging a punitive discharge have not, however, changed.

B. Chapter Supplement

(1) Note addition of Section 20.8 which was inadvertently omitted from the original edition.

(2) The Manual for Courts-Martial is in a new edition. MANUAL FOR COURTS-MARTIAL, 1984 Ed.—effective August 1, 1984; Exec. Order 12,473 (April 13, 1984); published at 49 Fed. Reg. 17,151 (1984).

(3) On December 17, 1982, the Army Discharge Review Board (ADRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the SOP was. The other boards have never had an SOP or equivalent guidelines.

C. Section Supplement

20.1 Introduction

a. P.20/2R, n.10:

Cite to 32 C.F.R. § 70.6(c)(1) is now 32 C.F.R. § 70.9(c)(1).

b. P.20/2R, ¶ 3:

Amendments to the statute governing BCMR jurisdiction have made it clear that the BCMRs cannot expunge a post UCMJ conviction.

c. P.20/2R, ¶ 4:

Privileges as well as rights may be lost because of a criminal conviction. The opportunity to obtain a hunting license in some states is one example.

20.2 BCMR Practice

• P.20/2R, ¶ 6, 1st •:

Waiver of the statute of limitations is now a more complicated issue. *See* Supp. § 9.4.3.

20.3 BCMR Decision-Making

20.3.1 Overview

a. P.20/3L, ¶ 2:

In recent years the Army BCMR's upgrade rate of punitive discharges has been lower than the BCNR or AFBCMR's.

b. P.20/3L, ¶ 3:

Note, however, that the AFBCMR took favorable action in approximately 16% of its reviews of discharges resulting from courts-martial in 1985. The available statistics do not reveal what specific relief was granted.

20.3.2 Chart of Important Factors

20.3.3 Analysis of BCMR Decisions

20.3.3.1 Military Offenses

20.3.3.2 Civilian/Common Law Offenses

a. P.20/5R, n.36:

AC 78-04644 (DD upgraded; applicant convicted for participation in a stockade riot. ABCMR noted that nobody was injured, property damage was minor, and that applicant's youth was a mitigating factor).

b. P.20/5, n.37:

See AC 77-05387 (Applicant's DD upgraded although he was convicted of aggravated assault. The victim had sustained numerous bruises. The board concluded that the applicant's participation was minimal and that the victim was not severely injured); AC 61-01525 (BCD upgraded; conviction for assault with a dangerous weapon); AC 79D00980 (DD upgraded; applicant had shot wife four times and was convicted of assault with intent to commit murder).

20.3.3.3 Mitigating Factors

a. P.20/6L, n.40:

AC 78-04644 (DD upgraded; applicant convicted for participation in a stockade riot. ABCMR noted that nobody was injured, property damage was minor, and that applicant's youth was a mitigating factor).

b. P.20/6L, n.41:

AC 80-02538 (BCD to GD; applicant had committed three AWOLs and was ultimately given a BCD as a result of a GCM conviction. His discharge was upgraded based on, *inter alia,* the board's conclusion that "in retrospect it appears that the applicant was generally unsuited for military service and should have been discharged from the service for that reason").

c. P.20/6L, n.42:

NC 78-1794; AC 79-00980; AC 76-02149 (DD upgraded; psychiatric report prepared by Army physicians indicated that the applicant had a condition for which he could have been separated administratively under the unsuitability regulations. Considering the inequity of the court-martial conviction in light of his emotional disability, the board granted the upgrade).

d. P.20/6R, n.47:

Post-traumatic stress disorder is the more common diagnosis/label used today.

e. P.20/7L, n.56:

AC 80-06196 (DD to GD; pleaded guilty at GCM to AWOL, unlawful drug use, and breaking restriction, in 1955. Since discharge, veteran was in prison for 17 years. ABCMR, in granting upgrade, stressed his post-service accomplishments. The board concluded that while it was "conscious of the applicant's post service criminal record, it takes cognizance of the fact that the applicant has recently taken strides toward rehabilitation as exemplified by the termination of his alcohol abuse, his reunion with his family, his academic achievement [working on an associate's degree at community college] and his parole.").

f. P.20/7R, 6th •:

But see AC 77-05387 (Applicant's Dishonorable Discharge upgraded although he was convicted of aggravated assault. The victim had sustained numerous bruises. The Board concluded that the applicant's participation was minimal and that the victim was not severely injured).

20.3.3.4 Aggravating Factors

20.3.4 Improper Execution of a Punitive Discharge

• P.20/8L, ¶ 3:

(1) *See United States v. DeHart,* 18 M.J. 693 (A.F.C.M.R. 1984) (When a servicemember, sentenced to twelve months confinement and a BCD, is directed to rehabilitation by the convening authority, the failure to ensure that the serviceman serves his time in a rehabilitative unit is error and the BCD must be overturned if the confinement has already been served).

(2) *United States v. Schmit,* 13 M.J. 934 (A.F.C.M.R. 1981) (convening authority may, pursuant to sentence amelioration powers, designate a specific base with a rehabilitation program to be the servicemember's place of confinement. Failure to confine at the designated location denied servicemember the benefit ordered by the convening authority and denied the servicemember an opportunity to prove his worth. The bad conduct discharge executed at end of confinement period was disapproved).

20.4 Alternatives to DRB or BCMR Review of a Punitive Discharge

20.4.1 Introduction

20.4.2 Collateral Attack on A Court-Martial Conviction

20.4.2.1 Writ of Error *Coram Nobis* in Military Tribunals

20.4.2.2 Review of Court-Martial Convictions in the Federal Courts

• P.20/9L, ¶ 1:

See Kaiser v. Secretary of the Navy II, 542 F. Supp, 1263 (D. Colo. 1982) (Because of JAG jurisdiction to review under Article 69, action stayed pending review. The court held that a veteran must exhaust Article 69 appeals for courts-martial held before the Uniform Code of Military Justice was enacted in 1951).

20.4.3 Application for New Trial

20.4.4 Application Under Article 74(b) U.C.M.J.

20.4.4.1 The Nature of the Application

• P.20/9L, ¶ 5:

For Navy procedures, *see* 32 C.F.R. § 719.155. Points of particular note are:

- "Except in unusual circumstances, applications will not normally be approved if received within five (5) years of the execution of the punitive discharge or dismissal, or within five (5) years of disapproval of a prior request under 10 U.S.C. § 874(b)."[1]
- [I]n determining what constitutes 'good cause' under 10 U.S.C. § 874(b), the primary Secretarial concern will be with the applicant's record in the civilian community subsequent to his or her punitive separation."[2]

20.4.4.2 How to Apply

a. P.20/10L; ¶ 2:

The rules of the appropriate service should be consulted prior to application, as they each have unique requirements with which there must be compliance.[3]

b. P.20/10L, ¶ 3, replace 1st sentence with:

"A cover letter should indicate that application is being made under Article 74(b), U.C.M.J., and should make clear what form of discharge is sought. If the veteran has a dishonorable discharge, upgrade to a bad conduct discharge or an under other than honorable conditions discharge is possible. Although these would be an improvement, if the veteran does not wish to be considered for one, or both, of these, the cover letter should say so explicitly."

20.4.5 Appealing Certain Pre-1951 Punitive Discharges Under Article 69, U.C.M.J.

20.5 Appealing Court-Martial Convictions Not Resulting in a Punitive Discharge Pursuant to Article 69, U.C.M.J.

20.5.1 The Nature of the Application

a. P.20/10L, ¶ 1:

Military Justice Act of 1983 and the 1984 MCM made several important changes in Article 69 appeals. One of these was giving TJAG more flexibility in decision-making. Previously, TJAG had to either set aside a conviction or approve it. Under Article 69c, TJAG may now order a rehearing except when the setting aside is based on a lack of sufficient evidence in the record to support the conviction.

b. P.20/10R, n.83:

After some uncertainty, the Court of Military Appeals reaffirmed *McPhail* in *Unger v. Ziemniak,* 27 M.J. 349 (C.M.A. 1989) (C.M.A. has extraordinary writ jurisdiction to protect accused's rights under UCMJ and Constitution).

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[1]32 C.F.R. § 719.155(b).

[2]32 C.F.R. § 719.155(c)(17).

[3]The Navy rules are at 32 C.F.R. § 19.155.

c. P.20/10R, ¶ 1, • 4:

Pursuant to the Military Justice Act of 1983 and the 1984 MCM, GCM cases are now subject to only one automatic TJAG review under Article 69a.

d. P.20/10R, ¶ 2:

(1) Pursuant to the Military Justice Act of 1983 and the 1984 MCM, the appropriateness of the sentence is a new ground for relief in an Article 69 appeal.

(2) Note case of *United States v. Hallock,* TJAG Action 1 (April 1982). (TJAG found error when the servicemember, who had refused NJP for an offense was tried by summary court-martial for that offense plus two others, for neither of which had he been offered NJP. The servicemember was acquitted of the offense for which he had turned down the NJP and convicted of the other two. TJAG based its decision on Air Force policy that offenses are not to be tried by summary court-martial unless the servicemember has been offered NJP for the offense. *See* AFM 111-1, 2D7).

20.5.2 Application Procedures for Each Service

• P.20/10R, ¶ 3:

There is now a deadline for Article 69 appeals of two years after sentencing, unless the veteran can establish good cause for failure to appeal within that time.

Article 69 has been amended to add deadlines for applications.[4] The amendment states:

> When such case is considered upon application of the accused, the application must be filed in the Office of the Judge Advocate General by the accused before—
>
> (1) October 1, 1983; or
>
> (2) the last day of the two-year period beginning on the date the sentence is approved by the convening authority or, in a special court-martial case which requires action under section 865(b) of this title (article 65(b)), the officer exercising general court martial jurisdiction, whichever is later, unless the accused establishes good cause for failure to file within time.

What is "good cause" for filing out of time is uncertain and has not been defined in the service regulations.

20.5.2.1 Air Force Procedure

The new address is HQ USAF/JAJM, Bolling AFB, Washington, D.C. 20332.

20.5.2.2 Navy and Marine Corps Procedure

The new address is TJAG (Code 00), Dept. of Navy, 200 Stovall St., Alexandria, VA 22332-2400.

• P.20/11L, ¶ 3:

Current Navy regulations (JAG Manual ¶ 0153) require the application to contain:

(1) Full name of the applicant;
(2) Social Security number and branch of service, if any;
(3) Present grade if on active duty or retired, or "civilian" or "deceased" as applicable;
(4) Address at time the application is forwarded;
(5) Date of trial;
(6) Place of trial;
(7) Command title of the organization at which the court-martial was convened (convening authority);
(8) Command title of the officer exercising review authority in accordance with 10 U.S.C. § 864 over the applicant at the time of trial, if applicable;
(9) Type of court-martial which convicted the applicant and sentence adjudged;
(10) General grounds for relief which must be one or more of the following:
(i) Newly discovered evidence;
(ii) Fraud on the court;
(iii) Lack of jurisdiction over the accused or the offense;
(iv) Error prejudicial to the substantial rights of the accused;
(v) Appropriateness of the sentence;
(11) An elaboration of the specific prejudice resulting from any error cited (legal authorities to support the applicant's contentions may be included, and the format used may take the form of a legal brief if the applicant so desires);
(12) Any other matter which the applicant desires to submit;
(13) Relief requested;
(14) Facts and circumstances to establish "good cause" for a failure to file the application within the time limits prescribed,[5] if applicable; and
(15) If the application is signed by a person other than the applicant, an explanation of the circumstances rendering the applicant incapable of making application [sic]. The applicant's copy of the record of trial will not be forwarded with the application for relief, unless specifically requested by the Judge Advocate General.

20.5.2.3 Army Procedure

The new address is Headquarters DA (JALS-ED), Nassif Bldg., Falls Church, VA 22041-5013.

20.5.2.4 Coast Guard Procedure

20.6 Common Errors at Courts-Martial

• P.20/12L, ¶ 4:

A 62-page Guilty Plea Checklist is available from:

US Army Legal Service Agency
Defense Appellate Division
Attn: Case Notes Editor
The Advocate
Nassif Bldg.
Falls Church, VA 22041

It is a comprehensive checklist of possible issues that may arise during a military criminal proceeding.

20.6.1 Jurisdictional Errors

a. P.20/12L, ¶ 6:

Note that the United States Court of Military Appeals is taking a less rigid approach to enforcing technical jurisdictional defects that do not create substantial prejudice to the accused.

b. P.20/13L, 1st •:

(1) *O'Callahan* has been overruled.
(2) An issue related to service connection is whether the

[4]Pub. L. No. 97-81, 95 Stat. 1085 (1981) (amending 10 U.S.C. § 869).

[5]32 C.F.R. § 719.144(b) provides that the application must be submitted within two years of the beginning date of the approved sentence, unless there is "good cause" for the delay. *See* Supp. § 20.5.2, *supra.*

offenses charged occurred in the current enlistment. *See United States v. Clardy,* 13 M.J. 308 (1982), *overruling United States v. Ginyard,* 27 C.M.R. 132 (1967).

20.6.2 Other Potential Errors

a. P.20/13L, 1st •:

Pre-trial confinement of more than 90 days may also be a violation of an accused's right to a speedy trial. The length of the delay, requests for prompt trial, the government's motive, and the prejudice to the accused are balanced to make the determination.[6]

b. P.20/13L, n.92:

United States v. Driver, 49 C.M.R. 376 (1974)

c. P.20/13L, last •:

This is not an error under current law.[7]

d. P.20/13L, new •:

• Failure to send to rehabilitation unit after conviction as directed by convening authority.[8]

e. P.20/13L, new •:

• Exclusion from consideration at sentencing or convening authority review of sentences given in similar cases.[9]

f. P.20/13L, new •:

• Failure to provide due process in a hearing on the vacation of the suspension of a sentence.[10]

g. P.20/13L, new •:

• Discharge without proper authority after delay or appeal.[11]

[6]United States v. Washington, 49 C.M.R. 884 (1975).

[7]*See* Supp. Ch. 15.

[8]United States v. DeHart, 18 M.J. 693 (A.F.C.M.R. 1984).

[9]United States v. Mann, 22 M.J. 279 (C.M.A 1986); *see Sentence Proportionality Under Article 66,* THE ARMY LAWYER, July 1985. *See also* United States v. Cantland, 14 M.J. 531 (A.C.M.R. 1982).

[10]*See* Morrissey v. Brewer, 408 U.S. 471 (1972); United States v. Bingham, 3 M.J. 119, 5 MIL. L. REP. (C.M.A. 1977); United States v. Hurd, 7 M.J. 18 (1979).

[11]Under R.C.M. 1113(c), if greater than six months (presumably due to appellate review) has passed since the convening authority's action, the officer currently with general court-martial authority over the servicemember must consult his staff judge advocate on whether retaining the servicemember would be in the best interest of the service. This must be done before execution of a DD or BCD. AFR 111-1 requires the advice to be in writing.

20.7 Presidential Pardons

20.7.1 The Nature of the Power and Current Policies

a. P.20/13R, ¶ 4:

After a pardon, an often effective alternative to an application to a Correction Board is Article 74 review.

b. P.20/13R, last ¶:

Experience has shown that reviews of special courts-martial can be successful even when the court included a BCD in the sentence.

20.7.2 Procedures for Application for Pardon

a. P.20/14L, ¶ 2:

The Department of Justice has issued new regulations governing applications for executive clemency. They are codified at 28 C.F.R. Part 1. Among the changes, the length of time which must pass after a conviction or release from incarceration before a petition will be considered is increased to five years.

b. P.20/14R, ¶ 1:

The Department of Justice Pardon Attorney's address is now Office of the Pardon Attorney, Department of Justice, Washington, D.C. 20530.

c. P.20/14R, ¶ 3:

The Air Force address is now HQ USAF/JAJM, Bolling AFB, Washington, D.C. 20332.

20.8 Relevant Index Categories

Old Index—11.00; 34.02; 21.00; New Index—106. The BCMRs should also index cases under relevant equitable considerations in the DRB Index but generally do not. Some cases, however, are indexed under A68.00 and A82.26.

Appendix 20A

DRB/BCMR Decisions

Appendix 20B

Research Key

CHAPTER 21
Retroactive Application of Current Standards

A. Overview

The principles of the application of current standards remains unchanged. There have, however, been changes in the regulations which constitute "current standards."

B. Chapter Supplement

On December 17, 1982, the Army Discharge Review Board (ADRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the SOP. The other boards have never had an SOP or equivalent guidelines.

C. Section Supplement

21.1 Introduction

a. P.21/1L, ¶ 1:

Due to a subsequent court case, compelled urinalysis can again be used as a basis for a less than honorable discharge under many circumstances. *See* Chapter 15.

b. P.21/1L, ¶ 2:

See, e.g., FC 83-04076 (GD to HD; based on current AFR 39-10 discharge standards pertaining to "conditions that interfere with military service.").

c. P.21/1L, ¶ 3:

This paragraph should read as follows:

> A veteran should always check for significant changes in administrative separation standards and procedures that have occurred since (s)he was separated and which might have resulted in a better character of discharge had the separation occurred today. DRBs are required to consider significant changes in standards and procedures as a ground for upgrading a discharge. BCMRs often upgrade discharges based on changes in standards and procedures, but are not required to do so.

21.2 DRB Application of the Current Standards Test

a. P.21/1R, n.1b:

Cite is now 32 C.F.R. § 70.9(b). The paragraph which begins with "(2)" now begins with "(ii)" and the first word, "That" has been deleted and the next word, "a" is capitalized.

b. P.21/1R, n.3:

Cite is now 32 C.F.R. § 70.9(c).

c. P.21/2R, n.10:

See § 12.5.2.

d. P.21/2R, ¶ 2, last sentence:

Replace last sentence with:

> The *Giles* court's analysis applies only when the standards and procedures used in the discharge proceedings violated regulatory, statutory or constitutional requirements.
>
> Thus, there are two important strategies to use, where possible, to avoid losing a current standards argument because of the substantial doubt test. First, whenever possible, argue that the regulations pursuant to which the applicant was discharged violated the law (identify the source of law violated), and that the changes in policies reflected the military's recognition that, as a matter of law, the more favorable standard or procedure was required.
>
> Second, [continue with ¶ 3].

e. P.21/2R, ¶ 3:

In the case of rehabilitation, the military substantially enhanced the available rehabilitation opportunities in the early 1970s for the express purpose of not administratively discharging as many servicemembers. Thus, servicemembers who did not have the benefit of these rehabilitative measures were denied a current standard specifically designed to avoid discharging them. This raises a "substantial doubt" that the servicemember would have been discharged under the current standard. *See* Change 12, AR 635-212; Memorandum for: The Deputy Chief of Staff for Personnel, from Hadlai A. Hull, Assistant Secretary of the Army (Manpower and Reserve Affairs), and comments to, and from, DCSPER, relating to Change 12, AR 635-212.

21.3 Sample Contentions

• P.21/3L, #5:

Cite is now 32 C.F.R. § 70.9(c)(1).

21.4 June 1981 Proposed Change to DOD's Administrative Separation Directive

a. P.21/3R, ¶ 1:

This directive has been adopted. It is generally being interpreted in ways disadvantageous to servicemembers.[1]

[1] *See* discussion of specifics in relevant Supp. Chapters. *See especially* Supp. Chapters 16 and 17 on Unsuitability and Misconduct and Supp. Chapter 5 which digests the Army implementation of the new DoD regulations. The DoD regulations are located at 32 C.F.R. Part 41, App. A.

b. P.21/4L, ¶ 2:

DRBs are only authorized to change a discharge to an ELS if the discharge was accomplished after the effective date of the new regulations: October 1, 1982.[2]

21.5 Situations in Which DRBs Apply Current Standards Retroactively

[2]32 C.F.R. § 70.8(a)(3)(i).

Appendix 21A

Checklist of Changes to be Instituted by Proposed DOD Directive Amendment

This appendix should be ignored. For accurate information, refer to the digest of the Army implementation in Supp. Chapter 5 and discussions under specific reasons for discharge in other Supp. chapters.

Appendix 21B

Checklist of Common Instances in Which DRBs Apply Current Standards Retroactively

This list is generally still valid; however, the Supplement comments, if any, at the cross-referenced cites should be referred to for the present status of the current standards arguments suggested in the original text.

CHAPTER 22
General Equitable Approaches to Upgrading

A. Overview

Equitable approaches to upgrading have not fundamentally changed in recent years, but it has become increasingly important to emphasize equitable approaches at the DRBs. With the DRBs very reluctant to upgrade discharges based on propriety considerations, the equitable approaches discussed in this chapter and, as importantly, the equitable aspects of propriety approaches, should be emphasized. Thus, if, for instance, a servicemember is denied access to counsel in violation of regulations, both the impropriety and the unfairness (the "inequity") of being denied counsel should be emphasized.

B. Chapter Supplement

1. The most difficult aspect of making equitable arguments today is the deference the boards pay to the servicemember's command. Circumstantial cases of unfairness, supported solely by an applicant's testimony, are not likely to succeed today. It is vital to make as strong a documentary case as possible. Full use of the Freedom of Information Act, as described elsewhere in the manual, to get unit documents or other records which may possibly support the applicant's allegations may be critical.

2. Note new paragraph 7 of Appendix 22B, A. It identifies relevant Air Force BCMR cases.

3. On December 17, 1982, the Army Discharge Review Board (ADRB) rescinded its Standard Operating Procedure (SOP) cited throughout this chapter. Citation to directly relevant provisions of it may, however, add credibility to an applicant's arguments. The regulations which remain are much less specific than the SOP. The other boards have never had an SOP or equivalent guidelines.

C. Section Supplement

22.1 Introduction

a. P.22/1L, ¶ 1:

The most significant impact of a board decision based on equity instead of propriety is that the success of a court case for backpay or other relief from a premature discharge is usually contingent on a finding that the discharge was illegal (*i.e.*, "improper"). The courts pay great deference to the review boards and a board finding of impropriety makes success in court far more likely than an equity-based decision.

b. P.22/1R, ¶ 1:

Another reason boards refuse to grant cases on the basis of propriety is that finding an impropriety puts the government in a poor litigation posture should further relief be sought in court.[1]

c. P.22/2L, ¶ 4:

But see 32 C.F.R. Part 41, App. A, Part 2, § C, ¶ 2.

22.2 Retroactive Application of Current Policies

a. P.22/3L, n.7:

(1) 32 C.F.R. § 70.6(c)(1) cite is now 32 C.F.R. § 70.9(c)(1).

(2) The ADRB SOP has been withdrawn.[2]

b. P.22/3L, ¶ 4:

Unsuitability is no longer a reason for discharge and thus no longer a "current standard."[3]

22.3 Discharge Too Harsh When Issued

a. P.22/3L, n.11:

(1) 32 C.F.R. § 70.6(c)(2) cite is now 32 C.F.R. § 70.9(c)(2).

(2) The ADRB SOP has been withdrawn.[4]

b. P.22/3R, n.12:

See AD 82-00470 (19 months good service followed by Article 15 for marijuana possession, followed by ten months good service, followed by SPCM for DOLO and disrespect to NCO); ND 82-00436 (UD to GD; 1934 UD for unclean habits. Two NJPs, an over-leave for five hours and drunk ashore in five and a half years service).

22.4 Quality of Service or Overall Record

a. P.22/3R, n.16:

The quoted material, substantively unchanged, is now at 32 C.F.R. § 70.9(c)(3). More of this provision is quoted at § 9.3, n.105c and Appendix 22A.

b. P.22/3R, last ¶, replace the last sentence with:

"This standard of equity is merely a catch-all permitting the Board to act as an 'equalizing agency.' The DRBs have a clearer view of historical contexts and a better opportunity to scrutinize the facts."[5]

---

[1] *See* a, this section, *supra.*

[2] *See* Chapter Supplement, *supra.*

[3] *See* Supp. Chs.16 and 21, *supra.*

[4] *See* Chapter Supplement, *supra.*

[5] *See* note 2 in original text. Most bad discharges are issued without meaningful fact-finding proceedings.

22.4.1 Service History

• P.22/4L, ¶ 2:

See FD 77-02054 (GD to HD; "in consideration of almost three years of exemplary duty performance as evidenced by overall evaluations of 8, 8, 6, 9 and 8"). *See also* AD 81-06877 (UD to GD; previous HDs, Korean and Vietnam service, total of four periods of AWOL for 40 days); MD 78-610 (GD to HD; "The discharge is inequitable because two of the three behavior marks which keep his conduct average below 4.0 (normally, full honorable) were awarded in twelve days and essentially for the same act").

22.4.2 Awards and Decorations

a. P.22/4R, n.22:

AD 81-07451 (UD to GD; Purple Heart and Combat Infantry Badge); AD 81-06877 (UD to GD; ARCOM and overall service mitigate AWOL); MD 78-03299 (GD to HD; "[A]pplicant's award for heroic achievement in combat is considered sufficient basis for upgrading applicant's General Discharge").

b. P.22/4R, ¶ 2:

See Chapter 6 for how to obtain this information.

22.4.3 Letters of Commendation and Acts of Merit Not Formally Recognized

• P.22/4R, n.23:

See also AD 81-07266; AD 81-06877 (UD to GD; six letters of commendation and overall service mitigate AWOLs); AD 81-03649.

22.4.4 Combat Service and Wounds Received in Action

• P.22/4L, n.26:

See also AC 80-01891 (Upgrade to HD; applicant had received Purple Heart, Combat Infantry Badge, and Korean Service Medal); AC 72-00252A (Upgrade to HD; applicant had received Bronze Star and Purple Heart).

22.4.5 Records of Promotions, Demotions, and Level of Responsibility at Which the Applicant Served

22.4.6 Length of Time Served During Service Period in Question and Prior Honorable Service

22.4.7 Postservice Conduct

a. P.22/5L, n.30:

Cite is now 32 C.F.R. § 70.9(C)(3)(i)(J).

b. P.22/5R, ¶ 3, sentence 3:

See e.g., AC 80-06196 (DD to GD; pleaded guilty at GCM to AWOL, unlawful drug use, and breaking restriction, in 1955. After discharge, veteran was in prison for 17 years. ABCMR, in granting upgrade, stressed his post-service accomplishments. The Board concluded that while it was "conscious of the applicant's post service criminal record, it takes cognizance of the fact that the applicant has recently taken strides toward rehabilitation as exemplified by the termination of his alcohol abuse, his reunion with his family, his academic achievement [working on an associate's degree at community college] and his parole.").

c. P.22/6L, n.36:

See AD 82-00470; MD 81-05258; FD 80-02124.

22.4.8 Records of Misconduct Indicating Isolated or Minor Offenses

a. P.22/6L, ¶ 3:

See also Chapter 17 for discussion of discharges based on misconduct and the different reasons for discharge which may be assigned.

b. P.22/6L, n.37:

(1) *See* AD 82-00034 (UD to GD; one SPCM for sleeping on guard duty in occupied country); AD 79-0060.

(2) The ADRB SOP has been withdrawn.[6]

c. P.22/6R, n.38:

(1) *See United States v. Huggins,* 12 M.J. 657 (A.C.M.R. 1981).

(2) The ADRB SOP has been withdrawn.[7]

22.4.9 Miscellaneous Equitable Factors Relating to Quality of Service

• P.22/7L, n.39:

See Ferrell v. Secretary of Defense, No. 81-02063 (5th Cir. 1981) (servicemember promised placement in the Active Mariner Apprenticeship Training Program. He was not, however, placed in the program. The court found that the Navy had breached the contract but that it was not a sufficiently material breach to warrant voiding of the enlistment). *See also* Chapter 18.

22.5 Factors Relating to A Servicemember's Ability to Perform

• P.22/7R, n.45:

Cite is now 32 C.F.R. § 70.9(c)(3)(ii).

22.5.1 Age and Maturity

• P.22/8L, n.47:

See AD 82-00402; AD 79-02263; AD 7X-21238A; AC 77-05387.

22.5.2 Aptitude and Education

• P.22/8R, n.50:

See AD 82-00402, AD 78-01023A (discharge inequitable where it resulted from the failure of the servicemember with a limited education to understand the full implications of the legal process leading to his discharge); AD 79-05253; AD 77-08823; ND 81-05190 (UD to GD; extremely low AFQT (010) and GCT (025) scores evidence of a diminished ability to serve); FD 80-02214 (UD to GD; upgraded based on mitigation of personality disorder and mental category (IV)).

• P.22/8R, n.51:

A report by the Human Resources Research Organization, 1100 S. Washington St., Alexandria, VA 22314 sponsored by the Assistant Secretary of Defense (Force Management and Personnel) and entitled "Effects of Military Experience on the Post-Service Lives of Low-Aptitude Recruits: Project 100,000 and the ASVAB Misnorming" (Dec. 1989) investigated those inducted under lower standards in 1966–71 and 1976–80. Low-aptitude veterans were not found to be better off economically, educationally or socially than their non-veteran counterparts.

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[6] *See* Chapter Supplement, *supra.*

[7] *Id.*

22.5.3 Deprived Background

• P.22/8R, n.52:

See AD 79-0576; AD 77-08823; MD 78-00935; FD 80-02077 (UD to GD; deprived background, knee injury, homesickness, and medical problems mitigate two SCMs in five months service).

22.5.4 Marital, Family, and Other Personal Problems

a. P.22/9L, n.53:

See AC 78-00670 (family problems); AD 82-00402 (AWOL to be with new wife); AD 81-14406 (family illness and financial problems); AD 81-01634 (family and marital problems mitigate AWOL).

b. P.22/9L, n.54:

(1) *See* AD 82- 00448 (UD to GD; drug abuse and spousal abandonment of applicant and child mitigate drug trafficking and abuse).

(2) The ADRB SOP has been withdrawn.[8]

c. P.22/9L, n.57:

See AD 81-14406.

22.5.5 Financial Problems

22.5.6 Racial, Religious, Cultural, or Sex Discrimination

a. P.22/9R, n.63:

(1) 32 C.F.R. § 70.6(c)(3)(ii)(D) cite is now 32 C.F.R. § 70.9(c)(3)(ii)(D).

(2) The ADRB SOP has been withdrawn.[9]

b. P.22/10L, ¶ 2:

But see AD 77-04544 (UD to UHC; case involving a 1972 UD issued after the denial of a conscientious objection application. The Army DRB stated:

> "The board is aware that during the time frame the applicant applied for CO status that the rise of and unfavorable publicity associated Black Moseleum (sic) groups may have beem (sic) a factor considered by the denial authority (sic))."

22.5.6.1 History and Problems of Blacks in the U.S. Armed Forces

22.5.6.2 Symbols of Cultural Identity

• P.22/12R, n.77:

The PFB Project is now located at:

Suite 400
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016

22.5.6.3 Case Approaches

a. P.22/13L, ¶ 1:

See United States v. Hullum, 15 M.J. 261 (C.M.A. 1983) (racial harassment as defense or sentence mitigation).

b. P.22/13L, n.83:

See AC 72-04062A (BCD to UHC; citing deprived conditions on Indian reservation during childhood and fact that incidents were alcohol-induced).

22.5.6.4 Sex Discrimination

• P.22/13L, n.86:

Other resources are:

Vietnam Veterans of America Women's Project
1224 M Street, N.W.
Washington, D.C. 20005-5183
202-628-2700

The Clearinghouse on Women and the Military
Women's Equity Action League
805 15th Street, N.W., Suite 822
Washington, D.C. 20005
202-638-1961

22.5.7 Medical and Physical Considerations

22.5.8 Drug and Alcohol Problems

• P.22/14L, n.98:

See, e.g., AD 79-02263; FD 79-00589; FC 81-02415; FD 79-01460; FD 79-00560; FD 79-00099; FD 81-00579; FD 81-00067; FD 81-00120; FD 80-01822.

22.5.9 Psychiatric, Emotional, or Other Mental Problems

a. P.22/14L, ¶ 3:

See § 22.5.12.

b. P.22/14L, n.100:

AD 79-02263; AD 78-0483; FC 83-04076.

22.5.10 Matters of Conscience

22.5.11 General Inaptitude (Would But Couldn't)

22.5.12 Vietnam War Syndrome and Posttraumatic War Neurosis

a. Post-traumatic stress disorder (PTSD) is widely accepted in the mental health community. It can be used to explain unusual post-war zone service conduct. However, many review board members remain skeptical. Strong psychiatric evidence should accompany any such claim.

b. P.22/15R, n.112:

See AD 80-07321 (UD to GD; two Article 15s, one SCM, one SPCM, and 67 days lost due to military confinement—all after Vietnam tour where awarded Bronze Star, Army Commendation Medal and other awards. "[A]pplicant had an adjustment problem from the combat zone upon his return to CONUS, Garrison type duty"); AD 7X-021580 (UD to HD; discharge for AWOL of more than 280 days. Team leader at Vet Center where veteran receiving treatment testified concerning disorder. AWOL considered isolated incident, not typical of tour); AD 79-03055A (UD to HD; enlistment to escape problems in civilian life. Prior tour in Vietnam. Could not perform duties in second tour and went AWOL for two periods totaling 401 days. GOS in 1975. After discharge, had arrest for assault on a police officer, was committed to a mental hospital, and was treated in a VA hospital. With testimony from psychiatrist, the DRB concluded that the applicant was suffering from PTSD during AWOLs); MD 78-04617 (UD to HD; duty in Vietnam as "tunnel rat" and sole survivor of an ambush. Discharged for civilian offense after return to U.S. After discharge held eight persons hostage in a Maryland bank in 1977. Was placed in VA facility for treatment after hostage incident. DRB found that PTSD played role in UD).

[8] *Id.*

[9] *Id.*

22.5.13 Arbitrary and Capricious Command Actions

• P.22/16, n.116:

Cite is now 32 C.F.R. § 70.9(c)(3)(ii)(c).

22.6 Aggravating Factors

22.6.1 When the Servicemember Wanted to be Discharged

• P.22/16R, ¶ 3:

The worst case is where a servicemember engaged in fraud to get out. *See, e.g., Steuer v. United States,* 207 Ct. Cl. 282, 3 MIL. L. REP. 2401 (1975). Fraud in the discharge does not, however, create an estoppel to an upgrade where the fraud is induced by coercion by a superior. *Mulvaney v. Stetson,* 554 F. Supp. 811 (1982).[10]

22.6.2 Other Common Defenses

Appendix 22A

DRB Equity Rules and Index Categories

A. DRB Equity Rules

Cite is now 32 C.F.R. § 70.9(c).

B. Relevant DRB Index Categories

Appendix 22B

DRB/BCMR Decisions

A. Case Lists

1. Army BCMR

AC 78-00670; AC 77-05387.

2. Army DRB

AD 82-00470; AD 82-00402; AD 82-00034; AD 81-14406; AD 81-07266; AD 81-03649; AD 79-02263; AD 79-0576; AD 79-0060; AD 78-0483; AD 77-08823; AD 7X-21238A.

3. Navy BCMR

4. Navy DRB

ND 82-00436.

5. Marine DRB

MD 81-05258; MD 78-00935.

6. Air Force DRB

FD 81-00579; FD 81-00120; FD 81-00067; FD 80-02124; FD 80-01822; FD 79-01460; FD 79-00589; FD 79-00560, FD 79-00099.

7. Air Force BCMR

FC 83-04076; FC 81-02415.

B. Digest of Cases Relied Upon

1. Army BCMR

AC 80-01891 (Upgrade to HD; applicant had received Purple Heart, Combat Infantry Badge, and Korean Service Medal);

AC 72-04062A (BCD to UHC; citing deprived conditions on Indian reservation during childhood and fact that incidents were alcohol-induced).

AC 72-00252A (Upgrade to HD; applicant had received Bronze Star and Purple Heart).

[10]*See also* § 14.5.2 and DRB/BCMR cases cited therein.

2. Army DRB

AD 82-00470 (19 months good service followed by Article 15 for marijuana possession, followed by ten months good service, followed by SPCM for DOLO and disrespect to NCO);

AD 82-00448 (UD to GD; drug abuse and spousal abandonment of applicant and child mitigate drug trafficking and abuse);

AD 82-00402 (AWOL to be with new wife);

AD 82-00034 (UD to GD; one SPCM for sleeping on guard duty in occupied country);

AD 81-14406 (family illness and financial problems);

AD 81-07451 (UD to GD; Purple Heart and Combat Infantry Badge);

AD 81-06877 (UD to GD; previous HDs, Korean and Vietnam service, total of four periods of AWOL for 40 days);

AD 81-01634 (family and marital problems mitigate AWOL);

AD 80-07321 (UD to GD; two Article 15s, one SCM, one SPCM, and 67 days lost due to military confinement—all after Vietnam tour where awarded Bronze Star, Army Commendation Medal and other awards. "[A]pplicant had an adjustment problem from the combat zone upon his return to CONUS, Garrison type duty");

AD 79-03055A (UD to HD; enlistment to escape problems in civilian life. Prior tour in Vietnam. Could not perform duties in second tour and went AWOL for two periods totaling 401 days. GOS in 1975. After discharge had arrest for assault on a police officer, was committed to a mental hospital, and was treated in a VA hospital. With testimony from psychiatrist, the DRB concluded that the applicant was suffering from PTSD during AWOLs);

AD 78-01023A (discharge inequitable where it resulted from the failure of the servicemember with a limited education to understand the full implications of the legal process leading to his discharge);

AD 77-04544 (UD to UHC; case involving a 1972 UD issued after the denial of a conscientious objection application);

AD 7X-021580 (UD to HD; discharge for AWOL of more than 280 days. Team leader at Vet Center where veteran receiving treatment testified concerning disorder. AWOL considered isolated incident, not typical of tour).

3. Navy BCMR

4. Navy DRB

ND 82-00436.(UD to GD; 1934 UD for unclean habits. Two NJPs, an over-leave for five hours and drunk ashore in five and a half years service);

ND 81-05190 (UD to GD; extremely low AFQT (010) and GCT (025) scores evidence of a diminished ability to serve); FD 80-02214 (UD to GD; upgraded based on mitigation of personality disorder and mental category (IV)).

5. Marine DRB

MD 78-04617 (UD to HD; duty in Vietnam as "tunnel rat" and sole survivor of an ambush. Discharged for civilian offense after return to U.S. After discharge held eight persons hostage in a Maryland bank in 1977. Was placed in VA facility for treatment after hostage incident. DRB found that PTSD played role in UD);

MD 78-03299 (GD to HD; "[A]pplicant's award for heroic achievement in combat is considered sufficient basis for upgrading applicant's General Discharge");

MD 78-610 (GD to HD; "The discharge is inequitable because two of the three behavior marks which keep his con-

duct average below 4.0 (normally, full honorable) were awarded in twelve days and essentially for the same act").

6. Air Force DRB

FD 80-02214 (UD to GD; upgraded based on mitigation of personality disorder and mental category (IV)); FD 80-02077 (UD to GD; deprived background, knee injury, homesickness, and medical problems mitigate two SCMs in five months service);

FD 77-02054 (GD to HD; "in consideration of almost three years of exemplary duty performance as evidenced by overall evaluations of 8, 8, 6, 9 and 8").

CHAPTER 23
Special Vietnam-Era Review Programs (Amnesty)

A. Overview

There have been no changes of broad significance in the "amnesty programs" described in this chapter. The passing of the 15-year deadline at the DRBs, however, bars application for most Vietnam-era veterans. Relief must now be sought at the BCMRs.

B. Chapter Supplement

Note that the processing for the amnesty programs was done on a mass basis. Very little care was taken in the process and errors were not uncommon. Thus, pay close attention for errors in the amnesty application process. Also, rarely was any analysis conducted to determine if there was a basis for relief other than the special program. Thus, these cases should be examined for alternative, preferable, means of obtaining relief.

C. Section Supplement

23.1 Introduction

23.2 The Ford Clemency Program

23.2.1 Introduction and Overview

23.2.2 Military Absentees and Pending Cases

a. P.23/3L, ¶ 2:

The processing at Ft. Benjamin Harrison was on a mass basis. Little, if any, review was ever conducted to see if there was any basis for relief other than amnesty.

b. P.23/3L, ¶ 2, • 1:

There was some question concerning whether it was appropriate for citizens of foreign countries to take this oath. The informal position at Ft. Benjamin Harrison was that this would not be an impediment to amnesty.

23.2.3 Presidential Clemency Board (PCB) Applicants

23.2.4 Final Ford Directive Regarding Upgrades

23.3 The 1977 Special Discharge Review Program

23.3.1 Introduction and Overview

23.3.2 Description of the SDRP

23.3.3 Public Law 95-126

23.3.4 Current Relevance of the SDRP

a. P.23/6L, n.40:

Reference should be to § 9.2.2.16.

b. P.23/6L, ¶ 3:

(1) The DRBs' current stated policy is to review all SDRP cases under uniform standards. It is unclear what they would do if confronted by a case specifically within the parameters of these court orders. The NDRB has reviewed at least one case in recent years using the SDRP criteria.[1] The expiration of the 15-year statute of limitations at the DRBs is a further complication.

(2) The ABCMR policy in SDRP cases is to remand the case to the DRB if there is a right to confirmation review. If the ABCMR does not remand the case, it will review it on the merits, not just as a review of the DRB decision. The BCNR has no special procedures for SDRP cases.

23.4 Consequences of Failure to Complete Alternative Service Under the FCP

• P.23/6R, • 4:

See AD 79-00724 (UD to UHC; "The Board noted . . . that he failed to complete the alternative service for which he volunteered but, based on his testimony which the Board chose to believe . . . this failure was not entirely his fault.").

Appendix 23A

Resource List

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[1]Case on file with NMDRP.

CHAPTER 24
Federal Court Litigation

A. Overview

The most significant changes in federal court litigation have been the developments in the application of the statute of limitations and the willingness of some courts to overturn a discharge characterization based on legal error in the discharge process. These developments are dealt with in Supp. § 24.3.1.2 and Supp. Ch. 12 respectively. Note that although § 24.3 is entitled "Challenging the Character of Discharge," several of its subsections are relevant beyond that context, including the discussion of the statute of limitations at § 24.3.1.2.

The other broad change in federal court litigation has been the restructuring of the Court of Claims. This court has been replaced by the United States Claims Court and appeal is to the new Court of Appeals for the Federal Circuit (CAFC).

B. Chapter Supplement

Note new sections on court review of BCMR consideration of discharges resulting from courts-martial, § 24.3.1.4; appellate review, § 24.5; attorneys' fees, § 24.6; the *Feres* Doctrine, § 24.7; and sample pleading on statute of limitations issues at new Appendix 24E.

C. Section Supplement

24.1 Introduction

24.2 Challenging the Decision to Discharge Prematurely

24.2.1 Available Relief

a. P.24/1R, ¶ 1:

(1) *See also* Chapter 28.

(2) *See Krzeminski v. United States,* 13 Cl. Ct. 430 (1987).

b. P.24/2L, n.3:

See Krzeminski v. United States, 13 Cl. Ct. 430 (1987).

c. P.24/2, n.4:

See Neal v. Secretary of the Navy, 639 F.2d 1029, 9 MIL. L. REP. 2247 (3d Cir. 1981).

d. P.24/2, n.5:

Mulvaney v. Stetson, 544 F. Supp. 811, 10 MIL. L. REP. 2998.1 (N.D. Ill. 1982); *Neal v. Secretary of the Navy,* 639 F.2d 1029, 9 MIL. L. REP. 2247 (3d Cir. 1981).

24.2.2 Standards of Review for a Challenge to a Decision to Discharge Prematurely

a. P.24/2L, ¶ 2:

See Fairchild v. Lehman, 609 F. Supp. 287, 290 (E.D. Va. 1985), *aff'd,* 814 F.2d 1555 (Fed. Cir. 1987). The scope of review of courts-martial is narrow. *See Bowling v. United States,* 552 F. Supp. 54 (Ct. Cl. 1982), *aff'd,* 713 F.2d 1558 (Fed. Cir. 1983). (Discusses scope of review by Court of Appeals for the Federal Circuit on collateral attack on court-martial. Discusses degree to which Claims Court must review the record).

b. P.24/2L, n.6:

See Krzeminski v. United States, 13 Cl. Ct. 430 (1987); *Morrow v. United States,* 227 Ct. Cl. 290, 296, 647 F.2d 1099, 1102, *cert. denied,* 454 U.S. 940 (1981); *California Canners & Growers Ass'n v. United States,* 9 Cl. Ct. 774, 782-83 (1986). *Compare Jordan v. National Guard Bureau,* 877 F.2d 245, 17 MIL. L. REP. 2578 (3d Cir. 1989) (too much deference to BCMR by District Court results in remand).

c. P.24/2L, ¶ 2, add at end of section:

In at least one case, the Court of Appeals for the Federal Circuit (CAFC) has used a new standard of proof in applying the standards of review. In *Wronke v. Marsh,* 787 F.2d 1569, 1576 (Fed. Cir.), *cert. denied,* 107 S. Ct. 188 (1986), the court held the evidence that a finding was arbitrary or capricious, unsupported by substantial evidence, or in violation of statutory or regulatory requirements must be "clearly convincing," citing *Dorl v. United States,* 200 Ct. Cl. 626, 633, *cert. denied,* 414 U.S. 1032, 94 S. Ct. 461, 38 L. Ed. 2d 323 (1973).[1] This standard has not been adopted by any other court.

24.2.3 Judicial Review in the Court of Claims

a. P.24/2L, ¶ 3:

Effective October 1, 1982, the trial jurisdiction of the "Court of Claims" was assumed by the new "United States Claims Court." Appeal from the Claims Court is to the contemporaneously created United States Court of Appeals for the Federal Circuit (CAFC).[2] This reorganization was the outcome of the merger of the Court of Claims with the United States Court of Customs and Patent Appeals. Although based in Washington, D.C., the Claims Court will travel to hear cases in other cities or utilize telephonic oral argument.

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[1] *See also* Krzeminski v. United States, 13 Cl. Ct. 430 (1987); Armstrong v. United States, 205 Ct. Cl. 754, 761 (1974); Stewart v. United States, 197 Ct. Cl. 472, 484 (1972); Terrell v. United States, 7 Cl. Ct. 171, 174 (1984), *aff'd,* 785 F.2d 323 (Fed. Cir. 1985), *cert. denied,* 107 S. Ct. 129 (1986).

[2] *See* new section on appeals, § 24.5, below.

b. P.24/2R, n.10:

See United States v. Koster, 685 F.2d 407, 10 MIL. L. REP. 2851 (Ct. Cl. 1982) and § 28.3.1.

c. P.24/2R, n.12:

All available administrative remedies are permissive, not just appeal to a BCMR. *See Heisig v. United States,* 719 F.2d 1153, 1155 (Fed. Cir. 1983); *Krzeminski v. United States,* 13 Cl. Ct. 430 (1987); *Doyle v. United States,* 599 F.2d 984, 1000, 220 Ct. Cl. 285, 311, *opinion modified,* 609 F.2d 990, 220 Ct. Cl. 326 (1979), *cert. denied,* 446 U.S. 982 (1980); *Poe v. United States,* 7 Cl. Ct. 40, 42 (1984). *But see Diliberti v. Brown,* 583 F.2d 950, 951 (7th Cir. 1978). *But cf. Maier v. Orr,* 754 F.2d 973, 984 (Fed. Cir. 1985) (dictum).

d. P.24/2R, ¶ 2, last sentence:

The Correction Boards can, however, offer relief on purely equitable grounds and fashion equitable remedies unlikely to be ordered by a court. Thus, it is often wise to apply to the Correction Board first if the case is sympathetic on its facts as a matter of fairness.

e. P.24/2R, ¶ 3:

(1) Acceptance of partial monetary relief from the BCMR may be a waiver of further relief. *See Powell v. Marsh,* 560 F. Supp. 636 (D.D.C. 1983); 10 U.S.C. § 1552(c).

(2) Note, however, that if relief has been sought at the Correction Board prior to the Claims Court, any issues not raised at the Correction Board may be considered waived. It has been held that the review is of the Correction Board's decision, not the discharge. *Doyle v. United States,* 599 F.2d 984, 220 Ct. Cl. 285, *opinion modified,* 609 F.2d 990, 220 Ct. Cl. 326 (1979), *cert. denied,* 446 U.S. 982 (1980). Also, the question of the admissibility of new evidence is unsettled. *See Krzeminski v. United States,* 13 Cl. Ct. 430 (1987). It has been suggested that new evidence is admissible only if it was unavailable below or if the plaintiff makes a "'strong showing of bad faith or improper behavior' that creates 'serious doubts about the fundamental integrity' of administrative action." *Long v. United States,* 12 Cl. Ct. 174, 176, 177 n.2 (1987) (quoting *Sierra Club v. Costle,* 657 F.2d 298, 390 (D.C. Cir. 1981)). *See Krzeminski v. United States,* 13 Cl. Ct. 430 (1987); *Terrell v. United States,* 7 Cl. Ct. 171, 174 (1984), *aff'd,* 785 F.2d 323 (Fed. Cir. 1985), *cert. denied,* 107 S. Ct. 129 (1986).

But see Bonen v. United States, 666 F.2d 536 (Ct. Cl. 1981), holding that where the plaintiff made no request at the BCMR for back-pay or active duty credit and attempted to waive her rights to monetary relief, the "half-a-loaf" doctrine does not apply. *Cf. Mullen v. United States,* 19 Cl. Ct. 50 (1990) (court can review BCMR failure to waive three-year statute of limitations even though discharge was more than six years ago). There are also exceptions in some disability retirement cases as each month's failure to pay retirement is a new cause of action.

g. P.24/3L, ¶ 2:

See generally Pepper v. United States, 8 Cl. Ct. 666, 14 MIL. L. REP. 2083 (1985). In *Pepper,* the officer was discharged on February 29, 1980 and filed suit on October 9, 1980. The court found the action barred by laches because the plaintiff's argument relied on the inadequacy of OERs from 1974, 1975, 1976, and 1977 and, though no cause of action accrued in the Claims Court at the time of the OERs, they could have been challenged in Federal District Court. The court determined that the delay between the 1974 OER and the 1980 suit was unreasonably long, inexcusable, and prejudicial to the government; *Adkins v. United States,* 228 Ct. Cl. 909 (1981) (similar facts to *Pepper,* with the same result).

Since those cases the Claims Court has held that laches should normally not apply in military pay cases and the burden is on the government to show actual prejudice. *Cornetta v. United States,* 851 F.2d 1372 (Fed. Cir. 1988).

h. P.24/3L, notes 17-20:

See Cornetta v. United States, 851 F.2d 1372 (Fed. Cir. 1988).

i. P.24/3L, n.17:

See Halliday v. United States, 7 Cl. Ct. 315, 320-21 (1985).

j. P.24/3L, n.18:

See generally Pepper v. United States, 8 Cl. Ct. 666, 14 MIL. L. REP. 2083 (1985).

k. P.24/3R, ¶ 1:

The Claims Court now holds session in other cities, although its sole permanent location is still in Washington.

24.2.4 Judicial Review in Federal District Court

• P.24/3, n.23:

See Stone v. United States, 683 F.2d 449 (D.C. Cir. 1982) ("When a plaintiff seeks government back pay and other monetary allowances, with a deduction for civilian earnings, a waiver of any *net* recovery in excess of $10,000 is sufficient to establish the District Court's jurisdiction" (emphasis added)). *Goble v. Marsh,* 684 F.2d 12 (D.C. Cir. 1982) (Waiver only of damages which have accrued to time of filing complaint insufficient. Waiver must include damages in excess of $10,000 which will continue to accrue. But collateral benefits need not be waived; e.g., accruing back-pay must be included in the damages calculation and waived, but future pay which would be received if the veteran were reinstated is not included in the $10,000 damage calculation. The court remanded to the District Court to allow appellants to amend their complaints). *See also Wolfe v. Marsh II,* 846 F.2d 782 (D.C. Cir. 1988).

24.2.5 Injunction Preventing an Imminent Discharge

a. P.24/4L, n.29:

See, e.g., Hartikka v. United States, 755 F.2d 1516, 13 MIL. L. REP. 2322 (9th Cir. 1985); *Chilcott v. Orr,* 747 F.2d 29 (1st Cir. 1984). *But see Atwell v. Orr,* 589 F. Supp. 511 (D.S.C. 1984) (Preliminary injunction preventing discharge granted. The Air Force desired to deny reenlistment of sergeant based on noncompliance with weight requirements. The harm to the sergeant and his family of a discharge while action was pending outweighed the likelihood of harm to the government).

b. P.24/4, n.31:

See, e.g., Chilcott v. Orr, 747 F.2d 29 (1st Cir. 1984).

24.3 Challenging the Character of Discharge

a. P.24/4R, ¶ 3:

Courts will generally not order a discharge upgraded. More likely relief is a remand to the discharge upgrade agency with guidance from the court. Courts will occasionally, however, directly order an upgrade. *See Smith v. Marsh,* 787 F.2d 510 (10th Cir. 1986); *Giles v. Secretary of the Army,* 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980); *White*

v. Secretary of the Army, 878 F.2d 501 (D.C. Cir. 1989), *rev'g and remanding* 629 F. Supp. 64, 12 MIL. L. REP. 2449 (D.D.C. 1984); *Blassingame v. Secretary of the Navy,* 866 F.2d 556, 17 MIL. L. REP. 2188 (2d Cir. 1989).

b. P.24/4R, n.34:

See Schmidt v. United States, 3 Cl. Ct. 190, 194 (1983).

24.3.1 Common Obstacles to Judicial Review

24.3.1.1 Exhaustion of Administrative Remedies

a. P.24/4R, ¶ 1:

See Watkins v. United States Army, 541 F. Supp. 249 (W.D. Wash. 1982), *aff'd,* 875 F.2d 699 (9th Cir. 1989); *Montgomery v. Rumsfeld,* 577 F.2d 250 (9th Cir. 1978).

b. P.24/5, ¶ 1:

Two federal district court decisions from the District of Columbia have held that remedies at both the DRB and BCMR must be exhausted. *Bittner v. Secretary of Defense,* 625 F. Supp. 1022, 13 MIL. L. REP. 2593 (D.D.C. 1985); *White v. Secretary of the Army,* 629 F. Supp. 64, 12 MIL. L. REP. 2449 (D.D.C. 1984), *rev'd and remanded,* 878 F.2d 501 (D.C. Cir. 1989).

c. P.24/5R, ¶ 2:

(1) In *Kaiser v. Secretary of the Navy II,* 542 F. Supp. 1263 (D. Colo. 1982), the court held that where Article 69 review was available, it had to be exhausted before an action would lie in federal court.[3]

(2) In *Kalista v. Secretary of the Navy,* 560 F. Supp. 608, 612 (D. Colo. 1983), the court held that review was not limited to the record of the correction board.

24.3.1.2 Statute of Limitations

a. P.24/5R, Statute of Limitations Developments:

Veterans who, through litigation, have sought upgrades of less than honorable discharges and other corrections of military records have in recent years been confronted with a new potential obstacle. The government began to argue in the late 1970s that the statute of limitations set forth in 28 U.S.C. § 2401(a) bars any lawsuit seeking an upgrade in discharge or correction of military records brought more than six years after discharge. Until the government began to raise this argument, federal courts had reviewed the merits of lawsuits brought for the equitable relief of an upgrade in discharge or change in records without regard to the time elapsed since discharge.[4]

The government has, however, in recent years, been raising this statute of limitations as a defense even in those cases in which the veteran has filed a timely application with a Discharge Review Board (DRB) (*i.e.,* prior to the 15-year deadline). For example, if a veteran applies to a DRB eight years after discharge and the DRB arbitrarily and unlawfully refuses to upgrade the veteran's discharge, the government argues that there is nothing a court can do to remedy the DRB's unlawful denial of relief because the suit is time barred. Thus, the argument is advanced despite the fact that Congress has provided that a veteran has 15 years from the date of discharge to apply to a DRB for an upgrade. The same analysis is also applied by the government to the Boards for Correction of Military Records (BCMRs) and their waivable three-year statute of limitations.

In the face of this argument, the courts have ruled that there are two possible causes of action which can start the statute of limitations running. The first cause of action accrues at the time of discharge. The decision to discharge and the character of discharge can be directly challenged in court up to six years after the discharge. Within this six years, monetary damages can also be sought, usually in the form of back-pay and entitlements.

Beyond six years from discharge, the decisions made at the time of discharge can no longer be challenged. A new cause of action arises, however, if a timely application is filed with the review agencies. A decision by a DRB or BCMR can be challenged in court anytime within six years of the decision date. The challenge can include, but is not limited to, contesting the Board's refusal to declare the discharge itself to be void or to change the character of discharge. No monetary relief can, however, be received through a court challenge to a DRB or BCMR decision made more than six years after discharge. (There are some exceptions in claims for disability retirement and where the BCMR only granted partial—"half-a-loaf"—relief.)

Significant cases in this area are:

- *Geyen v. Marsh,* 775 F.2d 1303 (5th Cir. 1985), *reh'g denied,* 782 F.2d 1351 (1986) (Discharge in 1972, ADRB and ABCMR review in late 1970's, suit filed in 1985, more than six years after last board, ABCMR review. Court held that since ABCMR reviewed ADRB application of current standards, a new cause of action arises at the ABCMR decision);
- *Dougherty v. U.S. Navy Bd. for Correction of Naval Records,* 784 F.2d 499 (3d Cir. 1986) (Discharge in 1972, ADRB application in 1980, ABCMR denial in 1983, suit filed in 1984. Court adopted reasoning of *Geyen* court);
- *Blassingame v. Secretary of the Navy,* 866 F.2d 556 (2d Cir. 1989) (Discharge in 1971, NDRB applications in 1973, 1977, and 1983, BCNR applications in 1979, 1981, and 1984. Court found right of action accrues at time of Correction Board decision based on intent of Congress and that BCNR reviews DRB application of current standards making the claim new and separate from the one which accrued at discharge);
- *Smith v. Marsh,* 787 F.2d 510 (10th Cir. 1986);
- *See also Ballenger v. Marsh,* 708 F.2d 349 (8th Cir. 1983) (court implied that on applications that a DRB and BCMR must consider (not time barred or within BCMR discretion to time bar), a new six-year period begins to run); *Hurick v. Lehman,* 782 F.2d 984, 986-987 (Fed. Cir. 1986) (Holding that no new cause of action accrues with DRB and BCMR decision for the purposes of Federal Circuit Court of Appeals cases. Such cases necessarily include an application for monetary relief so this case is consistent with the cases in the other circuits). *Compare Mullen v. United States,* 19 Cl. Ct. 50 (1990) (failure of BCMR to waive three-year statute of limitations reviewable beyond six years since discharge); *Walters v. Secretary of Defense,* 725 F.2d 107, 12 MIL. L. REP. 2178 (D.C. Cir. 1983), *reh'g denied,* 737 F.2d 1038 (1984) (suit brought eight years after discharge without having applied to DRB); *Calhoun v. Lehman II,* 725 F.2d 115 (D.C. Cir. 1983) (discharge in 1944, applied to

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[3] *Contra* Calhoun v. Lehman I, 556 F.Supp. 67 (D.D.C. 1982). *See* cases at 10 MIL. L. REP. 1105.

[4] *See, e.g.,* Peppers v. United States Army, 479 F.2d 79, 1 MIL. L. REP. 2264 (4th Cir. 1973) (reviewing the merits of a discharge upgrade case brought 28 years after the date of discharge); Kennedy v. Secretary of the Navy, 401 F.2d 990 (D.C. Cir. 1968) (brought 13 years after discharge); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) (brought 17 years after discharge). *See also* Baxter v. Claytor, No. 77-77-1984 (D.C. Cir. 1978), *vacated on other grounds,* 652 F.2d 181, 9 MIL. L. REP. 2633 (1981) (explicitly holding statute of limitations inapplicable); Kaiser v. Secretary of the Navy I, 525 F. Supp. 1226, 1228 (D. Colo. 1981); Wood v. Secretary of Defense, 496 F. Supp. 192, 198, 8 MIL. L. REP. 2454 (D.D.C. 1980).

BCMR in 1959 and 1966, filed suit in 1978); *Nichols v. Hughes,* 721 F.2d 657 (9th Cir. 1983) (veteran discharged in 1957, applied to DRB and BCMR in 1958, applied to BCMR again in 1977, sued in 1979 on grounds raised in the first BCMR decision but not the second—court considered the effect that tolling the statute of limitations while an administrative remedy was being exhausted would have, but it did not matter because the relevant BCMR decision was 21 years prior to bringing lawsuit so even if tolled, more than six years had passed); *Schmidt v. United States,* 3 Cl. Ct. 190 (1983); *Lepore v. United States,* No. 2-85C (Cl. Ct. 1985); *Mulvaney v. Stetson,* 470 F. Supp. 725, 7 MIL. L. REP. 2366 (N.D. Ill. 1979), *supplemented,* 493 F. Supp. 1218, 8 MIL. L. REP. 2628 (1980), *supplemented,* 512 F. Supp. 574, 9 MIL. L. REP. 2418 (1981), *supplemented,* 544 F. Supp. 811, 10 MIL L. REP. 2998 (1982) (suit brought 33 years after discharge but action held not to accrue until discharge review agency procedures exhausted); *Kaiser v. Secretary of the Navy I,* 525 F. Supp. 1226 (D. Colo. 1981); *Bittner v. Secretary of Defense,* 625 F. Supp. 1022, 13 MIL. L. REP. 2593 (D.D.C. 1985) (several veterans' discharges in 1950s through 1980s, suit filed 1984); *White v. Secretary of the Army,* 629 F. Supp. 64, 12 MIL. L. REP. 2449 (D.D.C. 1984), *rev'd and remanded on other grounds,* 878 F.2d 501 (D.C. Cir. 1989) (discharge in 1973, DRB decision in 1982, lawsuit filed in 1983); *Schmidt v. United States,* 3 Cl. Ct. 190 (1983) (several veterans' discharges in 1960s, NDRB application in 1981, suit filed shortly after NDRB denial); *Lichtenfels v. Orr,* 604 F. Supp. 271 (S.D. Ohio 1984); *Nethery v. Orr,* 566 F. Supp. 804 (D.D.C. 1983); *Yagjian v. Marsh,* 571 F. Supp. 698 (D.N.H. 1983) (suit brought 38 years after discharge, but two years after BCMR decision); *Mishell v. Lehman,* 566 F. Supp. 1486 (D.D.C. 1983); *Austin v. Lehman,* CA 3-80-1591-F, 10 MIL. L. REP. 2305 (N.D. Tex. Jan. 27, 1982); *Wood v. Secretary of Defense,* 496 F. Supp. 192, 8 MIL. L. REP. 2454 (D.D.C. 1980).[5]

In drafting a complaint where the discharge was over six years prior to the filing of the action, care must be taken to craft it as a challenge to the latest administrative board decision, not the discharge itself.[6] It may also be necessary to expressly waive monetary damages which could in theory be a result of the litigation. If, for instance, the challenge is to a BCMR decision denying a claim that a discharge was improper, there is a theoretical right to back-pay should the discharge be found illegal. If the discharge was more than six years prior to the filing of the lawsuit, the claim for back-pay is unenforceable because that claim clearly arose at the time of discharge. If the theoretical claim for back-pay is not, however, waived, a court may dismiss the action because a consequence of the court's decision could be to entitle the veteran to something which is barred by the statute of limitations.[7] To get past this problem, the veteran can expressly waive his or her rights to any monetary relief.[8]

NVLSP has extensive pleadings on file relating to most of the above-discussed cases.

b. P.24/5R, n.39b:

There is a waivable three-year statute of limitations at the BCMRs.[9]

c. P.24/6L, add to end of section:

The doctrine of laches also can be a bar to relief in the Claims Court or federal district court.[10] In general, for laches to be a bar, the court must find that the plaintiff has delayed unreasonably in filing suit and that the defendant (the government in discharge cases) has been prejudiced by the delay. There have been a number of cases addressing the laches issue in recent years. Of particular importance is *Cornetta v. United States,* 851 F.2d 1372 (Fed. Cir. 1988). The court, sitting *en banc,* held that the burden of meeting the prejudice element of the laches doctrine rests with the government in discharge cases. The court also rejected the "double payment" argument frequently advanced by the government. The "double payment" argument is that the government is always prejudiced by delay where back-pay is sought because if back-pay is awarded for the period of the delay, the government must pay both the plaintiff and the servicemember who took the plaintiff's place for the period of the delay.

See also for example:

- *Cowhig v. Marsh,* 693 F.2d 234 (1st Cir.), *reh'g denied* (1982) (Waiting 18 years from discharge until filing action is unreasonable and prejudiced government. Discusses tolling effect of seeking permissive remedies: "Pursuit of permissive administrative remedies, whether before the Correction Board or through Congressional intervention, did not necessarily toll the running of either laches or limitations." 693 F.2d at 235. The dictum in this First Circuit case characterizing an application to the Correction Board as permissive is surprising).
- *Van Bourg v. Nitze,* 388 F.2d 557 (D.C. Cir. 1967). Government argued laches, but the court held that the period of delay begins with a DRB or BCMR denial:

> Since appellant promptly sought review in the District Court after exhausting administrative remedies and now challenges the adequacy of the review proceedings we cannot say that he was guilty of unreasonable delay.[11]

- *Pepper v. United States,* 8 Cl. Ct. 666, 14 MIL. L. REP. 2083 (1985) (Laches bars challenges to discharge based on allegedly defective OERs even though cause of action did not arise until shortly before filing suit. Officer held to challenging the OERs closer to when they were prepared through channels available. Failure to do so results in laches for suit based on alleged defective OERs).
- *Nethery v. Orr,* 566 F. Supp. 804 (D.D.C. 1983) (no laches where plaintiff applied over the years and the Records Center Fire was not his fault).[12]

[5]This case is somewhat atypical because it had been reviewed pursuant to P.L. 95-126, which allowed any veteran to seek relief before the discharge review agencies within one year of new standards and procedures. *See also* White v. Secretary of the Army, 878 F.2d 501 (D.C.Cir. 1989).

[6]*See* Appendix 24E, *infra,* for a sample pleading.

[7]*See* Calhoun v. Lehman II, 556 F. Supp. 67 (D.D.C. 1982). Plaintiff had previously brought an action in the Court of Claims for both monetary and injunctive relief. The case was dismissed based on the Court of Claims six-year statute of limitations. 28 U.S.C. § 2501. The court here dismissed the case on the grounds that a Court of Claims dismissal based on the statute of limitations is a decision on the merits and is res judicata in federal district court. Thus, even though the plaintiff had dropped his requests for monetary relief, and the statute of limitations grounds for dismissal were not applicable in the district court, res judicata barred the action.

[8]*See* discussion at MDU § 24.2.4 and cases cited at footnote 23 relating to waiver of damages in excess of $10,000 to obtain federal district court jurisdiction.

[9]*See* § 9.4.3.

[10]*See* § 24.2.3.

[11]388 F.2d at 566.

[12]*See also* MDU § 9.2.10.4 on Records Center fire.

• *Mosley v. Secretary of the Navy,* 522 F. Supp. 1165 (E.D. Pa. 1981) (laches can apply, but tolls while exhausting remedies).

• In *Kaiser v. Secretary of the Navy I,* 525 F. Supp. 1226 (D. Colo. 1981), the court held that where a Correction Board decides to review an application well after its three-year statute of limitations, it implicitly finds that the "interest of justice" outweighs the prejudice to the government and thus a prompt challenge to the Correction Board action cannot be barred by laches.

24.3.1.3 Cases in Which DRBs or BCMRs Failed to Explain Their Decisions Denying Relief

a. P.24/6L, n.45:

See Benvenuti v. Department of Defense, 587 F. Supp. 348 (D.D.C. 1984); *Mozan v. Orr,* 600 F. Supp. 772, 13 MIL. L. REP. 2214 (E.D. Pa. 1985).

b. P.24/6L, n.46:

See Rucker v. Secretary of the Army, 702 F.2d 966 (11th Cir. 1983).

c. P.24/6R, ¶ 1:

The BCMRs today appear to be more attuned to the possibility of litigation.

24.3.1.4 BCMR Upgrades of Bad Conduct or Dishonorable Discharges

Subsequent to the publication of MDU, Congress passed legislation which places grave doubt on whether there is federal court review of a BCMR decision denying an upgrade in discharge to a veteran who received a less than honorable discharge by sentence of a court-martial. The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, amended the BCMR's enabling statute, 10 U.S.C. § 1552, to add subsection (f). That subsection provides that the authority of a BCMR to upgrade a bad conduct or dishonorable discharge is only "for purposes of clemency." Since clemency decisions normally are not subject to judicial review, a federal district court could well rule that it has no jurisdiction to review such a BCMR decision.

Collateral relief from court-martial convictions by way of a writ of habeas corpus is clearly still possible. The Tenth Circuit (*Monk v. Zelez,* 901 F.2d 885 (1990)) and other courts have not barred injunctive relief.

24.3.2 Pleadings

24.4 Class Actions

24.5 Appellate Review of District Court and Claims Court Decisions

All discharge review cases where money is sought as a remedy, whether brought in District Court or Claims Court, can only be appealed to the United States Court of Appeals for the Federal Circuit (CAFC). Care should be taken to file appeals in the correct court. Otherwise an appeals deadline can be missed.[13]

Some of the early CAFC cases have held that:

• It has jurisdiction under 5 U.S.C. § 7703(c) to "set aside any agency action" (*Asberry v. U.S. Postal Service,* 692 F.2d 1378 (Fed. Cir. 1982));

• After October 12, 1982, frivolous appeals will result in the imposition of damages, costs and attorney fees (*Id.*);

• For purposes of fees under the Equal Access to Justice Act, the government's posture before the agency is only one factor to consider and the government's position in court is the key factor (*Broad Avenue Laundry & Tailoring v. United States,* 693 F.2d 1387 (Fed. Cir. 1982)); and

• Prior holdings of the Court of Claims and the Court of Customs and Patent Appeals are binding precedent on the CAFC (*South Corp. & Seal Fleet v. United States,* 690 F.2d 1368 (Fed. Cir. 1982)).

• The scope of review of courts-martial is narrow (*Bowling v. United States,* 713 F.2d 1558 (Fed. Cir. 1983), *aff'g* 552 F. Supp. 54 (Ct. Cl. 1982)) (Discusses scope of review by Court of Appeals for the Federal Circuit on collateral attack on court-martial. Discusses degree to which Claims Court must review the record).

24.6 Attorneys' Fees

Plaintiffs can have their attorneys' fees paid by the government when they substantially prevail in litigation against the government and the government's position is not substantially justified. NVLSP has pleadings on file from *Weber v. Weinberger II,* 651 F. Supp. 1379 (W.D. Mich. 1987).

• *Neal v. Secretary of the Navy,* 639 F.2d 1029, 9 MIL. L. REP. 2247 (3d Cir. 1981). Attorney fees paid under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), since the veteran had "substantially prevailed."

• *Lauritzen v. Secretary of the Navy,* 546 F. Supp. 1221, 10 MIL. L. REP. 2996 (D.C. Cal. 1982). Attorney got Temporary Restraining Order (TRO injunction) for a sailor claiming that she was threatened with discharge and had been reduced in rank because of her statements to a Navy psychiatrist that she might have lesbian tendencies. The court ordered her to seek review at the BCNR before it would schedule a trial on the merits of the sailor's charges. The BCNR granted most of the relief requested, and the court dismissed the case. The attorneys then requested fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. Under the Act, a court can award fees to the prevailing party. The court decided Lauritzen was such a prevailing party and awarded more than $20,000 to her attorneys.

24.7 *Feres* Doctrine

Because of a Supreme Court interpretation of the Federal Tort Claims Act (FTCA)[14] known as the *Feres* doctrine,[15] the federal government is immune from direct suit for military-related injuries to active duty personnel. The FTCA provides remedies for most civilians to sue the government for negligence by waiving sovereign immunity, but ex-

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[13] *See* Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir 1985) (A district court's subjective reliance on Little Tucker Act jurisdiction—*i.e.,* invocation of Little Tucker Act without a valid basis—does not require that an appeal proceed to the federal circuit). Sharp v. Weinberger, 798 F.2d 1521, 1524 (D.C. Cir. 1986) (A district court's subjective reliance on Little Tucker Act jurisdiction—*i.e.,* invocation of Little Tucker Act without a valid basis—does not require that an appeal proceed to the federal circuit. A general request that a district court award costs and all other relief deemed just and proper is irrelevant to the Little Tucker Act jurisdiction inquiry). *Cf.* Wolfe v. Marsh II, 846 F.2d 782 (D.C. Cir. 1988) (Collateral consequences of equitable relief of reinstatement do not implicate the Little Tucker Act, so as to require that appeal be brought in federal circuit. In this case, the "collateral consequences" would have included entitlement to back-pay, which was not requested in the complaint.). *See also* Ben-Shalom v. Secretary of the Army, 807 F.2d 982 (Fed. Cir. 1986).

[14] 28 U.S.C. § 1291 (1976).

[15] Feres v. United States, 340 U.S. 135 (1950).

cludes from this waiver claims which arise out of combatant activities or which occur in foreign countries.[16] These vague exceptions have been interpreted by the courts to bar former servicemembers from suing the government for in-service injuries.[17] This has meant that servicemembers generally cannot sue the government for negligence or intentional torts occurring while in service.

The courts have created some exceptions to this bar. In *Thornwell v. United States,*[18] the court ruled that the military is liable to veterans for post-discharge negligence. In the Thornwell case, a servicemember was forced to undergo LSD experimentation that rendered him psychotic. The service failed to inform him of the nature of the experiments and did not offer treatment after his separation from service. He sued the government for its failure to warn him after service that his health problems were related to service. The failures to warn and to provide follow-up care constituted negligent acts separate from in-service actions taken by the government. These post-service acts were the bases for findings of negligence not barred by the *Feres* doctrine.[19]

Some recent *Feres* doctrine cases[20] include:

• *United States v. Stanley,* 483 U.S. 669 (1987). In 1958, plaintiff, an Army Master Sergeant, was regularly administered LSD without his knowledge as part of an Army experiment. He alleged that because of the LSD exposure he had suffered from hallucinations, periods of incoherence and memory loss, impaired military service, and on occasion would awake from sleep at night and beat his wife and children, with no recollection of it happening. He was discharged in 1969 and his marriage dissolved shortly thereafter. Plaintiff was first notified that he had been given LSD in 1975 when the Army sought his participation in a study of the long-term effects. Plaintiff brought action under Federal Tort Claims Act, alleging negligence in the administration, supervision, and monitoring of the drug testing program.

The district court ruled that the suit was barred by *Feres* as plaintiff "was at all times on active duty and participating in a bona fide Army program during the time the alleged negligence occurred." The court found this activity incident to service and thus barred by *Feres.* The Fifth Circuit agreed that *Feres* barred the suit but held that the district court should have dismissed for lack of subject matter jurisdiction instead of disposing of the case on the merits. The Fifth Circuit held that there might be a Constitutional claim against individual officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The case was remanded to give the plaintiff the opportunity to cure the jurisdictional defect.

On remand, the plaintiff amended his complaint to include individual officers and alleged that the government's failure to warn, monitor, or treat him after he was discharged was a separate tort which because it was subsequent to service, was not incident to service. The Supreme Court held against the plaintiff.

• *Shearer v. United States,* 105 S. Ct. 3039 (1985). The Supreme Court reaffirmed the *Feres* doctrine in reversing a Third Circuit decision allowing a mother to sue the Army under the FTCA for the death of her son, an Army private who was murdered by a fellow soldier. Private Shearer was off-duty and off-base when he was kidnapped and murdered by Private Heard. Years earlier, while on active duty with the Army in Germany, Heard had been convicted of manslaughter by a civilian German court and sentenced to a four- year prison term. After his release, the Army returned Heard to duty in the U.S. at the same post as Shearer.

The Third Circuit had held that *Feres* did not bar the suit because the death had not occurred in the course of Shearer's official duties. The Court of Appeals stressed that Shearer was off-duty and off-base when the murder occurred.

The Supreme Court pointed out that the location of the murder is not the key factor when applying *Feres.* Rather, the analysis should focus on whether the suit would involve the judiciary in sensitive military matters, such as command and personnel decisions. The Court found that retaining Heard in the service and not controlling his activities, the claimed negligence by the Army, clearly fit these types of military matters. The Court structured its analysis around two prior *Feres*-based decisions. It found that Shearer's suit would require a civilian court to second-guess military decision-makers (*see Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977)) and that the suit might have negative effects on military discipline (*see Chappell v. Wallace,* 462 U.S. 295 (1983)).

The Court emphasized the effect of a tort suit in the second-guessing of military discipline decisions or impairment of military discipline, and specifically stated that the third factor of the *Feres* doctrine—the fear of damaging the military disciplinary structure—was the only one that was still controlling. 105 S.Ct. at 3043, n.4.

• *Chappell v. Wallace,* 462 U.S. 295 (1983). Five black sailors sued their commanding officer for racially discriminating against them in duty assignments, performance evaluations and disciplinary actions. The Court held that the "special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." As a result, service personnel cannot sue for damages in a suit under the rule of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). In *Bivens,* federal narcotics agents were held liable for violations of constitutional rights even though Congress had not authorized such lawsuits. The Court emphasized the importance of the *Feres* decision and that Congress did not intend to allow the military to be sued under the FTCA by servicemembers.

The Court only barred lawsuits to recover damages from superiors for constitutional violations. Military personnel can still sue in federal courts for "constitutional wrongs suffered in the course of military service." The Court remanded the case to the Ninth Circuit to consider the portion of the sailors' case seeking damages from an alleged conspiracy by the superiors to deprive them of their civil rights.

The Court noted that "[u]nder the [BCNR's] procedures, one aggrieved as [the sailors] claim may request a hearing; if the claims are denied without a hearing, the Board is required to provide a statement of its reasons. The Board is empowered to order retroactive back pay and retroactive promotion. Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence."

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[17]Feres, 340 U.S. 135 (1950). *See* Cyze, *The Federal Tort Claims Act: A Cause of Action For Servicemen,* 14 VAL. L. REV. 527 (1980).

[18]471 F. Supp. 344 (D.D.C. 1979).

[19]The most important exception is for negligence performed at VA hospitals after discharge. *See also* 38 U.S.C. § 351.

[20]The Military Law Reporter provides the best comprehensive analysis of *Feres* cases. The Feres Project, 1440 Corcoran St., N.W., Washington, D.C. 20009 (202) 797-0439 also monitors *Feres* developments and can sometimes refer potential claimants to attorneys experienced in this area.

• *Atkinson v. United States,* 804 F.2d 561 (9th Cir. 1986), held that medical malpractice claims of military personnel are not *per se* barred by *Feres.* The court held that the effect of the particular action on military decisions and discipline had to be determined. The court found pre-*Shearer* decisions non-binding. In *Atkinson,* the suit was brought by a women on active duty in the Army, for malpractice in the handling of her pregnancy. The court found that *Feres* did not bar the suit.

• *LaBash v. United States Army,* 668 F.2d 1153 (10th Cir.), *cert. denied,* 456 U.S. 1008 (1982) (Medical malpractice suit for malpractice by military medical personnel barred by *Feres.* LaBash was administered a medication not intended for human use, lapsed into a coma and died several months later).

• *Hunt v. United States,* 636 F.2d 580 (D.C. Cir. 1980) (*Feres* doctrine does not preclude recovery by a servicemember under the National Swine Flu Immunization Program Act (42 U.S.C. § 247b(k)-(l)).

Appendix 24A

Sample Court of Claims Petition

Pleading before the Claims Court, formerly the Court of Claims, is now similar to that before federal district courts. A "complaint" is used instead of a "petition."

Appendix 24B

Sample Federal District Court Complaints

Also, consult text and notes in this chapter of the supplement.

Appendix 24C

Sample Pleading Discussing Injury to Veterans with Less Than Honorable Discharges

Appendix 24D

List of Selected Federal Court Cases Involving Military Administrative Discharges

1. Due Process Generally

Antonuk v. United States, 445 F.2d 592, 595 (6th Cir. 1971) (violation by military of its own regulations violates due process).

2. Right to Notice and a Hearing

3. Right to Confront Witnesses

4. Search and Seizure

5. Coercion or Duress

6. Evidence

7. Counsel

8. Basis in Fact/Inadequate Administrative Record

Kalista v. Secretary of the Navy, 560 F. Supp. 608, 613 (D. Colo. 1983) (no "extensive exegesis of the underlying reasoning" required, only a "sufficient explanation of the basis").

9. Jurisdiction

10. BCMR Procedures

Marcotte v. Secretary of Defense, 618 F. Supp. 756 (D. Kan. 1985) (correction board filing of application without action is arbitrary and capricious).

11. Employment Discrimination

Appendix 24E

Sample Pleading Where Complaint Filed More Than Six Years After Discharge

[*See* page 24S/8]

Appendix 24F

Sample Pleading of Class Action Allegations

[*See* page 24S/13]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD N. [redacted]
2320 Irving Street, S.E., #1
Washington, D.C. 20020
(202) 889-2422

Plaintiff,

vs. Civil Action No. _____

SECRETARY OF THE ARMY
The Pentagon
Room 3E718
Washington, D.C. 20310-0101
(202) 695-3211

Defendant.

COMPLAINT FOR MANDATORY
DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff seeks declaratory and injunctive relief relating to the failure of the Army Discharge Review Board ("ADRB") and the Army Board for Correction of Military Records ("ABCMR") to correct the plaintiff's records of military service. Plaintiff applied to both agencies to recharacterize his undesirable discharge. Both Boards have denied such relief. Plaintiff challenges these decisions pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq., on the grounds that they are arbitrary, capricious, not supported by substantial evidence, and not in accordance with law.

JURISDICTION

2. This cause of action arises under Articles 37 and 38 of the Uniform Code of Military Justice, 10 U.S.C. §§ 827, 838; 10 U.S.C. §§ 1552, 1553 and the Fifth and Sixth Amendments to the United States Constitution; Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2); and Chapter 10 of Army Regulation 635-200. Jurisdiction of this court is provided by 28 U.S.C. §§ 1331 and 1361. Declaratory relief is sought pursuant to 28 U.S.C. § 2201, 2202. There is presently an actual controversy between the parties in which a declaration of rights is sought and needed. Venue is properly in this court by virtue of 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff in this action, Richard [redacted], is a former private in the United States Army. He is a citizen of the United States of America, and currently resides at [redacted] Street, S.E., #1, Washington, D.C. 20020.

4. Defendant, Secretary of the Army, is sued here in his official capacity. His official place of business is Room 3E718 of the Pentagon, Washington, D.C. 20310. Defendant is responsible for and has the authority necessary to conduct all affairs of the Department of the Army, including the governance of the separation of all military personnel from the United States Army. 10 U.S.C. § 3012. He is empowered to act through a board of civilians, the Army Board for Correction of Military Records ("ABCMR"], to change any military record of a member or former member of

the Army whenever necessary to correct an error or to remove an injustice. 10 U.S.C. § 1552. In addition, pursuant to 10 U.S.C. § 1553, he has established an Army Discharge Review Board ("ADRB") to reconsider the character of a servicemember's discharge from the Army, subject to further review by him.

FACTUAL ALLEGATIONS

5. On January 10, 1975, the Army Discharge Review Board denied plaintiff's application for an upgrade in discharge.

6. On May 7, 1975, the Army Board for Correction of Military Records denied plaintiff's application to that Board for an upgrade in discharge.

7. In July 1980, without holding a hearing, the Army Discharge Review Board denied a second request by plaintiff to that Board for an upgrade in discharge.

8. Pursuant to P.L. 95-126, 91 Stat. 1106 (October 6, 1977), plaintiff was given a new opportunity to have his discharge reconsidered by the Army Discharge Review Board. As a result, on June 3, 1982, after holding a full hearing, the ADRB denied plaintiff's application for an upgrade in discharge.

9. At the June 1982 hearing, the plaintiff testified that:

(a). On March 20, 1972, he enlisted to serve in the United States Army for two years.

(b) During his military service, he was absent without official leave ("AWOL") during several periods because of his desire to care for his sick grandmother who raised him.

(c) Plaintiff spent all of his AWOL time at home caring for her as there was no one else to care for her at that time.

(d) Plaintiff was punished for these AWOL's pursuant to the provisions of the Uniform Code of Military Justice.

10. The plaintiff further testified that:

(a) On March 14, 1973, he began his last AWOL to care for his ailing grandmother.

(b) He was on leave prior to March 14 because his other grandmother, [redacted], had died.

(c) He had requested an extension of his leave to care for his ailing grandmother, but it was denied.

(d) On June 3, 1973, plaintiff voluntarily surrendered to Federal Bureau of Investigation agents.

11. Plaintiff testified that he desired to remain in the United States Army, and that if he had known that he could not legally have been separated from service and issued a stigmatizing less than Honorable Discharge as a result of the court-martial instituted against him, he would not have requested a discharge in lieu of court-martial.

12. The military records examined by the Army Discharge Review Board ("ADRB") included a statement which is a part of his official Army personnel file that he did not want to be discharged from the United States Army.

13. In its decision dated June 3, 1982, the ADRB found that:

(a) Charges that Mr. [redacted] was AWOL from March 14 to June 4, 1973 were referred for trial by a special court-martial.

(b) Pursuant to Article 27, UCMJ, 10 U.S.C. § 827, the Army appointed an attorney to represent plaintiff regarding these charges.

14. In its decision of June 3, 1982, the ADRB also found that:

(a) On June 26, 1973, plaintiff met with appointed counsel.

(b) Counsel advised plaintiff that his trial by special court-martial could potentially lead to incarceration and dismissal from the service with a Bad Conduct Discharge.

(c) Counsel further advised plaintiff that he could request a discharge in lieu of trial by court-martial under the provisions of Chapter 10, AR 635-200, which authorizes such a discharge without incarceration when charges by court-martial which could potentially lead to a Bad Conduct or Dishonorable Discharge are pending.

(d) On June 28, 1973, plaintiff requested that he be discharged pursuant to Chapter 10, AR 635-200, in lieu of trial by court-martial based upon the advice of his counsel.

15. Plaintiff argued before the ADRB that the advice of counsel described in paragraph 14 above was incorrect as a matter of law.

16. In its June 3, 1982, the ADRB further found that on July 13, 1973, the discharge authority approved plaintiff's request pursuant to AR 635-200, Chapter 10, for a discharge in lieu of court-martial and also approved issuance of an Undesireable Discharge (Under Other Than Honorable Conditions) to plaintiff.

17. In its June 3, 1982, decision all five members of the Board agreed that an error had been made in that the plaintiff was erroneously informed by his counsel that the court-martial charges lodged against plaintiff could potentially lead to a Bad Conduct Discharge. Three

Board members determined that this error was not prejudicial to the plaintiff and denied an upgrade in discharge. Two Board members dissented from this decision on the ground that the error was prejudicial to plaintiff because plaintiff would have had the opportunity to complete his discharge enlistment contract if he had been given correct legal advice by his appointed counsel.

18. On June 1, 1983, plaintiff filed a complaint for mandatory, declaratory and injunctive relief against the Secretary of the Army in the United States District Court challenging, inter alia, the 1982 decision of the ADRB.

19. On April 10, 1984, the Court (per Judge Corcoran) held that plaintiff's claims arising under the Administrative Procedure Act challenging the 1982 ADRB decision were not barred by the six year statute of limitations set forth at 28 U.S.C. § 2401(a). The Court also granted defendant's motion for summary judgment on the ground that plaintiff had not exhausted his administrative remedies before the Army Board for Correction of Military Records ("ABCMR").

20. On June 12, 1984, plaintiff applied for correction of his military records before the ABCMR on the grounds that the ADRB decision was erroneous.

21. In a letter dated February 12, 1986, regarding a decision rendered January 15, 1986, but not received by plaintiff until March 12, 1986, the ABCMR denied plaintiff's request for correction of records.

22. Pursuant to the Court's order dated April 10, 1984, plaintiff has exhausted his administrative remedies.

INJURY TO PLAINTIFF

23. Plaintiff has suffered and continues to suffer serious and irreparable injury because his less than Honorable Discharge stigmatizes him, adversely affects his reputation and standing in the community, causes him embarrassment and loss of self-esteem, engenders substantial prejudice against him, and impairs his social and economic opportunities in civilian life.

24. Plaintiff is without an adequate remedy at law.

CAUSE OF ACTION

25. The refusals of the Army Discharge Review Board and the Board for Correction of Military Records to recharacterize plaintiff's discharge were unlawful under the Administrative Procedure Act, 5 U.S.C. § 706(2), since the actions by the ADRB and the ABCMR were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with plaintiff's rights guaranteed by Army Regulation 635-200, Chapter 10; 10 U.S.C. §§ 827, 838, 1552, 1553, and the Fifth and Sixth Amendments to the U.S. Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court grant the following relief:

1. Delcare that the refusals of the Army Discharge Review Board and the Board for Correction of Military Records to recharacterize plaintiff's discharge were unlawful under the Administrative Procedure Act, 5 U.S.C. § 706(2), and violated plaintiff's rights guaranteed by Army Regulation 635-200, Chapter 10, 10 U.S.C. §§ 827, 838, 1552, 1553, and the Fifth and Sixth Amendments to the U.S. Constitution.

2. Direct, by issuance of an injunction, that defendant recharacterize to Honorable the discharge of plaintiff and amend plaintiff's records to indicate that plaintiff was separated at expiration of his enlistment contract;

3. Award plaintiff reasonable attorney's fees and other litigation costs; and

4. Grant such other and further relief as the Court may deem proper.

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Attorneys for Plaintiff

VERIFICATION

I, Richard N. [redacted], hereby state that the above statements are true and accurate to the best of my knowledge and belief.

[redacted]

SUBSCRIBED AND SWORN TO before me this 16th day of April, 1986.

NOTARY PUBLIC, D.C.

My Commission Expires:
Jan. 14, 1991.

CLASS ACTION ALLEGATIONS

6. Plaintiff [redacted] brings this action on his own behalf and, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, on behalf of all persons similarly situated.

7. The class represented by plaintiff consists of all former servicemembers of the United States Navy, Marine Corps or Air Force who presently possess less than honorable administrative discharges which were characterized as less than honorable in an administrative proceeding in which the Navy, Marine Corps or Air Force introduced evidence developed by or as a direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers (either for purposes of entry into a treatment program or to monitor progress during rehabilitation or followup).

8. On information and belief, there are over 1,000 former servicemembers who are members of this class. These persons reside at widely scattered locations throughout the United States. Many of them possess limited financial resources. Defendants have exclusive knowledge and control of the information necessary to determine the exact size of the class and the identify of each member of the class. This class is so numerous that joinder of all of its members is impracticable.

9. There are questions of law and fact common to plaintiff and all members of the class, including, but not limited to, the punitive and stigmatizing effects of a less than fully honorable discharge and those questions of law raised by the claim in paragraph 20, infra.

10. The claims of the named plaintiff are typical of the claims of all the class members. The named plaintiff will fairly and adequately protect the interests of all class members. The interests of the named plaintiff are not in conflict with those of the class members.

11. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

DEFENDANTS' ACTIONS CHALLENGED HEREIN

12. In June 1971, the President of the United States directed that a comprehensive national effort be undertaken by the United States Armed Forces to eliminate drug abuse among military personnel. Pursuant to this directive, the Secretary of Defense promulgated regulations, applicable to each of the military services, authorizing and requiring the military services to compel military personnel to render urine samples for the purpose of determining whether they were using drugs. See 37 Fed. Reg. 7791 (1972); 32 C.F.R., Part 60 (1980). Over 4,400,000 urinalyses were compelled in the first 14 months of this program. The Department of Defense Directive governing administrative separation of military personnel authorized the issuance of less than honorable administrative discharges to servicemembers based upon evidence of drug abuse developed through these compelled urinalyses.

13. On July 5, 1974, in a case arising from the Department of Defense urinalysis program, the Court of Military Appeals held that Article 31 of the UCMJ, 10 U.S.C. § 831, prohibits issuance of a less than honorable administrative discharge when evidence of compelled urinalyses is used in such a proceeding. United States v. Ruiz, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974).

14. Thirteen days after the Ruiz decision, the Secretary of Defense directed each of the military services to suspend all urine testing. Six months thereafter, the Secretary of Defense directed the military services to resume compulsory urine testing in a manner that would not violate the Ruiz decision. The Secretary of Defense directed the military services in discharges effected in the future to follow the rule that evidence developed by, or as a direct or indirect result of urinalysis may not be used for supporting, in whole or in part, a less than honorable administrative discharge.

15. In Giles v. Secretary of the Army, 475 F. Supp. 595 and 84 F.R.D. 374 (D.D.C. 1979), a lawsuit brought by a former Army servicemember on behalf of Army veterans, the Court (Parker, J.)

(a) certified a class consisting of all former servicemembers of the United States Army who presently possess less than honorable administrative discharges which were characterized as less than honorable in an administrative proceeding in which the Army introduced evidence developed by or as a direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers (either for purposes of entry into a treatment program or to monitor progress during rehabilitation for follow up);

(b) held that the class members had been issued a less than honorable discharge in violation of Article 31 of the UCMJ, 10 U.S.C. § 831;

(c) issued an injunction requiring the Army to identify certain former Army servicemembers and determine whether they were members of the certified class;

(d) issued an injunction requiring the Army automatically to issue honorable discharge certificates to members of the certified class.

16. In Giles v. Secretary of the Army, 627 F.2d 554 (D.C. Cir. 1980), the Court of Appeals affirmed the District Court's Orders discussed in paragraph 15 above and partially modified the relief fashioned by the District Court.

17. Plaintiff and the members of the class described in paragraph 7 herein are not members of the class certified in Giles v. Secretary of the Army, supra in that they are not former members of the United States Army, but are former members of other military departments. As to these non-Army veterans, defendants Secretary of Defense, Secretary of the Navy and Secretary of the Air Force have not taken any of the actions that the Army was required to take in Giles v. Secretary of the Army, supra.

INJURY TO PLAINTIFF AND INDIVIDUALS REPRESENTED BY PLAINTIFF

18. Plaintiff and the members of the class plaintiff represents have suffered and continue to suffer serious and irreparable injury because their less than honorable discharge stigmatizes them, adversely affects their reputation and standing in the community in which they live, causes them embarrassment and loss of self-esteem, engenders substantial prejudice against them, and impairs their social and economic opportunities in civilian life.

18. Plaintiff and the members of the class plaintiff represents are without an adequate remedy at law.

CLAIM

20. By issuing plaintiffs and the members of the class plaintiff represents a less than honorable administrative discharge based in whole or in part upon evidence developed by or as a direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers, defendants violated their rights guaranteed by Article 31 of the UCMJ, 10 U.S.C. § 831.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the Court grant the following relief:

(1) Certify that this action may be maintained as a class action pursuant to Rule 23, Federal Rules of Civil Procedure;

(2) Declare that by issuing plaintiff and the members of the class plaintiff represents a less than honorable administrative discharge based in whole or in part upon evidence developed by or as direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers, defendants violated their rights guaranteed by Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831;

(3) Direct, by issuance of an injunction, that with regard to plaintiff and the members of the class he represents, defendants take each of the actions that the Army was directed to take in Giles v. Secretary of the Army, supra, including identification of the members of the class who were separated for drug abuse and issuance of an honorable discharge certificate to all of the class members;

(4) Grant plaintiff attorney fees and other litigation costs; and

(5) Grant such other and further relief as the Court may deem proper.

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Attorneys for Plaintiff

CHAPTER 25
The Privacy Act

A. Overview

There have not been any significant changes in the structure of the Privacy Act.

B. Chapter Supplement

In a number of places in this chapter, there is language that could be interpreted as meaning that the Privacy Act should be used as a routine means of seeking a discharge upgrade. This is not the case. The Privacy Act is useful under three circumstances: (1) when only a change in records is desired. (2) when a change in records is sought for the purpose of improving chances for an upgrade, and (3) where a change is sought in a discharge when there is a clear error in the type or character of discharge listed in the records of the military service.

C. Section Supplement

CHAPTER 26
Entitlement to Veterans Administration Benefits

A. Overview

No significant changes have occurred since the original MDU. With the advent of the Court of Veterans Appeals, some unresolved issues raised by this chapter may receive judicial interpretation. NVLSP will pay close attention to these cases.

See also the new rules relating to those who failed to serve a minimum of 24 months on enlistments after September 8, 1980. Supp. § 28.1.

B. Chapter Supplement

With the creation of the U.S. Court of Veterans Appeals, many of these issues may receive some needed judicial gloss.

C. Section Supplement

26.3.2.1 Insanity

• P.26/4R, n.36, delete sentence and add:

The definition of insanity appears at 38 C.F.R. § 3.354:

(a) *Definition of insanity.* An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

(b) *Insanity causing discharge.* When a rating agency is concerned with determining whether a veteran was insane at the time he committed an offense leading to his court-martial, discharge or resignation (38 U.S.C. 3103(b)), it will base its decision on all the evidence procurable relating to the period involved, and apply the definition in paragraph (a) of this section.

In a precedential opinion, the DVA General Counsel held that this definition was to be followed when reviewing a military determination in a "line of duty" investigation for purposes of a benefit claim.[1]

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[1]O.G.C. Prec. 18-90 issued June 13, 1990, discussed at Vol. 2, No. 2 of *The Veterans Advocate.*

CHAPTER 27
Advocacy Before the Veterans Administration

The chapters of this Manual pertaining to Veterans Administration benefits are substantially out of date.

NVLSP will publish in 1991 a comprehensive Veterans Benefits Manual. Other materials available from NVLSP follow:

PERIODICAL

The Veterans Advocate—successor to *Veterans Rights Newsletter* and *Veterans' Law Reporter;* a newsletter concerned with issues in veterans law and advocacy; offers timely information on changes in VA laws, regulations and procedures; covers current developments in matters related to veterans benefits, such as the Court of Veterans Appeals, Agent Orange, discharge upgrading, military records correction, VA overpayments, actions for medical malpractice and pending legislation in veterans law; includes practical advice and advocacy tips for those representing veterans and their dependents; ten issues per year; ISSN 1046-3429.

____Rate 1: accredited service representatives, LSC-funded offices, VA-funded vet centers, veterans employment representatives, AOCAP-funded programs, homeless shelters, and others serving Vietnam veterans and their families ..... free
____Rate 2: private attorneys, government, all others (1 year) $30

MANUALS

Guide to Veterans Benefits: Service Representatives Manual (rev. ed. 1985)—by Snyder, Addlestone, O'Dell, Diamond, Ettlinger; 512pp; comprehensive guide to filing for VA benefits; emphasis on preparing service-connected disability claims; includes detailed description of appellate procedures; advocacy-oriented; loose-leaf format; tabs included (supply limited); updated through *The Veterans Advocate;* entirely new manual will be completed in 1991; ISBN 0-915465-02-7.

____Rate 1: veterans, LSC-funded offices, pro bono attorneys $30
____Rate 2: private attorneys, nonprofit organizations $55
____Rate 3: government, libraries, all others $70

SELF-HELP GUIDES

Agent Orange—20pp; describes application process for VA Agent Orange claims and claims for benefits under the $180 million Agent Orange Settlement Fund; includes resource contacts and materials.

VA Claims—8pp; practice tips for preparing and presenting a claim for benefits to the VA; explains how to appeal a VARO denial.

Discharge Upgrading—8pp; suggestions on how to upgrade a military discharge; includes instructions for getting military records and completing the upgrade application.

Stress Disorder—7pp; information to help veterans and their families understand post-traumatic stress disorder; includes instructions on applying for VA disability compensation.

Rates for all Self-Help Guides:

____Rate 1: veterans who served in SE Asia 1961-1972 and their families ..... 1 free copy of each
____Rate 2: accredited service representatives, AOCAP-funded programs, LSC-funded offices, pro bono attorneys ..... 1 free copy of each (send stamped (postage below), self-addressed envelope)

Agent Orange ..... $.75
VA, Stress Disorder ..... $.29
Discharge Upgrading ..... $.52
Any 2 Guides ..... $.98
Any 3 Guides $1.21
All 4 Guides $1.44

____Rate 3: private attorneys, all others .....$5 each
____Rate 4: bulk orders 2 to 50 copies.....$3 each
51 or more copies .....$2 each

MISCELLANEOUS

Human Health Effects Associated with Exposure to Herbicides and/or Their Associated Contaminants—Chlorinated Dioxins: A Review of the Scientific Literature (April, 1990). Report of the Agent Orange Scientific Task Force; review of studies relating to the health effects of Agent Orange by a panel of scientists working with The American Legion, Vietnam Veterans of America and the National Veterans Legal Services Project; reveals link between exposure to Agent Orange and several diseases; $13 ($10 plus $3 postage)

Court of Veterans Appeals Interim General Rules and "The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings." Recently published rules of procedure for practice before the Court of Veterans Appeals and a comprehensive article on the legislation which created the court; rules effective December 18, 1989; permanent general rules will be promulgated following a comment period in the spring of 1991.

____Rate 1: veterans, nonprofit organizations, LSC-funded offices .....free
____Rate 2: private attorneys, libraries, government, all others $5

Stress Disorder Packet: Veterans Administration—background materials; Vietnam Era Stress Inventory; collection of pertinent VA policy statements, regulations and forms; model brief on PTSD presented to the Board of Veterans Appeals; list of VA PTSD treatment units, vet centers and nationwide listing of mental health professionals; $50

Stress Disorder Packet: Criminal—background materials; "Paying the Price for Vietnam: PTSD and Criminal Behavior" by C. Peter Erlinder; Vietnam Era Stress Inventory; sample Presentence Report and transcript of expert witnesses from a sentencing hearing; sample brief prepared to support motion for sentence reduction; Report to Virginia Parole Board; forms to obtain service and medical records; list of VA PTSD treatment units, vet centers and nationwide listing of mental health professionals; $50

OTHER RESOURCES AVAILABLE

The Viet Vet Survival Guide (1985)—by Kubey, Addlestone, O'Dell, Snyder, Stichman; 328pp, paperback; includes sections on VA benefits, claims procedures, strategies, advocacy tips; also discharge upgrading, obtaining and correcting military records; emphasis on issues of concern to Vietnam veterans and their families; published by Ballantine Books; can be purchased for $3.95 at many bookstores; also can be purchased from Vietnam Veterans of America Product Sales, P.O. Box 3666, Santa Rosa, CA 95402; (707) 538-2122; FEIN 13-2929110; call for price and bulk rates; ISBN 0-345-32127-8.

Overpayments of VA Benefits (1985, with 1988-89 supplemental materials)—by Keith Snyder; 237pp; comprehensive manual for attorneys and advocates to assist veterans notified of an overpayment of VA benefits; focuses on disputing debt, requesting waiver, responses to VA-initiated litigation and bankruptcy; updated through *The Veterans Advocate, Veterans Law Reporter* and *Veterans Rights Newsletter;* can be purchased from National Clearinghouse for Legal Services, 407 S. Dearborn, Suite 400, Chicago IL 60605; (312) 939-3830; FEIN 36-315-1279; call for price; Clearinghouse No. 39,980.

NOTE: THESE TWO GPO PUBLICATIONS ARE NOT AVAILABLE FROM NATIONAL VETERANS LEGAL SERVICES PROJECT.

Title 38, Code of Federal Regulations—official rules and regulations of the Department of Veterans Affairs (as of September, 1989); two volumes: Parts 0-17 and Parts 18-end; can be purchased from Government Printing Office, Superintendent of Documents, Washington, D.C. 20402; (202) 783-3238; call for price.

Federal Benefits for Veterans and Dependents—booklet, briefly summarizing VA benefit programs (January 1990 ed.); can be purchased from Government Printing Office (address above); call for price; also available at VA Regional Offices.

NOTE: Except as indicated, these advocacy publications will be distributed by NVLSP. The prices and availability of these materials are subject to change without notice. Orders must be prepaid and *submitted to the organization specified,* otherwise checks and order forms will be returned. Please allow 4 to 6 weeks for delivery.

CHAPTER 28
Miscellaneous Non-VA Benefits

A. Overview

A new section has been added to better describe the possibilities of retirement pay (§ 28.3.3.5). The most significant change in non-VA benefits has been in the area of state benefits. The Supreme Court has held that states may not discriminate between veterans who enlisted from residency in the state and those who enlisted from other states if they are, at the time the benefit is sought, citizens of the state.[1]

B. Chapter Supplement

1. The veteran applying for any money from the federal government faces the possibility of having the amount due the veteran offset by amounts owed the government by the veteran, and in some situations civilian earnings.[2] The offsetting of reenlistment bonuses for unfulfilled enlistment periods is the most routine example of this.[3] Back-pay awards from the military are also routinely offset by VA benefits paid to the individual during the period covered by the back-pay (benefits to which s/he would not have been entitled if s/he had still been in service).[4]

These offsets are often applied even if the statute of limitations has expired.[5]

2. Note new sections on Retirement Pay (§ 28.3.3.5) and Procedures (§ 28.2).

3. The benefits described in this chapter, including back-pay, should be available to those who were discharged based on inadequate urinalysis tests as described in Chapter 15.

4. A finding that one of the new uncharacterized discharges was illegal should have the same consequences of a like finding with regard to a characterized discharge. Similarly, a change to a favorably characterized discharge (GD or HD) should result in all of the benefits of such a discharge becoming available to the veteran. Of course, there may still be a statutory bar of some sort, unrelated to the character of discharge (see n.1).

C. Section Supplement

28.1 Introduction and Overview

a. P.28/1R, n.1, end of note:

Title 10 of the United States Code, § 977, was repealed in 1982 and its subject matter transferred to 38 U.S.C. § 3103A. Title 38 of the Code of Federal Regulations, § 3.12a, the regulatory implementation of 38 U.S.C. § 3103A, now bars VA benefits to most veterans joining the service after 1980 who did not serve at least 24 months in continuous active duty. Those included in the bar are:

(1) A person who originally enlists (enlisted person only) in the Armed Forces after September 8, 1980; and

(2) Any other person (officer as well as enlisted) who enters active duty after October 16, 1981, and who has not previously completed a continuous period of active duty of at least 24 months or been discharged under an "early out" program.

Exclusions from this bar are:

(1) Persons discharged under hardship or early out provisions.

(2) Persons with service-connected disabilities.

(3) Insurance benefits.

b. P.28/2L, n.2, end of note:

But see Chappell v. Wallace, 462 U.S. 295 (1983).

c. P.28/2L, n.3, substitute:

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

ARMY:
U.S. Army
Finance & Accounting Center
Dept. 70
Indianapolis, Indiana 46249

NAVY:
Finance Center
U.S. Navy
Cleveland, Ohio 44114

AIR FORCE:
Finance Center
U.S. Air Force
Denver, Colorado 80205

MARINE CORPS:
Headquarters
U.S. Marine Corps (Code CDB)
Washington, D.C. 20380

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[1] *See* Supp. § 28.4.4.4.

[2] *See* MDU § 28.3.3.1 and note 22.

[3] *See* MDU § 28.3.3.3.

[4] Comp. Gen. Dec. B-177924.

[5] *See* 28 U.S.C. § 2415, 1977 56 OP COMP GEN 587, 56 OP COMP GEN 943, 57 OP COMP GEN 554.

COAST GUARD:
Commandant (FP)
Headquarters
U.S. Coast Guard
Washington, D.C. 20591

Denials of relief are appealable to:

Claim Division
U.S. General Accounting Office
Washington, D.C. 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).

28.2 Statutes of Limitations

• P.28/2, replaced by following:

28.2 Claims Procedures

28.2.1 Statutes of Limitations

A claim for money due from the military as a result of an upgrade will be barred by the statute of limitations unless it is made within six years of the upgrade.[6]

A claim for back-pay as a result of an improper decision to discharge (the only situation where back-pay is awarded) must be made within six years of discharge.[7]

28.2.2 Finance Center and GAO Procedures

An application for any claim should be accompanied by supporting documents whenever they are available. Evidence of the date of the change in discharge is important to show current eligibility. Copies of the original and corrected DD 214 forms should be submitted so that the Finance Center has the dates of service, member's home of record, place of entry on active duty and overseas service. Final pay and leave records should also be submitted when available. The submission of as much information as possible to the Finance Center may help avoid a time-consuming appeal to the GAO. Also, a denial by the Finance Center is accorded great deference by the GAO. Thus, it is a good idea to submit any information or arguments to the Finance Center even though it will automatically process the case upon notice by the service and without application from the veteran.

If the Finance Center denies payment, the veteran will receive a letter announcing the decision. The reason given is often vague but usually states the presumption that payment has already been made; or was never due; or that the records leave it uncertain if money is due and thus cannot support a claim. The best source of action, upon receipt of that denial, is to appeal the decision directly to the GAO. The original Finance Center is very slow when reconsideration is requested. The GAO sometimes orders the Finance Center to reevaluate the case, and this will likely result in a quicker decision than requesting a reconsideration.

The appeal process is simple and straightforward. Send a letter to the GAO, Claims Division, Washington, D.C. 20548, referring to the original denial and stating reasons why you believe the claim was wrongly denied. Include any documents and affidavits supporting your claim with arguments supporting the conclusion that payment is due. There are no hard rules for what is considered valid proof of entitlement, so it is worthwhile to submit whatever you have that is relevant and to make any logical arguments. Upon receipt of your letter, the GAO will give you what is called a "Z" number and will assign your claim to a specific adjudicator. It will take a week to ten days for this to happen. It may be useful to call the GAO ((202)275-3218) to determine what happened with the claim. Use of the applicant's name and the Z number speeds up the process.

The individual who handles the claim is often backlogged and will not be able to begin work immediately on the claim. One way to expedite the process, however, is to request that the person send for the report at the Finance Center as soon as possible so that the claim is ready for processing when (s)he is able to begin work on it. If the original denial was a blatant error, this request for the report can trigger a reevaluation and can result in a payment without further activity on your part. Requests for a copy of the report from the Finance Center will probably be granted. If not, release should be sought under the Privacy or Freedom of Information Acts.

Preparation of this report by the Finance Office takes a minimum of 90 days. At the end of that time, contact the GAO adjudicator and request the name and address of the Finance Office adjudicator preparing the report. Write directly to that person and request a status report on the claim. This follow-up, in addition to that of the GAO adjudicator, may speed the process. The final decision will take several months. Persistence can help. With the Z number and name of the adjudicator handling the claim, phone call follow-ups are fairly simple. Because the process is so informal, there is a lot of room for experimentation with arguments and presentation.

The GAO instructions and Comptroller General decisions are helpful. The decisions can be found in many law libraries and the instructions can be obtained by writing the GAO or the applicable Finance Center. Old regulations relevant to the computation of travel pay are very difficult to find but can be requested under the Freedom of Information Act from each service.

28.3 Claims for Military Money Benefits

28.3.1 Accrued Leave and Travel Expenses

28.3.2 Mustering-Out Pay

• P.28/3L:

There are currently provisions for officer separation pay and payment of shipment of household goods after separation. *See, e.g.,* 37 U.S.C. § 406(b)(2); Comp. Gen. Dec. B-126158, April 21, 1976; OpJAGAF 1983/51, July 13, 1983.

28.3.3 Miscellaneous Military Benefit Issues

28.3.3.1 Back-Pay Claims

a. P.28/3R, ¶ 3:

The relevant military finance offices have the authority to award back-pay in situations where no change in records is necessary. Once the finance office, or the BCMR, or a court, has made the determination that back-pay *is* owed, the finance office will calculate *how much* is owed. These

[6] 31 U.S.C. § 71(a). 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.

[7] *See* U.S.GAO memo from Director T.E. Sullivan, 3/14/75.

calculations are usually accurate. The burden is on the servicemember to prove them wrong.[8]

b. P.28/3R, n.22:

See also Chapter Supplement, *supra,* for more on the offset problem.

28.3.3.2 Void Enlistment Problems

• P.28/3R, replace section:

If the reason for discharge was fraudulent enlistment or discharge otherwise resulted in no credit for service (the DD 214 will often show zero time served), the Finance Center will usually not pay for any forfeited benefits unless the reason for discharge is changed.[9] The changing law of void and voidable enlistments, which has added some complicated twists to these cases,[10] is beyond the scope of this manual.

28.3.3.3 Reenlistment Bonus Problems

a. P.28/4L, ¶ 3:

See Chapter Supplement, *supra,* for an update on the offset problem.

b. P.28/4L, ¶ 4:

The Selective Reenlistment Bonus (SRB) program offers servicemembers bonuses for reenlisting in certain specialties. Once a servicemember receives the bonus, it is difficult for him or her to back out of the obligation to fill the specialty. Although the authorizing statute provides for voluntary withdrawal from the program with a pro-rata refund of the bonus,[11] DoD Pay Manual 10942.1a(1) limits voluntary termination to where the member refuses to perform duties required for effective performance in the specialty. Such a refusal, even if agreed to by the service, may leave a negative mark on the servicemember's record. *See* Op-JAGAF 1983/8, February 14, 1983.

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

• P.28/4R, n.30, end of note:

Cowden v. United States, 600 F.2d 1354 (Ct. Cl. 1979); *Dickenson v. United States,* 163 Ct. Cl. 512 (1963); DoD Pay Manual 10104, 10317.

When a conviction is set aside on appeal and the member is retried and reconvicted, pay and allowances continue until the date the member's second court-martial sentence is approved by the convening authority. *Rhoades v. United States,* 668 F.2d 1213 (Ct. Cl. 1982).

There have been some problems with the military finance office in Ft. Leavenworth, Kansas, initially refusing to give back-pay for periods after ETS to members whose convictions have been overturned on appeal. Applications to the central finance offices of each service following these denials have been successful. *See* note 3 and § 28.2 above.

28.3.3.5 Retirement Pay

Veterans eligible for retirement pay but for the character of their discharge should be able to receive such pay from at least the date of the upgrade or application to the BCMR. If the discharge is found improper, the retirement benefits should be paid back six years or to date of discharge, whichever is later.

Likewise, a veteran whose discharge is found improper who would have been eligible for retirement had (s)he finished out the current enlistment should receive retirement pay. Career tracked officers should be presumed to have finished the time needed to retire if the voided discharge gives them 20 years active service.

28.4 Claims for Benefits not Administered by the Military or the VA

28.4.1 Unemployment Benefits

• P.28/4R, end of section:

Even with an Honorable or General discharge, not all veterans are entitled to benefits for periods of unemployment following service. The law in this area has undergone several changes and the precise eligibility rules vary, depending on when the veteran was discharged. 5 U.S. § 8521, et. seq.; 20 C.F.R. pt. 614; PL 97-35 95 Stat. 357 (August 13, 1981); PL 97-362, 96 Stat. 1726; PL 94-566; PL 96-215; PL 96-364; *Smith v. District Unemployment Compensation Board,* 435 F.2d. 433 (D.C. Cir. 1970); *In re Roseberry,* Case No. 82-2216 (West Virginia Department of Employment Security); *In re Ward,* No. 82-C-03279 (Maine Employment Security Commission (July 30, 1982)).

28.4.2 Reemployment Rights

a. P.28/5L, n.34, end of note:

The reemployment provisions described in this section have applied to non-governmental employees since they were first enacted.

b. P.28/5L, n.39:

(1) *Malko v. United States Postal Service, reported without opinion,* 672 F.2d 895 (D.C. Cir. 1981), does not resolve the issue. The court stated:

> This court finds it unnecessary to decide whether or not 38 U.S.C. § 2021 (1976) requires a discharged veteran to obtain a certificate of satisfactory discharge within ninety days after discharge in order to be eligible for job restoration rights. In this case, according to the record, appellant did not attempt to have his discharge upgraded until more than five years after his discharge from the Army, and he did not obtain an upgraded discharge until more than nine years after

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[8]The following partial table of Enlisted pay as of January 1987 will give a rough guide as to back-pay a veteran may expect in back base-pay. Note that other allowances can be substantial:

Grade	-2	2	3	4	6	8	10	12	14	16	18	20	22
E-9						n/a	1974	2018	2064	2111	2158	2200	2541
E-8						n/a	1655	1702	1747	1793	1840	1882	1929	2042
E-7	1155	1247	1294	1339	1385	1429	1474	1520	1589	1634	1680	1702	1816
E-6	994	1083	1129	1177	1221	1265	1311	1379	1422	1468	1492	same	
E-5	872	950	996	1039	1107	1152	1198	1242	same				
E-4	814	859	909	980	1019	same							
E-3	766	808	841	874	same								
E-2	738	same											
E-1	658	same											

E-1 with less than four months: $608.40

[9]*See* Comp. Gen. Op. B- 192210 (July 17, 1979), MIL. L. REP. 2441 (1979) (unpublished). *See also* MDU § 18.6 (correcting void enlistments).

[10]*See, e.g.,* MDU § 12.6.3. 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.

[11]38 U.S.C. § 308(d).

his discharge. Under these circumstances, we hold that appellant has no basis for relief.

This does not help much.

(2) *Farries v. Stanadyne/Chicago Div.*, 618 F. Supp. 1324, 14 MIL. L. REP. 2085 (N.D. Ind. 1985), held that laches barred a claim where the veteran was discharged with a UD, applied for an upgrade, did not get his upgrade for two and one-half years, wasn't notified until a year later that the Department of Labor was investigating the claim, and the investigation took another eighteen months. The suit was thus filed five and one-half years after the upgrade. The court found inexcusable the failure to file before the upgrade.

c. P.28/5L, end of section:

There are some peculiar statute of limitations and laches questions in this area, as exemplified by the case *Letson v. Liberty Mutual Insurance Co.*, 523 F. Supp. 1221 (N.D. Ga. 1981). In *Letson,* the court held that a state statute of limitations did not apply to a claim, for pension purposes, for credit for military service between 1943–1946. The court also held that the case was not barred by laches because, although the service for which credit was sought had occurred many years prior to the request, the claim for pension did not accrue until 1977, only two years before the suit was filed.

28.4.3 Retirement Credit

28.4.4 State Veterans Benefits

- P. 28/6, replace section:

28.4.4 State Veterans Benefits

28.4.4.1 Variety of Benefits Available

All states provide benefits for veterans under a wide variety of statutes.[12] Important benefits that may be available to veterans, their dependents, and 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.

Veterans with less than honorable discharges usually face two issues:

- The definition of "veteran" under state law; and
- What effect an upgrade has on benefit eligibility and/or statutory time limits for claiming benefits, particularly bonuses.

28.4.4.2 The Definition of "Veteran"

State statutes define "veteran" and establish the effect of an upgrade in a variety of different ways:

- Served "under honorable conditions . . . or who later received an upgraded discharge under honorable conditions";[13]
- ". . . discharged under other than dishonorable conditions";[14]
- ". . . a veteran . . . as defined by 38 U.S.C. § 101";[15]
- For a bonus there may be a "refiling upon upgrading of discharge indicating honorable service";[16] and
- "Under Honorable Conditions," 'Honorable" or "Honorably" without reference to an upgrade.[17]

If the statute is not specific on the effect of an upgrade, it should be argued that an upgraded discharge should be counted as if it had been given at separation because it is normally given retroactive effect for federal benefit programs.

28.4.4.3 Time Limits

Many disputes arise concerning statutes of limitations for bonuses, tuition benefits and similar time-limited benefit programs. Particularly difficult problems will occur where the statute specifies an application time limit with language such as "must be filed by [a date certain]" and no reference is made to an upgrade. Some approaches are:

- Argue that such laws are to be construed liberally as the federal laws are;
- If the veteran applied within the time period and was turned down because of his/her less than honorable discharge, (s)he should qualify upon an upgrade;[18] and
- The upgrade is fully retroactive, thereby providing the veteran who receives it with rights that have not already partially or completely expired.

28.4.4.4 Residency Requirements

Many state veterans benefits programs have had residency requirements limiting eligibility to those who resided in the state when they entered the service or those who became residents before a specified date. Two such statutes have been found unconstitutional by the United States Supreme Court as violative of the 14th amendment Equal Protection Clause. *Attorney General of New York v. Soto-Lopez,* 476 U.S.898, 106 S. Ct. 2317 (1986); *Hooper v. Bernalillo City Assessor,* 472 U.S. 612, 105 S. Ct. 2862 (1985). NVLSP is contemplating a challenge in Connecticut, Kentucky and Oregon.

28.5 Reduction of Prison Sentence

Appendix 28A

Application for Arrears in Pay (DD Form 827)

Appendix 28B

Request for Detailed Earnings Information (Form SSA-L137)

Appendix 28C

Request For Copy of Tax Form (IRS Form 4506)

Appendix 28D

Sample Appeal From Denial of Unemployment Benefits

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[12]*See* Digests of State Laws Regarding Rights, Benefits, and Privileges of Veterans and Their Dependents (Feb. 1984) (House Veterans' Affairs Committee Print No. 47—Government Printing Office, Washington, D.C. 20402).

[13]FLA. STAT. § 1.01(15). This would clearly include a GD UHC.

[14]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.

[15]VT. STAT. ANN., tit. 32, §§ 3802(10), (11). *See supra* note 14.

[16]MICH. COMP. LAWS ANN. § 35.1027 (referring to refiling for a bonus).

[17]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.

[18]*See* MDU Chapter 28, notes 38 and 39.

TABLE OF CASES

Cases appearing in bold are cited in this supplement. All other cases are cited in the original *Military Discharge Upgrading* manual.

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INDEX

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CHAPTER 1
OVERVIEW OF DISCHARGE UPGRADING

1.1 INTRODUCTION

Some view the problem of less than honorable military discharges[1] as simply part of the military hiring and firing process. Such a view oversimplifies the unique relationship (which probably began with conscription, enlistment to avoid conscription, or "economic conscription" by the employer of last resort), that a military "employee" has with his/her "employer," and fails to acknowledge the debilitating effects of the lifetime stigma imposed by a bad discharge. Termination of military employment is complicated by the fact that the employment contract is enforceable by the employer through federal criminal laws (courts-martial) unless the servicemember qualifies for early separation under one of the few voluntary reasons, or is involuntarily discharged for cause.[2] It is in the latter situation that 99% of the "bad paper" discharges are issued.[3]

Since 1942, there have been over three million less than honorable discharges issued by the United States Armed Forces.[4] Over 90% of these discharges have been issued through a regulatorily-created administrative system; 10% have been issued through the statutorily-mandated court-martial system (the punitive discharges). The administrative discharges, commonly known as General (Discharge Under Honorable Conditions), and Undesirable (Discharge Under Other Than Honorable Conditions), are the main topics of this manual. While there has been a continuing debate over the fairness of this system as a whole,[5] it is apparent that the services' failure to provide for a pre-discharge appeal of these discharges or to routinely advise a dischargee of post-discharge appeal rights, leaves many people with severe disabilities and no awareness of their current right to appeal.

The consequences of a less than honorable discharge are serious and can include ineligibility for

[1] This term includes General Discharges (GDs), now called "discharges under honorable conditions." While GDs usually do not affect VA or other benefits, they can present severe employment impediments. *See* note 6 *infra*.

Frequently, the terms "discharge" and "separation" are used interchangeably, although they have different technical meanings. Discharge means a complete severance of military connection; separation means release from active duty to the reserves or retirement.

[2] The bi-monthly *Military Law Reporter* (MIL. L. REP.) and *The Objector* are good sources of the law of courts-martial, voluntary separation programs, and veterans law in general. Subscription information is found in the bibliography of this manual, as are citations to many relevant articles on these topics.

[3] It is an oversimplification to distinguish reasons for separation as involuntary and voluntary. For example, neither a denial of reenlistment at the expiration of the period of obligated service nor the recent early discharge program for trainee failures or "marginal performers" fits neatly into either category. Many persons who are separated involuntarily have actually manipulated themselves into

[3] (continued)
that situation. Many advocates argue, however, that, in the latter case, the servicemember is acting from less than free will.

[4] The United States Armed Forces includes the Army, the Navy, the Marine Corps (which has been a part of the Naval force since 1834), and the Air Force (which did not become a separate entity until 1947 when it ceased to be the Army Air Corps). Since the Coast Guard has had very few cases, it is rarely mentioned in this manual.

[5] Much of this debate has centered on not only the procedural fairness of the discharge system but also on the fairness and legality of issuing discharges for vague reasons, such as "shirking" and "frequent involvement of a discreditable nature"; for nonservice-related reasons, such as "homosexual acts or tendencies"; failure to pay debts, and bed-wetting; or for reasons beyond the servicemember's control, such as "personality disorders" and "inaptitude," and arguably alcoholism and drug addiction.

The debate has also centered on the services' alarming and often disparate trends toward issuing fewer Honorable Discharges. *See* App. 1B.

unemployment compensation, re-employment rights, and Veterans Administration (VA) and state veterans benefits. Worse, it can result in a lifetime stigma which can make employment or employment advancement difficult.[6]

While no study has been conducted of all bad paper veterans, living or dead, the studies that have been conducted show conclusively that disproportionate numbers of bad paper veterans were, at the time of discharge, young, had limited educations, came from minority groups, from lower socio-economic backgrounds, from rural areas, and had psychological or situational adjustment problems.[7] This class of people obviously could greatly profit from the knowledge that any veteran or his/her survivors can appeal an adverse discharge.

A recharacterization of discharge (discharge upgrade) can result in access to VA medical care, educational benefits, home loans, and the VA's pension system. Frequently, these are the systems to which the poor must turn after providing the bulk of the bodies for the nation's military service. Further, in times of economic turmoil, the traditional respectability of the honorably discharged veteran is needed most by people in low-level jobs. While a discharge upgrade can be of great psychological significance to some, for many of the nation's poor the upgrading of an adverse discharge, even many years after the fact, can also provide a share of the huge federal funds reserved each year for those who successfully complete military service.[8]

1.2 DISCHARGE REVIEW: A HISTORICAL OVERVIEW

There have not always been appeals of adverse discharges. Outraged by the large number of veterans negatively affected by both the military justice system and the administrative discharge system during World War II,[9] traditional veterans organizations such as the American Legion, Veterans of Foreign Wars, and the Disabled American Veterans lobbied hard to have appellate rights for bad paper veterans included in the GI Bill legislation of 1944. There are no statistics indicating the number of servicemembers discharged with less than honorable discharges between 1892, the date the adverse administrative discharge first appeared, and 1942. Presumably, tens of thousands of affected veterans mis-

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[6] The courts have long recognized the debilitating stigma of a less than honorable discharge.

> There are five types of military discharge. . . . 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.
>
> . . . .
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> . . . any discharge characterized as less than honorable will result in serious injury. It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment.

Bland v. Connally, 293 F.2d 852, 853 n.1, 858 (D.C. Cir. 1961) (footnotes omitted). *See also* Roelofs v. Secretary of the Air Force, 620 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980); Van Bourg v. Nitze, 388 F.2d 557, 559 n.1 (D.C. Cir. 1967); Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961); Unglesby v. Zimny, 250 F. Supp. 714, 716 (N.D. Cal. 1965); Crawford v. Davis, 247 F. Supp. 943, 946 (E.D. Pa. 1966), *cert. denied*, 383 U.S. 921 (1966); Sofranoff v. United States, 165 Ct. Cl. 470, 478 (1968).

The Department of Justice recognizes the currency of this case law:

> It is well recognized that persons with less than Honorable Discharges are stigmatized in the civilian community in that they suffer loss of reputation and difficulty in obtaining gainful employment. The unmistakable social stigma greatly limits the opportunities for both public and private civilian employment and robs the veteran of his good name.

Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Veterans Education Project v. Secretary of the Air Force, Civ. No. 79-0210 at 5 (D.D.C., filed Aug. 11, 1979) [hereinafter cited as VEP].

In VEP, plaintiffs sought under the Freedom of Information Act the names and addresses of hundreds of thousands of veterans with bad discharges to inform them of their right to apply for discharge review. The defendants asserted that this information was exempt under the invasion of personal privacy exemption to the FOIA, hence their unusual reliance on stigma. A settlement resulted in the defendants instituting an outreach program. *See* § 1.5 *infra*.

The military itself has long recognized that General and Undesirable Discharges impose a severe stigma. For example, since at least 1966, the forms used by the services to warn servicemembers against whom administrative separation proceedings have been initiated usually state: "I understand that I may expect to encounter substantial prejudice in civilian life in the event a general discharge under honorable conditions is issued to me." A similar warning is made regarding the consequences of Undesirable Discharge.

For an excellent compilation of the sources of congressional testimony on the issue of stigma, see Effron, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates,* 9 HARV. C.R.-C.L.L. REV. 227 (1974) (*e.g.*, testimony of Judge Ferguson of the U.S. Court of Military Appeals, stating that "the impact of a general or undesirable discharge is the same as that of a punitive discharge . . . it frequently marks the accused for the balance of his life, denies him job opportunities otherwise available . . . no matter how exemplary his subsequent conduct may be"; 1966 Hearings at 178 (testimony of John Finn, American Legion); 1962 Hearings at 313-30 (testimony of Rep. Doyle (Calif.)); 1962 Hearings at 365-66 (testimony of Francis Stover, Veterans of Foreign Wars); *Hearings on H.R. 1108 (Before Special Subcomm. on Military Discharges of the House Comm. on Armed Services)*, 85th Cong., 1st Sess. 2482 (1957) (testimony of American Legion official) ("Employers are looking down their noses today at general discharges")). *See also* Everett, *Military Administrative Discharges: The Pendulum Swings*, 1966 DUKE L.J. 41, 44-45; Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973); PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT at 403-09 (1975).

A less than honorable discharge issued administratively often precludes eligibility for veterans benefits provided by state governments. *See, e.g.*, Schustack v. Herren, 234 F.2d 134, 135 n.2 (2d Cir. 1956); TEX. EDUC. CODE ANN. § 54.203(a) (Vernon 1972 & Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 4413(31) (Vernon 1976).

[7] OFFICE OF ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER, RESERVE AFFAIRS AND LOGISTICS, REPORT OF THE JOINT-SERVICE ADMINISTRATIVE STUDY GROUP (1977-78) 3-43 to 3-46 (Aug. 1978) [hereinafter cited as JOINT-SERVICE REPORT]; REPORT TO DoD TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES (1972); *see also* Bell, Characteristics of Participants in the DoD Special Discharge Review Program (U.S. Army Research Institute, March 1978); § 22.5.6 *infra* (discussion of racism in the military).

[8] The VA budget is approximately 21 billion dollars a year with roughly 9 billion dollars in pensions divided between service-connected and needs-based pensions for veterans, their dependents, and their survivors.

[9] One out of eight servicemembers was court-martialed in World War II. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future,* 55 MIL. L. REV. 39 (1972). Over 15% of all who served received bad discharges. JOINT-SERVICE REPORT, *supra* note 7, at 3-41, 3-48, n.8.

takenly believed that such discharges would upgrade automatically within six months — a myth in the barracks and stockades that has survived to this day.

Each service created a Discharge Review Board (DRB)[10] in 1944 and a Board for Correction of Military Records (BCMR)[11] in 1946. The DRB has authority to hear an appeal of any adverse discharge, except one issued as a result of a general court-martial, if an application is filed by a veteran or his/her survivor within 15 years of discharge (this was waived until April 1, 1981). The Board must grant a personal appearance hearing and the veteran can challenge the propriety and equity of the character of discharge issued. If the result of the DRB is adverse, the veteran can apply to the BCMR which, like the DRB, has the authority to correct any error or injustice contained in a military record. By 1966, the traditional veterans organizations discontinued their strong opposition to the administrative discharge system, but they continue to provide free counsel to applicants before the Boards in Washington, D.C.[12]

Based on Department of Defense (DoD) estimates and reports, about 300,000 applications for discharge review have been heard since 1944, with about 75,000 discharges upgraded.[13] This upgrade rate is somewhat misleading because the overall rate remained at around 12% until the mid-1970s. It has since climbed to about 40%,[14] with a significantly higher rate of success for those who make a personal appearance with legally-trained counsel.[15]

The belated increase in the upgrade rate reflects the often conflicting powers of a variety of forces: public pressure on the government; the tendency of the military services to cling to any decision they have made no matter how insignificant it was to the maintenance of the military establishment; and the power of the traditional veterans organizations. Meanwhile, the traditional veterans organizations, despite a history of activism on behalf of their constituents,[16] never followed up their verbal attacks on the discharge system beyond providing counsel before the DRBs and BCMRs to all applicants who requested their assistance.

The great strides resulting from the legal activism of the 1960s did not affect discharge review. Consequently, discharge review law remains somewhat undeveloped, with efforts toward reform deferred until the last several years.[17]

During the Vietnam War, the problem of bad paper Vietnam-era veterans was adopted by anti-war and amnesty movements as one of their causes.[18] Involvement of anti-establishment forces (as opposed to veterans groups), placed the bad paper issue in an unfortunate political posture, where logic, reason, and fairness were likely not to be dispositive.

1.3 THE ROLE OF THE AMNESTY MOVEMENT

The amnesty movement, by focusing attention on bad discharges, provided the first impetus for internally and externally imposed reform at the DRBs. The internal reform was instituted perhaps partly to head off external interference with the system and partly out of a recognition that "the turbulence created by the requirements of RVN [Vietnam], produced a situation in which the administrative discharge system, when at its best, was operating in an almost impersonal manner, and, when at its worse, was operating almost with assembly line procedures."[19] As described later, external and internal reform occurred simultaneously, leading unpredictably to today's discharge review system.

The amnesty movement made two strategic errors, which probably could not have been avoided given the strong moral basis of the movement and the divisions in American society. These were:

- An undue focus on absentees (so-called deserters) instead of on bad paper veterans, many of whom had either served in Southeast Asia or served for lengthy periods prior to discharge;[20] and
- Failure to grasp the depth of the opposition to any form of discharge review except on an individual basis.

Moreover, the amnesty movement's adoption of discharge review as a cause completely alienated traditional service organizations from supporting discharge review reform, despite the latter's historical opposition to the administrative discharge system.

Discharge review reform was not to come in the guise of amnesty. Nonetheless, the late adoption of discharge review by the universal and unconditional amnesty movement may not have harmed the cause because it set in motion the unpredictable series of

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[10] 10 U.S.C. § 1553.

[11] 10 U.S.C. § 1552.

[12] *See* note 6 *supra* (particularly Effron). Interestingly, even holders of General Discharges are excluded from membership in congressionally-chartered veterans organizations even though part of the price the organizations paid for the charter was their agreement to provide free counsel before the Review Boards.

[13] The estimated total incorporates a rough guess of BCMR upgrades. *See* App. 1A (more detailed upgrade statistics).

[14] The DoD compiles statistics semi-annually which are reported in the *Veterans Rights Newsletter* (formerly the *Discharge Upgrading Newsletter*).

[15] *See* note 64, Ch. 9 *infra*.

[16] *See* Effron, *supra* note 6. The American Legion reportedly played a significant role in the WWI veterans Bonus March on Washington.

[17] In 1958, the federal courts first held that administrative discharges were reviewable by the courts, but even then relatively few successful cases followed. *See* Ch. 24 *infra;* Bibliography *infra;* note 6 *supra*.

[18] *See, e.g.,* P. Starr, THE DISCARDED ARMY: VETERANS AFTER VIETNAM (1973).

[19] ADRB SOP, Annex F-1, para. 1.D., 44 Fed. Reg. 25,068 (1979). This may also be a recognition of what Senator Sam J. Ervin, Jr., observed:

> Those who defend our rights must not be the only citizens who are denied their protections and, as a consequence, are returned to a civilian world that holds little promise for them. We must not ignore those servicemen who are daily eliminated in administrative settings which accord less than what the due process clause of the Fifth Amendment guarantees and less than what we owe those who are prepared to give their lives to safeguard our freedoms and our rights.

Ervin, *Military Administrative Discharges: Due Process in the Doldrums,* 10 SAN DIEGO L. REV. 9, 10 (1972).

[20] *See* Bell, *supra* note 7.

events that culminated in today's high discharge upgrade rate.

1.4 BEYOND AMNESTY

1.4.1 POLITICAL ACTIONS

To some reformers and politicians, the bad discharge issue had nothing to do with civil liberties or the Vietnam War. They realized that whole classes of discharges were questionable as a matter of law or unjustified in light of current thinking.[21] The nature of the discharge review system has always permitted some flexibility in remedying such situations. However, prior to 1971, the power to review cases on the Boards' own motion or to institute significant, across-the-board policy changes, was rarely exercised.[22]

In 1971, then-Secretary of Defense Melvin Laird applied the logical next step to the existing DoD campaign to eradicate the drug epidemic among the troops in Vietnam. Drug abuse became a medical problem, and the law enforcement approach to it was de-emphasized. The medical approach was officially applied retroactively to applicants for discharge review who had been discharged for use or possession of drugs. The General Accounting Office (GAO) found that this beneficial program suffered from one major failing: the lack of meaningful outreach.[23] This was an early sign to advocates of reform that Washington-based changes alone were insufficient.

Meanwhile, rather than waiting for amnesty, community-based Vietnam-era veterans groups began to establish discharge upgrade projects. These groups helped generate enough political pressure to be largely responsible for the establishment of DRB regional or traveling panels in 1974. The increased access helped broaden the base of people favoring procedural reform and outreach, and provided a fresher look at the substantive rules of the process.

Almost simultaneously with the expansion of access to the DRBs came the 1974-75 Ford Clemency Program. This program provided conditional clemency for draft resisters, convicted draft resisters, absentees, and 100,000 bad paper veterans whose discharges resulted from absence-related offenses. Eligible bad paper veterans were offered a Clemency Discharge in exchange for bad discharges if they successfully applied to the Presidential Clemency Board (PCB) and completed assigned alternative service, even though many cases could have been more successfully presented to the DRBs. A broad-based coalition including the amnesty movement boycotted the Presidential Clemency Board.[24] While no discharges were upgraded as a result of this program, a conservative President had taken the first step in recognizing the need for concerted action on discharge review, a problem that raised political emotions but affected a politically impotent minority.

Following the death of Senator Philip Hart, a major proponent of amnesty for absentees and bad paper veterans, Mrs. Hart publicly called on President Ford to declare an amnesty. Perhaps this was the catalyst for the President's action on a pending proposal of the Chairman of the PCB. On his last day in office, January 19, 1977, President Ford issued a directive to the Secretary of Defense to identify those veterans who had applied to the Clemency Program and who had either been decorated for combat experience or wounded, and to upgrade their discharges at least to General, absent aggravating circumstances.[25] This set the stage for the Carter Administration.

In April 1977, after ordering the dismissal of all indictments and barring further prosecution of Vietnam-era violators of the Selective Service Act, President Carter ordered DoD to institute the Special Discharge Review Program (SDRP). The SDRP was a program aimed at 433,000 holders of General and Undesirable Discharges from a portion of the Vietnam era. The program provided for outreach, a simplified application process, a set of almost automatic upgrading criteria, and a secondary set of criteria to be applied "with compassion."[25a] Because it attempted to appeal to everyone, the SDRP pleased no one, least of all the traditional veterans organizations and Congress. Congress moved swiftly to prohibit paid advertising of the program, held hearings that dissuaded many from applying, and in October of 1977 passed legislation effectively ending the program and foreclosing any similar future program.[26]

The effects of this compromise legislation were both varied and unpredictable. Veterans benefits were denied to anyone with an upgrade under programs such as the January 19th Ford directive and the SDRP, or to anyone upgraded in the future by a DRB not operating under published, uniform standards and procedures.

Congress ordered DoD to waive the normal 15 year statute of limitations for at least one year after the publication of the new rules. This action was taken to satisfy the complaints of the traditional service organizations that the SDRP unfairly singled out the Vietnam-era veterans and to give all veterans an

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[21] *See* note 5 *supra*.

[22] Harmon v. Brucker, 355 U.S. 579 (1958) (certain bad discharges based on pre-service political associations were justiciable, after which the DRBs reviewed a class of these cases on their own motion).

[23] GENERAL ACCOUNTING OFFICE, IMPROVING OUTREACH AND EFFECTIVENESS OF DOD REVIEWS OF DISCHARGES GIVEN SERVICE MEMBERS BECAUSE OF DRUG INVOLVEMENT (Nov. 30, 1973). A suit seeking to force DoD to perform more outreach resulted in DoD being ordered to send out 6,400 individual notices. American Veterans Committee v. Schlesinger, 2 MIL. L. REP. 2239 (Nov. 13, 1973).

[24] GOVERNMENT PRINTING OFFICE, PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT at 81 (1975). This boycott, a rare occasion on which diverse amnesty-supporting groups were united, had as its common denominator the view that nothing tangible could result from appeal to this Board, and that effort would be better spent at the DRBs. *See also* L. BASKIR & W. STRAUSS, CHANCE AND CIRCUMSTANCE 213 (1978).

[25] *Id.* at 225-26. The directive and a discussion appear at 4 MIL. L. REP. 6036 (1976).

[25a] *See* Ch. 23 *infra*.

[26] Pub. L. No. 95-126, 91 Stat. 1106 (1977) (codified at 38 U.S.C. § 3103(e)). *See* § 9.1.3.3, Chs. 23, 26 *infra* (discussion of the effects of this change in the law).

opportunity for a discharge review where the "rules of the game" were public.

1.4.2 COURT ACTIONS AND INTERNAL REFORM

Several other important events brought discharge upgrading to its present status:

- The courts became less timid about involvement in the discharge upgrading process.[27] This resulted in a major reform of discharge review procedure: the courts brought the Boards into compliance with the Administrative Procedure Act and established that class action cases could be brought on behalf of veterans who had not individually applied for discharge review;
- The publicity created by the SDRP and its critics generated an increased case flow to the DRBs;[28]
- Community-based veterans organizations and Legal Services-funded projects increased their involvement in discharge review cases; and
- Under the courageous leadership of the president of the Army DRB, a system was devised whereby compassion and rationality were applied to the discharge upgrading process at the Army Board, which hears two-thirds of the cases.

This last development led to the creation of the now-published Standard Operating Procedures of the Army DRB (ADRB SOP).[29] This document was able to reach greater refinement as a result of the waiver of the statute of limitations, because the waiver gave the DRBs a greater frame of reference within which to view the discharge upgrade process. That process is now recognized as a potentially flexible one, even conforming retroactively to positive changes in philosophy. The president of the ADRB has elaborated:

> It is the essence of discharge review to act as an "equalizing agency" to insure that the application of the discharge process remains a relatively uniform procedure with uniform standards irrespective of the location of the unit or the commander at the time of discharge. . . .[30]
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> . . . .
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> [T]he experience of thousands of cases and the statistical pattern evidenced over the past ten years indicates that some personnel were discharged administratively from the U.S. Army by means which were either improper or inequitable, and while it is almost certain that these inadequacies could not be perceived at the time, in retrospect it is possible to perceive them as such now. . . . While circumstances can vary, there are certain parameters within which all types of cases fit and by which these various cases can be considered, so as to apply what might be called a "worldwide standard" for the consideration of discharge review appeals.[30a]

1.5 OUTREACH

Failure to provide meaningful outreach has always plagued discharge review. Where outreach is successful, veterans may still fail to seek help in applying for review because of the perceived public stigma, particularly in rural areas. These two factors have kept the application rate relatively low.

The original waiver of the statute of limitations was to end on December 31, 1979. A lack of outreach, however, had resulted in few applications being filed. The Veterans Education Project (VEP) sought, under the Freedom of Information Act, a list of the names and addresses of bad paper veterans in order to notify them of their special opportunity for a DRB hearing. A lawsuit resulted[31] and, to demonstrate how outreach could satisfy the goal of the suit, the VEP established its own model outreach campaign. A toll-free number was provided, and all FCC licensed radio and TV stations were requested to air VEP-created public service announcements. This campaign generated almost 25,000 responses in three months.

Supported by most of the traditional veterans organizations and many other groups, the VEP was able to generate enough congressional interest for DoD to extend the waiver until April 1, 1981. The lawsuit was settled with DoD agreeing to institute a significant outreach campaign from November, 1980, until April, 1981, referring eligible applicants to Legal Services-funded projects and other organizations.[32] The settlement of the outreach suit further provided that contact with the post office box established for intake would permit the veteran to apply within six months even if (s)he was discharged more than 15 years ago and the waiver period had ended.

1.6 THE FUTURE OF DISCHARGE REVIEW

This is a critical period for the future of discharge review reform. Outreach, with referral to an extensive network of advocates, should present the

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[27] *See* Stichman, *Developments in the Military Discharge Review Process*, 4 MIL. L. REP. 6001 (1976); Ch. 24 *infra*.

[28] The Boards have consistently maintained a backlog of approximately 25,000 cases since the SDRP was established.

[29] Although this document first appeared in 1975, it was not published in the *Federal Register* until a lawsuit seeking its publication was filed. *See* note 22, Ch. 9 *infra* (discussion of National Association of Concerned Veterans v. Secretary of Defense, 487 F. Supp. 192 (D.D.C. 1979)). The SOP appears at 44 Fed. Reg. 25,046 (April 27, 1979), with amendments at 45 Fed. Reg. 15,234-16,310 (March 13, 1980).

[30] ADRB SOP, para. I.A.2, 44 Fed. Reg. 25,046 (1979).

[30a] *Id.*, Annex F-1, paras. 1.E.,F., 44 Fed. Reg. 25,068 (1979).

[31] Veterans Education Project v. Secretary, Civ. No. 79-0210 (D.D.C. 1979). *See* 5 Discharge Upgrading Newsletter nos. 9-10 (1980) (description of the settlement agreement).

[32] *Id.* Private attorneys can ask to have their names placed on the referral list maintained by the Veterans Education Project by contacting VEP at 1346 Connecticut Avenue, N.W., Washington, D.C. 20036.

DRBs with the largest group of applicants represented by legally-trained counsel in history. Such advocacy can often assist the Boards to dispose efficiently of cases on a very busy docket.[33] It is not suggested that "flooding of the Boards" will alone produce favorable results. A heavy caseload, however, should cause the DRBs to seek a way to reduce rote case-by-case review, particularly in older cases processed under harsher standards. Furthermore, legally-trained counsel will continue to affect the process, whether through case development, advocacy techniques, or resort to creative court action.

What does this portend for meaningful discharge reform? Certainly there will be insufficient resources to provide counsel for all applicants. The solution would be to create a single-type discharge with merit awards and efficiency and conduct ratings satisfying the need to characterize the quality of a servicemember's military service. A possible alternative might be an ungraded discharge for failure in the first six months. Although the 1981 revision to the basic discharge regulation will probably in practice eliminate some categories of bad discharges, it remains unlikely that any sweeping change will occur in the near future.[34]

1.7 LEGAL SERVICES INVOLVEMENT IN DISCHARGE UPGRADING

In part to satisfy the recommendations resulting from the study mandated by the 1977 amendments to the Legal Services Corporation Act,[35] the Legal Services Corporation (LSC) sponsored two national training events in discharge upgrading in 1979, contracted for this manual, and funded the National Veterans Law Center (NVLC) to act as a national support center in veterans law, concentrating on discharge upgrading. In 1981, the NVLC will produce a self-contained training module in discharge upgrading and will engage in the full range of national support in veterans law. The training module will allow any interested local or state program to conduct its own training in discharge upgrading.[36]

What can local programs do to increase their involvement? The NVLC and its affiliate, the Veterans Education Project, can assist local programs in conducting training, doing local outreach, and connecting with community-based veterans organizations. The VEP has prepared the *Self-Help Guide to Discharge Upgrading* and various outreach materials, and can provide lists of all radio and TV stations within defined zip code areas.

Even the simplest local outreach can bring many bad paper veterans to the office. Some programs have conducted self-help training for clients and client-groups. In some areas, local members of the bar have done pro bono work in discharge upgrade cases. This is because many members of the bar have had military experience and tend to be sympathetic to these cases. Alliances with local chapters of traditional veterans organizations might also be possible, particularly because many older veterans may now have their discharges reviewed.

Involvement in discharge upgrading will inevitably bring involvement with other veterans issues, including:

- Agent Orange exposure;
- Nuclear radiation exposure;
- Special problems of incarcerated veterans;
- Questions about re-enlistment in the armed forces;
- Psychological readjustment problems of Vietnam veterans;
- VA disability, pensions, and other benefits programs; and
- VA educational overpayment claims.

The NVLC is prepared to provide national support to local programs that become involved in these and other veterans issues, as well as continuing to keep the LSC community up-to-date on veterans issues through the *Veterans Rights Newsletter*.[37]

1.8 THE PURPOSE OF THIS MANUAL

The original *Practice Manual on Discharge Upgrading* was published in 1975 by the American Civil Liberties Union's Military Rights Project and had a small 1978 supplement.[38] The original manual assumed that readers had some knowledge of the mili-

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[33] For example, a concise statement in a routine case can prompt the Navy to invoke its recently re-established procedure for informing the applicant that an upgrade is likely and that the request for a hearing can be suspended pending a records review. *See* § 9.2.7.5.5 *infra*. Strong advocacy and a busy docket can make such time-saving procedures attractive. Of course, they will only be used by applicants if upgrades result.

[34] Some members of Congress have responded to a recent GAO report critical of the discharge system by arguing that too many Honorable Discharges are being issued. GENERAL ACCOUNTING OFFICE, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARTIES: CONGRESSIONAL REVIEW IS NEEDED, Report No. B-197168 (Jan. 15, 1980). One result of these sentiments has been the loss of federal benefits to veterans discharged after less than two years of service, unless discharged for hardship or separated for disability, for those enlisting after September 8, 1980. Pub. L. No. 96-342, § 1002, 94 Stat. 1119 (1980). This recent action circumvents the U.C.M.J. by punishing servicemembers while providing virtually no procedural safeguards. *See* § 21.4 *infra* (discussion of proposed directive).

[35] 42 U.S.C. § 2996f, Pub. L. No. 95-222, § 1007(h), 88 Stat. 378 (1977).

[36] The Legal Services Corporation Act prohibits the use of Corporation funds "to provide legal assistance with respect to any proceeding or litigation arising out of a violation of the Military Selective Service Act or of desertion from the Armed Forces of the United States. . . ." 42 U.S.C. § 2996f, Pub. L. No. 95-222, § 1007(b)(10), 88 Stat. 378 (1977). The General Counsel of the LSC has interpreted this to prohibit only the representation of those persons actually convicted of desertion or charged with desertion in a court-martial.

The General Counsel further ruled that the income level exception in § 1611.4(b) of the LSC regulations for over-income persons seeking benefits from government programs for the poor applies to needs-based veterans benefits.

[37] The *Veterans Rights Newsletter*, formerly the *Discharge Upgrading Newsletter*, has been published for five volume years. The NVLC has also published the *Veterans Self-Help Guide on Agent Orange* and plans to produce similar materials in the future.

[38] The original manual was authored by David F. Addlestone and Susan H. Hewman.

tary or the military justice system. Previously, there had been no practical and detailed guide to case preparation. The Boards had no written standards and issued no individualized decisional documents; thus, the original manual was based on observations, conversations, and guesswork. In retrospect, the predictions and general analysis of how cases were decided seem generally correct. Since that time, however, so much has happened that the manual has required substantial alteration.

One aim of the new manual is to be a comprehensive self-contained treatise or library on discharge upgrading. We hope and believe that an advocate, especially a paralegal, who knows nothing about the military, discharge upgrading, or military law, can become a competent and skilled advocate in discharge upgrade cases with proper use of this manual and sufficient experience.

We have included practical how-to chapters, sections on specific issues, and sections that deal in depth with relatively minor issues that might arise in only a fraction of all cases. We have tried to arrange the manual so that answers to simple questions can be located easily. We have included checklists to provide a quick refresher so that a great deal of text need not be reread with each case. We have compiled lists of common or simple cases that may allow quick resolution of similar cases. References to other sources of information are also provided. Because periodic supplementing will depend on many variables, we recommend that users of this manual obtain subscriptions to the *Military Law Reporter* and the *Veterans Rights Newsletter* (formerly the *Discharge Upgrading Newsletter*), the former providing a timely bi-monthly report of all relevant military and veterans law cases, the latter a monthly report of current trends in discharge upgrading, rules changes, and current veterans issues, plus a supplementary service for this manual.

Since the first manual, the DRBs have promulgated substantive rules by which they decide cases and have, along with the BCMRs, issued approximately 100,000 written decisions in discharge upgrade cases. We had hoped that this manual could provide an analysis of all of these cases; however, we found that task impossible due to the quality of indexing and the simple need to produce this manual in a timely fashion. However, we believe that we have reached deeply enough into decisions of the Boards to report what they are doing, describe some of the important cases, and provide the user of this manual with an idea of how to analyze these cases.

We believe that this manual will give the advocate knowledge of how to take advantage of the current system for the benefit of his/her clients, to forcefully present cases, think of strategies for future work, and spot related veterans issues.

As was said in the 1975 manual, this manual is not the last word and should not be blindly followed. While that manual was the first word, this one takes at least a few steps forward. We have no doubt that everyday practitioners will continue to devise tactics and strategies that have never dawned on us.

We solicit the readers' comments concerning problems with the structure and contents of this manual, suggestions for additions and supplements, and new developments or tactics.

APPENDIX 1A
DISCHARGE REVIEW DATA[1]

ERA	ARMY Discharges Reviewed	ARMY Discharges Upgraded	NAVY Discharges Reviewed	NAVY Discharges Upgraded	AIR FORCE Discharges Reviewed	AIR FORCE Discharges Upgraded
WWII & post-WWII (9/40-6/50)	36,946	7,090	15,000[2]	3,600[2]	N/A[3]	N/A[3]
Korea & post-Korea (7/50-7/64)	40,328	6,251	9,000[2]	1,710[2]	5,970 (1950-53) 33,303 (1954-68)	853 3,996
Vietnam (8/64-12/73)	25,376	3,806	13,500[2]	3,240[2]	3,980	1,682
Post-Vietnam	18,826	5,272	6,272[4]	1,505[4]	3,000[4]	1,269[4]
SDRP (11/1/78)	23,882	13,267	11,641	5,505	2,668	1,681
Regular Cases						
(10/77-9/78)	4,630	2,400	2,497	459	1,255	791
(9/78-3/79)	4,724	1,429	625	134	1,037	517
TOTALS	154,712	39,515	58,535	16,153	51,213	10,789

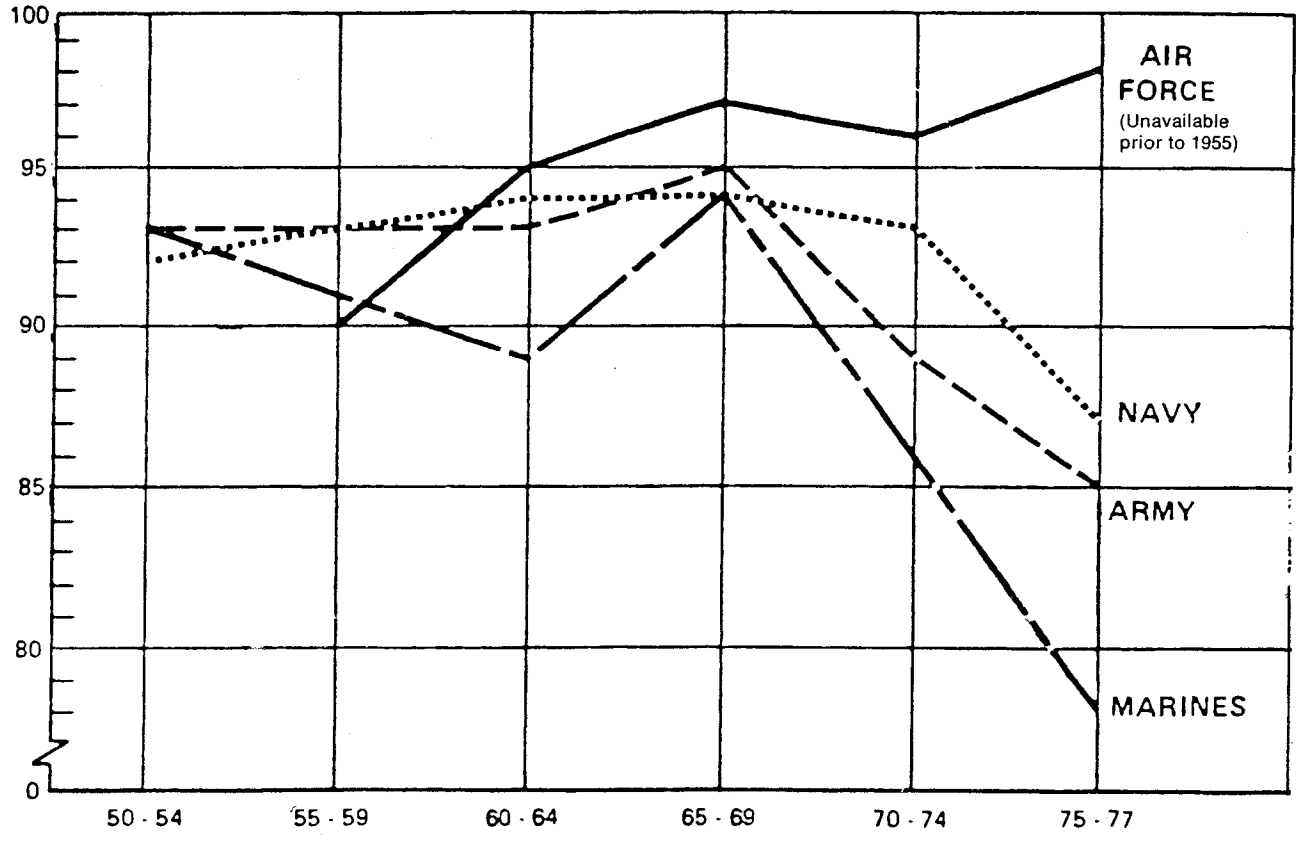
TOTAL APPLICANTS: 264,460

TOTAL UPGRADES: 66,457

[1] This data is from the Department of the Army Response to Inquiry from United States Representative John Paul Hammerschmidt, House Committee on Veterans Affairs (14 July 1977); SDRP After Action Report; and semi-annual DRB reports.
[2] These figures are said to be approximations.
[3] No figures are available.
[4] These figures are based on an estimate that the Army heard 67% of cases reviewed from 1973-1978 and that upgrades were at the same rates as for Vietnam-era veterans.

APPENDIX 1B
HONORABLE DISCHARGES BY SERVICE

PERCENT OF HONORABLE DISCHARGES BY SERVICE FY50 - FY77



Fiscal Year	Army	Navy	Marine Corps	Air Force
50-54	93	92	93	-
55-59	93	93	91	90
60-64	93	94	89	95
65-69	95	94	94	97
70-74	89	93	86	96
75-77 (also 7T)	85	87	78	98

Reprinted from DoD REPORT, Ch. 1, note 7 *supra*.

CHAPTER 10
RESEARCH

10.1 DISCHARGE INDEX

10.1.1 INTRODUCTION

In 1977, the Discharge Review Boards (DRBs) and Boards for Correction of Military Records (BCMRs) agreed, in settlement of a lawsuit, to explain, publish, and index their decisions. Decisions must be "indexed in a usable and concise form . . . to enable those who represent applicants before the Board to isolate . . . those cases that may be similar to any applicant's case. . . ."[1]

The first rudimentary discharge index was prepared in the spring of 1977; a "Basic Index" followed, and the first quarterly supplement was completed in November of that year. Every three months a supplement is prepared.

There were two serious flaws in the compilation of the Basic Index and Supplements 1-4:

- It was not possible to tell from the early Index whether a particular issue was considered favorably or not; and
- Supplements 3 and 4 contained cases decided under the then-new DoD Dir. 1332.28 (29 Mar. 1978), but the standards of that regulation were not included in the Index.

By November, 1978, beginning with Supplement 5, the Discharge Index became substantially more useful.[2]

Initially, a paper copy of the Discharge Index was produced. The Index is now produced in microfiche format, and is maintained in the Reading Room at the Pentagon. Although the Reading Room policy states that costs will be assessed on a case-by-case basis, the director of the Reading Room has stated that no organization has ever been charged for a microfiche copy of the Index. He also stated, however, that due to the cost of reproducing a paper copy of the Index (more than 100,000 pages), no waiver of fees for these costs would be granted.[3]

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[1] *See* Ch. 11 *infra* (reproduction of Urban Law Institute of Antioch College v. Secretary of Defense, No. 76-0530 (D.D.C. Jan. 31, 1977) (stipulation of dismissal)).

[2] The Army finally devised a method to indicate whether the Board accepted or rejected an issue raised by the applicant or Board, and a second *Urban Law Institute* court order corrected the latter problem. *See* Ch. 11 *infra* (reproduction of Urban Law Institute of Antioch College v. Secretary of Defense, No. 76-0530 (D.D.C. Aug. 23, 1978) (order).

[3] *See* App. 10A *infra*. All requests for a copy of the Index should be made under the Freedom of Information Act, 5 U.S.C. § 552, and should specifically request a waiver of fees.

The Index is maintained at 20 VA Regional Offices, 50 state Department of Veteran's Affairs offices, and about 30 Legal Services Projects and community-based veterans organizations. Persons who cannot travel to these locations, however, and who do not have access to a microfiche reader (for example at a local public or university library) should insist on a paper copy and appeal any denial of the material or waiver of fees.

10.1.2 STRUCTURE OF INDEX AND LISTING

Discharge Index entries are unlike most other types of indexes and are arranged only by columns of numbers.[4] There are two keys to deciphering the numbers:

- Column headings which are repeated on each page of the Index; and
- A "Subject/Category Listing (rev. 1978)."[5]

There are two major parts to each supplement:

- Part I lists case numbers in numerical order for each board and lists all of the issues addressed by the board; and
- Part II lists cases in issue number order (a case with more than one issue will appear on multiple pages).

The column headings on each page of the Discharge Index provide the following information:

- A unique case number for each veteran's decision;
- An indication of the number of times a case has been heard;
- Date of the review board decision;
- Type of discharge held by the servicemember at time of this review;
- Date of original discharge;
- Discharge regulation number;
- The reason for discharge;
- Review board decision;
- Secretarial reviewing authority decision; and
- Issue or issues addressed in the decision.

The Subject/Category Listing (rev. 1978) is a list of numbers that track, among other factors, the provisions of the DoD separations regulation and the DoD DRB regulations.[6] The outline of the listing follows.

Propriety considerations:

- Common elements to all discharges;
- Common elements to discharges where servicemember has right to board hearing;
- Reasons for discharge and specific elements pertaining to those reasons; and
- Specifically retroactive policy changes.

Equity considerations:

- Policy changes not specifically retroactive;
- Quality of service;
- Capability to serve; and
- Other equitable considerations.

Other considerations:

- Administrative actions indirectly related to discharge; and
- Special programs.

The listing also assigns numbers that are used by the BCMRs when requests are processed from servicemembers on active duty and other non-discharge upgrade matters. When the BCMRs consider administrative discharge upgrade requests they use the same numbers used by the DRBs.

10.1.3 USING THE INDEX AND LISTING

First, the Subject/Category Listing should be reviewed and a checklist of pertinent entries compiled. For example, if a veteran's reason for discharge was "unfitness/drugs," the entry corresponding to that reason for discharge is A53.00. There are about 20 drug-related index entries or possible drug-related issues that can be raised. Two of them are:

- Exempt evidence (drug rehabilitation program) improperly considered — A01.29/30; and
- Simple possession of drugs (small amount) — A94.29/30.

These entries in the Subject/Category Listing include two numbers after the decimal point: .29/30. One is odd and one is even. In the Discharge Index, only one of these will be displayed. If the odd number appears, the Board rejected the issue; if the even number appears, the Board accepted the issue (*i.e.*, it agreed that exempt evidence was improperly considered, or that only a small quantity of drugs was involved).

Next, the Discharge Index should be reviewed to locate pertinent case numbers, comparing the checklist of pertinent issue numbers with the "issue addressed" column of part II of the most recent supplement. Progressively earlier supplements should be checked until enough relevant cases have been located. For some issues there may be hundreds of case numbers.

Restrictions on time and on the number of cases that can be obtained free each month[7] may require screening or sorting to narrow the focus of research. Examples of ways to narrow the focus of research include:

- Selecting only those cases in which the issue was decided favorably (*i.e.*, even numbers);[8]
- Selecting only those cases upgraded from UD to HD;
- Selecting cases where the reason for discharge was the same as the applicant's;
- Selecting cases only from the applicant's branch of service;
- Selecting cases in which the year or era of discharge was the same as the applicant's; and
- Cross-checking case numbers obtained from reviewing part II's list of single issues against part I's list of all issues.

There are no cross-reference entries in the Discharge Index as would be found in an index to a book. However, some cross-checking can be done with part I of the Discharge Index.

This cross-checking will enable the advocate to learn as much about the case as possible, without

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[4] *See* App. 10B *infra* (sample pages of the Discharge Index).

[5] The 1978 revised version of the Subject/Category Listing was developed in response to complaints about the usefulness of the listing. *See* note 2 *supra*. The earlier version must be used with the Basic Index and Supps. 1-4. Given the problems with this version of the Subject/Category Listing, as well as the poor quality of the decisional documents indexed through Supp. 4, avoid using the earlier listing and Index. The earlier version of the listing is published at 44 Fed. Reg. 47,237 (Oct. 13, 1978), and is provided to persons who obtain the Index.

[6] DoD Dir. 1332.14, DoD Dir. 1332.28. Note that as these regulations change, there will be corresponding changes in the Subject/Category Listing.

[7] *See* App. 10A *infra* (Reading Room policy). *See also* § 10.2 *infra*.

[8] Sometimes it may be desirable to obtain cases in which the issue was rejected to examine the reasons for the rejection.

seeing the decisional document itself. This will also help determine the significance of the single issue which was the original focus. For example, if cross-checking the other issues addressed and listed in part I in a particular case reveals that additional interesting or relevant issues were addressed, that case may be more useful than one in which none of the additional issues related to the applicant's situation. It may be possible to gauge the significance of a particular issue if all the other issues have odd numbers (*i.e.*, were rejected by the Board). This will help ascertain that the issue which was selected was the Board's reason for granting the upgrade. Finally, the list of case numbers selected should be ordered.[9]

10.1.4 PROBLEMS

Most problems related to using the Discharge Index involve:

- Lack of a specific number for an important issue;
- Too many cases within a given category to conduct meaningful research; or
- Improper assignment of numbers.

An issue in the Subject/Category Listing that has hundreds of cases is probably not specific enough. Suggestions for new issues should be made to the director of the Reading Room.[10]

A formal grievance mechanism is available to force the correction of any indexing errors.[11] This includes either wrong numbers being assigned or no numbers being assigned to issues within a decisional document.

The BCMRs' indexing of issues is generally unsatisfactory. They have not adopted the configuration of odd/even numbers used by the DRBs to indicate acceptance or rejection of an issue. Their entries within some categories are very limited; for example, "court-martial" is subdivided into only six entries. The Reading Room has, however, recently solicited public comment on the BCMR listings.[12]

10.2 DRB/BCMR DECISIONAL DOCUMENTS

10.2.1 INTRODUCTION

Before April 1, 1977, the decisions of the DRBs and BCMRs were presented in a form letter stating whether relief was granted or denied. No explanations or details were given. Today the Boards are required to provide a detailed statement of findings, conclusions, and reasons.[13]

The decisional documents used by the DRBs are not uniform. The Army DRB's form is more detailed and longer than either the Navy's or the Air Force's.[14]

10.2.2 OBTAINING DECISIONAL DOCUMENTS

The Reading Room on the public concourse at the Pentagon maintains a paper copy of all the DRB and BCMR decisions issued since April 1, 1977. Copies are being reduced to microfiche, but paper copies are still available upon request. Decisions are filed in numerical order by Board. The Reading Room is open to the public and its staff is very helpful. Decisions can be copied there free of charge.

Persons who do not live in the Washington, D.C. area must write for copies of desired cases, including a list of case numbers.[14a] Requests for cases should be submitted under the Freedom of Information Act.[15] Reading Room policy is that only 25 cases will be provided free each month. If more are needed, alternatives can be pursued.[16] If cases are not provided within two to three weeks, an appeal under the Freedom of Information Act may be useful.

10.2.3 USING THE DECISIONAL DOCUMENTS

Reviewing prior DRB decisions can provide a quick overview of how the Boards handle certain types of cases and can provide clues on what to avoid and what to include. One basic use of decisions obtained would be to work them into persuasive arguments or contentions.[17] For example, a contention might state that for the DRB to refuse to recharacterize an applicant's discharge to Honorable would violate due process and fundamental principles of administrative law because it would be inconsistent with the DRB's decision to upgrade to Honorable in each of the following cases [here discuss the particular issues being argued and include a list of cases which are helpful to the applicant]. Building contentions like this can be critical in persuading the DRBs to grant an upgrade, as well as in convincing a federal court to upgrade if the DRB does not.

In reviewing the DRB decisions, particular attention should be paid to the reasons for the Board's votes. Sometimes there may be only a cursory explanation that incorporates the Board's findings. Sometimes the Board refers to the applicant as being "young" or as having a "low mental capability" but does not specify the age or mental test scores. In these situations, counsel will have to leaf through the decision to locate that data. A formal complaint can

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[9] A request should include the full case number and should be submitted as a Freedom of Information Act request. *See* App. 10D *infra* (model letter). *See also* App. 10A *infra* (Reading Room policy); § 10.2.4 *infra* (problems in obtaining decisional documents).

The inclusion of brief digests of cases in various appendices of this manual is intended to avoid dependence on the Discharge Index. These digests do not obviate the need for copies of the relevant decisional documents themselves, any more than headnotes alone obviate the necessity of reading civil court decisions before citing them. Sources of additional digests include the *Veterans Rights Newsletter* and the *Military Law Reporter* (MIL. L. REP.).

[10] The mailing address is: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310, 202/695-5704.

[11] *See* Ch. 11 *infra* (discussion of the complaint procedure required by *Urban Law Institute*).

[12] *See* 45 Fed. Reg. 71,839 (Oct. 30, 1980) (notice of public comment period).

[13] *See Urban Law Institute*, No. 76-0530 (D.D.C. Jan. 31, 1977), at para. 5.A. *See also* App. 10E *infra* (sample decisional documents).

[14] *See* App. 10E *infra* (sample copies of decisions).

[14a] *See* note 10 *supra*.

[15] *See* App. 10D *infra* (model letter to use to request cases).

[16] *See* § 10.2.4 *infra*.

[17] *See* Ch. 11 *infra* (preparation of contentions).

be filed to obtain any pertinent information that may be missing.[18]

Although the Review Boards' regulations do not require counsel to submit a copy of decisional documents cited in a brief to the Boards, it is a good idea to do so. Note: If a decisional document has been obtained with the case number "7X," which indicates that it was originally an SDRB case,[18a] and it appears to support an upgrade outside the criteria of the SDRP, care should be taken to insure that the SDRP decision to upgrade was "affirmed under uniform standards."[18b] The entry in the Discharge Index for Board decisions is "CU" for confirmed upgrade, and "NU" for nonconfirmed upgrade.

10.2.4 PROBLEMS

Problems with the use of decisional documents usually involve delays receiving copies, restrictions on the number of copies that can be obtained free, poor quality of the copies, and incomplete decisions.

If copies of decisions are needed quickly because a hearing is scheduled, that information and the date should be included with the request. "A priority effort will be made to provide the requested decisional documents before that date."[19] A hearing may be postponed if copies have not been received. If there is no postponement and full relief is not granted, reconsideration may be possible.[20] In any event, delays of more than three weeks in receiving cases should be appealed.

Persons needing more than the maximum 25 free cases per month should submit a request under the Freedom of Information Act for as many as are needed. These requests should include a request for waiver of fees.[21] Other alternatives include dividing up a long list of requests among different staff members, clients, or satellite offices.

The quality of the copy provided to the Reading Room is occasionally poor and gets worse with subsequent copying. The Reading Room can usually obtain the DRB's file copy if necessary. Copies that are not legible should be requested again.

Many early decisional documents, especially those from the 1977 SDRP, are one- or two-page decisions that include little useful information. More recent decisions, though more detailed and longer, may still not explain cases understandably. It may be possible to obtain a new, more complete document by filing a formal complaint.[22]

Individual veterans who never received a copy of the decision on their case can write to either the DRB or the BCMR for a copy, or to the National Personnel Records Center using an SF 180.[23]

10.3 REGULATIONS

10.3.1 INTRODUCTION

Reference to the regulation under which a veteran was discharged is necessary to be certain of the exact official reason for discharge, the first step in preparing a case. Procedural errors or evidence of enhanced rights under current regulations can facilitate or even compel an upgrade.[24] Another important use of regulations is to double-check whether evaluation marks were properly assigned. Sometimes tenths of a point can make the difference between a GD and an HD.

A brief note may be useful in understanding the current organization of regulations in the area of administrative separations for enlisted personnel, which are the ones most commonly consulted in preparing a discharge review case.[25]

Since 1948, DoD has had responsibility for developing enlistee discharge regulations. Periodically, DoD revises and reissues its basic Directive.[26]

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[18] *See* § 11.5 *infra* (details on obtaining a better decision if data are missing or the Board explanation makes no sense).

[18a] *See* Ch. 23 *infra* (discussion of President Carter's 1977 Special Discharge Review Program).

[18b] If the rationale does not state "affirmed under uniform standards," look for a citation to DoD Dir. 1332.28. A statement that the "upgrade was warranted under the provisions of the SDRP (4 APR 77)" indicates that the case was not affirmed under uniform standards and would be useful only in supporting an argument based on the SDRP's criteria. *See* Ch. 23 *infra*.

[19] Letter from R. L. Gilliat, Asst. General Counsel (MH & PA), Department of Defense, to B. Stichman (Feb. 6, 1979) (on file at NVLC).

[20] *Id.* The DoD Directive [1332.28] provides the opportunity for corrective action should problems arise. Section 70.5(b)(7) of the Directive permits an individual to request a postponement in the event that the individual requested certain decisional documents in order to prepare for a hearing but did not yet receive them. Further, if the hearing took place prior to the delivery of the documents, the provisions in the DoD Directive concerning reconsideration are sufficient to protect the individual's interests. If receipt of a decisional document subsequent to a hearing led to discovery and presentation of new, substantial, relevant evidence that would have had a probable effect on matters concerning the propriety or equity of the discharge, reconsideration would be granted.

[21] *See* App. 10D *infra* (model FOIA letter).

[22] *See* § 11.5 *infra*.

[23] *See* Ch. 6 *supra*.

[24] *See* DoD Dir. 1332.28, encl. 3, paras. (b), (c) (Mar. 29, 1979):

> A discharge shall be deemed to be proper unless . . . there exists an error of . . . procedures . . . associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby. A discharge shall be deemed to be equitable unless . . . it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies or procedures currently applicable, . . . provided that current policies or procedures represent a substantial enhancement of the rights afforded a respondent . . . and there is substantial doubt that the applicant would have received the same discharge.

See also § 12.5 *infra* (procedural errors); Ch. 21 *infra* (current standards).

[25] *See* Ch. 5 *supra* (comprehensive charts and lists of regulations). There is no quick way to understand the five different numbering schemes adopted by DoD and each service. There is, however, a helpful index to each service's and DoD's regulations available free. *See* § 10.3.2 *infra*. In most cases the guidance provided in this manual will be sufficient to obtain the appropriate regulation.

[26] Before 1948, the Army and Navy developed regulations independent of each other. On August 2, 1948, then-Secretary of Defense James Forrestal directed a memo to each of the Secretaries of the Army, Navy, and Air Force. Its subject was "Recommended Standards for Discharge Under the Selective Service Act of 1948." In 1959, that guidance was expanded upon and assigned a number: DoD Dir. 1332.14. In 1965, 1975, and 1976, the Directive was revised and reissued. Numerous significant and minor changes that did not result in reissuance of the entire directive have occurred almost annually. In 1981, a major revision was proposed for public comment. *See* 46 Fed. Reg. 31,663 (June 17, 1981). *See also* § 21.4 *infra*.

Each branch of the service has implemented it, sometimes expanding upon the minimum due process rights included in the DoD Directive.[27] The services may implement the Directive in more than one regulation. For example, the Air Force includes its guidelines on discharges for misconduct in one manual, and guidelines on discharges for expiration of term of service in another.[28] The Army devotes a separate chapter within its single discharge regulation to the major reasons for discharge itemized in the DoD Directive. Many Army veterans will know they took a "Chapter 10 discharge," but may not recognize the official reason, *i.e.*, discharge for "good of the service in lieu of court-martial."[29]

The Secretary of the Navy and various Navy Department division heads periodically issue instructions that address a particular type of discharge. For example, homosexual conduct of naval personnel is addressed in a separate instruction. Such instructions, in addition to the DoD Directive, are used by the Bureau of Naval Personnel to write the articles in the Bureau's discharge manual[30] that are cited as the discharge authority on the veteran's report of separation.

10.3.2 OBTAINING REGULATIONS

To obtain a free copy of wanted regulations, a request under the Freedom of Information Act and DoD Dir. 1332.28 must be submitted.[31] There are other sources which an applicant might consider if time is short or if the Reading Room balks at the request.[32] For example, Title 32 of the Code of Federal Regulations (C.F.R.) contains all the DRB regulations and most enlisted administrative separation regulations.[32a] Many of the separation regulations in the C.F.R. are not the current versions; however, the defense counsel of any installation or any base librarian will provide the regulations on request. Also, many university libraries are "designated depositories" for government publications, and may have extensive collections of regulations.[32b]

In addition to the regulation governing the operation of the Review Board, the discharge regulation in effect at the date of the client's separation, its current version and any other regulations that may be relevant in a particular case should be obtained as early as possible.

To determine what regulations were used in discharging the client, form DD 214 or report of separation[33] should be checked for the entry in the "reason and authority for discharge" block. If the report of separation is not available but the applicant has other records, *e.g.*, discharge orders or discharge board proceedings, alphanumeric groupings in them may reveal the regulation upon which discharge was based.[33a] Often, "UP" (under the provisions of) or "IAW" (in accordance with) will immediately precede the citation. A full set of his/her service records may have to be obtained before it is possible to determine exactly what the official reason for discharge was.[34]

Occasionally, some other portion of the administrative discharge regulation than that under which the veteran was discharged may be needed. For example, an applicant may want to argue that the discharge should have been for unsuitability due to alcoholism, rather than for misconduct, or that the standards for characterizing the discharge should be those used for persons discharged at expiration of normal term of service.

Examples of other regulations which may be relevant in a particular case are those pertaining to:

- Assignment of evaluation ratings, or conduct and efficiency marks;
- Drug or alcohol rehabilitation programs;
- Entrance standards;
- Application procedures for obtaining a hardship transfer or conscientious objector discharge;
- Investigative boards; and
- Conducting a nonjudicial punishment hearing.

Any regulation cited within the discharge proceedings or any regulation which led to a nonjudicial punishment may also be relevant.

The Reading Room policy is to provide any "documents relevant to the review of the applicant's discharge," but as mentioned earlier, some problems have arisen in obtaining regulations.[35]

Offices handling any number of veterans' cases should have a library of important regulations. DoD is being encouraged to supply Legal Services Projects and counseling organizations with at least a micro-

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[27] Just as each service implemented the DoD Directive, in many cases a base or division or major command also implemented the service's regulation, sometimes expanding the servicemember's procedural rights.

[28] *See* AFM 39-12 "Enlisted Personnel: Separation for Unsuitability, Misconduct, Personal Abuse of Drugs, Resignation or Request for Discharge for the Good of the Service and Procedures for Rehabilitation Program" (Sept. 1, 1966); AFR 39-10 "Enlisted Personnel: Separation Upon Expiration of Term of Service, for Convenience of Government, Minority, Dependency, and Hardship" (Jan. 3, 1977).

[29] *See* AR 635-200 "Personnel Separations: Enlisted Personnel" (Nov. 21, 1977).

[30] *See* BUPERSMAN, NAVPERS 15791B (July 1, 1969). The Marine Corps discharge regulations are contained in MARCORSEPMAN, MCO 1900.16B (Mar. 23, 1978).

[31] *See* DoD Dir. 1332.28, encl. 2(f) ("Regulations of a military department may be obtained . . . by writing to the Armed Forces Discharge Review/Correction Board Reading Room."). *See also* App. 10D *infra* (sample letter); note 10 *supra* (mailing address for requests).

[32] *See* §10.3.4 *infra*.

[32a] *See* App. 10F *infra*.

[32b] A Freedom of Information Act request to offices other than the Reading Room can be useful. *See* App. 10F *infra* (list of addresses). DoD has a policy of providing single copies of its directives free to the public. 32 C.F.R. § 289.2. *See* App. 10F *infra*.

[33] Veterans discharged since October, 1979, may not have a DD 214 with this information on it. Currently, the copy given to the servicemember at date of separation — the first of eight copies prepared — does not have a block for this information. Some earlier editions may have the block's information deleted. The veteran may, however, have another copy which includes this data; if not, a request on a Standard Form 180 should be submitted. *See* Ch. 6 *supra* (details on filling out that form).

[33a] For example: AR 635-200, ch. 10 (Army); BUPERSMAN 3420220 (Navy); MARCORSEPMAN para. 6021 (Marine Corps); AFM 39-12, § F, para. 3-12 (Air Force).

[34] If the general reasons for a discharge are known, reference to the charts and lists of regulations in Ch. 5 *supra* may allow a reasonable assumption as to the particular regulation used.

[35] *See* § 10.3.4 *infra*.

fiche set of regulations. Currently, only the Army DRB has microfiched regulations.[36]

10.3.3 USING THE REGULATIONS

Two critical uses of military regulations in discharge upgrading cases follow:

- To compare the steps actually taken in processing the servicemember with those required by the regulations in effect at the time; and
- To compare the rights available in the regulation then in effect with those offered in the current regulations.

These two uses parallel the propriety and equity standards, respectively, applied by DRBs.[37]

Before beginning a paragraph-by-paragraph comparison of the old and the current regulations, two aids should be consulted:

- The Subject/Category Listing's propriety considerations;[38] and
- The lists of procedural rights and current standards contained in this manual.[39]

Both of these aids will provide clues as to the specific kinds of violations or changes that should be documented.

It is important to be creative in using regulations, rather than confining review to a narrow comparison of the specific paragraph of the discharge regulation and the corresponding provision in the current regulation. Arguments that an applicant should have been discharged under an entirely different provision (for example, unsuitability rather than misconduct) are often effective.

10.3.4 PROBLEMS

There are many potential problems in obtaining regulations, including:[40]

- Slow responses;
- Rejection on the grounds that a requested regulation is not relevant;
- Rejection on the grounds that the requestor is not a bonafide applicant;
- Assessment of fees; or
- Restrictive interpretations of the Freedom of Information Act.

According to the published Reading Room policy, the Reading Room is the "proper recipient" of a request for regulations. Unfortunately, it only stocks DoD Dir. 1332.28, "Discharge Review Board Procedures and Standards." All requests for other regulations are referred to the Board concerned, and a notice of referral is sent to the requestor.[41] These referrals are made promptly; any delays in responses are the fault of the Review Boards. All requests should be submitted under the Freedom of Information Act and delays of more than two weeks should be appealed.[42] A request for a postponement of a scheduled hearing due to delay in receiving regulations should be granted. If, however, an applicant elects to continue with the hearing without benefit of the regulations and full relief is not granted, a rehearing may be available under the Board's reconsideration criteria.[43]

Reading Room policy states that a DRB will provide pertinent portions of discharge regulations free. It does not specify that an entire discharge regulation or manual will be provided. Pertinent portions of other regulations relevant to the review of the applicant's discharge will also be provided. No guidance as to the definitions of pertinent and relevant is provided.

If the DRB decides that the requested regulation is not relevant it will offer to reconsider that decision and, at the same time, provide the address of another office that offers the regulation. Anyone whose request for a regulation is rejected as not being relevant has at least three choices:

- Provide the DRB with sufficient, specific information demonstrating the relevancy;[44]
- Pursue the request at another agency, and possibly be assessed a fee;[45] or
- Appeal the denial under the Freedom of Information Act.

Another recent problem is the denial by the Army DRB of a requested discharge regulation because the requestor is not a bonafide applicant. The Army DRB did not accept the explanation that a copy of the regulation may be necessary to determine whether to go

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[36] The Army cooperated with the Legal Services Corporation in the preparation of this manual by providing NVLC with a set of its microfiched regulations. Persons interested in obtaining a duplicate set should contact the National Veterans Law Center, 4900 Massachusetts Avenue, N.W., Washington, D.C. 20016.

[37] *See* note 24 *supra*.

[38] *See* App. 10C *infra*. Not only does the Subject/Category Listing provide clues about propriety considerations to look for, but it also makes it possible to locate previous DRB decisions in which a Board may already have conceded that a particular violation was prejudicial. Of course, the argument may be presented, even if cases are not supportive.

[39] *See* Ch. 5 *supra*; Chs. 12, 21 *infra*.

[40] *See* Ch. 9 *supra*; Chs. 12, 21 *infra* (whether regulatory error is prejudicial, whether regulations have enhanced procedural rights, and whether there is substantial doubt that the same type of discharge would be issued under current standards).

[41] *See* App. 10A *infra*.

[42] The authority to whom one should appeal is not clear; the Reading Room appears to be a function of the Department of the Army. It is wise to submit an appeal to at least two offices: the General Counsel of the Army, and the DoD. If the request was for Navy or Marine or Air Force regulations, appeal to the General Counsel of the Navy Department or the Air Force. *See* App. 10F *infra*.

[43] *See* 32 C.F.R. § 70.5(b)(8). *See also* notes 19 & 20 *supra*.

[44] The requirement for "sufficient, specific information demonstrating the relevancy" of the requested regulation is found in the Reading Room policy statement. *See* App. 10A *infra*. A statement similar to the following may meet that requirement: The regulations are necessary to evaluate the propriety and equity of the client's discharge specifically regarding the adequacy of the [drug rehabilitation measures taken/calculation of evaluation marks/possible abuse of discretion in discharging the client for misconduct rather than for unsuitability].

[45] A request for a waiver of fees may have to be repeated; any denial should be appealed.

to the DRB or BCMR or even to file at all.[46] The Naval DRB, however, has accepted this explanation. Counsel faced with this situation again has at least three choices:

- File an application at the DRB and withdraw it later if necessary;
- Pursue the requested regulation from another source; or
- Appeal the denial under the Freedom of Information Act.

Anyone assessed fees should appeal under the Freedom of Information Act. Anyone told that the FOIA does not apply to requests for "unaltered documents such as regulations" should contest that provision.[47]

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[46] For applicants who have been denied relief and who may seek reconsideration, this lack of cooperation by the Board seems especially unreasonable. Reconsideration is possible "where changes in discharge policy are announced subsequent to an earlier view . . . [or] where the DRB determines that policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable. . . ." 32 C.F.R. § 70.5(b)(8)(iii), (iv).

[47] A recent change in the DoD Directive implementing the Freedom of Information Act specifies that for purposes of the FOIA a "record" does not include "unaltered publications such as regulations." *See* 45 Fed. Reg. 80,502 (Dec. 5, 1980) (to be codified in 32 C.F.R.pt. 286). This position plainly violates the Act and should be appealed.

APPENDIX 10A
READING ROOM POLICY

Armed Forces Discharge Review/ Correction Boards Reading Room Requests for Regulations/Documents Made Pursuant to DoDD 1332.28

In FR Doc. 77–30712, published in the **Federal Register** (42 FR 56147) on October 21, 1977, the Department of the Army announced the establishment of the Armed Forces Discharge Review/ Correction Boards Reading Room on the public concourse of the Pentagon. The Reading Room was established in accordance with the Stipulation of Dismissal in the lawsuit entitled *Urban Law Institute of Antioch College, Inc., et al. v. Secretary of Defense, et al.*

Notice is hereby given that the policy stated in 42 FR 56147 for the distribution of documents and assessment of fees by the Reading Room has been revised as follows:

a. An applicant for discharge review is entitled to directives and other documents relevant to the consideration of his application by the DRB. The Reading Room, located at the Pentagon Concourse, is the proper recipient of a request for such materials from an applicant or his designated counsel or representative.

b. The Reading Room will provide the following publications, upon request, without charge:

(1) Stipulation of Dismissal

(2) DoDD 1332.28

(3) Subject/Category Listing

(4) Decisional Documents of the DRBs (up to 25 each 30 days)

(5) Index (case-by-case determination)

c. Requests for regulations other than those described above will be referred to the discharge review board of the military department concerned and a notice of referral will be provided to the requester by the Reading Room.

d. The discharge review board concerned will, upon request, provide the following regulations/Documents, without charge:

(1) DRB regulation/instruction;

(2) Pertinent portion of the regulation or manual under which the applicant was discharged (both current version and version in effect at the time of discharge);

(3) Pertinent portion of other directives and documents relevant to the review of the applicant's discharge (case-by-case determination).

e. If a requested directive or document does not appear to be relevant to the review of the applicant's discharge, the DRB will so inform the requester. In addition, the requester will be advised by the DRB of two alternative means to obtain the requested material:

(1) By writing to the appropriate agency (using the name and address provided) from which the material can be obtained for a fee (unless the agency in question waives the fee).

(2) By providing specific information to the DRB demonstrating the relevancy of the requested material to the review of the applicant's discharge. If sufficient information is provided, the material will be provided free of charge.

f. The above procedures are effective immediately.

Francis X. Plant,

Deputy Assistant Secretary (DA Review Boards and Personnel Security).

APPENDIX 10B
SAMPLES FROM DISCHARGE INDEX

The following pages are taken from the Discharge Index (November 1979 supplement). Page 10B/2 is a page from part I of the Index; page 10B/3 is a page from part II.

The columns in these sample pages provide the following information:

- CASE NO. (case number): a unique number assigned to each veteran's decision; A=Army, F=Air Force, M=Marine, D=Discharge Review Board, C=Board for Correction of Military Records.
- SUF (suffix): computer indication of lines filled.
- REC (reconsideration): indication of number of times a case has been heard; V=Pub. L. No. 95-126 re-review; A, B, C=1st, 2d, 3d review; X=re-review following a complaint.
- DATE OF BOARD DECN (date of board decision).
- TYPE DISCH (type of discharge): type held at time of this review.
- DATE OF DISCH (date of discharge).
- DISCHARGE AUTHORITY: regulation number.
- REASON FOR DISCHARGE (INDEX REF. NO.): number assigned from Subject/Category Listing.
- BOARD DECN (board decision): level of relief and vote; HD=Honorable, GD=General, UD=Undesirable, CD=Clemency, BC=Bad Conduct, DD=Dishonorable, NC=no change, CU=confirmed, NU=nonconfirmed (CU and NU are used with Pub. L. No. 95-126 re-reviews).
- SECY DECN (secretarial reviewing authority decision): A=affirmed, M=modified, D=denied.
- ISSUE ADDRESSED: number assigned from Subject/Category Listing.

CASE NO.	SUF	REC	DATE OF BOARD DECN	TYPE DISCH	DATE OF DISCH	DISCHARGE AUTHORITY	REASON FOR DISCH (INDEX REF. NO)	BOARD DECN	SECY DECN	ISSUE ADDRESSED				
AD7908000	1		- -		- -					A0101	A9405			
AD7908001			10-10-79	GD	11-01-74	AR635 200	A5300	HD 5-0	A	A9200	A9405	A9223	A9202	A9317
AD7908001	1		- -		- -					A5003	A9318	A9102		
AD7908007			10-09-79	UD	04-22-70	AR635-200	A7100	NC 5-0	A	A9200	A9307	A9208	A9223	A9225
AD7908007	1		- -		- -					A9229	A0101	A9405		
AD7908022			10-16-79	UD	09-11-59	AR 635-208	A5400	NC 5-0	A	A9200	A9307	A9222	A9309	A9225
AD7908022	1		- -		- -					A9229	A0207	A0209	A0101	A9405
AD7908048			09-11-79	UD	09-11-72	AR635-200	A7000	NC 5-0	A	A9200	A9323	A7100	A7700	A7500
AD7908048	1		- -		- -					A7005	A7007			
AD7908056			09-26-79	GD	05-18-63	AR 635-209	A4300	NC 5-0	A	A9200	A0101	A9225	A9229	
AD7908065		A	09-14-79	UD	06-05-73	AR635-200	A7100	NC 3-2	A	A9200	A9403	A9307	A9405	A9223
AD7908065	1		- -		- -					A9229	A9311	A9304	A9308	
AD7908067			10-10-79	UD	09-27-73	AR-635-200	A7100	NC 5-0	A	A9200	A9301	A9319	A9308	A0101
AD7908067	1		- -		- -					A9223	A9229			
AD7909000			10-15-79	UD	08-30-77	AR 635-200 C-10	A7100	HD 3-2	A	A9200	A9309	A9307	A7005	A9231
AD7909000	1		- -		- -					A9222	A0101	A9229	A9308	A9202
AD7909000	2		- -		- -					A9201				
AD7909002			10-16-79	UD	12-29-77	AR 635-200 C-10	A7100	HD 5-0	A	A9200	A9405	A0101	A9229	A9310
AD7909002	1		- -		- -					A9406				
AD7909004			09-25-79	UD	06-28-78	AR 635-200	A5100	NC 5-0	A	A9200	A0101	A9217	A9223	
AD7909069			09-19-79	UD	12-08-43	AR615 360	A3100	NC 4-1		A9200	A0101	A9225	A9229	A9231
AD7909069	1		- -		- -					A9406				
AD7909079			09-18-79	UD	04-19-45	AR 615-368	A7900	BD 5-0	A	A9200	A9324	A9225	A9229	A9231
AD7909105			09-14-79	UD	03-03-77	AR-635-200	A7100	AD-3-2	A	A9200	A9218	A9312	A9229	A0101
AD7909105	1		- -		- -					A9202				
AD7909109			10-17-79	UD	06-22-55	AR 615-368	A7900	HD 4-1	A	A9200	A9315	A0225	A5007	A0105
AD7909109	1		- -		- -					A0101	A9222	A9229	A9225	A9208
AD7909109	2		- -		- -					A9220	A9316			
AD7909111			08-16-79	UD	06-19-52	AR-615-366	A6300	GD 4-1		A9300	A9304	A9322	A9222	A9229
AD7909111	1		- -		- -					A0101	A9406	A9321	A9303	A9217
AD7909141	1		09-13-79	D	- -	AR	A		A	A9229	A9225	A5006	A0202	A0132
AD7909141	2		- -	D	- -					A9201				
AD7909232			09-27-79	UD	08-18-72	AR 625-212	A5400	GD 5-0	A	A9200	A9301	A9303	A9323	A9412
AD7909232	1		- -		- -					A8501	A0101	A9223	A9225	A9218
AD7909232	2		- -		- -					A9304				
AD7909237			08-15-79	GD	02-27-70	AR 635-212	A4200	NC 3-2	A	A9200	A0101	A9202	A9223	A9225
AD7909237	1		- -		- -					A9323	A9324			
AD7909238			08-15-79	GD	06-28-63	AR 635-209	A4200	HD 5-0	A	A9100	A9324	A0101	A9232	A9200
AD7909239			08-08-79	UD	12-23-63	AR 635-208	A5100	GD 5-0	A	A9200	A9406	A9218	A9323	A0101
AD7909239	1		- -		- -					A9223	A5003	A5001		
AD7909243			10-17-79	UD	01-17-74	AR-635-200	A7100	GD 4-1	A	A9300	A9323	A9324	A9330	A0101
AD7909243	1		- -		- -					A9223	A9229	A9329		
AD7909244			09-25-79	UD	12-02-74	AR 635-200	A7100	GD 5-0	A	A9200	A9405	A7005	A0101	A9223
AD7909244	1		- -		- -					A9229	A9218	A9220	A9306	A9406
AD7909245			10-16-79	UD	08-03-75	AR 635-200	A7100	GD 3-2	A	A9200	A9909	A9231	A7007	A9229

DOD DISCHARGE REPORT II

11/19/79

CASE NO.	SUF	REC	DATE OF BOARD DECN	TYPE DISCH	DATE OF DISCH	DISCHARGE AUTHORITY	REASON FOR DISCH (INDEX REF. NO)	BOARD DECN	SECY DECN	ISSUE	ADDRESSED
ND7903001			09-24-79	UD	09-02-71	MCSM 6021	A7100	UD 5-0		A9429	
ND7X01496	1	V	08-21-78	GD	10-15-68	DOD/SDRP	A6100	CU 5-0	A	A9429	
ND7X05903		A	09-11-79	GD	08-03-72	DOD/SDRP	A5300	GD 5-0		A9429	
ND7701767		A	09-04-79	GD	08-13-75	BPM 3420220	A5100	GD 5-0		A9429	
ND7800824	1		08-06-79	GD	09-01-71	BPM 3420220	A5300	GD 5-0		A9429	
ND7800956	1		05-16-79	UD	08-28-67	BPM C-10311	A5300	UD 5-0		A9429	
ND7800979	1		06-21-79	UD	09-16-74	BPM 3420270	A7000	UD 5-0		A9429	
ND7800980	1		09-05-79	UD	02-17-77	BPM 3420270	A7100	UD 5-0		A9429	
ND7801253			06-21-79	GD	05-24-68	BPM C-10311	A5300	GD 5-0		A9429	
ND7801555	1		08-10-79	GD	06-07-71	BPM 3420220	A5300	GD 5-0		A9429	
ND7801558	1		06-06-79	UD	04-08-68	BPM C-10311	A5300	UD 5-0		A9429	
ND7802343			08-13-79	UD	04-14-78	BPM 3420270	A7100	UD 5-0		A9429	
ND7802380			08-14-79	UD	10-14-58	BPM C-10313	A6100	GD 5-0		A9429	
ND7802398			08-14-79	BD	07-05-77	BPM 3420185	A6800	BD 5-0		A9429	
ND7802432			08-31-79	UD	02-02-77	BPM 3420185	A6400	UD 5-0		A9429	
ND7802490			07-17-79	GD	06-18-71	BPM 3420220	A5300	GD 5-0		A9429	
ND7802637	1		08-02-79	UD	11-24-67	BPM C-10312	A6100	UD 5-0		A9429	
ND7802710			10-01-79	GD	06-03-74	BPM 3420220	A5300	GD 5-0		A9429	
ND7802733	1		09-27-79	UD	06-09-78	BPM 3420185	A6600	UD 5-0		A9429	
ND7900102			10-01-79	GD	06-25-76	BPM 3420185	A6600	GD 5-0		A9429	
ND7900103			10-01-79	GD	02-18-70	BPM 3420220	A5300	GD 5-0		A9429	
ND7900289			08-07-79	GD	10-14-69	BPM C 10311	A5300	HD 5-0		A9429	
ND7901660			09-28-79	GD	03-05-70	BPM 3420220	A5300	GD 5-0		A9429	
AD7801273			09-08-79	UD	05-04-76	AR635-200	A7400	GD 4-1	A	A9430	
AD7804079			09-27-79	UD	11-25-76	AR635-200	A7400	HD 5-0	A	A9430	
AD7904267	1		- -		- -					A9430	
AD790693Z	1		- -		- -					A9430	
FD7900047			09-10-79	GD	02-09-75	AFM 39-12 CH 2	A6100	HD 3-2	-	A9430	
FD7900782			10-01-79	GD	05-06-71	AFM 39-12 CH 2	A5300	HD 3-2	-	A9430	
MC7600988			07-18-79	BD	10-16-55	BPM C10314	A6800	GRANT	A	A9430	
MD7900139			06-22-79	UD	12-14-70	MCSM 6017.2D	A5300	GD 5-0		A9430	
MD7900298			07-03-79	UD	11-24-75	MCSM 6021	A7400	UD 5-0		A9430	
NC7703946			07-10-79	BD	11-28-44	BPMD9114(2)	A6800	DENY		A9430	
ND7801459		A	07-06-79	UD	09-13-68	BPM C-10312	A6100	GD 5-0		A9430	
ND7801698			02-27-79	GD	11-07-69	BPM C 10311	A5300	HD 5-0		A9430	
ND7801698			02-27-79	GD	11-07-69	BPM C 10311	A5300	HD 5-0		A9430	
ND7900862			07-23-79	UD	10-20-69	BPM C 10311	A5300	GD 5-0		A9430	
AD7904531			08-16-79	UD	04-18-74	AR-635-200	A7400	NC 5-0	A	A9431	
MD7901507			09-13-71	GD	11-09-71	MCSM 6017.2D	A5300	GD 5-0		A9431	
ND7800313			06-04-79	GD	08-13-68	BPM C 10311	A5300	GD 5-0		A9431	
ND7801253			06-21-79	GD	05-24-68	BPM C-10311	A5300	GD 5-0		A9431	
ND7801480			07-06-79	GD	11-01-71	BPM 3420220	A5300	GD 5-0		A9431	
ND7802617			09-11-79	UD	03-19-71	BPM 3420220	A5300	GD 5-0		A9431	
ND7901660			09-28-79	GD	03-05-70	BPM 3420220	A5300	GD 5-0		A9431	
FD7900265			09-12-79	UD	09-27-52	AFR 39-17	A5100	GD 5-0	-	A9432	

APPENDIX 10C
SUBJECT/CATEGORY LISTING FOR DISCHARGE INDEX

(Use with Discharge Index Supp. 5 and Subsequent Supplements)

Propriety Considerations

☐ Part A—Common Elements Throughout the Discharge Process

(A01.01/02) Separation action *not* properly Initiated
(A01.03/04) SM *not* properly notified of Separation Action
(A01.05/06) Improper physical Examination at Separation
(A01.07/08) Discharge Authority *not* proper
(A01.09/10) Characterization based in part on Prior Service
(A01.11/12) Characterization based in part on Pre-Service Record
(A01.13/14) Evidence in Record does *not* Support Reason for Discharge
(A01.15/16) SM *not* Separated within Reasonable Time after Approval
(A01.17/18) JAG (Legal) Review, when required, defective
(A01.19/20) SM's ratings/grades were *not* properly calculated or administered
(A01.21/22) Evidence Obtained in Violation of Article 31, UCMJ, (Self-incrimination) improperly considered
(A01.23/24) Evidence Obtained from Unlawful Search Improperly Considered
(A01.25/26) Hearsay Evidence Improperly Considered
(A01.27/28) Unsworn Testimony or Statements Improperly Considered
(A01.29/30) Exempt Evidence (Alcohol/Drug Rehabilitation Program) Improperly Considered
(A01.31/32) Other Evidence Improperly Considered, Including Defective Records of Disciplinary Offenses

☐ Part B—Elements Common to Discharges Where SM Has Right to Board Hearing

(A02.01/02) Commander's Report improper
(A02.03/04) SM *not* properly notified of Rights to Request Board Hearing
(A02.05/06) SM *not* properly notified of Right to submit Statements
(A02.07/08) Improper Counsel for Consultation
(A02.09/10) Waiver of Board Hearing *not* proper
(A02.11/12) Improper Denial of Request for Board Hearing.
(A02.13/14) Improper Composition of Board
(A02.15/16) Improper Counsel for Representation
(A02.17/18) Ineffective Assistance of Counsel
(A02.19/20) Request for Witness improperly Denied
(A02.21/22) Command Intervention (influence) improper
(A02.23/24) Improper Denial of Request to Personally Appear
(A02.25/26) Recommendation of Board improper
(A02.27/28) Discharge Authority's approval improper in light of Board recommendation
(A02.29/30) Withdrawal of waiver not properly considered
(A02.31/32) Improper Vacation of Suspended Administrative Discharge

☐ Part C—Reasons for Discharge and Specific Elements Pertaining to These Discharges

● (A03.00) *Discharge for Expiration of Term of Service/Enlistment (ETS)*
(A03.01/2) SM did meet regulatory criteria for Honorable Discharge
(A03.03/4) Personal Decoration during Current Service *not* considered
(A03.05/6) Characterization based on Isolated Acts of Indiscipline.
(A03.07/8) Characterization based on Mental Status or other Medical Evaluation
(A03.09/10) Characterization improperly changed by Commanding Officer of Transfer Activity, and appropriate entries *not* made in file showing reason
● (A04.00) *Discharge For CONVENIENCE OF GOVERNMENT (See Specific Categories A05.-A30. below)*
(A05.00) Reduction in Strength (Service Manpower)
(A06.00) Erroneous Induction or Enlistment
(A07.00) Early Separation Under Directed Programs
(A08.00) Discharge on Basis of Alien Status
(A09.00) Lack of Jurisdiction
(A10.00) Sole Surviving Son/Daughter or Family Member
(A11.00) Concealment of Arrest Record
(A12.00) Secretarial Authority
(A13.00) Discharge for Obesity
(A14.00) Discharge for Motion/Travel Sickness
(A15.00) Inability to Perform Duties Due to Parenthood
(A16.00) Discharge to Accept Commission
(A17.00) Discharge for Enlistment-Reenlistment
(A18.00) Physically Disqualified for Officer Candidate School
(A19.00) SM Erroneously Delivered Punitive Discharge Before Review Final
(A20.00) Discharge for Allergy to Clothing
(A21.00) SM Serving Constructive Enlistment with Defective Contract
(A22.00) Discharge for Pregnancy or Marriage
(A23.00) Discharge for Conscientious Objection
(A24.00) Marginal Performer Discharge (EDP/QMP): Non-Trainee
(A24.01/02) SM *not* properly Counseled by Command
(A24.03/04) SM met required Standards of Performance after award of MOS
(A24.05/06) SM *not* in Unit from which separated required Period of Time
(A24.07/08) SM did *not* consent to Discharge
(A24.09/10) Improper Counsel for Consultation (when required)
(A24.11/12) Statement submitted *not* considered
(A24.13/14) Not separated within specified Period of Time in Service
(A25.00) Marginal Performer Discharge (TDP): Trainee
(A25.01/02) SM *not* discharged within required Period of Time after Enlistment
(A25.03/04) Trainee Discharge *not* properly Characterized as Honorable
(A25.05/06) Trainee *not* properly Counseled by Command before Discharge
(A25.07/08) Statement/Rebuttal submitted *not* considered
(A26.00) Substandard Performance/Behavior (Petty Officer)
(A27.00) Substandard Performance/Behavior (Non-Petty Officer)
(A28.00) Condition/Medical Disability which interferes with Performance of duties, *not* a Physical Disability
(A31.00) Discharge for Physical Disability
(A32.00) Discharge (Characterization) as a Result of DRB Action
(A33.00) Discharge (Characterization) as a Result of other Official Board Action (e.g. Clemency & Parole, Correction of Military Records)
(A34.00) Discharge for Minority
(A35.00) Discharge for Dependency or Hardship
(A36.00) Discharge for Security Reasons
● (A40.00) *Discharge for UNSUITABILITY (See Specific Categories A41.-A48. below)*
(A40.01/02) Counseling Requirements *not* met or waived
(A40.03/04) Rehabilitative Requirements *not* met or waived
(A40.05/06) Mental status Evaluation (when required) not conducted
(A40.07/08) Requested Psychiatric or Psychological Report *not* conducted
(A41.00) Inaptitude
(A42.00) Personality Disorder (Old Character & Behavior Disorder)
(A42.01/02) Neuropsychiatric (NP) Evaluation *not* proper/present
(A43.00) Apathy
(A44.00) Enuresis
(A45.00) Alcohol Abuse
(A46.00) Homosexual Tendencies
(A46.01/02) No verified record of Homosexual Acts prior to or during Service
(A46.03/04) Did *not* Exhibit, profess or Admit to Homosexual Tendencies
(A46.05/06) Psychiatric/Psychological Evaluation (when required) *not* performed
(A47.00) Financial Irresponsibility
(A48.00) Unsanitary Habits
(A49.00)
● (A50.00) *Discharge for UNFITNESS (See Specific Categories A51.-A58. below)*
(A50.01/02) Counseling Requirements *not* met or waived
(A50.03/04) Rehabilitative Requirements *not* met or waived
(A50.05/06) Mental Status Evaluation (when required) *not* conducted
(A50.07/08) Requested Psychiatric or Psychological Report *not* conducted
(A51.00) Frequent Involvement with Civil or Military Authorities
(A52.00) Sexual Perversion
(A53.00) Drug Use, Sale, or Possession
(A54.00) Established Pattern of Shirking
(A55.00) Established Pattern of Failure to Pay Debts
(A56.00) Established Pattern of Failure to Support Dependents
(A57.00) Homosexual Acts
(A57.01/02) No confirmed proposal, solicitation, attempt or performance of Homosexual Acts
(A57.03/04) Isolated Incident stemmed from Immaturity, Curiosity or Intoxication
(A57.05/06) Psychiatric/Psychological Evaluation (when required) not conducted
(A58.00) Unsanitary Habits
(A59.00)
● (A60.00) *Discharge for MISCONDUCT (See Specific Categories A61.-A66. below)*
(A61.00) Conviction by Civil Authorities (Foreign or Domestic)
(A61.01/02) No Conviction which met UCMJ Punishment Standards
(A61.03/04) Discharged before Appeal Action completed
(A61.05/06) Discharge *not* in accordance with Policy for Non-U.S. Convictions
(A61.07/08) Mental Status Evaluation (when required) *not* conducted
(A61.09/10) Improper Discharge after Construction Waiver
(A62.00) Fraudulent Enlistment
(A62.01/02) Fraudulent Entry *not* substantiated
(A62.03/04) Mental Status Evaluation (when required) *not* conducted
(A62.05/06) Recruiter Misconduct
(A63.00) Prolonged Unauthorized Absence (Extended AWOL/Desertion)
(A63.01/02) Unauthorized Absence (AWOL/Desertion) *not* continuous 1 year of more
(A63.03/04) Mental Status Evaluation (when required) *not* conducted

(A64.00) Frequent Involvement with Civil or Military Authorities (See Procedural Elements under UNFITNESS A50.01-08)
(A65.00) Homosexual Acts (See Procedural Elements under UNFITNESS A50.01-08; and A57.01-06)
(A66.00) Drug Abuse (See Procedural Elements under UNFITNESS A50.01-08)
(A67.00)
(A68.00) Bad Conduct Discharge (BCD)
(A68.01/02) BCD not affirmed on Appellate Reivew
(A69.00) Discharge for Alcohol/Drug Rehabilitation Failure
(A69.01/02) SM was *not* Rehabilitative Failure
(A69.03/04) SM was discharged prior to Minimal Treatment
(A69.05/06) Discharge *not* properly characterized as Honorable
(A69.07/08) Improper Counsel for Consultation
● (A70.00) *Request for Discharge for GOOD OF SERVICE (GOS) for Conduct which rendered SM triable by CM (See Specific Categories A71.-A77. below)*
(A70.01/02) Charges *not* preferred
(A70.03/04) Offense charged, *not* punishable by a "Punitive Discharge"
(A70.05/06) SM did *not* request For GOS Discharge
(A70.07/08) SM not properly counseled by Counsel for Consultation
(A70.09/10) Request for Withdrawal of GOS Discharge *not* processed/considered
(A70.11/12) SM Could *not* Knowingly request GOS Discharge at the time
(A70.13/14) No UCMJ Jurisdiction over the Person
(A70.15/16) No UCMJ Jurisdiction over the Offense
(A71.00) Conduct Triable by CM: AWOL
(A72.00) Conduct Triable by CM: Larceny
(A73.00) Conduct Triable by CM: Assault
(A74.00) Conduct Triable by CM: Drugs
(A75.00) Conduct Triable by CM: DOLO
(A76.00) Conduct Triable by CM: Disrespect
(A77.00) Conduct Triable by CM: Other
(A78.00) Discharge for Inaptitude or Unsuitability (Discharges prior to April 1959)
(A79.00) Discharge for Undesirable Habits or Traits (Discharges prior to April 1959)
● (A80.00) *Officer Resignation (Involuntary)*
(A80.01/02) Officer did *not* tender Resignation
(A80.03/04) No Elimination Action initiated, when required
(A80.05/06) Request *not* forward to Military Department by GCM Authorities
(A81.00) Officer Elimination
(A82.00) Officer Expiration of Term of Service
(A83.00) Other (Not Specifically Covered)
(A84.00)

☐ Part D—Policy Changes Made Specifically Retroactive

(A85.00) *Drug Use/Possession (LAIRD Memorandum)*
(A85.01/02) Discharge based solely on Drug related Conduct
(A85.03/04) Discharge based solely on Drug Use/Possession
(A85.05/06) Discharge based on Sale, but mere Conduit Theory applies
(A85.07/08) Service Record Otherwise Satisfactory
(A86.00) *Personality Disorder (Old Character and Behavior Disorder)*
(A86.01/02) No NP Evaluation
(A86.03/04) No NP Evaluation diagnosing a Personality Discharge
(A86.05/06) NP Evaluation *not* conducted by Proper Medical Authority
(A86.07/08) No Clear and Demonstrable Reason for a Less Than Honorable Discharge
(A87.00)
(A88.00)
(A89.00)

EQUITY CONSIDERATIONS (CONTENTIONS, ISSUES OR CONSIDERATIONS)

☐ Part E—Policy Changes Not Specifically Retroactive

(A90.00) *Procedural*
(A90.01/02) Formal Notification of Separation Action
(A90.03/04) Opportunity to Respond (e.g. Submit Statements)
(A90.05/06) Opportunity for a Board Hearing
(A90.07/08) Right to Lawyer for Consultation
(A90.09/10) Right to Lawyer for Representation
(A90.11/12) Opportunity to Examine/Cross-Examine Witness(es)
(A91.00) *Policy*
(A91.01/02) Character of Discharge Received by SM is not now Authorized or Required when a SM is Discharged for the Same Reason or Conduct
(A91.03/04) Conduct for which SM was Discharged No Longer Provides an Authorized Basis for Separation

☐ Part F—(A92.00) Quality of Service

(A92.01/02) Conduct and Efficiency Ratings
(A92.03/04) Awards and Decorations
(A92.05/06) Letters of Commendation
(A92.07/08) Combat Service
(A92.09/10) Wounds received in Action
(A92.11/12) Record of Promotions
(A92.13/14) Rank/Responsibility Level at which SM served
(A92.15/16) Other Acts of Merit
(A92.17/18) Date and Period of Service which is Subject of DRB Review
(A92.19/20) Prior (Honorable) Military Service
(A92.21/22) Post Service Conduct (Good Citizenship)
(A92.23/24) Record of Non-Judicial Punishment (indicates isolated/minor offenses)
(A92.25/26) Record of Courts-Martial Convictions (indicates isolated/minor offenses
(A92.27/28) Record of Conviction(s) by Civil Authorities while in Service and part of Service Record (indicates isolated/minor offenses)
(A92.29/30) Record of Unauthorized Absences (indicates isolated/minor offenses)

☐ Part G—(A93.00) Capability To Serve (Factors Which Could Impair Ability To Serve)

(A93.01/02) Age and Maturity
(A93.03/04) Aptitude (Scores) and Education
(A93.05/06) Deprived Background
(A93.07/08) Marital/Family Problems
(A93.09/10) Personal Problems
(A93.11/12) Financial Problems
(A93.13/14) Discrimination: Religious
(A93.15/16) Discrimination: Racial
(A93.17/18) Drugs
(A93.19/20) Alcohol
(A93.21/22) Medical/Physical
(A93.23/24) Psychiatric/Psychological Problems (may include Situational Maladjustment)
(A93.25/26) Matters of Conscience
(A93.27/28) Waiver of Moral standards for Enlistment

☐ Part H—(A94.00) Other Equitable Considerations

(A94.01/02) Severity of Punishment (Civil or Military): Current Standards
(A94.03/04) Inaptitude ("Would but Couldn't")
(A94.05/06) Too Harsh: At Issuance, Discharge inconsistent with Standards of Discipline
(A94.07/08) Discharge in lieu of Court Martial: Although a Punitive Discharge was authorized, an Other Than Honorable Discharge was *too harsh* under the curcumstances
(A94.09/10) Multiple Minor Offenses (Multiplicity)
(A94.11/12) *Arbitrary and Capricious Command Actions* that Constitute a clear abuse of Authority, and which, although not amounting to Prejudicial or Legal Error, may have contributed to the Decision to Discharge or the Characterization of Service
(A94.13/14) Vietnam War Syndrome
(A94.15/16) Received Clemency Discharge
(A94.17/18) Completed Alternate Service or excused therefrom
(A94.19/20) Failed to complete Alternate Service but Reasonable Explanation
(A94.21/22) Homosexual Interest Self-Admitted
(A94.23/24) Homosexual Act(s) committed with express/implied Consent of an Adult(s)
(A94.25/26) Homosexual Act(s) off Military Installation
(A94.27/28) Homosexual Act(s) resulted from Duress
(A94.29/30) Drugs: Simple Possession (Small Amount)
(A94.31/32) Drugs: Use off Duty
(A94.33/34) Drugs: Use off Military Reservation
(A94.35/36) Drugs: No use after Exemption Granted
(A94.37/38) Drugs: No Sale-Trafficking

OTHER CONSIDERATIONS

☐ Part I (A99.00) *Administrative Actions Indirectly Related to Discharge Process*

(A99.01/02) Application for Conscientious Objector (C.O.) Status
(A99.03/04) Application for Hardship Discharge
(A99.05/06) Improper Enlistment
(A99.07/08) Improper Induction
(A99.09/10) Enlistment Option not Satisfied or Waived
(A99.11/12) Application for Compassionate Reassignment
(A99.13/14) Evaluation/Consideration for Physical Disability Discharge

☐ Part J Special Programs

(A00.00) *Presidential Proclamation (PP 4313) dtd 16 September 1974*
(A00.10) *Presidential Memorandum dtd 9 January 1977*
(A00.11/12) SM who applied for Clemency UP, PP 4313, and was wounded in Combat (Vietnam)
(A00.13/14) SM who applied for Clemency UP, PP 4313, and was Decorated for Valor (Vietnam)
(A00.20) *Special Discharge Review Program (SDRP)*
(A00.21/22) Tour in Southeast Asia or Western Pacific
(A00.23/24) Wounded in Combat
(A00.25/26) Decorated for Valor/Merit
(A00.27/28) Previous Honorable Discharge
(A00.29/30) Satisfactorily served 24 Months prior to Discharge
(A00.31/32) Completed Alternate Service or was excused in accordance with Presidential Proclamation 4313
(A00.33/34) Age, Aptitude, Length Of Service at time of Discharge
(A00.35/36) Education Level
(A00.37/38) Deprived Background
(A00.39/40) Personal Distress
(A00.41/42) Waiver to Enlist
(A00.43/44) Conscience
(A00.45/46) Drugs or Alcohol
(A00.47/48) Good Citizenship
(A00.49/50) Other factors
(A00.51/52) Discharge for Act(s) of Violence
(A00.53/54) Discharge for Act(s) of Dishonor
(A00.55/56) Discharge for Desertion in or from Combat Theater
(A00.57/58) Discharge for Offense(s) subject to Civilian Criminal Prosecution
(A00.59/60) Determination of Program Eligibility

APPENDIX 10D
MODEL REQUEST LETTERS

Following are three model letters that can be used to request DRB/BCMR decisions or regulations from the Reading Room. The appropriate letter(s) should be sent to: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520, The Pentagon, Washington, D.C. 20310.

* * *

LETTER I: To request 25 or fewer DRB/BCMR decisions and to insure a timely response, use the following letter.

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, DoD Dir. 1332.28, and the Reading Room Notice, 45 Fed. Reg. 37,717 (June 4, 1980). We request that you mail us copies of the DRB or BCMR decisional documents listed below.

Please provide us with these decisions as soon as possible, but in any event no later than ten business days after receipt of this request, as required by the FOIA.

The DRB or BCMR decisions that we request are: _____

_____

* * *

OPTIONAL: If your client has a hearing scheduled in the near future, state: "To avoid postponement of our client's hearing scheduled for _____, please process this request on a priority basis."

LETTER II: To request more than 25 DRB/BMCR decisions and to insure a timely response and waiver of fees, use the following letter. Tailor it to your organization.

* * *

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, DoD Dir. 1332.28, and the Reading Room Notice, 45 Fed. Reg. 37,717 (June 4, 1980). We request that you mail us copies of the DRB or BCMR decisional documents listed at the end of this letter. To the extent that this request asks for more than the 25 cases you routinely provide at no charge, we request that you waive fees for any costs associated with providing these documents to us.

Our request for waiver of fees is based upon the FOIA, 5 U.S.C. § 552(a)(4)(A), and Department of Defense regulations, 45 Fed. Reg. 80,502 (Dec. 5, 1980) (to be codified in 32 C.F.R. § 286.60). We meet the standard for waiver of fees set forth in these provisions for the following reasons. We estimate that the direct search and duplication costs for those copies beyond the 25 routinely provided free, pursuant to your Reading Room Notice, are below the level of the automatic fee waiver [$30.00 in search and duplication].

In addition, our office is a nonprofit organization dedicated to assisting Vietnam-era veterans to readjust to civilian society. Among the ways that we assist these veterans is by representing them in their applications before the Military Review Boards. We believe that release of these documents can be considered as primarily benefiting the general public.

Release of the requested documents is necessary in order for us to effectively represent our clients. After examining the Discharge Index to DRB/BCMR decisions and the military personnel records of our clients, we isolated those decisions which address issues of fact, law, or discretion that we believe are raised in our clients' cases.

Because our office is a nonprofit organization and has limited financial resources, payment by us of the cost of providing the requested documents would deplete our funds to the point that we could not continue to represent these veterans. Furthermore, these veterans are indigent and cannot themselves afford to pay for these documents.

Our clients have hearings scheduled before the Review Boards in the near future. Because the requested decisions are needed in order to effectively represent these clients at their hearings, we request that you waive fees and provide us with these documents as soon as possible but in any event no later than ten business days after receipt of this request. Should you decide not to waive fees for this request, please inform us of the person to whom we may appeal this decision.

The decisional documents that we request are: _____

_____

OPTIONAL: If your client has a hearing scheduled in the near future, state: "To avoid postponement of our client's hearing scheduled for _____, please process this request on a priority basis."

LETTER III: To request regulations from the Reading Room, use the following letter. Tailor it to your organization.

* * *

This is a request under the Freedom of Information Act, 5 U.S.C. § 552 DoD Dir. 1332.28, and the Reading Room Notice 45 Fed. Reg. 37,717 (June 4, 1980). We request that you mail us copies of the regulations listed at the end of this letter and that you waive fees for any costs associated with providing these documents.

Our request for waiver of fees is based upon the FOIA, 5 U.S.C. § 552(a)(4)(A), and Department of Defense regulations, 45 Fed. Reg. 80,502 (Dec. 5, 1980) (to be codified in 32 C.F.R. § 286.60). We meet the standard for waiver of fees set forth in these provisions for the following reasons. We estimate that the direct search and duplication costs for those copies are below the level of the automatic fee waiver [$30.00 for search and duplication].

In addition, our office is a nonprofit organization dedicated to assisting Vietnam-era veterans to readjust to civilian society. Among the ways that we assist these veterans is by representing them in their applications before the Military Review Boards. We believe that release of these documents can be considered as primarily benefiting the general public.

Release of the requested documents is necessary in order for us to effectively represent our clients. After examining the military personnel records of our clients, we believe that an analysis of the propriety and equity of those discharges requires access to the regulations listed below.

Because our office is a nonprofit organization and has limited financial resources, payment by us of the cost of providing the requested documents would deplete our funds to the point that we could not continue to represent these veterans. Furthermore, these veterans are indigent and cannot themselves afford to pay for these documents.

Our clients have hearings scheduled before the Review Boards in the near future. Because the requested regulations are needed in order to effectively represent these clients at their hearings, we request that you waive fees and provide us with these documents as soon as possible but in any event no later than ten business days after receipt of this request. Should you decide not to waive fees for this request, please inform us of the person to whom we may appeal this decision.

The names and service numbers of our clients, and the regulations that we need are: _____

_____

* * *

Insert the citation of the regulation and state the date of discharge of your client. Ask for the regulation in effect on that date as well as the current version.

OPTIONAL: If you have been able to narrow the issues you want to pursue in the regulations, you should consider additional details. For example: "The regulations are necessary to evaluate the propriety and equity of the client's discharge specifically regarding the adequacy of the drug rehabilitation measures taken [or] calculation of evaluation marks [or] possible abuse of discretion in discharging the client for misconduct rather than for unsuitability." *See* note 44 *supra.*

OPTIONAL: If your client has a hearing scheduled in the near future, state: "To avoid postponement of our client's hearing scheduled for _____, please process this request on a priority basis."

APPENDIX 10E
SAMPLE DRB DECISIONAL DOCUMENTS

UNITED STATES ARMY
DISCHARGE REVIEW BOARD
CASE REPORT AND DIRECTIVE

CASE #

** PART I **
** APPLICATION DATA **

NAME	SSN/ASN	ADDRESS:
		PHONE:
COUNSEL/REP: ORGN:		ADDRESS:
		PHONE:
NEXT-OF-KIN: SURV SPOUSE: LEGAL REP:		ADDRESS:
		PHONE:

TYPE DISCH	DATE DISCH	AUTH CH AR	DATE OF APPLICATION	DATE OF PRIOR REVIEW

TYPE APPLICATION: ☐ INDIV ☐ BD MOTION
REQUEST: ☐ RECHARACTERIZE ☐ MODIFY

** PART II **
** PERSONAL HISTORY DATA **

DOB	AGE AT ENTRY FIRST	AGE AT ENTRY LAST	CIV ED LEVEL ENTRY	CIV ED LEVEL DISCH	APTITUDE DATA AFQT	APTITUDE DATA GT	APTITUDE DATA MEN CAT

** PART III **
** SERVICE HISTORY DATA **

SECTION A
UCMJ AND DISCIPLINARY DATA

ART 15	DATE	OFFENSE
SCM		
SPCM		
GCM		

SECTION B
TIME LOST DATA

STATUS	TIMES	DAYS
AWOL/DFR		
CONF MIL AUTH		
CONF CIV AUTH		
EXCESS LEAVE		
TOTAL		

SECTION C
CONDUCT/EFFICIENCY/RATING

C&E/ER	MO/YR	MO/YR

SECTION D
AWARDS AND DECORATIONS

TYPE	LOCATION
VALOR	
MERIT	
SERVICE	
FOREIGN	

SECTION E
ASSIGNMENT/OVERSEA DUTY

UNIT	MO/YR	MO/YR	PLACE

SECTION F
PROMOTION/DEMOTION

FROM	TO	MO/YR	DUTY/REASON

SECTION G

SERVICE DATA				WAIVER			
ENL		IND Mos		MORAL		MEDICAL	MINOR
REENL		OAD Yrs		AWOL		MENTAL	OTHER

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CASE#

** PART III **
** SERVICE HISTORY DATA (con't)**

SECTION H TRNG/REHAB/ADMIN DATA	YES	NO	NA
COMPL BCT			
COMPL AIT			
ENL OPT SATIS			
ENL OPT WAIVED			
ASGD TOE UNIT			
ASGD IN PROS			
REHAB TRANS			
REHAB DRUGS			
RET TO DY FM RB			
DISCH FM RB/CTR			
DISCH TDP/EDP			
DISCH FM UNIT			

SECTION I MED/SJA/DISCH PROC DATA	YES	NO	NA
NP/MEN STAT EVL			
ENTRY PHYSICAL			
SEPAR PHYSICAL			
EPTS MED			
COUN FOR CONSULT			
COUN FOR REPRE			
GMC SJA REVIEW			
GMC CDR REVIEW			
SEP ORDER FILED			
DD 214 CORRECT			
CM CHGS PREF'D			
WAIVER ST'MNTS			

SECTION K BACKGROUND DATA	YES	NO	NA
MCL REC			
CIV REC			
FBI REC			
ART 32 INVEST'N			
WITNESS ST'MNTS			
CIV DRUG/ALCOHOL			
CIV CONV (EPTS)			
CIV CONV (IN SVC)			
CLEMENCY DISCH			
ALTERNATE SVC			
REENL BAR			
OTHER PERT DATA			

** PART IV **
** PRE HEARING REVIEW **

SECTION A
ANALYST ASSESSMENT

1. DISCH REASON: (a). REGS: CH____ AR____ (at sep), CH____ AR____ (now)
   (b). NARRATIVE:

2. SUMMARY OF FACTS AND CIRCUMSTANCES CONCERNING DISCHARGE:

3. SUMMARY OF PREHEARING EXHIBITS OR EVIDENCE SUBMITTED:

4. PREHEARING CONTENTIONS SUBMITTED WITH DD293 AND/OR BRIEF:

5. COMMENTS:

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SECTION B
APPLICABLE ELEMENTS

	ISSUES				
(A07.00) Elements Common All Discharges	ANAL	PRO		PANEL	
		YES	NO	YES	NO
_____,					
_____,					
_____,					
(A02.00) Elements common when SM has BD rights					
_____,					
_____,					
_____,					
(A03.00)to(A04.00) Spec ele pert to Ysn/disch					
_____,					
_____,					
_____,					
(A85.00)to(A89.00) Policy chgs spec retroactive					
_____,					
_____,					
_____,					
_____,					
_____,					
_____,					

	ISSUES		
(A90.00) Procedural changes not made retroactive.	PRO	PANEL	
		YES	NO
_____,			
_____,			
(A91.00) Policy chgs not retroactive			
_____,			
_____,			
(A92.00) Quality of service			
_____,			
_____,			
(A93.00) Capability to serve			
_____,			
_____,			
_____,			
_____,			
(A94.00) Other equity considerations			
_____,			
_____,			
(A99.00) Adm act indirect to disch			
_____,			

SECTION C
HE AND/OR PREREVIEW OFFICER EVALUATION

1. EVALUATION:

2. POSSIBLE ISSUES FOR BOARD CONSIDERATION: ☐ NONE. ☐ AS FOLLOWS:

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CASE #

** PART IV **
** PRE HEARING REVIEW (con't)**

SECTION C
HE AND/OR PREREVIEW OFFICER EVALUATION (con't)

3. REFERRED TO: ☐ MEDICAL ADVISOR; ☐ JAG ADVISOR; FOR:

SECTION D
MEDICAL PREHEARING COMMENTS

SECTION E
LEGAL PREHEARING COMMENTS

** PART V **
** SUMMARY OF HEARING **

SECTION A
ADMINISTRATIVE DATA

TYPE OF HEARING
☐ RECORDS ☐ HEARING EX
☐ PERSONAL ☐ TRAVEL PNL
☐ COUN/REP ☐ OTHER____

HEARING
SITE: _____
DATE: _____
N. E. SITE/DATE
SITE _____
DATE

APPEARANCE BY

	APPLICANT	COUNSEL
☐	YES	YES
☐	NO	NO
☐	NA	NA

SECTION B
STIPULATIONS

SECTION C
SUMMARY OF OPENING REMARKS

SECTION D
SUMMARY OF DIRECT EXAMINATION

SECTION E
SUMMARY OF WITNESS STATEMENT

SECTION F
SUMMARY OF EXHIBITS

SECTION G
SUMMARY OF CROSS EXAMINATION

SECTION H
SUMMARY OF CLOSING REMARKS

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CASE# | ** PART VI ** | ** CONTENTIONS AND ISSUES **

SECTION A
APPLICANT CONTENTIONS-BOARD FINDINGS

CONTENTIONS:
1.
2.
3.

FINDINGS:
1.
2.
3.

SECTION B
BOARD ISSUES-BOARD FINDINGS

ISSUES:
1.
2.
3.

FINDINGS:
1.
2.
3.

SECTION C
PRESIDING OFFICERS COMMENTS

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Case # | ** PART VII ** | **BOARD ACTION (con't)**

SECTION F
MINORITY REPORT

☐ NONE SUBMITTED ☐ SUBMITTED AS FOLLOWS:

MEMBER MEMBER

SECTION G
VERIFICATION AND AUTHENTICATION

FINDINGS AND RATIONALE VERIFIED: | HEARING SUMMARY AND BOARD ACTION AUTHENTICATED:

POST HEARING REVIEW OFFICER ALTERNATE SECY RECORDER

SECTION H
PRESIDENT ADRB RECOMMENDATION

☐ REFERRAL TO SECY/ARMY NOT REQUIRED (See Part VIII)
☐ REFERRAL TO SECY/ARMY FOR:
☐ MINORITY RPT DECISION ☐ POLICY CONSIDERATION
☐ SPECIAL INTEREST ☐ INFORMATION

COMMENTS:

PRESIDENT, ADRB

SECTION I
SECRETARY OF ARMY (or designee) DECISION

☐ NOT REQUIRED | ☐ APPROVE MAJORITY ☐ APPROVE MINORITY | ☐ RETURNED FOR REHEARING ☐ NEW FINDINGS

RATIONALE:

** PART VIII--DIRECTIVE **

TO: THE ADJUTANT GENERAL DATE:

The Army Discharge Review Board, established UP Sect 30, PL 346, 78th Cong, 22 June 1944 and codified in 10 U.S.C., Sect 1553, in the case of the applicant named in Part I finds, concludes, and decides as indicated.

As authorized by the Secretary of the Army, it is directed that actions specifie in Part VII be executed and the indivials, named in Part I be notified.

OFFICIAL | APPROVED

s/V. C GOMEZ LTC SEC/REC ADRB | s/WILLIAM E. MEBER COL PRESIDENT ADRB

EXHIBITS
A - ORDER APPOINTING BOARD D - INSTRUCTIONAL LETTER APPLICANT F - OTHER
B - APPL FOR REV OF DISCH E - SCHEDULE LTR TO APPLICANT G - OTHER
C - AFF., DEP., STMTS BY/FOR APPL

INDEX REFERENCE NUMBERS

DSA FORM 172, DISCHARGE REVIEW, 1 OCT 79

DEPARTMENT OF THE NAVY
NAVAL DISCHARGE REVIEW BOARD

REVIEW OF DISCHARGE
NAVSO 1900/5C (REV. 12-78)
Supersedes All Prev Editions
PART 1

ND-78-01091/771227
DOCKET NUMBER ASSIGNED
TSE: 1 6 (Y)
BRIEFED

REVIEW OF DISCHARGE OF (Name, Rate/Rank, SSN, Comp)	CITY/STATE
	San Francisco, CA
TYPE AND REASON/BASIS FOR DISCHARGE	DATE OF ISSUE
UD/UNFIT	15Jun62
DISCHARGE REGULATION	PLACE OF REVIEW
BUPERSMAN C 10311	San Francisco, CA

PRESENT:

APPLICANT: [X] YES [ ] NO REPRESENTATIVE ( ): [ ] YES [ ] NO

PROCEEDINGS RECORDED: [X] YES [ ] NO DATE OF REVIEW: 15Feb79

APPLICANT'S CONTENTIONS/ISSUES

AT THE BEGINNING OF THE HEARING THE APPLICANT INTRODUCED THE FOLLOWING CONTENTIONS/ISSUES AS THE ONLY CONTENTIONS/ISSUES THE APPLICANT IS REQUESTING THE BOARD TO CONSIDER:

Applicant's Issue (A): An honorable discharge is warranted because the applicant's overall service record is outstanding and without flaw for almost eighteen years of service, and under current standards for consenting homosexual acts he would have received nothing less than an honorable discharge.

Applicant's Issue (B): At the time of the investigation and proceedings leading to the applicant's discharge he was experiencing family and personal problems which strongly influenced his decision not to fight the less than honorable discharge.

Applicant's Issue (C): The intimidating and coercive atmosphere surrounding the investigation of the allegations involving the applicant resulted in questionable statements, personal harrassment and duress and his inability to avail himself of his rights in fighting the charges.

INDEX:
A57.00/A92.02/A92.01/A93.07/A93.09

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PART 2

ND-78-01091
DOCKET NR

REVIEW OF DISCHARGE OF (Name, Rate/Rank, SSN, Comp)

SUMMARY OF EVIDENCE

SUMMARY OF SERVICE:

DATE OF THIS ENL	ENLISTED FOR	AGE AT THIS ENLISTMENT	CREDITABLE SERVICE THIS ENLISTMENT (Year, month, day)			
18Mar58	6	32	04 02 28 (TL-None)			
GRADES HELD THIS ENLISTMENT			MOS (USMC)	YRS CIV EDUC	GCT	AFQT
HMI, HMCA			---	12	060	NIR
MIL BEH/CON	PROF PERF/PRO	OTA (USN)	PRIOR SERV - ACTIVE (Year, month, day)		INACTIVE	
3.78 (9)	3.69 (9)	3.74	09 09 02		03 04 03	
MILITARY DECORATIONS			UNIT/CAMPAIGN/SERVICE AWARDS			
GCM			ACM, Asiatic/Pacific/Middle Eastern CM, WWII Victory Medal, NDSM			

18Mar58	Jd	NAS ATLANTIC CITY, NJ
26Jun58	Jd	USNH PHIL PA
09Aug61	Jd	US NAVAL AIR FACILITY SIGONELLA, SICILY
10May62	SR	Applicant denies to ONI agent the accusations that he made homosexual advances to a SA.
12May62	SR	SA makes statement to ONI agent about homosexual advances made by applicant.
11May62	SR	Applicant denies to ONI agent accusations by ATR3 the applicant performed a homosexual act on him.
16May62	SR	Applicant made a signed sworn statement admitting performing a homosexual act on an ATR3. Also admitted paying an SN to perform homosexual acts on him when he was stationed in Phil, and that he received money from civilians for letting them perform homosexual acts on him.
21May62	SR	Applicant advised that he may be discharged under other than honorable conditions. Afforded rights and waived same.
21May62	CO	Recom dis for unfitness.

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REVIEW OF DISCHARGE OF *(Name, Rate/Rank, SSN, Comp)*

22May62	NP Eval	Homosexual activity started at age 15. Had about 20 homosexual experiences in the last 12 years all occurred after drinking and in all except the last one he was the passive partner. Does not think o himself as a homosexual and prefers sexual activity with females. Represents a rather passive personality with strong latent homosexual tendencies.
25May62	SR	CO recommended UD/UNFIT.
06Jun62	SR	CNP directs UD/UNFIT.
15Jun62	Dis	UD/UNFIT/BUPERSMAN C 10311.
MEDREC:		NPTD.

RECORDER'S NOTES: a. Received honorable discharge at the end of 4 previous tours.

SUMMARY OF APPLICANT'S CLAIM: Applicant contends that his discharge was and is inequitable and was improperly characterized.

SUMMARY OF DOCUMENTARY EVIDENCE:

Exhibit A. Character reference letter from fiance of applicant, undated and notarized.

Exhibit B. Character reference letter from brother of applicant, dated 12 Dec 1977, notarized.

Exhibit C. Character reference letter from friend of applicant, dated 19 Sept 1966.

Exhibit D. Employment verification letter from Manager dated 7 March 1978.

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REVIEW OF DISCHARGE OF *(Name, Rate/Rank, SSN, Comp)*

SUMMARY OF HEARING:

The Board convened at San Francisco, California on 15 February 1979.

Applicant appeared with counsel and presented the following matters with respect to the circumstances of his discharge.

Applicant related history of four prior honorable discharges. He cited exemplary performance reports during his period of service. He related what he described as a coercive atmosphere surrounding the investigation of his alleged homosexual acts. He denied participation in any acts and claimed he was pressured into an admission of the acts when confronted with the statements of others alleging his participation. He described personal family problems which added to his upset mental state at the time. He stated he signed a confession feeling he had no other choice and would be excused as it would be a first offense. He described his post service employment and personal life.

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ND-78-0109J
DOCKET NO.

REVIEW OF DISCHARGE OF *(Name, Rate/Rank, SSN, Corp)*

FINDINGS/CONCLUSIONS/REASONS UPON CONTENTIONS/ISSUES

APPLICANT ISSUE (A): An honorable discharge is warranted because the applicants overall service record is outstanding and without flaw for almost eighteen years of service, and under current standards for consenting homosexual acts he would have received nothing less than an honorable discharge.

FINDINGS:

(1) The applicant was discharged with an Undesirable Discharge as Good of the Service in lieu of trial by court martial for homosexual acts involving other Navy enlisted men (Class II Homosexual).

(2) Examination of the applicant's service record shows that his overall performance of duty was above average to outstanding.

(3) The homosexual acts or attempted homosexual acts of the applicant involved his actively soliciting the participation of a SN, USN in oral copulation for which the applicant paid the SN, and the participation of an ATR3 in oral copulation, plus the attempted solicitation of homosexual activity with a SA, USN.

CONCLUSION: That Applicant Issue (A) is Invalid.

REASON: Under current Secretary of Navy policy concerning the administrative discharge of homosexuals, an honorable discharge is normally given unless otherwise warranted by the record of service. However where aggravating circumstances exist an honorable discharge is not warranted. In this case the solicitation of members of the naval service by the applicant, who were considerably junior in rank to the applicant is considered aggravation.

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REVIEW OF DISCHARGE OF *(Name, Rate/Rank, SSN, Corp)*

FINDINGS/CONCLUSIONS/REASONS UPON CONTENTIONS/ISSUES

APPLICANT ISSUE (B): At the time of the investigation and proceedings leading to the applicant's discharge he was experiencing family and personal problems which strongly influenced his decision not to fight the less than honorable discharge.

FINDINGS:

(1) The applicant's testimony and exhibit "B" provided evidence that the applicant did have family problems at the time that he signed a statement admitting commission of homosexual acts.

CONCLUSION: That Applicant Issue (B) is Invalid.

REASON: The fact that the applicant chose not to have his case heard by an Administrative Discharge Board and chose instead to accept an Undesirable Discharge was a matter of free choice of the applicant. The fact that family problems existed does not change the fact that the applicant signed a statement admitting to the commission of numerous homosexual acts for which he was subject to discharge under less than honorable conditions.

APPLICANT ISSUE (C): The intimidating and coercive atmosphere surrounding the investigation of the allegations involving the applicant resulted in questionable statements, personal harassment and duress and his inability to avail himself of his rights in fighting the charges.

FINDINGS:

(1) The applicant testified that he was pressured into admitting his homosexual acts and that he suffered personal embarassment on base from snide remarks of other personnel.

(2) The applicant voluntarily waived all his rights to have his case heard by an Administrative Discharge Board and all other privileges available to him at that time.

CONCLUSION: That Applicant Issue (C) is Invalid.

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REVIEW OF DISCHARGE OF (Name, Rate/Rank, SSN, Comp)

USN

FINDINGS/CONCLUSIONS/REASONS UPON WHICH DECISION IS BASED

REASON: The applicant did not provide any evidence save for his unsubstantiated testimony that he was unable to intelligently exercise his privileges. There is no evidence that any impropriety existed in the processing of the applicant for discharge and conversely there is evidence in the record that the applicant voluntarily waived all of his rights to present his case to an Administrative Discharge Board.

CHECK ONE:

[X] All contentions/issues raised by the applicant have been addressed.

[ ] Any contentions/issues raised by the applicant which were not addressed, were not required to be addressed because a finding of valid on any or all of them would not grant the applicant any greater relief. However, any issues not addressed are either listed in Part I or attached to this document.

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REVIEW OF DISCHARGE OF (Name, Rate/Rank, SSN, Comp)

FINDINGS/CONCLUSIONS/REASONS UPON WHICH DECISION IS BASED

FINDINGS

I. Current Discharge: That the applicant was discharged on 15 June 1962 UD/UNFIT (Homosexual Acts) pursuant to Article C10311, Bureau of Naval Personnel Manual (BUPERSMAN)

II. Applicant's Request: That, in his application dated 20 Dec 1977, the applicant requested that his discharge be reviewed and upgraded to Honorable.

III. Conclusions on Contentions/Issues: That none of the issues in this case are valid.

CONCLUSION

The applicant's discharge should not be changed.

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REVIEW OF DISCHARGE OF *(Name, Rate/Rank, SSN, Corp)*

FINDINGS/CONCLUSIONS/REASONS UPON WHICH DECISION IS BASED

REASONS

(A) REASON/BASIS: The admission of the applicant to homosexual acts with other Navy personnel clearly showed that he was unfit for further Naval service.

(B) TYPE: The fact that the applicant solicited homosexual acts and performed homosexual acts with enlisted personnel of considerably disparate grade establishes that his service was under other than honorable conditions.

DECISION/RECOMMENDATION

NO CHANGE: *The applicant's discharge should remain:*	CHANGE: *The applicant's discharge should be changed to:*
UD/UNFIT BUPERSMAN C-10311	

BOARD MEMBERS

PRESIDING OFFICER	MEMBER
WILLIAM J. DICKINSON, COL,USMCR (A)	DONALD K. SULLIVAN, LCDR, USN (A)
MEMBER	MEMBER / RECORDER
WILLIAM S. ARNOLD, CAPT, USN (A)	JAMES F. BARNES, CAPT, USN (A)
MEMBER	PRESIDENT, NDRB
KENNETH BARNES, COL, USMCR (A)	

VOTES: *(A) Approve (D) Dissent*
UNANIMOUS DECISIONS: *Signed by Presiding Officer and Recorder*
NON-UNANIMOUS DECISIONS: *Signed by Presiding Officer and all Members*

DEPARTMENT OF THE NAVY
NAVAL DISCHARGE REVIEW BOARD

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REVIEW OF DISCHARGE OF *(Name, Rate/Rank, SSN, Corp)*

PRESIDENT, NDRB FINDINGS/CONCLUSIONS/REASONS

The Director, Naval Council of Personnel Boards, concurs with the conclusion of the Board for the reasons stated by the Board in the Record of Review of Discharge.

JOHN M. DE LANCEY
Rear Admiral, U. S. Navy
Director,
Naval Council of Personnel Boards

REVIEW OF DISCHARGE
NAVSO 1900/5C (REV.12-78)
SUPERCEDES ALL PREVIOUS EDITIONS
PART 7

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20350

ND-78-01091
DOCKET NR

REVIEW OF DISCHARGE OF *(Name, Rate/Rank, SSN, Corp)*

DECISION

3 OCT 1979

On reviewing the entire record, I specifically adopt findings (1) and (2) of the Board pertaining to Applicant's Issue (A). With regard to finding (3), I do not adopt it. I find instead that there was in fact no aggravation surrounding Mr. homosexual activity. Accordingly, I find that Applicant's Issue (A) is valid and that his discharge should be changed to honorable by reason of unfitness, and I so direct. In view of this action, I consider it unnecessary to address issues (B) and (C).

Edward Hidalgo
Assistant Secretary of the Navy
(Manpower, Reserve Affairs, & Logistics)

DUP81-10E

AIR FORCE DISCHARGE REVIEW BOARD HEARING RECORD

NAME OF APPLICANT (Last, First, Middle Initial)	GRADE	AFSN	SSAN

TYPE OF CASE	Yes	No	NAME OF COUNSEL	ADDRESS AND/OR ORGANIZATION OF COUNSEL
PERSONAL APPEARANCE				
COUNSEL				

MEMBERS SITTING	VOTE	DENY
COL ROBERT E. SPENCER	HON	
COL WILLIAM J. HENDERSON	HON	
COL RICEARD K. HILE	HON	
LT COL THOMAS F. WEST		X
CAPT ROBERT C. HINSON	HON	

CONTENTIONS	INDEX NUMBER
A93.02, A93.20, A92.22	A79.00

TYPE OF DISCHARGE RECEIVED		DISCHARGE DATE AND AUTH
	HONORABLE	AR 615-368 19 OCT 50
	GENERAL	
X	OTHER THAN HONORABLE CONDITIONS	
	BAD CONDUCT	

APPEALS FOR		OTHER (Specify)
X	HONORABLE	
	GENERAL	

EXHIBITS SUBMITTED TO BOARD		OTHER (Specify)
1	ORDER APPOINTING BOARD	EXHIBITS 5 - 8 SUBMITTED AT TIME OF HEARING.
2	APPLICATION FOR REVIEW OF DISCHARGE	
3	NOTIFICATION LETTER	
4	BRIEF OF PERSONNEL FILE	
	WAIVER	
	PRELIMINARY OFFER/REPLY	

Applicant's reasons/contentions and the Board's decisional rational are discussed on the attached AFHQ Form 0-454

CONCLUSIONS

THE AIR FORCE DISCHARGE REVIEW BOARD CONCLUDED THAT:

	THE APPLICANT SHOULD RECEIVE (Type of Discharge)
	THE DISCHARGE SHOULD NOT BE CHANGED
X	HONORABLE DISCHARGE

	UNDER THE PROVISIONS OF
X	AFM 39-12, CHAPTER 2, SECTION A.

REMARKS

CASE HEARD AT SAN FRANCISCO CA.

SIGNATURE OF RECORDER	SIGNATURE OF BOARD PRESIDENT
ROBERT C. HINSON, CAPT, USAF	ROBERT E. SPENCER, COL, USAF

INDORSEMENT — DATE: 9 Nov 76

TO:	FROM:
AFMPC/DPMDOAI Randolph AFB, Texas 78148	Secretary of the Air Force Personnel Council Air Force Discharge Review Board Washington, D.C. 20330

ADVISE THE APPLICANT, NEXT OF KIN, LEGAL GUARDIAN, OR OTHER OF THE BOARD'S DECISION. SEE REMARKS SECTION FOR ADDITIONAL INSTRUCTIONS

NAME AND ADDRESS OF PERSON TO BE NOTIFIED (If other than indicated on application)	DATE OF HEARING	CASE NUMBER
	5 OCT 76	FD-78-00436

AFHQ FORM JUN 75 0-2077 PREVIOUS EDITION WILL BE USED.

AIR FORCE DISCHARGE REVIEW BOARD DECISIONAL RATIONALE

CASE NUMBER: FD-78-00436

CONTENTIONS/ISSUES ADDRESSED: Applicant appeals for upgrade of his discharge to Honorable. He contends that: (See Attachment 1).

He made a personal appearance before the Regional Discharge Review Board, with counsel, in San Francisco, CA, on 5 Oct 76.

FINDINGS: The attached brief (Atch 2) contains pertinent data on the applicant and the factors leading to the discharge.

The applicant was provided full administrative due process. A Board of Officers, convened to make findings and recommendations, found that he repeatedly committed petty offenses not warranting trial by courts-martial. Failure to show profitable improvement to repeated attempts of rehabilitation. Therefore, a recommendation for an Undesirable Discharge because of unfitness.

After thorough legal review, the discharge authority concurred in the recommendation of the commander and ordered an Undesirable Discharge.

The applicant's contentions are addressed as follows: The Board finds the applicant's contentions without merit in that the record clearly indicates that the commander followed the specific guidlines of the existing directive. All counseling efforts ended with no recognizable improvements which clearly indicated his non-receptiveness to counseling. The record also indicates that he was advised of his rights from both his immediate counsel and the Board of Officers. There is some indication that alcohol was involved in some of the incidents however, the record is not clear to the precise degree.

CONCLUSIONS: The Board concludes that the discharge was consistent with the procedural and substantive requirements of the discharge regulations and was within the sound discretion of the discharge authority. However, the Board further concludes that the applicant's discharge should be changed to Honorable under the provisions of AFM 39-12, Chapter 2, Section A.

REASONS: Although the record is replete with incidents of misconduct, the Board finds the offenses to be relatively minor. The record is void to the extent of the applicant's alcohol consumption and to what degree alcohol was involved in each offense but there appears to be ample documentation that the applicant was frequently intoxicated. Post-service medical reports further document that the applicant was an acute and chronic alcohol abuser for many years. In the opinion of the Board, the applicant's youth, immaturity and inability to control his use of alcohol provides some mitigation in his behalf and therefore renders the applicant a good candidate for discharge for unsuitability.

2 Atch
1. Applicant's Contentions
2. Examiner's Brief

AFHQ FORM FEB 77 0-454

RESEARCH

10E/9

DEPARTMENT OF THE AIR FORCE
AIR FORCE DISCHARGE REVIEW BOARD
WASHINGTON, DC

(Former Pvt)

1. MATTER UNDER REVIEW: Appl rec'd UNDES Disch fr USAF 19 Oct 50

UP AR 615-368 (Unfitness) (Habits & traits of char) (repeated petty offenses, unclean habits - VD). Appeals for Hon.

2. BACKGROUND:

a. DOB: _____. Enlmt Age: 17-1/2. Disch Age: 19-2/12.

Educ: 3 Yrs H/S. ~~AGCT~~ AGCT: III 103. AQE: NA

P/C AFSC: 47131 - Apr Auto Mech.

b. Prior Sv: None

3. SERVICE UNDER REVIEW:

a. Enld as Pvt (grade) 22 Sep 48 (date), for 3 yrs. Svd: 2 Yrs 28 Das

~~(Enlisted)~~ (of which 2 Yrs 3 Das is AMS.

o/s: 1 Yr 8 Mos 11 Das, Japan (Jan 48 - Oct 50)
(amount, location & dates)

b. Grade Status: Pfc 17 Dec 48
Pvt 3 Sep 49 (Reason unknown)

c. Time Lost: Mil Conf 25 Das (2 occ)

d. Art 15's: (1) 12 Jul 49 - Off limits - apprehended in Japanese Restaurant. Restr 7 das.
(2) 12 Oct 49 - AWOL & insolence. Restr 7 das.
(3) 8 Feb 50 - Off limits in a drinking establishment. Restr 7 das.
(4) 28 Feb 50 - Failure to obey a standing order. Restr 7 das.
(5) 5 May 50 - AWOL 0001 - 1700 hrs 4 May 50. Restr 7 das.

e. CM: (1) Sum, 14 Apr 50, Yokota AB - Failure to pay debt to Mitake Hotel, in sum of 250 Yen, 26 Mar 50. Restr 30 das, forf $50.
(2) Sum, 1 Jun 50, Yokota AB - Wrongful possession of unauthd pass, 23 May 50. CHL 20 das, forf $30.
(3) Sum, 12 Sep 50, Yokota AB - AWOL 10-11 Sep 50. CHL 30 das, forf $30

f. Record of Sv:

14 Oct 48	1 Jan 49	Sheppard AFB	Ex	Ex
24 Feb 49	12 May 49	APO 328	Ex	Ex
2 Jul 49	31 Mar 50	APO 328	Poor	Sat
1 Apr 50	16 Jun 50	APO 328	Poor	Unsat
			(Comdr's Req for Disch)	
14 Aug 50	25 Sep 50	APO 328	Poor	Unsat

(Ret'd fr Japan to Hamilton AFB & dischd 19 Oct 50)

g. Awards & Dec: Occ Medal (Japan)

h. Stmt of Sv: TMS: NA

TAMS:

4. FACTS LEADING UP TO DISCHARGE:

On 16 Jun 50 Comdr recmd Bd Action UP AR 615-368. Undesirable traits of character & constant defiance of rules & regulations make him highly undesirable as a member of the service. Has been convicted by 2 SumCM & punished UP AW 104 on 5 occ. Constant source of trouble, no regard for rules & regs & does as he pleases. Untrustworthy, unreliable & a discredit to AF.

Rcd of incident rpts. (see atchd)

11 Sep 50 Amn appeared before B/O.
FDGS: Repeatedly committed petty offenses not warranting trial by courts-martial. Disregard for military authority, customs & courtesies. Unfavorable influence on his fellow Amn. Unclean habits (VD). Failure to show profitable improvement to repeated attempts of rehabilitation.

RECM: Undes disch because of unfitness.

23 Sep 50 Disch Auth approved fdgs & recm of Bd.

5. BASIS ADVANCED FOR REVIEW: Appln (DD Fm 293) dtd 14 Feb 78. "Petitioner contends that the discharge was and is inequitable".

egb/11 May 79

APPENDIX 10F

MISCELLANEOUS CITATIONS AND ADDRESSES

Discharge upgrade regulations:

- Department of Defense: DoD Dir. 1332.28; C.F.R. Part 70.
- Army DRB: AR 15-180; 32 C.F.R. Part 581.2.
- Army BCMR: Ar 15-185; 32 C.F.R. Part 581.3.
- Naval DRB: SECNAVINST 5420.174B; 32 C.F.R. Part 724.
- Naval BCNR: NAVEXOS P-473; 32 C.F.R. Part 723.
- Air Force DRB: AFR 20-10; 32 C.F.R. Part 865B.
- Air Force BCMR: AFR 31-3; 32 C.F.R. Part 865A.

Enlisted administrative separations regulations:

- Department of Defense: DoD Dir. 1332.14; 32 C.F.R. Part 41.
- Army: AR 635-200.
- Navy: BUPERSMAN Articles 3420175 through 3420270; 3840260; 3850120 through 3850260.
- Marine Corps: MARCORSEPMAN ch. 6.
- Air Force: AFR 39-10, AFM 39-12.

Indexes to service regulations:

- Department of Defense: DoD 5025.1-I, Directives System Quarterly Index.
- Army: DA PAM 310-1, Index of Administrative Publications.
- Navy: NAVPUBNOTE 5215, Consolidated Subject Index.
- Marine Corps: MCBul 5215, Directives Systems Checklist.
- Air Force: AFR 0-2, Numerical Index of Standard and Recurring Air Force Publications.

Freedom of Information Act regulations:

- Department of Defense: DoD Dir. 5400.7; 32 C.F.R. Part 286.
  Request: Director, Freedom of Information and Security Review, Office of the Assistant Secretary of Defense (Public Affairs), 2C757 The Pentagon, Washington, D.C. 20310.
  Appeal: Secretary of Defense, Office of General Counsel, Washington, D.C. 20310.
- Army: AR 340-17; 32 C.F.R. Part 518.
  Request: HQDA (DAAG-AMR-S), Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20314.
  Appeal: Secretary of the Army, Office of General Counsel, Washington, D.C. 20310.
- Navy/Marine Corps: SECNAVINST 5720.42; 32 C.F.R. Part 701.
  Request: Chief of Naval Records Management Division (OP-09B1), 5E613 The Pentagon, Washington, D.C. 20350.
  Appeal: Secretary of the Navy, Office of General Counsel, Washington, D.C. 20350.
- Air Force: AFR 12-30; 32 C.F.R. Part 806.
  Request: HQ USAF/DADF, Washington, D.C. 20330.
  Appeal: Secretary of the Air Force, Office of General Counsel, Washington, D.C. 20330.

Ordering DoD directives: 32 C.F.R. Part 289.2

(a) In addition to the subscription service on new and revised DoD Issuances outlined in § 289.1, individual copies of any other DoD Directive, Instruction, and Change listed in the Number Index portion of the DoD Directives System Quarterly Index (except those marked not releasable to the public) will continue to be made available on an "as ordered" basis, without charge to the requester.

(b) This service is provided to the public and Federal Agencies other than the Department of Defense by the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, Pa. 19120, Attention: Code 301. Issuances will be limited to one copy of each DoD Issuance per customer, and the number of individual items requested must be limited to five (5) or less.

Recommended resource material:

Litigation Under the Freedom of Information Act and Privacy Act (published by The Center for National Security Studies; available from VEP, 1346 Connecticut Ave., N.W., Washington, D.C. 20036).

CHAPTER 11
PREPARING A LIST OF CONTENTIONS

11.1 INTRODUCTION

Throughout this manual references are made to the "list of contentions" that the applicant submits. This is a term coined by the authors of this manual to refer to the arguments that an applicant makes in support of the administrative request for an upgrade and/or change in the reason for discharge.

A list of contentions is a powerful weapon that can be used to convince a Discharge Review Board (DRB), Board for Correction of Military Records (BCMR), or Secretarial Reviewing Authority (SRA) that it must either upgrade a discharge or explain in minute detail its reasons for denying a full upgrade and identify the evidence on which the denial was based. It is also the key to winning an upgrade in federal court, should the DRB or BCMR unlawfully deny an upgrade.

This powerful tool was created as a result of the settlement of *Urban Law Institute of Antioch College, Inc. v. Secretary of Defense.*[1] Because of this case, applicants have a weapon that parties before other administrative agencies do not have.

There is normally no need to inform people who represent applicants before administrative agencies how to state in writing the basic reasons why a client deserves relief. For most agencies, the advocate simply submits a legal brief and the agency then explains its decision accepting or rejecting the arguments presented in the brief or at the agency hearing.

Traditionally, however, the DRBs and the BCMRs have proceeded as if they were immune from the fundamental principle that agency adjudications must be supported by a statement of findings and reasons. For over 30 years, the DRBs and BCMRs almost never prepared statements of the rationale for their decisions; they merely stated that relief was denied or that an upgrade was granted.[2]

In 1977, the Department of Defense and the military services settled *Urban Law Institute*, which had been brought to end the secrecy in agency decision making. As part of that settlement, DoD and the services agreed to prepare and make publicly available a statement of findings and reasons in every DRB and BCMR decision and to include in that statement, in any case in which the requested full upgrade is not granted, an explanation for the Board's rejection of each of the applicant's contentions.[3] For the first year following the settlement, however, the DRBs rarely provided the required detail in their statements of findings and reasons. In particular, the Boards failed to address adequately, or ignored completely, the contentions made by the applicant in support of the discharge upgrade request.

The plaintiffs in *Urban Law Institute* were forced to return to court to secure compliance with the settlement agreement. The court responded by:

- Ordering the Department of Defense to review all complaints by members of the public that a DRB statement of findings and reasons does

[1] Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, No. 76-0530 (D.D.C. Jan. 31, 1977). *See* App. 11A *infra* (settlement agreement).

[2] *See generally* Stichman, *Developments in the Military Discharge Review Process*, 4 MIL. L. REP. 6001 (May-June 1976).

[3] *Urban Law Institute*, No. 75-0530 (D.D.C. Jan. 31, 1977); *see generally* Stichman, *supra* note 2.

not comply with the Stipulation of Dismissal in *Urban Law Institute* and requiring, if the statement is found to violate the stipulation, the DRB to prepare a new statement that complies with the agreement and, in some cases, provide the applicant involved with a new hearing;[4] and

- Ordering the military departments to send certified mail letters to the over 50,000 applicants denied relief since the settlement, informing them, among other things, of the court-created grievance mechanism.[5]

The DRBs, especially the Naval DRB, continued to violate the settlement even after the court ordered this remedial relief. Again, the key violations were failing to respond, either at all or in an adequate fashion, to the applicant's arguments for the discharge upgrade. Some of the DRB practices which have amounted to a failure to state findings and reasons for rejecting applicant contentions have included:

- Failing to list the applicant's contentions in the DRB statement as required by the *Urban Law Institute* settlement agreement.[6]
- Refusing to respond to the applicant's contentions, after having listed them verbatim, saying that the contentions were not clearly stated, even though they were.[7]
- Stating that it "noted the contention" or that it could not resolve the contention.[8]
- Using tactics which have made applicants and counsel feel forced to withdraw, reword, or otherwise alter their listed contentions, so that only a few general contentions were presented. The Naval DRB has found this advantageous because it can then avoid addressing the numerous specific contentions originally presented.[9]
- Unilaterally rewording the applicant's contentions when the applicant or counsel refuse to do so. Reworded contentions are usually a gross summary of the original contentions. Boards responding to only the summarized contentions leave the applicant uninformed of reasons for rejection of the original arguments.[10]

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[4] *See* § 11.6 *infra* (discussion of grievance mechanism).

[5] Order of August 23, 1978, *Urban Law Institute*, No. 76-0530 (D.D.C. Jan. 31, 1977) (reprinted at App. 11B *infra*).

[6] Stipulation of Dismissal (para. 5A(4)(a)), *id.*, provides that "if not otherwise listed in the statement of findings, conclusions, and reasons, a list of contentions and/or issues of fact, law or discretion presented by the applicant will be made public with the decision."

[7] Settlement Agreement (para. 5A(1)(e)), *id.* (reprinted at App. 11A *infra*), provides that a contention must be "clearly and specifically" stated before a DRB is required to state its findings, conclusions, and reasons for rejecting it. One of the many cases in which the Naval DRB avoided making findings, conclusions, and reasons on some of the applicant's contentions based on this rationale is ND 79-02356. Among the contentions which the Naval DRB refused to address in that case were the following:

> Applicant's undesirable discharge should be upgraded because the offer and acceptance of an administrative or "consent" discharge is so fundamentally unequal to the alternative UCMJ criminal process that it violated his right to the equal protection of the law as guaranteed in the U.S. Constitution.
>
> Applicant's undesirable discharge should be upgraded because the discharge authority erred in accepting his agreement to discharge since the offense charged did not qualify for punitive discharge under the MCM (1950).

The Naval DRB stated it did not have to address these contentions because 32 C.F.R. § 70 states that the objective of a discharge review is to examine the propriety and equity of the applicant's discharge, and because these contentions did not *specifically* address the propriety or equity of the applicant's discharge. This analysis is flawed for several reasons. First, contentions need not be tied to the propriety or equity of the applicant's discharge in order for the Board to be required to address them. Second, the merit of a contention is irrelevant to whether the contention meets the threshold requirement that it be "clearly and specifically" stated.

[8] *See* AD 77-10759; AD 7X-01920.

[9] *See* App. 11C *infra* (affidavits concerning Board pressure to change contentions).

[10] ND 77-01549 contains a typical example of an inappropriate DRB summary of an applicant's contentions. In that case, the applicant's attorney submitted a document entitled "Statement of Material Contentions" in which he listed the following nine contentions:

> 1. Passive aggressive personality is a "character-behavior disorder" within the provisions of BUPERSMAN Art. 3420180, 1 July 1969.
>
> 2. As a "character and behavior disorder" within BUPERSMAN Art. 3420180, "passive aggressive personality" could, within the discretion of the command, form the basis for separation for reasons of unsuitability.
>
> 3. The applicant was evaluated by CMDR [X], MC USN, on 27 July 1972 as having a passive aggressive personality.
>
> 4. CMDR [X] failed to submit to the applicant's command for consideration for possible unsuitability discharge pursuant to BUPERSMAN Art. 3420180 his evaluation of the applicant as a passive aggressive personality.
>
> 5. CMDR [X] had an obligation under BUPERSMAN Art. 3420180 to submit his evaluation of the applicant for exercise of command discretion.
>
> 6. The applicant's command did not exercise its discretion on the question of separation for reasons of unsuitability due to the character and behavior disorder of passive aggressive personality.
>
> 7. The failure to be properly considered for separation for reasons of unsuitability materially prejudiced the applicant in that it led to the unauthorized absence which resulted in his Undesirable Discharge.
>
> 8. The applicant's command failed to consider the evaluation and recommendation of Lt. [Y], that he be discharged as unsuitable pursuant to BUPERSMAN Art. 3420180.
>
> 9. The failure of the command to consider the evaluation and recommendation of Lt. [Y] materially prejudiced the applicant in the manner set forth in #7 above.

After failing to convince the applicant's counsel to reword or summarize his list of contentions, the Board issued its decision denying an upgrade and listed only one contention instead of the nine contentions that were actually submitted. The one contention fashioned by the Board was "the petitioner should have been discharged by reason of unsuitability." The Board's entire statement of findings and reasons for its conclusion that this manufactured contention was not valid was: "The decision as to whether or not a person is to be discharged for unsuitability is a command responsibility. In this case, the decision was made to retain the petitioner on active duty based upon information furnished by the medical authorities."

Thus, the applicant was never informed of the Board's position on any of his nine contentions. The Board could have concluded that these contentions did not warrant an upgrade in discharge for a variety of reasons. For example, the Board could have found, contrary to the applicant's contentions, that the evaluations of Commander X and Lt. Y were considered by the command in deciding whether to separate by reason of unsuitability, that the two evaluations did not support a finding that the applicant had a type of character and behavior disorder defined in Naval regulations, that other evidence in the applicant's record outweighed the evaluations of Commander X and Lt. Y, or that Contentions 1-6 and Contention 8

11.2 BENEFITS OF CAREFULLY PREPARING A COMPLETE LIST OF CONTENTIONS

The benefits to the applicant of a careful list of contentions are numerous.[11] Such a list will:

- Focus the Board's or the Secretarial Reviewing Authority's (SRA's) attention on the nature of the argument.
- Ensure that the Board or SRA will create a record revealing why it rejected the applicant's arguments. Such a record will help the applicant decide whether an appeal of the decision is likely to succeed.
- Increase the likelihood of avoiding the delay of a remand in cases in which the veteran seeks judicial review. One of the fundamental principles of judicial review of administrative agency action is that the agency must clearly disclose the grounds upon which it acted to permit effective court review of the case.[12] Following a request for judicial review of a DRB's, BCMR's, or SRA's decision, the court has been forced to remand because the DRB, BCMR, or SRA did not adequately explain its findings and reasons for rejecting the applicant's arguments, making effective review impossible.[13] In addition to causing further delay, a remand puts the Board on notice that the case definitely will be reviewed by a federal court; therefore, the Board will be more likely than usual to prepare findings and reasons that will be sustained by the court.
- Increase the chance of success if the veteran seeks judicial review of the DRB's, BCMR's, or SRA's decision to deny a full upgrade in discharge. Reviewing courts tend to give considerable deference to a military Board's decision. When the Board's rationale is shrouded in generalities, federal courts will often rule against the veteran, reasoning that the military agency knew what it was doing. If, however, the Board is forced to explain its reasoning in detail and to point out exactly where it disagrees with the applicant's argument, reviewing courts are much more likely to feel comfortable overturning the military Board's denial of an upgrade. A corollary to this principle is that the more specific Boards are forced to be, the more likely it is that Boards will prepare findings and reasons that courts will overturn. The Boards are composed mostly of nonlawyers and have many cases to decide. They are apt, when forced to be specific, to write findings and reasons that are not supportable. Furthermore, reviewing courts will only judge the sufficiency of the reasoning actually used by the Board; the courts will not turn a veteran down on the basis of reasoning that the agency could have used, but did not use, to support its decision.[14]

11.3 CASES IN WHICH A CAREFUL LIST OF CONTENTIONS SHOULD BE PREPARED

It is most important to take the time to prepare a careful list of contentions when a federal court is likely to overturn a DRB or BCMR decision denying a full upgrade. This usually will occur when:

- Military regulations, statutes, or constitutional provisions were violated in the process leading to the applicant's discharge;[15]
- The servicemember was discharged for conduct that did not affect "on the job" performance;[16]
- The veteran's in-service application for a conscientious objector, hardship, dependency, or medical discharge was improperly denied;[17]
- The veteran was improperly inducted, enlisted, or activated into service;[18]
- The decision of the discharge authority to separate the servicemember prematurely or to characterize the discharge derogatorily was arbitrary and capricious or was not supported by substantial evidence;[19]

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[10] (continued)
were correct, but, for any of a variety of reasons, that the failure to consider the two evaluations did not constitute prejudical error.

The grievance mechanism established by the court in *Urban Law Institute* can be used by any member of the public to obtain a complete statement of findings, conclusions, and reasons in cases such as the one discussed in this footnote. *See* § 11.5 *infra* (discussion of grievance procedure).

[11] *See* § 11.2 *supra* (discussion of *Urban Law Institute* procedures).

[12] *See* FPC v. Texaco, Inc., 417 U.S. 380, 396 (1974); Burlington Truck Lines v. United States, 371 U.S. 156, 167-68 (1962); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

[13] *See, e.g.,* Roelofs v. Secretary of the Air Force, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980); Matlovich v. Secretary of the Air Force, 591 F.2d 852, 4 MIL. L. REP. 2208 (D.C. Cir. 1978); Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967); Davis v. Brucker, 275 F.2d 181 (D.C. Cir. 1960); Olenick v. Brucker, 273 F.2d 819 (D.C. Cir. 1959); Martin v. Secretary of the Army, 455 F. Supp. 634 (D.D.C. 1977). In some cases in which a federal court has been faced with the task of reviewing a DRB or BCMR decision which lacked findings and reasons, however, the court has, instead of remanding, reviewed the Board's decision without giving it the deference normally accorded a military agency determination. *See, e.g.,* Werner v. United States, 642 F.2d 404, 9 MIL. L. REP. 2411 (Ct. Cl. 1981); Beckham v. United States, 392 F.2d 619, 183 Ct. Cl. 619 (1968).

[14] *See FPC*, 417 U.S. 380; *Burlington Truck Lines*, 317 U.S. 156; *SEC*, 318 U.S. 80. For example, in Local 814, International Brotherhood of Teamsters v. NLRB, 546 F.2d 981, 992 (D.C. Cir. 1976), the court stated that "[t]he 'post-hoc rationalization rule' . . . forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decision-makers. Thus, the rule applies to rationalizations offered for the first time in litigation affidavits . . . and arguments of counsel. . . ."

[15] *See* § 12.5 *infra* (procedural errors); § 12.7 *infra* (discharges based upon improperly considered military disciplinary actions); § 12.8 *infra* (improper performance ratings).

[16] *See* § 12.4 *infra* (limitations on the military's statutory authority to upgrade discharges).

[17] *See* § 12.6 *infra* (errors relating to failure to discharge for reasons other than cause or to acquire jurisdiction over a servicemember for purpose of issuing a less than honorable discharge).

[18] *Id.*

[19] The DRBs should upgrade discharges in these types of cases pursuant to the "propriety" standard contained in 32 C.F.R. § 70.6(b)(1). If the DRB does not upgrade the discharge in a case in which the decision of the discharge authority to separate prematurely or to characterize the discharge derogatorily was arbitrary and capricious

- Military policy established after the applicant was discharged requires an upgrade;[20]
- The applicant would have received a higher character of discharge had (s)he been discharged under current policies and procedures;[21] or
- A DRB, BCMR, or SRA denial of an upgrade in discharge to Honorable (or General) would be inconsistent with the result reached in one or more past DRB, BCMR, or SRA cases.[21a]

11.4 HOW TO PREPARE A LIST OF CONTENTIONS

As used in the settlement in *Urban Law Institute*, a "contention" is simply an issue of fact, law, or discretion which the applicant or counsel presents in support of an application or counsel presents in support of an application and which (s)he believes warrants, either by itself, or in combination with one or more other contentions, a change in the character of discharge, the reason for discharge, or both. An issue of fact may be something that is obviously true and with which the Board will immediately agree, because it is reflected clearly in the applicant's military record; the fact that an applicant entered service at the age of 17 would be such a contention. An issue of fact can, on the other hand, be something with which the Board may well disagree, such as the contention that "the applicant's offense of July 19, 1963 was caused by his addiction to heroin."

Similarly, an issue of law may be one with which the Board will obviously agree. For example, a contention may simply quote an Army regulation verbatim.

There is no particular form that a contention must take. The only requirement is that it be clear and specific.[22]

Contentions may be presented either orally or in writing. It is strongly urged that applicant and counsel prepare a written statement of contentions as a separate document rather than including the contentions in a legal brief. This will minimize the possibility that the DRB, BCMR, or SRA will overlook a contention.[23] At the time of the writing of this manual, the military departments were contemplating creating a form on which applicants and counsel must list their contentions. If given such a form, an applicant should either list every contention on the form, or use the form only to refer the Board to another document which contains the list of contentions.[24]

The following principles apply to the concept of contentions under the *Urban Law Institute* settlement agreement:

- There is no limit to the number of contentions that an applicant may submit;
- An applicant may alter his/her contentions at any time before the DRB, BCMR, or SRA closes the case to reach a decision;
- The military has agreed that DRB staff and Board members will not request, suggest, or instruct an applicant or counsel to reword, withdraw, or otherwise alter or amend any of the applicant's contentions;[25] and
- One sentence presented by the applicant may contain many issues of fact, law, or discretion (*i.e.*, one sentence may contain many contentions).

It is strongly recommended that each issue of fact, law, or discretion be listed as a separately numbered contention. The list of contentions will therefore resemble the proposed findings of fact and conclusions of law that are often submitted to administrative agencies and to courts. It is also urged that the building block approach to contentions be used. In other words, each logical step of each major argument made by the applicant should be submitted in a separately numbered contention. For example, in a case alleging that military regulations were violated in the process leading to an applicant's discharge, the following types of contentions should be made, in the order given:

- Contentions showing exactly what the regulations require;
- Contentions showing that the regulations applied to the applicant and citing the relevant parts;
- Contentions interpreting the regulations, if necessary, and identifying, as a logical result

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[19] (continued)
or unsupported by substantial evidence, the federal courts will provide relief. *See* Matlovich v. Secretary of the Air Force, 591 F.2d 852, 4 MIL. L. REP. 2208 (D.C. Cir. 1978); Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972).

[20] An example of such a policy is the so-called Laird Memo, by which most servicemembers who were issued Undesirable Discharges for personal use or possession of drugs are given upgrades to at least General Discharges. *See* § 15.2 *infra*.

[21] *See* Ch. 21 *infra*.

[21a] *See* § 11.4.2.2 *infra* (sample list of contentions). Other sample contentions can be found in relevant chapters throughout this manual.

[22] Paragraph 5A(1)(e) of the *Urban Law Institute* settlement (reproduced in App. 11A *infra*). The authors of this manual expect that shortly after this manual's publication, amendments to the uniform standards and procedures (32 C.F.R. Part 70) will clarify the requirements for the form of an applicant's contentions. These amendments will be reported in the *Veterans Rights Newsletter* (formerly *Discharge Upgrading Newsletter*).

[23] The authors of this manual expect that shortly after this manual's publication, amendments to the uniform standards and procedures (32 C.F.R. Part 70) will address the circumstances under which the DRBs must address contentions that are not presented in writing and are not formally labeled as contentions. It is expected that these amendments will give DRBs broad discretion to ignore contentions that are not submitted in writing and labeled as contentions. These amendments will be reported in the *Veterans Rights Newsletter* (formerly *Discharge Upgrading Newsletter*).

[24] The authors of this manual expect that amendments to the uniform standards and procedures (32 C.F.R. Part 70) will require the DRBs to provide applicants with a form on which to specify their contentions. These amendments will be reported in the *Veterans Rights Newsletter* (formerly *Discharge Upgrading Newsletter*).

[25] The authors of this manual expect that this agreement will be contained in amendments to the uniform standards and procedures (32 C.F.R. Part 70) which will be promulgated shortly after this manual's publication. These amendments will be reported in the *Veterans Rights Newsletter* (formerly *Discharge Upgrading Newsletter*).

of the above contentions, the specific actions required in the applicant's case;

- Contentions alleging that each of the factors necessary to show that the regulations were violated and referring specifically to the facts in the applicant's case;
- Contentions stating that the regulations were violated;
- Contentions that help to show that there is substantial doubt that the discharge would have remained the same if no error had been made;[26]
- Contentions as to prejudicial error and impropriety;
- Contentions as to the relief required if a discharge is improper; and
- Contentions that the error rendered the discharge inequitable.[26a]

While preparation of such a detailed list is time consuming and is not absolutely necessary, it is recommended because it will help to ensure that the DRB or BCMR will provide detailed findings and reasons.

11.4.1 CONTENTIONS AS TO THE RELIEF REQUIRED IF A DISCHARGE IS IMPROPER

In cases in which the applicant argues that there was legal error, contentions should be included concerning the relief required if the Board finds the discharge improper. The following types of contentions should be used for arguing the appropriate relief:

1. Because the applicant's discharge was improper, the DRB must recharacterize the applicant's discharge to Honorable. *See* Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980); Dilley v. Alexander, 627 F.2d 407, 8 MIL. L. REP. 2324 (D.C. Cir. 1980).

2. If the DRB rejects the last contention, then, because the applicant's discharge was improper, the DRB must determine the character of the applicant's discharge by applying the standard used for those discharged at expiration of term of service (ETS), assuming the applicant received exemplary performance ratings from the time of the prejudicial error until ETS. *See* Carter v. United States, 213 Ct. Cl. 717 (1977); AD 77-00348; AD 77-07130; Roelofs v. Secretary of the Air Force, 628 F.2d 594, 598-99, 601 n.36 (D.C. Cir. 1980).

3. At the time the applicant was discharged, the regulation for determining the character of discharge for those discharged at ETS [cite the regulation] provided that [quote relevant provisions].

4. If the standard for determining the character of discharge of those separated at ETS at the time of the applicant's discharge is applied to the applicant's service record, assuming the applicant received exemplary performance ratings from the time of the prejudicial error until ETS, the applicant would receive an Honorable Discharge.[27]

5. Because of the validity of the last contention, and because the applicant's discharge was improper, the applicant's discharge should be recharacterized to Honorable.

11.4.2 CONTENTIONS CITING PAST BOARD DECISIONS

Often, an applicant or counsel will find past Board decisions granting upgrades in discharge cases similar to the applicant's. Citing these cases to the Board can help persuade it to upgrade the applicant's discharge. If the Board denies the upgrade, citation of these past decisions to a federal court might persuade it to upgrade the discharge.

Some of the Boards have maintained that they do not have to decide cases before them in a consistent fashion. In an apparent attempt to discourage applicants from citing past Board decisions, these Boards have refused to distinguish cases cited to them, except when the applicant or counsel has presented a carefully written contention. Because it is sometimes difficult to ensure that Boards will address past decisions, and because use of these decisions can greatly

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[26] This type of contention is unnecessary if the applicant was denied a fundamental right, such as the right to an administrative separation hearing or to counsel, since this type of violation is so serious that it is automatic (*per se*) prejudicial error. An error which is prejudicial *per se* renders the discharge improper automatically, eliminating the need to speculate as to the likelihood of a derogatory discharge had the error not occurred.

[26a] *See* § 12.1.2 *infra* (sample contentions for case in which military regulations were violated in process leading to applicant's discharge).

[27] *See* § 5.4 *supra* (regulations regarding the character of discharge appropriate for those separated at expiration of the normal term of service). Usually, they mandate Honorable Discharges for servicemembers whose performance ratings exceed a certain level. *See* § 7.3 *supra*; § 12.8 *infra* (discussions of the method of evaluating performance ratings); § 12.1.2 (contentions concerning Army ETS regulation in effect from 1955 to 1975).

Normally, the applicant should cite the regulation in effect at the time (s)he was discharged. In many cases, however, the current regulation should also be cited because it contains a favorable standard. At the time of this manual's publication, the Department of Defense had proposed to amend 32 C.F.R. § 41 to require that current servicemembers from each military department receive an Honorable Discharge if separated at expiration of term of service. The Air Force already has such a regulation. *See* Change IMC 80-1 (June 20, 1980) to AFR 39-10 8 MIL. L. REP. 4028. By adding the following contentions, Air Force applicants and, if DoD finally adopts its proposed revision, applicants from the other services can help ensure that the DRB will upgrade the discharge to Honorable:

- [Cite the current ETS regulation] differs in material respects from the policies and procedures under which the applicant was discharged and represents a substantial enhancement of the rights afforded a respondent in such proceedings in that it requires an Honorable Discharge be issued to any servicemember separated at expiration of term of service, whereas prior regulations permitted issuance of a General (Under Honorable Conditions) Discharge to servicemembers discharged for this reason;
- There is substantial doubt that the applicant would have received a less than honorable discharge if this current standard had been in effect at the time the applicant was discharged because this current standard requires an Honorable Discharge and the DRB must determine the character of the applicant's discharge by applying the standard used for those discharged at ETS; and
- Because of the validity of the last two contentions, a less than Honorable Discharge is inequitable within the meaning of 32 C.F.R. § 70.6(c)(1).

The DoD regulations that are finally adopted will be reported in the *Veterans Rights Newsletter*.

increase the likelihood of an upgrade in federal court, this section describes how to present past Board decisions in contentions.

11.4.2.1 Position of the Boards When Past Cases Are Cited

It is an elementary tenet of administrative law that an agency must either be consistent with its own past decisions or explain its departure from them.[28] The Department of Defense (DoD) has recognized that this principle applies to DRBs. It therefore has strongly encouraged them either to upgrade a discharge or to explain the distinguishing factors when an applicant contends that an upgrade is compelled because the Board granted an upgrade in an earlier, similar case.[29]

The Army DRB now appears to follow DoD's instructions on this matter.[30] As of this writing, however, the Navy and Air Force DRBs are still resisting compliance with DoD instructions and the rule of law. Usually, in a case in which the applicant contends that an upgrade is warranted because of a similar DRB decision rendered in the past, these two Boards state that past decisions have no precedential value, although they sometimes make a half-hearted attempt to distinguish the past Board decisions that are cited.

Despite the reluctance of some of the Boards to be consistent with past decisions, the importance of finding cases that are similar to the applicant's and of preparing careful contentions based on these cases cannot be overestimated. Very often, cases can be found in which the veteran's record of service was inferior to the applicant's, yet the veteran in the earlier case received an upgrade to Honorable. Past Board decisions can also be cited for their rulings on issues of law. While the Boards may not see the need to be consistent with past cases, federal courts will be more likely to upgrade a discharge if they are convinced that the Boards have upgraded similar discharges in the past. Indeed, a court may grant an upgrade on the sole ground that the DRB has not been able to find a reasonable basis on which to distinguish a past Board decision cited by the applicant.

11.4.2.2 How to Prepare Contentions Citing Past Board Decisions

Since many Boards are reluctant to distinguish past Board decisions, it is not sufficient merely to cite a past Board decision. Separate contentions should be prepared when past decisions are cited. The two reasons for citing a past Board decision are:

- To urge the Board to upgrade the applicant's discharge because it did so in case X, which was similar in all relevant respects to the applicant's; or
- To urge the Board to resolve a particular issue of fact, law, or discretion in the same manner as it did in case X, even though case X isn't necessarily relevant to the applicant's case in any other respect.

In the first type of case, counsel should, at a minimum, contend that:

> #. The conclusion that the applicant's discharge should not be recharacterized to Honorable would violate due process and fundamental principles of administrative law because it would be inconsistent with the Discharge Review Board's decision to upgrade to Honorable in each of the following cases which are similar to the applicant's case in all relevant respects: [cite cases and attach copies].

The contention above can be improved by being more specific about the cases. A more specific set of contentions follows:

> ISSUES OF FACT, LAW, OR DISCRETION RELATING TO APPLICANT'S CLAIMS REGARDING OTHER DRB DECISIONS IN SIMILAR CASES
>
> Issues of Fact
>
> 1. In cases _____
>
> _____
>
> (copies attached), the Board upgraded each of

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[28] *See* Waterways Freight Bureau v. ICC, 591 F.2d 947 (D.C. Cir. 1977); Garrett V. FCC, 513 F.2d 1056, 1060 & n.26 (D.C. Cir. 1975); United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[29] In an August 25, 1977, memorandum to the General Counsel of the Army, Navy, and Air Force from the Office of General Counsel of the Department of Defense (on file with National Veterans Law Center) the Assistant General Counsel, stated that:

> With respect to the issue of precedent in actual Board cases, paragraph 5.1.(1)(d)(iii) [of the *Urban Law Institute* Stipulation] requires the Discharge Review Boards (DRB's) [*sic*] to address fully specific contentions of applicants. For example, when an applicant contends that a DRB must grant an honorable discharge in his case because the facts of the case are similar to those in an earlier case in which the Board granted such relief, the Stipulation requires the DRB to include findings, conclusions, and a reasoned statement for its rejection if the contention is rejected and an honorable discharge denied. In such a case, a conclusory statement that DRB decisions are not precedential or that they have no bearing on later decisions without any discussion of distinguishing facts, differing equities, or changes in policy between decisions will probably lead to further litigation. Accordingly, the General Counsel strongly encourages the DRB's [*sic*] to point out distinguishing characteristics in cases where the applicant makes a precedential contention.

The courts also recognize that this principle applies to the BCMRs. *See, e.g.,* Buchanan v. United States, 621 F.2d 373, 8 MIL. L. REP. 2252 (Ct. Cl. 1980).

[30] SFRB, Memo 2-78 (Feb. 10, 1978), 44 Fed. Reg. 25,092-93 (April 27, 1979) stated:

> Contentions of precedent can[not] be ignored, nor does it suffice to answer such a contention with a conclusory statement that prior DRB decisions have no bearing in consideration of the case at hand. . . . applicants may make proper use of prior decisions to help them in persuading the panel to decide similar cases in a similar way . . . there should be a discussion in the finding of distinguishing facts, differing equities, changes of policy and the like which make the case at hand different from the case cited. Given the broad equitable powers at the Discharge Review Board, and the widely varying circumstances of the cases considered, distinguishing factors among cases are normally the rule rather than the exception. This will be particularly true when the cases from other services are cited.

the applicant's discharges to Honorable and in each case:

(a) the servicemember was discharged for the good of the service to avoid trial by court-martial for wrongful possession and use of at least 0.25 ounces of marijuana;

(b) the servicemember had creditable service of less than three years;

(c) the servicemember had average military behavior and conduct marks of less than 3.56, average proficiency/performance marks of less than 3.56, and overall trade average of less than 3.58; and

(d) the servicemember either did not serve in Vietnam or served there less than 16 months.

2. The applicant here:

(a) was separated from military service for the good of the service to avoid trial by court-martial solely for wrongful possession and use of approximately 0.25 ounces of marijuana;

(b) had over three years and two months of creditable service;

(c) had average military behavior and conduct marks of 3.56, average proficiency/performance marks of 3.56, and overall trade average of 3.58; and

(d) served in Vietnam for approximately 16 months.

Issues of Law

3. Due process and fundamental principles of administrative law require that the Board grant the same degree of relief to applicants who are similarly situated.

4. When evaluated under the standards used by the DRB to review discharges, the relevant facts in the applicant's case, including, but not limited to, those discussed in Contention 2 above, warrant granting an Honorable Discharge to at least the extent as do all the relevant facts relied upon by the DRB in upgrading to Honorable in each of the cases cited in Contention 1.

5. The applicant's discharge should be upgraded to Honorable because of the validity of Contentions 3 and 4.

A sample contention in which a past Board decision is cited to support a determination that is favorable to the veteran on an issue of law follows:

#. A DRB determination that two nonjudicial punishments constitute "frequent involvement of a discreditable nature with military authorities" within the meaning of regulation X would violate due process and fundamental principles of administrative law, because it would be inconsistent with the following Board decisions holding that two nonjudicial punishments do not constitute "frequent involvement . . .": _____.

Another example, involving the discharge review standard requiring application of "current standards," follows:

#. A DRB determination that the Army's current regulations on grading the discharges of those separated for character and behavior or personality disorders (a) do not "differ in material respects" from pre-1978 Army discharge regulations for such disorders, or (b) do not "represent a substantial enhancement of the rights afforded a respondent in such proceedings" within the meaning of 32 C.F.R. § 70.6(c)(1) would violate due process and fundamental principles of administrative law, because it would be inconsistent with the following Board decisions applying 32 C.F.R. § 70.6(c)(1) to these Army regulations: _____.

11.4.3 CONTENTIONS IN CASES BEING REVIEWED BY THE SECRETARIAL REVIEWING AUTHORITY

When a Board decision is being reviewed by the SRA,[30a] the applicant or counsel should submit a new statement of contentions to the SRA. These new contentions should state that each of the previous contentions is being realleged and should explain why the opinions adverse to the applicant are erroneous and should not be accepted by the SRA.[31]

The objective in submitting new contentions is to prevent the SRA from merely adopting the opinions adverse to the applicant without even stating why they have been adopted. Examples of contentions which should accomplish this result are:

#. The minority of the Board incorrectly concluded that there were "aggravating circumstances" involved in the applicant's discharge for homosexual acts because [insert explanation].

#. The finding of the majority of the Board that the applicant intended to sell the marijuana found in his possession is against the substantial weight of evidence before the Board, in that [list all of the evidence contradicting an attempt to sell] and in that the only evidence supporting the finding was [list any evidence supporting an attempt to sell].

11.5 RECOURSES IF THE BOARD OR SECRETARIAL REVIEWING AUTHORITY DOES NOT ADEQUATELY ADDRESS THE CONTENTIONS

There are three situations in which an applicant and counsel suffer from the fact that a DRB, BCMR, or SRA has not prepared an adequate statement of

[30a] *See* § 9.2.15 *supra* (preparing a case for SRA review).

[31] The following opinions are adverse to the applicant: the statement of findings, conclusions, and reasons of the majority of the Board when the majority has voted to deny the applicant a full upgrade in discharge; the statement of findings, conclusions, and reasons of the minority of the Board, when the minority has voted not to grant a full upgrade in discharge; and recommendations made to the SRA that are unfavorable to the applicant.

findings, conclusions, and reasons for the decision in a case:

- The applicant may obtain counsel after (s)he has already applied to a Board and been denied relief. The previous Board decision in the veteran's case may not have been supported by an adequate statement of findings, conclusions, and reasons;
- In researching past Board decisions in order to prepare the applicant's case, counsel may find decisions that appear to be helpful but are supported by only a general or conclusory statement of findings, conclusions, and reasons, thereby making it difficult to prove to the DRB that the decision cannot be distinguished from the applicant's case; and
- After presenting the case to the Board, the decision received is not supported by an adequate statement of findings, conclusions, and reasons.

To obtain a more detailed statement in any of the above circumstances, the veteran or counsel can use the Department of Defense (DoD) grievance procedure established in accordance with the 1978 court order in *Urban Law Institute*.[32]

11.5.1 DEPARTMENT OF DEFENSE (DOD) GRIEVANCE PROCEDURE

The DoD grievance procedure is designed to resolve complaints that particular DRB or SRA statements of findings, conclusions, and reasons do not comply with the settlement agreement in the *Urban Law Institute* case. The procedure provides that:

- Any member of the public may use the grievance procedure. The individual complaining does not have to be a DRB applicant or the representative of a DRB applicant.
- An individual can complain about *any* DRB or SRA decision. Thus, one DRB applicant can file a complaint about the decision in the case of a different DRB applicant.
- There is no time limit on when a complaint must be filed; however, the complaint must concern a statement issued on or after April 1, 1977, when the settlement agreement in *Urban Law Institute* went into effect.
- Applicants denied a full upgrade in discharge under the 1977 Special Discharge Review Program (SDRP)[32a] on the basis of a mere review of the records, rather than a hearing, can reopen the case and obtain a new review under the SDRP's liberal criteria if a successful complaint about the adequacy of the SDRP statement of findings, conclusions, and reasons is filed.[33]

To use the complaint procedure, the veteran or counsel should write a letter to the Department of Defense,[34] stating as specifically as possible why the DRB or SRA statement of findings, conclusions, and reasons is believed to violate the *Urban Law Institute* requirements[35] and enclosing a copy of the decision at issue.

It should take no more than two months for DoD to respond to a complaint. If DoD agrees that there is a violation, copies of a new DRB or SRA statement of findings, conclusions, and reasons will automatically be prepared and sent to the individual who filed the complaint, the applicant involved in the case, and that applicant's representative, if any. If the violation

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[32] *See* 45 Fed. Reg. 72,249 (Oct. 31, 1980). *See* App. 11B *infra* (court order requiring creation of the DoD grievance mechanism). During the infancy of the grievance mechanism, DoD did not adequately respond, and some complaints went unanswered for over a year. Subsequently, DoD assigned lawyers to review these complaints. *See* 44 Fed. Reg. 62,929 (Nov. 1, 1979). The problems in DoD's handling of complaints should be resolved by the time this manual is published, and quick resolution of complaints should be possible.

[32a] *See* Ch. 23 *infra*.

[33] *Urban Law Institute*, No. 76-0530 (D.D.C. Aug. 23, 1978) (order) requires this result:

> For any decisional document that is determined to violate the Stipulation [of Dismissal settling the *Urban Law Institute* case in 1977], a new statement of findings, conclusions and reasons shall be prepared which complies with the Stipulation and which applies the discharge review standards in effect at the time the original decisional document was prepared. . . . For those new statements that replace a decisional document for which the applicant was given an opportunity to request a *de novo* hearing, applicant and counsel shall be notified of the right to request a *de novo* hearing under the discharge review standard in effect at the time the original decisional document was prepared. . . .

Since all Special Discharge Review Program applicants who were denied a full upgrade in discharge after their record review were given an opportunity to request a *de novo* hearing, these applicants qualify for new *de novo* hearing now if they successfully use the grievance procedure for their SDRP statements of findings, conclusions, and reasons.

[34] Army: Office of the Assistant Secretary of Defense (MRA&L/MPP), ATTN: Discharge Review — Army, Pentagon, Washington, D.C. 20301.

Navy/Marine Corps: Office of the Assistant Secretary of Defense (MRA&L/MPP), ATTN: Discharge Review — Navy, Pentagon, Washington, D.C. 20301.

Air Force: Office of the Assistant Secretary of Defense (MRA&L/MPP), ATTN: Discharge Review — Air Force, Pentagon, Washington, D.C. 20301.

[35] Listed below are types of violations that occurred quite often in cases decided in 1977 and 1978, and somewhat less frequently thereafter:

Common Types of Violations:

- The decision does not show what the veteran's record of military service was like;
- The Board uses a general phrase for why it decided to upgrade, or not to upgrade, without explaining exactly what it was referring to; and
- The Board upgrades the veteran's discharge to General, but does not explain why it did not upgrade all the way to Honorable;

Violations in Cases in Which the Veteran Stated Specific Reasons Why the Discharge Should Be Upgraded:

- The Board does not list the veteran's contentions in its decision;
- The Board does not state whether it decided that a veteran's contention was valid or invalid;
- The Board states merely that the testimony or other evidence submitted by the veteran, or the record as a whole, was not enough to prove that the veteran's contention was correct;
- The Board decides that a contention is valid or invalid because of some part of the record, but does not specifically refer to that part of the record;
- The Board does not explain *specifically* why it accepted or rejected a veteran's contention; and
- The Board dodges the contention or states reasons that are not responsive to the contention.

took place in an SDRP documentary review, and the applicant in that case did not have an SDRP hearing, DoD will also inform that applicant of the right to request an SDRP hearing. If the violation occurred in a documentary review under Pub. L. No. 95-126, and the applicant in that case did not request a hearing after that review, DoD will tell that applicant of the right to request a hearing under the new uniform standards.

11.5.2 THE ADVANTAGES OF USING THE DOD GRIEVANCE PROCEDURE

The advantages of using the DoD grievance procedure are:

- It provides information useful in deciding whether the DRB or SRA decision is justified and whether it is worth appealing to a BCMR or federal court;
- If the veteran is applying for a new DRB review of the case, it helps the veteran prepare for the new review by identifying the reasons for the DRB's previous denial of relief;
- It can be used as a research tool;[36] and
- In SDRP cases, it makes a new review under the more favorable SDRP criteria possible.

Although the court-ordered grievance mechanism technically applies only to defective DRB and SRA statements, there is nothing to prevent an individual from complaining about the adequacy of a BCMR statement of findings and reasons.

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[36] If, for example, a DRB decision is found that upgrades to Honorable but does not fully explain the decision, and the case looks like one that might be used as a cite in support of a veteran's application, it would probably be useful to complain first about the inadequacy of the decision in the other case. With a more complete statement, an argument can more persuasively be made that the Board should follow the other case, and it will be more difficult for the DRB to distinguish the case that is cited from the applicant's case.

APPENDIX 11A

URBAN LAW INSTITUTE: STIPULATION OF DISMISSAL

1. Pursuant to the provisions of Rule 41(a)(2) of the Federal Rules of Civil Procedure, it is stipulated and agreed by and between the parties to this action, acting through their undersigned counsel, that the Complaint (as amended) instituting this suit is hereby dismissed with prejudice, with the understanding that defendants shall take all action necessary to effectuate the settlement terms and conditions hereinbelow set forth, and with the further understanding that plaintiffs may move to reopen to secure compliance with this stipulation if they are not satisfied that the terms of this stipulation are being met.

2. It is further stipulated and agreed that any complaints by counsel for plaintiffs herein regarding compliance with the terms of this stipulation, with the exception of complaints regarding compliance with the time provisions contained herein, shall be presented initially, in writing, to the General Counsel of the Department of Defense, who shall be given a reasonable opportunity, not to exceed thirty (30) days, to take corrective action if warranted.

3. It is further stipulated and agreed that this stipulation shall not constitute an admission of liability on the part of the defendants as to the matters set forth in the Complaint. Moreover, nothing in this stipulation is intended to address the following issues:

A. whether the law requires that Discharge Review Board and Correction Board applicants be provided with the decision of the Board prior to Secretarial review;

B. whether the law requires that Discharge Review Board and Correction Board applicants be given a reasonable opportunity to submit for the reviewing authority's consideration exceptions or rebuttals to the decision of the Board; and

C. whether, as to the Boards for Correction of Records, due process and considerations of fundamental fairness require, in individual cases, a statement of findings, conclusions and reasons in addition to the statement of grounds for denial agreed to herein.

4. Nothing in this stipulation shall preclude the Boards for Correction of Records from disclosing to applicants and their counsel the Board's statement of findings, conclusions and reasons or recommendations on decisions not covered by this agreement.

5. Defendants shall take the following actions set forth in subparagraphs A and B below to change current procedures of the Discharge Review Boards and Boards for Correction of Records for each military service. Where amendments to current Department of Army, Navy and Air Force regulations regarding Board procedures are required by the agreement herein, said amendments shall be made and submitted for publication in the Federal Register and Code of Federal Regulations on or before sixty (60) days from the date of the court's approval of this stipulation. As used hereinafter as to the Discharge Review Boards, the "decision of the Board" refers to the majority determination that becomes or constitutes the Board's final determination on an application. It does not refer to the majority determination of a Regional, Review or Field Panel of Board members that is later rejected by the Board. Thus, under AR 15-180, paragraph 8(d)(3), the Review or Field Panel's majority determination that is approved by the President of ADRB or that is reviewed by the Office of the Secretary is the "decision of the Board."

A. Regarding the Discharge Review Board for each military service, defendants shall:

(1) Amend current Department of Army, Navy, and Air Force regulations to conform to the following requirements:

(a) On every application filed with the Discharge Review Board, the decision of the Board shall be made in writing.

(b) On every decision of the Board that is reviewed by the Secretary, or by one to whom reviewing authority has been delegated, the decision on review shall be made in writing.

(c) In every case, the decision of the Board and the reviewing authority, if any, shall include a statement of findings, conclusions and reasons, except where the reviewing authority expressly adopts in whole or in part the statement of findings, conclusions and reasons of the Board. Similarly, where the reviewing authority adopts the Board's statement of findings, conclusions and reasons, there is no requirement for duplicative publication and indexing under terms of paragraphs 5A(4) and 5A(5), *infra.*

(d) Statements of findings, conclusions and reasons, shall include:

(i) The date, character of and reason for the discharge or dismissal certificate issued to the applicant upon separation from military service, including the specific regulatory authority under which the discharge or dismissal was issued.

(ii) Findings on all issues of fact, law or discretion upon which the decision on the application is based, including those factors required by applicable service regulations to be considered for determination of the character of and reason for the discharge or dismissal certificate in question where such factor(s) is (are) a basis for denial of any of the relief requested by the applicants.

(iii) Findings and conclusions on all other issues of fact, law or discretion raised by the applicant in accordance with procedures set forth in paragraph 5A(1)(e) below, including claims by applicant that statutory, regulatory and/or constitutional provisions were violated and such other claims made by applicant, which in the opinion of the Board would warrant greater relief that that afforded applicant by the Board's decision if resolved in the applicant's favor.

(iv) Conclusion(s) as to whether or not any change, correction or modification should be made in the type or character of the discharge or dismissal certificate and/or the reasons and authority for the discharge or dismissal and, if so, the particular changes, corrections or modifications that should be made.

(v) A statement of the reasons for the findings and conclusions made in accordance with paragraphs (ii-iv) above.

(e) Applicants must state clearly and specifically their contention(s) and/or the issue(s) of fact, law or discretion for a written determination to be made in accordance with paragraph 5A(1)(d)(iii) above. Applicants may be provided a form for this purpose which must be completed or amended prior to the Board's decision.

(f) Advisory opinions or portions thereof containing factual information relied upon for final decision not fully set forth in the statement of findings, conclusions and reasons; or containing advice, recommendation(s) or opinion(s) accepted as a basis for rejecting any of applicant's claims that are not fully set forth in the statement of findings, conclusions and reasons shall be incorporated by reference in the statement of findings, conclusions and reasons, and appended to the decision.

(g) The final determination and the statement of findings, conclusions and reasons together with any required appendices thereto and minority opinions, if any, shall be sent promptly to the applicant and counsel with the notice of decision.

(h) It is understood that the terms of this paragraph 5A(1) do not apply to any determination as to whether a rehearing may be authorized (*see, e.g.*, paragraph 14, AR 15-180), but apply to a final determination of the Board and/or reviewing authority after a rehearing except to the extent findings, conclusions and reasons consistent with paragraph 5A(1)(d) exist for any prior denial and remain unchanged.

(2) Samples of statements of findings, conclusions and reasons which are considered by the parties herein to satisfy the requirements of paragraph 5A(1)(d) are attached to this stipulation at Annex A. These samples are not intended to reflect the actual findings, conclusions and reasons that necessarily should be given in any case. A sample of a form that may be furnished applicants to meet the condition set forth in paragraph 5A(1)(e) above is attached at Annex B to this stipulation. It is understood that a form such as DD Form 293 could be used for the same purpose.

(3) Amend current Department of Army, Navy and Air Force regulations to require that each DRB record the name and final vote of each Board panel member for every Board decision and either provide the names and votes to applicants or inform applicants that the names and votes of Board members on the decision of the Board on their application are available upon request.

(4) Amend current Department of Army, Navy and Air Force regulations to conform to the following requirements:

(a) Statements of Findings, Conclusions and Reasons prepared in accordance with the terms of this agreement and the record of the votes of Board members agreed to herein will be made available for public inspection and copying promptly after a notice of final decision is sent to the applicant. If not otherwise listed in the statement of findings, conclusions and reasons, a list of contentions and/or the issues of fact, law or discretion presented by the applicant will be made public with the decision.

(b) Written minority opinions or reports of a Board panel member on the decision of the Board will be made available for public inspection and copying at the same time as set forth in paragraph 5A(4)(a), above.

(c) To the extent required to prevent a clearly unwarranted invasion of personal privacy, identifying details of applicant and other persons will be deleted from the documents made available for public inspection and copying. Names, addresses, social security numbers and military service numbers must be deleted. Written justifications, which are to be made available for public inspection, shall be made for all other deletions.

(d) Any other privileged or classified material contained in or appended to any documents required by this agreement to be furnished applicant and counsel or made available for public inspection and copying may be deleted therefrom only if a written statement of the bases for the deletions is provided applicant and counsel and made available for public inspection. It is not intended that the statement be so detailed as to reveal the nature of the withheld material.

(e) Documents and records required by this agreement to be made available for public inspection and copying shall be made available at reading rooms at the Court of Military Appeals or such other location(s) within the Washington, D.C. metropolitan area as is (are) readily accessible to the public.

(5) Amend current Department of Army, Navy and Air Force regulations to conform to the following requirements:

(a) All documents made available for public inspection and copying in accordance with paragraph 5A(4) above shall be indexed in a usable and concise form so as to enable those who represent applicants before the Boards to isolate from all those decisions that are indexed those cases that may be similar to any applicant's case and that indicate the circumstances under and/or reasons for which the Board and/or Secretary have granted or denied relief. The index shall include, in addition to any other items determined by each Board, an identifying characteristic (i.e., case number) for each case; the date, character of, reason for and authority for the discharge or dismissal challenged therein, the decision of the Board and the reviewing authority, if any; and the issues addressed in the statement of findings, conclusions and reasons.

(b) Each index shall be published quarterly or more frequently and upon request be distributed by sale or otherwise.

(c) Each Board shall make its index available for public inspection and distribution by sale or otherwise at the reading room(s) established in accordance with paragraph 5A(4)(e) above. It is further agreed that an initial index shall be published and made available for public inspection on or before 120 days after the court's approval of this stipulation.

(d) Each index shall also be made available at all regional locations where DRB panels shall meet to hear cases. Notice of hearings to applicants shall include information as to where the DRB indexes may be located for inspection and copying. Indexes need be permanently maintained only at permanent regional locations.

(6) A sample index entry and terms to be included therein which is acceptable to plaintiffs herein is attached hereto at Annex C.

(7) Apply the changes agreed as to DRB procedures for every application pending for decision sixty (60) days from the date of the court's approval of this stipulation.

B. Regarding the Board for Correction of Records for each military service, defendants shall:

(1) Amend current Department of Army, Navy and Air Force regulations to conform to the following requirements:

(a) On every application denied in whole or in part, with or without a hearing, the determination of the Board shall be made in writing and include a brief statement of the ground(s) upon which the Board's determination to deny relief is based.

(b) On every determination of the Board to deny relief that is reviewed by the Secretary, or one to whom reviewing authority has been delegated, and on every other application reviewed where the reviewing authority decides to deny relief, the reviewing authority's decision shall be made in writing and include a brief statement of the ground(s) for denial, except where the reviewing authority expressly adopts in whole or in part the statement of ground(s) for denial by the Board.

(c) The Statement of Grounds for Denial shall include:

(i) A brief statement of the grounds upon which it is concluded that the complete relief requested by applicant should not be granted, including applicant's claim(s) of constitutional, statutory, and/or regulatory violation rejected by the Board and/or reviewing authority.

(ii) All essential facts upon which ground(s) for denial is (are) based, including, where appropriate, in those cases involving the characterization of an individual's discharge or dismissal from the military service, the factors required by applicable service regulations to be considered for determination of the character of and reason for the discharge or dismissal certificate in question.

(d) Advisory opinions or portions thereof containing information upon which a ground for denial is based not fully set forth in the statement of grounds for denial; or containing advice, recommendation(s) or opinion(s) upon which a ground for denial is based not fully set forth in the statement of grounds for denial shall be incorporated by reference in the statement of grounds for denial and appended thereto.

(e) The Board's statement of grounds for denial or where review is made thereof the statement of grounds for denial made by the reviewing authority, together with any required appendices thereto and minority opinions, if any, shall be sent promptly to the applicant and counsel with a notice of decision upon a final determination to deny applicant any of the relief requested.

(2) As to the paragraph 5B(1) above, it is understood that:

(a) The requirements thereof apply to all determinations reached upon further consideration or reconsideration of an application, except where complete relief is denied on the identical grounds for which relief was previously denied set forth in a written statement consistent with paragraph 5B(1) above, but not to the intitial determinations made by the Board as to whether further consideration or reconsideration of an application is or is not appropriate.

(b) That although the Board must independently consider the entire record in each application brought before it, in cases previously considered by a Discharge Review Board convened pursuant to 10 U.S.C. §1553, the Board and/or reviewing authority may, in whole or in part, incorporate by reference in the Statement of Ground(s) for Denial any statement made by the DRB present on the record.

(3) Amend current Department of Army, Navy and Air Force regulations to require that each Correction Board record the name and final vote of each panel member on every determination by the Board on an application before it and either provide the names and votes to applicants or inform applicants that the record of the names and votes of Board members on their application are available upon request.

(4) Amend current Department of Army, Navy and Air Force regulations to conform to the following requirements:

(a) Documents sent to each applicant in accordance with paragraph 5B(1)(e) above, and all other nonboilerplate statements of findings and conclusions made on final determination of an application by the Board or reviewing authority, and the required record of the votes of Board members will be made available for public inspection and copying promptly after the notice of decision is sent to the applicant.

(b) Written minority opinions or reports to all

written majority Board determinations made public in accordance with paragraph 5B(4)(a) above shall also be made available for public inspection and copying at the same time as the majority determination.

(c) To the extent required to prevent a clearly unwarranted invasion of personal privacy, identifying details of applicant and other persons will be deleted from the documents made available for public inspection and copying. Names, addresses, social security numbers and military service numbers must be deleted. Written justifications, which are to be made available for public inspection, shall be made for all other deletions.

(d) Any other privileged or classified material contained in or appended to any documents required by this agreement to be furnished applicant and counsel or made available for public inspection and copying may be deleted therefrom only if a written statement of the bases for the deletions is provided applicant and counsel and made available for public inspection. It is not intended that the statement be so detailed as to reveal the nature of the withheld material.

(e) Documents and records required by this agreement to be made available for public inspection and copying shall be made available at reading rooms at the Court of Military Appeals or such other location(s) within the Washington, D.C. metropolitan area as is (are) readily accessible to the public.

(5) Amend current Department of Army, Navy and Air Force regulations to conform to the following requirements.

(a) All documents made available for public inspection and copying in accordance with paragraph 5B(4) above shall be indexed in a usable and concise form so as to enable those who represent applicants before the Boards to isolate from all those decisions that are indexed those cases that may be similar to an applicant's case which indicate the grounds for which the Board and/or Secretary granted or denied relief.

(b) Each index shall be published quarterly or more frequently and upon request be distributed by sale or otherwise.

(c) Each board shall make its index available for public inspection and distribution by sale or otherwise at the reading room(s) established in accordance with paragraph 5B(4)(e) above.

(6) As to the index required by paragraph 5B(5) above for other than characterization of discharge cases, notice shall be published in the Federal Register to allow public comment on the proposed content of the index prior to final adoption of an index format.

(7) Apply the changes agreed to herein as to Correction Board procedures for every application pending for decision sixty (60) days from the date of the court's approval of this stipulation.

6. It is further agreed that the reading rooms provided for in paragraphs 5A(4)(e) and 5B(4)(e) above will be opened to the public on or before thirty (30) days following the court's approval of this stipulation.

7. It is further agreed that initial indexes as provided for in paragraphs 5A(5) and 5B(5) above shall be published and made available for public inspection on or before 120 days after the court's approval of this stipulation.

8. As to retroactive relief, within sixty (60) days after the court approves this stipulation (except 120 days shall be allowed the Army Board for Correction of Military Records), the following nonboilerplate decisional documents, with the findings and rationale, if any, in cases involving requests for recharacterization of discharge, together with documents referred to in the findings and rationale and advisory opinion(s) where the Board or reviewing authority relied upon them (so long as such documents are found in the Board's retained file on the applicant), along with, when such information was recorded, the names and votes of Board members, (except the Air Force Board for the Correction of Military Records shall not be required to make available retroactively the names and votes of Board members) shall be made available for public inspection and copying:

A. Army Discharge Review Board: The two identified minority opinion cases plus those decisions in retained files on hand at the Board in which there exists either a Field Panel or Review Panel advisory opinion or rationale.

B. Navy Discharge Review Board: (1) All Board decisions made since July 1, 1975, except those in which the conclusion section of the Review of Discharge form contains only the one sentence "The Board concludes that the discharge should not be changed, corrected, or modified because it was properly and equitably issued under standards of naval law and discipline existing at the time of separation"; and (2) All memoranda containing nonboilerplate recommendations made by the Director, Naval Council of Personnel Records, the Special Assistant for Legal Affairs or other individual to the Secretary in cases reviewed since July 1, 1975, in which the Secretary followed such recommendation.

C. Air Force Discharge Review Board: The only identified minority case in files retained on hand at the Board.

D. Army Board for the Correction of Military Records: Decisions on applications or requests for reconsideration decided since July 1, 1975. (On applications or requests for reconsideration denied without a hearing, the examiner's case summary, if any, shall be made available. On other cases, Board documents and any other memoranda containing recommendations to the reviewing authority which were accepted, if any, shall be made available if such documents are found in the Board's retained file on the applicant.)

E. Navy Board for Correction of Military Records: Same as for Army Board for Correction of Military Records.

F. Air Force Board for Correction of Military Records: Same as for Army Board for Correction of

Military Records, except only decisions since January 1, 1976.

9. As to the records made available in accordance with paragraph 8, deletions to prevent a clearly unwarranted invasion of personal privacy, or of other privileged or classified material, shall be made in the manner prescribed in paragraphs 5A(4)(c) and (d) and 5B(4)(c) and (d) above.

10. Although this stipulation does not require indexing of the records made available pursuant to paragraph 8, above, such indexing is encouraged.

11. This stipulation shall be effective until vacated or modified by Order of this court.

APPENDIX 11B
URBAN LAW INSTITUTE: ORDER

ORDER

Upon consideration of plaintiffs' motion for an Order of substitution of defendants sued in their official capacity, plaintiffs' motion for a preliminary injunction, and motion to reopen to secure compliance with the stipulation of dismissal herein, the memoranda in support thereof, the defendants' opposition hereto, oral argument of counsel, and the entire record herein, it appears to this Court that to further the purposes of the Stipulation entered in this case by this Court on January 31, 1977, it is hereby

ORDERED, that the plaintiffs' motion for an Order of substitution of party defendants sued in their official capacity is hereby granted; and it is

FURTHER ORDERED, that John M. DeLargy, Director, Navy Council of Personnel Boards be substituted as a defendant in this action for F. P. Anderson, the former Director, Navy Council of Personnel Boards and that Earl J. Archer, Director, Air Force Personnel Council be substituted as a defendant in this action for Oliver W. Lewis, former Director, Air Force Personnel Council; and it is

FURTHER ORDERED, that defendants shall not issue any decisional documents with regard to applications for recharacterization of an applicant's less than Honorable Discharge, including decisions made pursuant to Pub. L. 95-126, 91 Stat. 1106 (1977), unless the decision contains a statement of findings, conclusions and reasons that complies with Paragraph 5A(1) of the Stipulation approved by this Court on January 31, 1977; and it is

FURTHER ORDERED, that the Department of Defense shall consider specific complaints from any person who alleges that a decisional document or index entry contains a specifically identified violation of the Stipulation and that for any decisional document that is determined to violate the Stipulation, a new statement of findings, conclusions and reasons shall be prepared which complies with the Stipulation and which applies the discharge review standards in effect at the time the original decisional document was prepared. Such new statements shall be sent to applicant and counsel and made publicly available pursuant to the provisions of the Stipulation. For those new statements that replace a decisional document for which the applicant was given an opportunity to request a *de novo* hearing, applicant and counsel shall be notified of the right to request a *de novo* hearing under the discharge review standards in effect at the time of the original decisional document was prepared; and it is

FURTHER ORDERED, that the defendants shall make the quarterly index available at the site of all traveling board locations as soon aspossible for hearings to be held within sixty (60) days of this Order. For all such hearings held subsequent to sixty (60) days of this Order, the defendants shall insure that the index is reasonably available for the applicant at least thirty (30) days prior to the arrival of the traveling board; and it is

FURTHER ORDERED, that each quarterly index following the index currently in preparation shall include the terminology contained in DoD Directive 1332.28 and in any amendments thereof; and it is

FURTHER ORDERED, that defendants shall inform applicants who were denied complete relief on or after April 1, 1977, but before the date of this Order, and their counsel, if any by certified mail to the last known address, of the procedures set forth in this Order for processing complaints about violtaions of this Court's January 31, 1977, Stipulation. The notice shall also inform applicants of their right to request and receive an entirely new review of their case if their case has not been reviewed under DoD's March 31, 1978 published uniform standards, of the availability of indexes to assist them in teh preparation of their cases, and of the availability of plaintiffs, or those organizations plaintiffs may designate, to explain the meaning of the notice at no cost to the applicant; and it is

FURTHER ORDERED, that ten (10) days after the issuance of this Order, defendants shall include in the notice to an applicant with a scheduled hearing the following information:

(a) That quarterly index, including the terminology in Department of Defense Directive 1332.28 is scheduled to be published during the last week of November 1978;

(b) The applicant may obtain a continuance of the scheduled hearing for the purpose of consulting such index by submitting a timely request therefor to the Discharge Review Board.

Entered this 23rd day of August, 1978.

APPENDIX 11C

EXAMPLES OF UNAUTHORIZED BOARD PRESSURE TO CHANGE CONTENTIONS

Examples of the types of methods used by the Naval DRB that have made applicants and counsel feel forced to withdraw, reword, or summarize their contentions are set forth below. These examples are taken verbatim from affidavits prepared by representatives of DRB applicants and submitted to the Department of Defense complaining about the Board's practices. The Department of Defense has agreed that the Boards are not permitted to request, suggest, or instruct an applicant to reword, withdraw, or amend a contention.

The following affadavits have been excerpted and are on file with the National Veterans Law Center:

I represented Mr. [X] in the presentation of his case . . . before the Naval Discharge Review Board on January 9, 1979 in Arlington, Virginia. Prior to the actual hearing, I had prepared a brief outlining the facts, equitable arguments and supporting contentions and, as I had previously arranged with the Board's Secretary/Recorder . . . the brief was submitted early to allow for distribution to Board members in advance of the hearing. . . . When my client and I arrived for the hearing at 8:00 a.m. . . . , [the Secretary/Recorder] had with him . . . a copy of the brief and stated that the Board was concerned about the items which I had labelled as "List of Contentions." He said that the Board had not seen anything like this before. Specifically, the Board had noted that most of the contentions were not directly related to the discharge and for this reason the Board wished to raise this matter before the hearing. [The Secretary/Recorder's] . . . suggestion to me was that I might want to reduce the seventeen listed contentions to those which were only concerned with the fact of the discharge and its character. I declined to do this, citing my understanding of the Stipulation of Dismissal [in] Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, which . . . require[s] the DRBs to reply to all of the contentions made by the applicants. . . . As a result of this reading of the pertinent regulations, I indicated to [the Secretary/Recorder] that I would expect the Board to answer all of the contentions set forth in the brief and that I would not withdraw any of the contentions from the brief.

[The Secretary/Recorder] . . . then left the room and came back a few minutes later with the information that the Board would accept the brief as written and would respond in its decisional document to each contention made. However, once the hearing began, it was apparent that some members of the Board were still not comfortable with this resolution of the matter. Before any consideration on the merits of the case, [the Board President] brought the subject up again, confessing his failure to see the relation of the contentions to the fact of the discharge. I reiterated the essence of my comments made earlier to [the Secretary/Recorder] and added that without a response to the contentions as made, the decisional document would be inadequate to inform me of the specific findings of fact by the Board which were dispositive of my client's case and to provide a reasoned basis for an appeal of that decision. . . . In this context, I mentioned that [the applicant] had been trying to upgrade his discharge for seven years and was deserving of a full explanation for any adverse decision. [The Board President] . . . also had some difficulty in accepting the terminology of the brief when he noted that the three equitable arguments advanced in the brief were not labelled as "issues." . . . After this digression, which lasted for about 15-20 minutes, the actual hearing was allowed to begin. . . .

On March 28, 1979, I appeared with [a] student . . . at a hearing scheduled by the Navy Discharge Review Board on behalf of our client. . . . Several days prior to the hearing, we had submitted a brief in support of [the] application. The brief contained 28 contentions labelled as such.

When we appeared at the offices of the Board, [an officer] introduced himself as the reporter for the Board and explained that he wished to speak with us about our contentions. He had gone through the brief and had marked various contentions as being improper. He claimed that conten-

tions should be limited to a statement that the action of the service in awarding a discharge was either improper or inequitable and that those were the only appropriate contentions.

[The officer] . . . read to us several of our first contentions . . . and asserted that these were invalid contentions. He claimed that other of our contentions were statements of fact or statements of law and were inappropriate and would not be dealt with as such by the Board.

We explained to him what the settlement in Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, No. 76-350 (D.D.C., Jan. 31, 1977) provided and yet he still persisted for over fifteen minutes in trying to get our consent to drop a large number of our contentions.

We explained that the Board had previously accepted similar lists of contentions in other cases which we handled. . . . I felt that it was just our intimate knowledge of the *Urban Law* agreement that permitted us to prevail because he was very persistent.

On September 25, 1979, [I] represented Mr. [X] before a Marine panel of the Naval Discharge Review Board in Washington, D.C. On October 10, 1979 [I] received a call from Colonel [Y] who served as a panel member and recorder at the hearing. Colonel [Y] stated that I had improperly worded my contentions because I had not stated whether the contentions were to be considered on the basis of propriety or equity.

Colonel [Y] stated that I could not have contentions A and C considered on the basis of both propriety and equity, and that I had to make a choice.

CHAPTER 12
CHALLENGING DISCHARGES FOR LEGAL ERRORS: THE IMPROPRIETY APPROACH

12.1 INTRODUCTION

12.1.1 GENERAL

Review Boards considering discharge upgrading most often grant relief on the grounds that the applicant was treated unfairly.[1] They also recognize, however, that a discharge is illegal if a basic regulatory, statutory, or constitutional flaw occurred in the proceedings. When such a flaw has occurred, the decision to discharge, or the decision as to character of discharge, becomes "improper," an "impropriety," or an "error." [2]

This chapter discusses situations in which Boards will find an error or an impropriety and the arguments that will persuade them to do so. Because Boards often confuse equity with propriety (or simply disagree with the authors' approach), alternatives to the "legalistic" approach are frequently suggested.

Review Boards do not recognize that certain arguments present valid propriety issues and are still, compared with most administrative agencies, in a relatively unsophisticated state when dealing with contentions of counsel. Therefore, a carefully structured chain of contentions that resembles proposed findings of fact and conclusions of law can be helpful. Although it may be anticipated that Boards will balk at having to respond to numerous contentions, contentions that resemble proposed findings and conclusions actually lessen the Boards' work. All a Board must do is adopt contentions with which it agrees. Until there has been more federal court review of Board rejection of propriety issues, carefully structured contentions must be used in all cases to force the creation of an appropriate record not only for BCMR review of the DRBs but also for federal court review of both.[2a]

12.1.2 SAMPLE CONTENTIONS

A detailed set of sample contentions is given below. Subsequent sections will provide examples of phrasing for contentions covering the relevant legal issues. This sample will be referenced for boilerplate structure.

> ISSUES OF LAW, FACT, OR DISCRETION RELATING TO THE IMPROPRIETY IN THE APPLICANT'S DISCHARGE CAUSED BY THE FAILURE TO PROVIDE THE APPLICANT WITH A REHABILITATIVE TRANSFER[3]
>
> [Contentions showing exactly what the regulations required:]
>
> 1. Army Regulation (AR) 635-200, ¶ 13-5 stated at the time of the applicant's discharge:[4] "Commanders will ensure that before taking separation action against a member under provisions of this Chapter, adequate counseling and rehabilitation measures have been taken."
>
> 2. AR 635-200, ¶ 13-7, stated at the time the applicant was discharged:
>
> > 13-7. Rehabilitation. As a minimum, one of the following measures will be taken:
> >
> > *a. Replacement stream personnel.* Members will be recycled (reassigned between training companies) at least once.
> >
> > *b. Other than replacement stream personnel.* Members will be reassigned at least once, with a minimum of 2 months of duty in each unit. Reassignment should be between at least battalion-size units. This requirement does not preclude reassignment between brigade or larger units when considered necessary by local commanders. If this is not possible because of the circum-

[1] *See* Chs. 22 (general equity approaches), 13-19 (equity approaches for each reason for discharge).

[2] The Discharge Review Board (DRB) Statute, 10 U.S.C. § 1553, does not mention any standards of review. The DRB regulation, 32 C.F.R. § 70.6 lists "propriety" as one of the major avenues of inquiry in a DRB case. The BCMRs, which are not currently governed by a such a directive, look to their statute which requires them to correct "an error or remove an injustice," 10 U.S.C. § 1552. "Error" means legal error, and an "injustice" is usually nonlegal error. Reale v. United States, 208 Ct. Cl. 1010, 1011-12 (1976); Kaeserman v. United States, 202 Ct. Cl. 1081, 1083 (1973). *Cf.* Skaradowski v. United States, 200 Ct. Cl. 488, 489, 471 F.2d 627 (1973).

[2a] *See* Ch. 11 *supra* (detailed discussion of the Boards' obligation to respond to an applicant's contentions, and of how to argue that prior Board decisions should be followed).

[3] This heading is an example only and should be changed to include a description of the error that occurred in the applicant's case.

[4] A discharge can be "improper" only if regulations in effect at the time the applicant was discharged were violated. If regulations that were more favorable to servicemembers (by giving them more rights) were promulgated after the applicant was discharged, the applicant should use a different type of contention. *See* Ch. 21 *infra* (discussion of current standards approach).

stances involved in a case, the procedures prescribed in *c* below will apply.

c. Permanent change of station transfer. When permanent change of station is considered essential to provide a change in commanders, associates, and living or working conditions as a means of rehabilitating a member, the commander exercising general court-martial jurisdiction over the member may authorize such reassignment within the same command (or may request HQDA (DAPC-EP-appropriate branch), Alexandria, VA 22231 to accomplish assignment to another command) provided—

(1) The member involved is in pay grade E4 (with 2 years service or less), E3, E2 or E1. Members in grade E4 with over 2 years of active service and all other personnel who are eligible by virtue of grade and service for transportation of dependents and shipment of household goods are not eligible for reassignment under provisions of this paragraph.

(2) A transfer to another station would not be detrimental to the individual or to the Army (e.g., cases involving indebtedness, personnel enrolled in Alcohol and Drug Abuse Prevention and Control programs, or undergoing special counseling or other rehabilitative type mental hygiene treatment programs, or maladjusted or apathetic personnel who could not be expected to respond to disciplinary controls or to benefit from change of associates, regardless of assignment locale).

3. AR 635-200, ¶ 13-8 stated that at the time the applicant was discharged:

13-8. Waivers. Counseling and rehabilitation may be waived as follows:

a. Couseling required in paragraph 13-6 and rehabilitation required in paragraph 13-7 may be waived by the convening authority when separation is being considered under the provisions of paragraph 13-4d [homosexuality].

b. The special or general court-martial convening authority may waive the requirements of paragraph 13-6 and 13-7 when he determines that further duty of the individual would, in his best judgment:

(1) Create serious disciplinary problems or a hazard to the military mission or to the individual himself; or

(2) Be inappropriate because the individual is obviously resisting all rehabilitation attempts or that rehabilitation would not produce the quality soldier desired by the army.

[Contentions showing that the regulations applied to the applicant and showing which part of the regulations applied to the applicant:]

4. The applicant was separated for Unfitness due to shirking under the provisions of AR 635-200, Chapter 13.

5. During the period leading to the applicant's discharge, the applicant was not replacement stream personnel.

[Contention stating, as a logical result of the above contentions, what actions the regulations required in the applicant's case, and interpreting the regulations into clearer language, if necessary:]

6. AR 635-200, ¶¶ 13-5, 13-7, and 13-8 required that before separation action was taken against the applicant, the applicant must be (a) reassigned to another unit from the unit the applicant was in at the time separation action was first contemplated, or (b) given a permanent change of station transfer, *unless* the convening authority determines that these rehabilitative transfer requirements should be waived because one of the two waiver conditions specified in AR 635-200, ¶ 13-8b(1) or (2) exists.[5]

[Contentions alleging each of the factors necessary to show that the regulations were violated:]

7. On [Date X], the applicant was first assigned to [Unit Z].

8. Administrative separation proceedings were first contemplated and/or initiated against the applicant while (s)he was in [Unit Z].

9. From [Date X] to the date that the discharge authority approved the applicant's discharge, the applicant was not reassigned to another unit.

10. From [Date X] to the date that the discharge authority approved the applicant's discharge, the applicant was not given a permanent change of station transfer.

11. The applicant's military personnel records do not contain a document that is signed by the applicant's commanding officer or by any intermediate commanders, and that requests or recommends that the convening authority waive the rehabilitation required by ¶ 13-8 of AR 635-200.[6]

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[5] This regulation is somewhat ambiguous as to whether ¶¶ 13-7b and 13-7c cover all situations, or whether it is possible a servicemember would not meet either ¶ 13-7b, in that reassignment "is not possible because of the circumstances involved in the case," or ¶ 13-7c, in that one of the ¶ 13-7c prerequisites (like pay grade E1 to E4) is not present. The authors of this manual believe that the former is the proper interpretation.

[6] Contentions 11 through 16 represent the type of contentions that should be made when the DRB may rely upon the presumption of regularity to defeat a contention that an action required to be taken was not in fact taken. Contentions 11 through 16 essentially argue

12. The applicant's military personnel records do not contain a document that is signed by the convening authority and that expressly indicates that (s)he considered whether to waive the rehabilitation required by ¶ 13-7 of AR 625-200 and determined that rehabilitation should be waived for one of the reasons set forth in ¶ 13-8b of AR 635-200.

13. The custom and practice of the Army in cases in which the rehabilitation required by AR 635-200, ¶ 13-7 applied and was waived pursuant to AR 635-200, ¶ 13-8b was for the commanding officer and/or intermediate commanders to prepare and sign a document evidencing that (s)he recommended or requested that such rehabilitation be waived.

14. The custom and practice of the Army in cases in which the convening authority waived the rehabilitation required by AR 536-200, ¶ 13-7 was for the convening authority to prepare and sign a document evidencing that (s)he determined that such requirement should be waived.

15. The custom and practice of the Army, in cases in which a document of the type discussed in Contention 13 or Contention 14 above was prepared, is for such a document to be placed and retained in the applicant's permanent military personnel file.

16. The convening authority did not determine that the rehabilitation required by ¶ 13-7 should be waived in the applicant's case.

[Contention stating that the regulation was violated:]

17. The requirements of AR 635-200 ¶¶ 13-5, 13-7, and 13-8 were violated in the applicant's case.

[Contentions that help show that there is substantial doubt that the discharge would have remained the same if no error had occurred; these contentions are unnecessary if the violations are of such a serious nature — like not providing a right to an administrative separation hearing or to counsel — that they are automatic (per se prejudicial error).[7]]

18. In the 17 months of service before the applicant was assigned to [the name of the unit from which (s)he was discharged], (s)he had a disciplinary record of only one nonjudicial punishment and "Excellent" or "Good" conduct and efficiency ratings.

19. All of the applicant's disciplinary infractions that occurred while (s)he was in the (name of the unit from which (s)he was discharged) were for disobedience of orders given by [Sgt. Y].

20. In view of the applicant's overall record, if the convening authority had considered whether to waive the rehabilitation requirements of AR 635-200, ¶ 13-7, there is substantial doubt that (s)he would have determined that further duty of the applicant would have created serious disciplinary problems or a hazard to the military mission or to the applicant himself/herself.

21. In view of the applicant's overall record, if the convening authority had considered whether to waive the rehabilitation requirements of AR 635-200, ¶ 13-7, there is substantial doubt that (s)he would have determined that further duty of the applicant would be inappropriate because the applicant was obviously resisting all rehabilitation attempts or that rehabilitation would not produce the quality soldier desired by the Army.

22. There is substantial doubt that the discharge would have remained the same if the violation of AR 635-200 ¶¶ 13-5, 13-7, and 13-8 had not occurred because, among other things, of the substantial possiblility that the applicant would have served well if (s)he had been provided with the type of change in immediate supervisors and living and working conditions that a rehabilitative transfer would have provided.

[Contention as to prejudicial error and impropriety:]

23. Due to the failure to provide a rehabilitative transfer, the applicant's discharge was improper and there was prejudicial error in the applicant's discharge within the meaning of 32 C.F.R. § 70.6 (b).

[Contentions as to the relief required if a discharge is improper:]

24. Because the applicant's discharge was improper, the DRB must recharacterize the applicant's discharge to Honorable.[7a]

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[6] (continued)

that because no document in the applicant's military personnel file reflects that the convening authority determined to waive the rehabilitation requirements, then (s)he in fact did not make such a determination. If this is all that the applicant contended, however, the DRB might simply respond that because of the presumption of regularity provided in 32 C.F.R. § 70.5(b)(12)(vi), the DRB presumes that the convening authority made the determination that (s)he was required by regulation to make.

In order to protect against a DRB relying upon the presumption of regularity, more detailed contentions should be prepared, like those in Contentions 11 through 16, which demonstrate why, in the words of 32 C.F.R. § 70.5(b)(12)(vi), "there is substantial credible evidence to rebut the presumption [of regularity]." In addition, the applicant should present as much evidence to support his/her contentions as possible. Relying on a bare contention, without any evidence submitted to support it, should only be used if there is no alternative.

In the example presented here, in which no entry was made in the service record that evidenced compliance with a regulation, the Army DRB has guidelines stating that this may constitute prejudicial error. *See* ADRB SOP, Annex F-1, para. 1a(3), 44 Fed. Reg. 25,069 (1979). *See also* Olenick v. Brucker, 273 F.2d 819 (D.C. Cir. 1959).

[7] "Per se prejudicial error" means that a fundamental right was denied the applicant which was so serious that it should be considered to render the discharge improper automatically, without engaging in speculation as to what would have happened if the error had not occurred. For such errors, contentions like 18 through 22 should be skipped in favor of (*e.g.*) Contention 23. An example of per se prejudicial error is denial of a right to a predischarge hearing or a right to counsel.

[7a] *See* Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980); Dilley v. Alexander, 627 F.2d 407, 8 MIL. L. REP. 2324 (D.C. Cir. 1980).

25. In the alternative that the DRB rejects the last contention because the applicant's discharge was improper, the DRB must determine the character of the applicant's discharge by applying the standard for determining the character of discharge used for those discharged at expiration of term of service (ETS) to the applicant's service record assuming (s)he received exemplary performance ratings from the date the prejudicial error occurred until ETS.[7b]

26. At the time the applicant was discharged, AR 635-200, ¶ 1-9(d) (2) provided for a servicemember discharged at ETS, that

> A member's service *will* be characterized as honorable by the commanding officer authorized to take such action or higher authority when a member is eligible for or subject to separation and it has been determined that he merits an honorable discharge under the following standards:
>
> (a) Has conduct ratings of at least "Good."
>
> (b) Has efficiency ratings of at least "Fair."
>
> (c) Has not been convicted by a general court-martial.
>
> (d) Has not been convicted more than once by a special court-martial.[8]

27. The word "will" in AR 635-200, ¶ 1-9(d) (2) is mandatory, so that a servicemember who meets the four criteria must receive an Honorable Discharge.[8a]

28. If the applicant had received conduct ratings of "Excellent" from the date the prejudicial error occurred in this case [add this date here] until the date his/her term of service was scheduled to expire [add this date here], the applicant would have had conduct ratings of at least "Good" within the meaning of AR 635-200, ¶ 1-9(d) (2).

29. If the applicant had received efficiency ratings of "Excellent" from the date the prejudicial error occurred in this case [insert date] until the date his/her term of service was scheduled to expire [insert date], the applicant would have had efficiency ratings of least "Fair" within the meaning of AR 635-200, ¶ 1-9(d) (2).

30. The applicant was not convicted by a general court-martial.

31. The applicant was not convicted more than once by a special court-martial.

32. If the standard in effect at the time the applicant was discharged for determining the character of discharge for those discharged at ETS is applied to the applicant's service record assuming the applicant received exemplary performance ratings until ETS, the applicant would have received an Honorable Discharge.

33. Because of the validity of the last contention, and the fact that the applicant's discharge was improper, the applicant's discharge should be recharacterized to Honorable.

[Contention that the error rendered the discharge inequitable:[9]]

34. Due to the failure to provide a rehabilitative transfer, the applicant's discharge was inequitable.

12.2 FLAWS IN THE REVIEW BOARDS' APPROACH

The DRB standards[10] recognize the basic concept that an adverse personnel action must be voided or reevaluated if the legal requirements for such a proceeding were ignored. The rules alone, however, are not enough to enable a legally trained person to transfer traditional administrative law approaches to discharge upgrade cases. Advocates should be attuned to the deficiencies in the DRB process:

- The inadequate definition of "prejudicial error," particularly the refusal to acknowledge that some errors are in themselves inherently prejudicial ("per se error").[11]

[7b] *See* Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977); AD 77-00348 (*Carter* on remand); AD 77-07130; Roelofs v. Secretary of the Air Force, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980).

[8] Contentions 26 through 31 depend upon what the regulations of the military department in which the applicant served provided for servicemembers discharged at ETS. The Army regulation used in this example was in effect from December 6, 1955 to May 19, 1975.

[8a] *See* ADRB SOP, Annex O-1, SFRB Memo # 3-79, 4 Apr. 1979, 44 Fed. Reg. 25,098 (27 Apr. 1979).

[9] Whenever an impropriety is alleged, an accompanying contention should allege that the discharge is inequitable, in case the Board rejects the impropriety contentions.

[10] 32 C.F.R. § 70.6 states in relevant part that:

> (a) . . . neither a DRB or the Secretary of the Military Department concerned shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the DRB or Secretary of the Military Department concerned shall give full, fair, and impartial consideration to all applicable factors prior to reaching a decision.
>
> (b) Propriety. A discharge shall be deemed to be proper unless in the course of discharge review, it is determined that:
>
> (1) There exists an error of fact, law, procedures, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby. Such error shall constitute prejudicial error. If there is substantial doubt that the discharge would have remained the same if the error had not been made. . . .

[11] *Id.* The ADRB SOP at least provides some guidance as to what may constitute prejudicial error. *See, e.g.*, ADRB SOP, Annex F-1, para. 2.(1), (2), (4), (5), (6) (specific examples), 44 Fed. Reg. 25,069 (Apr. 27, 1979); *id.*, Annex H-2-1, 44 Fed. Reg. 25,076 (propriety checklist). A supplement to the SOP, SFRB Memo # 15-9, "Procedural/Prejudicial Error," 30 Nov. 1979, 45 Fed. Reg. 16,309 (Mar. 13, 1980), contains the following language:

> In considering the areas of propriety and equity, members must be careful to avoid prejudging the effect of a discerned question of propriety or equity. It is apparent that error is possible in the conduct of administrative affairs that need not be fatal to the outcome of these affairs. In short, we are dealing with the difference between the effects of a procedural error versus those of a prejudicial error. In this regard, the question of the process to be followed by a panel in

- The frequent attempts by the DRBs to look at a case anew after finding error, holding what is, in effect, a retrial after a reversal on appeal.[12]
- The overbroad and misunderstood "presumption of regularity."[13]
- The failure to recognize that a legal analysis is often required for both irregularities during entry into the Armed Forces and the improper denial of a request for discharge.[14]
- The lack of guidance about what type of discharge should follow the finding of a legal error.[15]
- The lack of legally trained Board members. The process for obtaining advisory opinions on legal issues is not designed to elicit useful responses in most cases.[16]
- The failure of the Boards to follow their own cases as precedent.[17]

These factors tend to create a system in which the emphasis is on what is "fair"; consequently, attempts are frequently made to breathe life into a cold, stale, and often incomplete record. The more precise, consistent, and predictable approach that results from a strict legal analysis is frequently lost.[18] This is not, however, always bad. A case without legal merit or with a questionable basis in the record for a finding of an inequity will often be saved by a sympathetic Board's reinterpretation of the past aided by the applicant's presently unchallenged recitation of events. On balance, the only applicants who suffer from the Boards' approach are those who have a very technical legal case with no equities in their favor and those who receive a partial upgrade based on a "benefit of the doubt" approach, as opposed to the full relief that the "law" would require as a logical consequence of legal error.

12.3 SOURCES OF LAW AND AUTHORITY RELEVANT TO DISCHARGE UPGRADE CASES

12.3.1 CIVILIAN COURTS

Federal civil courts provide the primary source of case law and guidance in discharge upgrade cases because military courts do not directly review discharges or noncriminal matters. A wealth of relevant "civilian and military pay cases" have been decided by the United States Court of Claims, most of which appear in the *Federal Reporter*. Those not appearing there can be found in the *Court of Claims Reports* and the *Military Law Reporter*. Unpublished orders of

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[11] (continued)

> determining the impact of error is a deliberate step-by-step process. It is not proper to conclude that the presence of error mandates relief and the absence of error insures equity.

While the SOP maintains in effect that an error may never alone mandate change, DRBs recognize that certain errors are per se prejudicial. *See* §§ 9.3.1.1 *supra*; 12.5 *infra*; AD 78-02365 (UD/unfitness upgraded to GD solely for failure to have a psychiatrist perform the NPE which rendered the discharge improper). *See* § 12.5.1.2 *infra*.

[12] DRBs interpret the prejudicial error definition as allowing them to determine what a command would likely have done even if a DRB finds error that "eliminates" the articulated reason for discharge. Sometimes this takes the form of the DRB "reversing" the original action and then "retrying" the case under new charges. This approach denies the applicant many fundamental rights, and is hard to put into practice when also following the standard of resolving all doubt in favor of the applicant. ADRB SOP, section II.C; ADRB SOP, Annex F-1, para. 1.h. *See* § 9.3.1 *supra*. This issue was effectively resolved against the DRBs in Giles v. Secretary, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980) where the DRBs were resisting the district court's order (475 F. Supp. 595) to upgrade a large class of discharges where evidence from forced urinalyses were introduced into discharge proceedings. *See* Ch. 15 *infra*. Following the *Giles* approach, a DRB must grant relief, find the error harmless, or provide a new in-service discharge board if a legal error is found.

[13] 32 C.F.R. § 70.5(b)(12)(v) reads:

> There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.

See § 9.3.3 *supra*; § 12.5.2 *infra*.

[14] *See* ADRB SOP, Annex F-1 para. 2.a. (5), 44 Fed. Reg. 25,069 (Apr. 27, 1979). It is unclear whether the Air Force and Navy also view these as issues of equity only. *See* § 12.6 *infra*.

[15] This problem may stem from the different service regulations. When discharge is based on unsuitability, the Air Force regulation presumes that it is an HD; the Navy and Marines rely strictly on the final numerical "marks" (conduct and proficiency ratings) just as they would at the end of one's term of service (ETS or EOS). The Army regulations provide no meaningful, objective guidance here and permit a purely subjective judgment. *See* ADRB SOP, Annex O-1, SFRB Memo # 3-79, 4 Apr. 1979, 44 Fed. Reg. 25,098 (Apr. 27, 1979) (discussion of the Army's position that when a servicemember is separated with less than an ETS rating, the generally objective ETS criteria are not mandatory). Giles v. Secretary, 627 F.2d 554 (D.C. Cir. 1980) would tend to support arguments for HDs. *See* § 12.5.1.3 *infra*.

[16] The Air Force DRB normally has lawyers sitting as panel members as do the Air Force and Navy BCMRs. However, the vast majority of panels have no attorneys. The Army and Navy DRBs usually obtain written opinions from JAGs on their staff when legal contentions are made. ADRB SOP, para. 2.H., 25 Fed. Reg. 25,049 (Apr. 27, 1979); *id.*, Annex H-2, para. 7, 25 Fed. Reg. 25,075 (Apr. 27, 1979). These opinions are available prior to the hearing. As with the BCMRs, it is best to request copies in advance to provide an opportunity for rebuttal, because these opinions often miss the point and/or are merely conclusory. *See* § 9.2.6 *supra*.

[17] *See* § 11.4.2.2 *supra*. The Army DRB recognizes that contentions raising prior cases as precedent must be distinguished. ADRB SOP, SFRB Memo # 2-78, 10 Feb. 1978, 44 Fed Reg. 25,092 (Apr. 27, 1979).

[18] The Army DRB has tried to provide guidance to DRB panels in this regard. ADRB SOP, SFRB Memo # 15-79, 30 Nov. 1979, 45 Fed. Reg. 16,309 (Mar. 13, 1980) states in part:

> The aspects of discharge review concerning propriety and equity cannot be separated from each other, though they are distinct considerations. . . . Though an oversimplification, propriety deals with the form and substance of regulation and law, while equity deals with the spirit and intent of these as well as the factors of fairness, compassion, tradition, and the responsibility of the officer corps to manage the force with honor. . . . [P]rejudice must exist before procedural error can be used to justify relief. . . . [T]here are two facets to the consideration of the impact of error. . . . [1.] . . . procedural error as a direct result of an act of omission in the processing of a discharge insures only that a panel is mandated to determine whether . . . the omission results in prejudice as to the reason for discharge or characterization thereof. . . . [2.] . . . procedural error by an act of commission and satisfaction that this error is known during the processing of the discharge, places both the reason and characterization in jeopardy, and if the panel determines that either has been prejudiced, then relief must be seriously considered. Justification for the foregoing is based on the principle of regularity in the former case and the challenge to impartiality in the latter case. The presence of error is not by itself a mandate to upgrade.

that court are often not readily accessible to the average practitioner.

12.3.2 MILITARY COURTS

Military courts, with some exceptions, only review a court-martial when the accused is sentenced to a Bad Conduct or Dishonorable Discharge and/or confinement for a year or more.[18a] These decisions are relevant when:

- The applicant seeks to challenge the legality of his/her court-martial conviction;[19]
- The applicant seeks to have favorable case law applied retroactively to his/her own conviction;[20]
- Military courts have interpreted regulations also relevant to administrative discharges;[21]
- Military criminal law is analogous in its procedures or its handling of factual issues to regular administrative law;[22] and
- The military courts have made broad rulings somehow applicable to administrative discharges.[23]

12.3.3 MILITARY ADMINISTRATIVE RULINGS

12.3.3.1 Opinions of the Judge Advocates General

Local commanders, DRBs, and BCMRs frequently refer questions involving the interpretation of military regulations to the chief legal officer, The Judge Advocate General (TJAG) of the armed service involved. These interpretations are called Judge Advocate General Opinions, often referred to as JAGOPS, OJAG, OTJAG, DAJA (Army), OPJAGAF (Air Force), or JAG Ltr (Navy). These letters often include, and are cited with, identifying numbers and dates (*e.g.*, DAJA-AL 1972/3895, 23 March 1972). Opinions of Judge Advocates General are binding upon all Judge Advocates in the performance of their duties.[24]

Researching JAG opinions is not easy.[25] Over the years, the various services have reported selected opinions in their publications received regularly by members of the JAG Corps. These opinions are normally available[26] under the Freedom of Information Act although the services maintain they are generally not releasable and need not be indexed. This position is questionable in light of their precedential value and/or final nature.[27]

12.3.3.2 DRB and BCMR Decisions

The decisions of these Boards have been made available since April 1, 1977. While the Boards claim these decisions have no precedential value, this perception (that administrative agencies need not be consistent) is incorrect;[28] in any event, reference to the manner in which other Boards have decided similar cases is not only instructive but helps "keep them honest."[29]

12.3.4 MILITARY REGULATIONS

The secretaries of military departments have broad authority to issue regulations in carrying out their statutory mandates. Military personnel matters, particularly discharge procedures, are no exception.[30] Bear in mind, however, that regulations from service to service differ significantly and are frequently amended. Be sure to locate the precise regulation(s) relevant to your case.

[18a] *See* Ch. 4 *supra* (military courts case law).

[19] *See* Ch. 20 *infra*.

[20] *Id. See* Owing v. Secretary, 298 F. Supp. 849 (D.D.C. 1969), *rev'd on other grounds*, 447 F.2d 1245 (1971) (the law to be applied when a BCMR, in reviewing the propriety of a court-martial conviction, is the law in effect at the time of the "appeal," that is, while the application is before the BCMR and the BCMR is bound by rulings of military courts). *See also* Baxter v. Claytor, 652 F.2nd 181, 9 MIL. L. REP. 2633 (D.C. Cir. Apr. 24, 1981).

[21] *See, e.g.*, Martin v. Secretary, 455 F. Supp. 634, 5 MIL. L. REP. 2412 (D.D.C. 1977) (discharge boards, DRBs, and BCMRs must follow CMA interpretation of Army regulations regarding removal from files of certain old nonjudicial punishments). *See* § 12.7 *infra*.

[22] *See, e.g.,* § 12.5.7.3 *infra* (availability of lawyer counsel); § 15.2.4 *infra* ("agency-sale" concept in drug cases).

[23] Giles v. Secretary, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980) (Self-incrimination provision of Art. 31 U.C.M.J. also applies to administrative discharges). *See* § 12.5.7.8.4 *infra*; Ch. 15 *infra*.

[24] 10 U.S.C. § 3037 (Army); JAGA 1961/4183, 8 May 1961, as cited in U.S. Dept. of Army, Pamphlet No. 27-187, Military Affairs at 5 n.23 (1966). *See* Giles v. Secretary, 475 F. Supp. at 602 (D.D.C. 1979) (cites an Army TJAG opinion).

[25] From 1951 to 1968, many JAG opinions of all three services appeared in the *Digest of Opinions — The Judge Advocates General of the Armed Forces*. The Air Force has published a compilation of the Civil Law Opinions of the JAG of the Air Force 1967-1977 with periodic supplements. They are available from JACM, Dept. of Air Force, Hq. USAF, Washington, D.C. 20324.

The first Army opinion digest useful today for more than purely historical research is *Digest of Opinions of The Judge Advocates General of the Army* (1912). This volume includes digests of almost all opinions of general interest from 1862 to 1912. The next major publication was *Digest of Opinions of The Judge Advocate General of the Army* (1912-1930). It has a 1931 supplement with additional cumulative supplements issued annually until 1938. The next publication of interest is *Digest of Opinions of The Judge Advocate General of the Army* (1913-1940). This latter volume with the 1912 publication spans the period September 1862 through 1940. One supplement was published in 1941; and then from January 1942 to the end of June 1951, a periodical entitled *Bulletin of The Judge Advocate General* was issued. From 1951 until 1968 coverage was via *Digest of Opinions — The Judge Advocates General of the Army Forces*. Thereafter selected opinions were reported in the *Judge Advocate Legal Service* from 1968 to August 1971 and from May 1976 to January 1977. THE ARMY LAWYER reported selected opinions from August 1971 until May 1974 and from January 1977 to date.

Navy opinions are frequently published in the periodic Navy JAG publication, *Off the Record*. The Navy will not make this publication available on a subscription basis but presumably will make individual opinions available which have been referenced there and elsewhere.

[26] DAJA-AL 1979/3112, 7 Aug. 1979 (on file at the National Veterans Law Center).

[27] *See* note 24 *supra*; 43 Fed. Reg. 59,869 (listing JAG opinions as type of "Legal Opinion Precedent File" to be listed under the Privacy Act); Art. 0460.8 of Navy Regulations.

[28] *See* § 11.4.2 *supra*. *But see* ADRB SOP, SFRB Memo # 2-78, 10 Feb. 1978, 44 Fed. Reg. 25,092 (Apr. 27, 1979) (Army DRB's approach).

[29] *See* Ch. 10 *supra* (researching and obtaining these opinions).

[30] 10 U.S.C. § 1169. *See* § 4.7.1 *supra* (military regulatory structure); Ch. 5 *supra* (list of regulations); Ch. 6 *supra* (ordering regulations).

12.4 LIMITATIONS ON THE MILITARY'S STATUTORY AUTHORITY TO GRADE DISCHARGES

12.4.1 INTRODUCTION

Federal courts have held that military services cannot issue a bad discharge based on conduct that does not affect the quality of a person's military service or that has no impact on the military service. While this seems analogous to the United States Supreme Court's holding that conduct must be "service-connected" before court-martial jurisdiction can attach, it rests on a different legal basis.[31]

12.4.2 CASE LAW

Federal courts have interpreted 10 U.S.C. Section 1553 as limiting the military's statutory authority to characterize a discharge as less than honorable. Specifically, courts have stated that the type of discharge must accurately reflect the nature of service rendered. The military cannot base a derogatory discharge on conduct not reflected in the record of military service and not found to have affected the quality of that service.

In *Harmon v. Brucker*,[32] the Army administratively issued the servicemember a less than honorable discharge because of conduct that occurred before he entered military service. The Supreme Court construed the DRBs' enabling statute[33] to mean that "the type of discharge to be issued is to be determined solely by the soldier's military record."[34] The Court quoted with approval military regulations construing the congressional grant of power to require that "the type of discharge will reflect accurately the nature of service rendered."[35]

The Court therefore concluded that defendant Secretary of the Army exceeded his statutory authority in issuing Harmon a less than honorable discharge: the derogatory discharge was not based on his military record nor on the nature of service rendered, but rather on preservice activities.

Federal courts applied the holding in *Harmon* to less than honorable discharges based upon conduct that occurred during military service. In *Kennedy v. Secretary of the Navy*,[36] the plaintiff was released from active duty under honorable conditions and transferred to inactive reserve status. Thereafter, he was separated with a less than honorable discharge for activities while in inactive reserve status (*i.e.*, activities that led the Navy to doubt his loyalty).[37]

In *Stapp v. Resor*,[38] the holdings in *Harmon* and *Kennedy* were applied to conduct that occurred while on active military duty. Stapp had a good record as a soldier, but was administratively issued an Undesirable Discharge (UD) just before the expiration of his term of active duty service for his political association with antiwar groups.[39]

The United States Court of Appeals for the District of Columbia further refined the scope of the military's authority to issue a derogatory discharge in

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[31] O'Callahan v. Parker, 395 U.S. 258 (1969). See Ch. 20 *infra*.

[32] 355 U.S. 579 (1958).

[33] At the time of the *Harmon* decision, the statute was codified as 38 U.S.C. § 693(h). The Supreme Court held in *Harmon* that although the authority for DRB review of derogatory discharges and the power originally to issue a derogatory discharge are based on separate statutory provisions, they must be given a harmonious reading so that the bases on which the DRBs must review a derogatory discharge are coterminous with the bases on which the military may validly issue such a discharge. 355 U.S. at 582.

After the *Harmon* decision, Congress recodified 38 U.S.C. § 693(h), with slight changes in the language, and it is today 10 U.S.C. § 1553. The legislative history to the present codification indicates that Congress did not intend "to make any substantive change in extending law." 1962 U.S. CODE CONG. & AD. NEWS 2456, 2459; Van Bourg v. Nitze, 388 F.2d 564, n.14 (D.C. Cir. 1967); Stapp v. Resor, 314 F. Supp. 475, 478 (S.D.N.Y. 1970).

[34] 355 U.S. at 583.

[35] *Id.*

[36] 401 F.2d 990 (D.C. Cir. 1968).

[37] In holding that the servicemember's derogatory discharge exceeded the military statutory authority, the court of appeals stated:

> Factually the case differs from Harmon v. Brucker in that the activities which led to *Harmon*'s discharge were prior to his induction into the Army whereas in the appellant's case the activities which [led to his discharge] . . . were during the time appellant was an officer in the Naval Reserve. However, these activities were not reflected in the record of his naval service and there is no finding that they affected the quality of that service. In these critical respects the case falls within Harmon v. Brucker. . . .
>
> [T]he majority opinion [in *Harmon*] holds that the nature of the discharge must [not] be governed . . . by . . . activities, such as occurred here, which left no discernable impact upon the service rendered or in the records of that service. . . .

401 F.2d at 991-92.

[38] 314 F. Supp. 475, 3 SEL. SERV. L. REP. 3293 (S.D.N.Y. 1970).

[39] After reviewing the holdings in *Harmon* and *Kennedy*, the district court stated:

> The facts presented in the instant suit compel a similar result since there has been no showing that [the alleged activity which led to Stapp's discharge] adversely affected his military performance. . . . Thus, even assuming the validity of the allegations, under the authority of Harmon v. Brucker, *supra*, these allegations will not serve as a predicate for an undesirable discharge since they do not charge plaintiff with any violation or misconduct connected to his military record. They charge him with purely personal conduct, wholely removed from his military duties, and as such are unsupportable bases for punitive action. . . .
>
> Since *Stapp* . . . is not charged with any military misconduct for matter affecting his military record, [the alleged activities which led to his discharge] fail to state a basis for issuing a less than honorable discharge.

314 F. Supp. at 478-79.

In Doe v. Chafee, 355 F. Supp. 112, 1 MIL. L. REP. 2052 (N.D. Cal. 1973), *aff'd sub nom.* Doe v. Warner, 2 MIL. L. REP. 2519 (9th Cir. 1974) a case which rests upon the application of Harmon v. Brucker, 355 U.S. 579 (1958); Kennedy v. Secretary of the Navy, 401 F.2d 990 (D.C. Cir. 1968); Stapp v. Resor, 314 F. Supp. 475 (S.D.N.Y. 1970), the district court stated: "The sole question is whether there has been a showing in petitioner's military record of a nexus between [the activity which led to his discharge] and the quality of his military service." 355 F. Supp. at 114.

In applying this statutory standard to the facts in *Doe*, the district court went on to hold that such a showing had been made in that individual's record of military service. *Doe* had been discharged for homosexual conduct, and the district court found that this affected his performance of military duty. 355 F. Supp. 112, 113 nn. 2 & 3. There is language in *Doe*, however, indicating that the court did not recognize the second prong of the Harmon v. Brucker statutory interpretation — that the military may not base a derogatory discharge on conduct which is not found to have adversely affected the quality of military service rendered. *Id.* at 114-15.

Roelofs v. Secretary of the Air Force.[40] Roelofs received a UD because of a civilian court felony conviction (possession of heroin with intent to distribute). He challenged an Air Force regulation[41] which stated that a UD should normally be issued to a servicemember discharged as a result of a civilian court conviction. All services have used a similar regulation since the 1940s.

Roelofs argued that the regulation exceeded the service's statutory and constitutional authority because it permitted a derogatory discharge to be based upon conduct that did not affect performance of military duties. Roelofs contended that his offense was not service-connected, that he had lost no time from work, and that his jail sentence would begin after his enlistment contract expired. The Air Force DRB upgraded Roelofs' discharge to General (GD). The Air Force BCMR denied his application for an Honorable Discharge (HD). The administrative discharge board, the DRB, and the BCMR did not decide whether Roelofs' drug conviction affected performance of his military duties.

The court held the regulation valid as a general rule for servicemembers discharged for felony convictions in civilian court. However, if a servicemember argues that the offense did not affect "on the job" performance of military duties, and the record supports this argument, a UD may not be issued.[42]

In order for the court to direct that Roelofs' case be reconsidered without any presumption of UD, it had to conclude that Roelofs' offense did not meet the legal standard for a UD: "[t]he presumption that an [U]ndersirable [D]ischarge will result from a civilian conviction is warranted *if it results in deficiency in performance of military duties or has a direct impact upon military service*."[43]

Indeed, the court expressly made this finding by stating that Roelofs' "offense had no connection with performance in the service and had no direct impact on the service."[44] Because of the seriousness of Roelofs' offense, and the involvement of another servicemember,[45] this holding is significant.

Language in the court's opinion, however, indicates that the military may validly consider more than "on the job" performance in deciding whether a General Discharge is appropriate. The court indicated that "the military may reasonably and properly look beyond the performance . . . of daily chores . . . and take into account the impact of [the conduct] . . . in diminishing the overall effectiveness of military."[46] The court limited this language to situations in which the discharge is for conviction of "serious criminal activity."[47]

The court allowed the military to consider factors beyond the performance of daily chores in part because "a person convicted of a felony is already stigmatized," and, "[t]o the extent that a 'general discharge' imparts stigma, the question arises whether it is greater in any significant degree than the stigma already borne by the felon."[48] The court's logic is questionable, in light of the unrebutted evidence of the stigma of a GD, but counsel should be aware of this language in future litigation.[49]

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[40] 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980). The opinion is somewhat confusing because the authoring judge died, apparently before a final revision of the opinion was made; this important case is thus discussed in detail.

[41] AFM 39-12, § 2.

[42] The court stated:

> We do not have here a case where an *undesirable* discharge was issued based upon conduct which was not "service-related." The incremental stigma that results from an undesirable discharge is of a different order from that present in this case. Regulations indicating that a good record would warrant either an honorable or general discharge create the clear impression that an undesirable discharge indicates the *absence* of a good record of performance in the service. This is an adverse finding, over and above the stigma of the felony, because it is equivalent to a finding that the serviceman has performed inadequately on the job. The [regulatory] presumption that an undesirable discharge will result from a civilian conviction is warranted if it results in deficiency in performance of military duties or has a direct impact upon military service. A showing that negatives such a deficiency rebuts the presumption. That is our understanding of the intent of the regulation, and is of course consistent with the [Discharge Review Board's] upgrading of appellant's discharge from undesirable to general. 628 F.2d 594, 598-99 (emphasis in original, footnotes omitted).

This statement is a holding of the court, and not dicta, since the court remanded the case "in order to permit reconsideration by the appropriate Air Force authority . . . without any presumption of appellant's susceptibility to an Undesirable Discharge." *Id.* at 601 n.36.

[43] *Id.* at 599 (emphasis added).

[44] *Id.* at 601 n.36.

[45] Roelofs, while on active duty in the Air Force,

> met and became friends with Air Force Sergeant Johnson. Johnson had been previously stationed in Thailand, and he told appellant that there were a lot of available drugs over there that he could buy (App. 59). Johnson proposed sending the heroin back to appellant who would sell it, and they split the profits two-thirds for Johnson, one-third for appellant. . . .
>
> . . . .
>
> After Johnson went to Thailand, he and appellant exchanged a series of letters culminating in a letter from Johnson saying that he had mailed the heroin and appellant should be receiving it. . . .
>
> Two weeks after receiving Johnson's letter, appellant was arrested by federal agents just after he picked up a package of heroin delivered to him through the mail from Sergeant Johnson in Thailand. . . .
>
> He was charged with importation of a controlled substance, a violation of 21 U.S.C. § 942(a), and possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1). After pleading guilty to the second count, the first count was dismissed.

Brief for Appellee Secretary of the Air Force in *Roelofs*. The Air Force argued that based on evidence of these facts, "it is inconceivable . . . that appellant's conviction and the circumstances surrounding the offense adversely affected the quality of his military service." *Id.* at 11-12.

[46] 628 F.2d 594, 598.

[47] *Id.*

[48] *Id.*

[49] This notion of "incremental stigma" is unusual and seems to be based on the court's sense that the felony conviction and the GD in some fashion merged. The court referred by analogy to the GD for early discharges as trainees and seemed also to rely on some notion that if a servicemember commits a nonconstitutional protected act which by regulation will cause a discharge, a GD can result, thereby presuming an impact on service sufficient to justify a GD.

In *Wood v. Secretary of Defense*,[49a] the court held that the interpretation of the *Roelofs* decision described above is correct. In *Wood*, a class action lawsuit, plaintiffs challenged a Department of Defense directive that prescribed UDs for servicemembers discharged for certain conduct occurring while in the inactive reserves, whether such conduct affected performance of military duties or not. Relying on *Roelofs*, the court held that the directive exceeded military statutory authority because an inactive reservist's conduct would rarely, if ever, affect performance of military duties.

The court in *Wood* remanded the cases of all class members (inactive reservists whose bad discharges were issued by any service or reviewed by a DRB or BCMR since April 20, 1971) to the military services for further action. The *Wood* court, following *Roelofs*, ordered the military services to issue each class member an HD or to determine whether a less than honorable discharge could be justified under the following rule:

> (1) An Undesirable Discharge can only be based on conduct found to have affected directly the performance on military duties.
>
> (2) A General Discharge can only be based upon conduct found to have an adverse impact on the overall effectiveness of the military, including military morale and efficiency.[49b]

12.4.3 WHEN TO USE THE CASE LAW

12.4.3.1 General

The *Roelofs* decision affects all servicemembers who have less than honorable discharges based on conduct that did not affect "on the job" performance. Like the regulations on civilian court convictions, military regulations state that a UD is normally issued in cases involving homosexual acts, use or possession of drugs, failure to pay debts or support dependents, fraudulent enlistment, and unsanitary habits. Because the Court of Appeals held that this regulatory presumption is impermissible for those who can show that their conduct did not affect their "on the job" performance, an upgrade to at least a GD is required if such a showing can be made.

While the court in *Roelofs* did not directly decide whether the military services can base a GD on conduct not affecting "on the job" performance, when the discharge is for a reason other than a felony conviction, the logic behind the opinion indicates that they cannot.

The cases have not resolved whether the military can base a derogatory discharge on conduct that did not affect performance of military duties, but that caused termination of military service before the contract or period of induction expired. In *Kennedy v. Secretary of the Navy*, the court stated that the very information which could *not* lawfully be considered in characterizing the servicemember's discharge (activities which led to doubt as to the servicemember's loyalty) *could* lawfully be considered by the Navy in deciding whether to separate the individual.[50]

The DRBs and BCMRs do not interpret the cases to require legal limitations on conduct the military may consider in grading a discharge. The only holding specifically recognized is that of *Harmon v. Brucker* — the military cannot legally base a derogatory discharge upon preservice activities.[51]

Some DRBs and BCMRs, however, can be persuaded as a matter of equity (not propriety) to upgrade a discharge when the conduct involved did not affect performance of military duties or otherwise have a direct impact on the military.[52] Thus, to make a record, DRB and BCMR applicants should contend in appropriate cases that the military improperly exceeded its authority by basing the applicant's discharge grade upon conduct that did not affect "on the job" performance of military duties and that it was inequitable to do so. Such claims are especially valid when the discharge is for homosexuality, failure to pay just debts, unsanitary habits, civilian court convictions, and use or possession of drugs.

[49a] 496 F. Supp. 192, 8 MIL. L. REP. 2454 (D.D.C. 1980).

[49b] *Id.* at 198-99.

[50] The court said:

> The basis for the discharge given appellant . . . was doubt as to appellant's loyalty. . . . [T]he conduct relied upon is not said to have interfered in any way with appellant's service as an officer. . . . [A]s we pointed out with Bland v. Connally, [293 F.2d 852, 858 (D. C. Cir. 1961)], it does not follow that authorities could not separate from the service one of doubtful loyalty. It follows only that the statutory standards governing the discharge did not authorize a [less than honorable] discharge, with all its derogatory consequences . . . [401 F.2d at 992].

Similarly, the Supreme Court in Harmon v. Brucker, 355 U.S. 579 (1958), reversed a court of appeals decision that stated:

> [I]f he can be discharged as a security risk, the Army can determine whether he is or is not a security risk. And in that determination surely no data is more relevant and material than are his past habits, activities and associations. . . . If it could make that determination, as admittedly it could, and upon that basis could determine whether a man was suitable for any service whatsoever, it could include that consideration among the facts to be considered in determining the value of his service and, consequently, in selecting the type of discharge to be given him.

Harmon v. Brucker, 243 F.2d 613, 620 (D.C. Cir. 1957). The Supreme Court accepted the court of appeals' conclusion that preinduction activities were relevant in deciding whether to discharge a soldier, but the Court rejected the proposition that those same activities could be considered in selecting the type of discharge that should be given. *See* Roelofs v. Secretary of the Air Force, 628 F.2d 594 at 601 (Bazelon, J., concurring).

On the other hand, the court of appeals in *Roelofs* appeared to suggest otherwise by stating: "Once the ability of the Air Force to discharge convicted individuals is recognized, there is no irregularity in the presumption that discharge under such circumstances will ordinarily be less than Honorable." *Id.* at 597. The majority in *Roelofs* distinguished Harmon v. Brucker on the ground that "the Court was no doubt concerned lest the Army's action subject the servicemembers involved to *ex post facto* punishment," and somewhat questionably distinguished cases like Kennedy v. Secretary of the Navy on the ground that they involve "fundamental liberties." *Id.*

[51] *See* ADRB SOP, Annex F-1, para. 2.a.(2)(b), 44 Fed. Reg. 25,069 (Apr. 27, 1979).

[52] *See* ADRB SOP, Annex F-1, para. 2.c.(1), 44 Fed. Reg. 25,070 (Apr. 27, 1979).

12.4.3.2 Sample Contentions

A suggested set of contentions based on the federal court cases discussed above follows.

#. As interpreted by the federal courts, discharging a servicemember with a less than honorable discharge for conduct that (a) does not result in deficiency in performance of the servicemember's military duty and (b) does not have a direct impact upon military service, exceeds the military's statutory authority and violates due process. *See Harmon v. Brucker*, 355 U.S. 519 (1958); *Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980); *Kennedy v. Secretary of the Navy*, 401 F.2d 990 (D.C. Cir. 1968); *Wood v. Secretary of Defense*, _____ F. Supp. _____, 8 MIL. L. REP. 2454 (D.D.C. 1980); *Stapp v. Resor*, 314 F. Supp. 475, 3 SEL. SER. L. REP. 3293 (S.D.N.Y. 1970).

#. The conduct for which the applicant was discharged consisted of [describe in terms of who, what, where, and how regarding the conduct for which the applicant was discharged according to the military's version of the events, or, if this version is going to be contested, according to the evidence that will be submitted by the applicant].

#. The conduct for which the applicant was discharged (a) did not result in deficiency in performance of duty and (b) did not have a direct impact upon military service, except for the fact that the applicant was separated prior to the expiration of the normal term of service.

#. In characterizing the applicant's discharge, the discharge authority considered the conduct for which the applicant was discharged.

#. The applicant's discharge is improper and inequitable because in characterizing the applicant's discharge, the discharge authority considered the conduct for which the applicant was discharged, thereby exceeding the military's statutory authority and violating due process.

#. In view of the validity of the contention above, the applicant's discharge should be recharacterized to Honorable. *See Giles v. Secretary of the Army*, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980); *Dilley v. Alexander*, 627 F.2d 407, 8 MIL. L. REP. 2324 (D.C. Cir. 1980).

#. The applicant's discharge should also be recharacterized to Honorable because if the regulatory standards for grading the discharges for those separated at expiration of the normal term of service are applied to the applicant's overall record of service — excluding consideration of the conduct for which the applicant was discharged — an Honorable Discharge is warranted.

Of course, if there is some evidence that the conduct did have an adverse impact on the military, this must be discussed and additional contentions made. An example follows.

#. The fact that the applicant spent one day in jail did not result in deficiency in performance of military duty and did not have a direct impact on military service because that day was Saturday, (s)he was off-duty, and (s)he was not called to duty that day.

12.5 PROCEDURAL ERRORS

12.5.1 INTRODUCTION

12.5.1.1 Failure To Follow Regulations

Even though servicemember's term of enlistment has not expired, (s)he has no absolute right to remain in the service,[53] and may be discharged administratively before the term expires.[54] An administrative discharge is void, however, if it violates minimum concepts of fairness and due process guaranteed by the constitution,[55] ignores pertinent procedural rights,[56] or exceeds statutory authority.[57] This section deals with the first two types of error.

The failure of the military to comply with its own rules and regulations governing separation procedure[58] is the most common procedural error in mili-

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[53] 10 U.S.C. § 1169; Birt v. United States, 180 Ct. Cl. 910 (1967); McAulay v. United States, 305 F.2d 836, 158 Ct. Cl. 359 (1962), *cert. denied*, 373 U.S. 938 (1963); Reed v. Franke, 187 F. Supp. 905 (E.D. Va. 1960), *aff'd*, 297 F.2d 17 (4th Cir. 1961).

[54] Birt v. United States, 180 Ct. Cl. 910 (1967); Rowe v. United States, 167 Ct. Cl. 468, 470-72 (1964), *cert. denied*, 380 U.S. 961 (1965).

[55] *See, e.g.*, Clackum v. United States, 296 F.2d 226, 148 Ct. Cl. 404 (1960). *But see* Davis v. Secretary of the Army, 440 F.2d 817 (5th Cir. 1971); Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963); Jackson v. United States, 156 Ct. Cl. 183, 297 F.2d 939 (1962), *cert. dismissed*, 372 U.S. 95 (1962). The constitutional right to notice and an opportunity to be heard, however, applies only where the discharge, albeit honorable, either casts a stigma on the serviceman or has some derogatory connotation. Keef v. United States, 185 Ct. Cl. 454, 467 (1968). *Accord*, Sims v. Fox, 505 F.2d 857, 2 MIL. L. REP. 2653 (*en banc*) (5th Cir. 1974), *cert. denied*, 421 U.S. 1011 (1975); *rev. en banc* 2 MIL. L. REP. 2653. Rew v. Ward, 402 F. Supp. 331, 3 MIL. L. REP. 2393 (D.N.M. 1975). Some courts have held that, under some circumstances, an opportunity to be heard need not precede the discharge and is satisfied by a post-discharge hearing before a military discharge review board. Reed v. Franke, 297 F.2d 17 (4th Cir. 1961). *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974) (constitutional right of civil servant to notice and hearing satisfied by speedy postremoval hearing). The *Reed* decision is questionable in light of the subsequent decision in *Arnett*. In *Arnett*, the Supreme Court upheld a postdischarge hearing at which the government had the burden of proof. In contrast, at a discharge review proceeding, the veteran has the burden of showing why the discharge was improper or inequitable.

[56] *See, e.g.*, Cruz-Casado v. United States, 213 Ct. Cl. 498, 553 F.2d 672, 5 MIL. L. REP. 2053 (1977); Bray v. United States, 207 Ct. Cl. 515, 515 F.2d 1383, 3 MIL. L. REP. 2207 (1975); Conn v. United States, 376 F.2d 878, 180 Ct. Cl. 120 (1967); Murray v. United States, 154 Ct. Cl. 185 (1961).

[57] *See, e.g.*, Harmon v. Brucker, 355 U.S. 579 (1958); Kennedy v. Secretary of the Navy, 401 F.2d 990 (D.C. Cir. 1968); Davis v. Brucker, 275 F.2d 181 (D.C. Cir. 1960); Stapp v. Resor, 314 F. Supp. 475, 3 SEL. SERV. L. REP. 3293 (S.D.N.Y. 1970). Each of the foregoing cases addresses the authority of the armed services to characterize a servicemember's service on the basis of preservice or nonservice related factors. *See* § 12.4 *supra*.

[58] Failure to comply with procedure mandated by statute is also error. *See, e.g.*, Dilley v. Alexander, 603 F.2d 914, 7 MIL. L. REP. 2033, (D.C. Cir. 1979), *rehearing denied*, 7 MIL. L. REP. 2349, 627 F.2d 407, 8 MIL. L. REP. 2324 (1980); Doyle v. United States, 599 F.2d 984, 7 MIL. L. REP. 2253 (1979); Ricker v. United States, 396 F.2d 454, 184 Ct. Cl. 402 (1968). The foregoing cases involved officer promotions, the procedure for which is dictated by statute. Aside from authorizing discharges, Congress has left the establishment of discharge procedure to the discretion of each military department.

tary discharges. Each branch of the armed services has promulgated regulations within guidelines set by the Department of Defense, establishing procedures for administrative discharges prior to the expiration of a servicemember's term of service. These regulations provide certain rights to servicemembers which, if violated, may invalidate a discharge.

A government agency must abide strictly by its own validly prescribed rules and regulations when the underlying purpose of such rules and regulations is to confer important procedural benefits upon the individual affected.[59] This requirement of "due process" of law applies with equal force to the military administrative discharge process.[60] When a government employee is protected by procedural due process created by the agency's own regulations, "scrupulous compliance" with those regulations is required to avoid injustice.[61]

12.5.1.2 What Is Prejudicial Error?

The following must be shown to invalidate an action in which procedural rules or regulations were not followed:

- The provision violated is in fact a rule or regulation;[62]
- The regulation is designed for the benefit of the affected person;[63]
- The regulation is mandatory rather than merely general guidance;[64]
- The service in fact violated the regulation;[65]

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[59] Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957). *Accord*, Morton v. Ruiz, 415 U.S. 199, 235 (1974); Yellin v. United States, 374 U.S. 109 (1963); Doe v. Hampton, 566 F.2d 265, 280 (D.C. Cir. 1977).

[60] Matlovich v. Secretary of the Air Force, 591 F.2d 852, 6 MIL. L. REP. 2569 (D.C. Cir. 1978); Vandermolen v. Stetson, 571 F.2d 617, 624, 6 MIL. L. REP. 2569 (D.C. Cir. 1977); Harmon v. Brucker, 355 U.S. 579 (1958); Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979); Geiger v. Brown, 419 F.2d 714, 717-19 (D.C. Cir. 1969); Roberts v. Vance, 343 F.2d 236, 240 (D.C. Cir. 1964). *See also* note 56 *supra*.

[61] Mazaleski v. Treusdale, 562 F.2d 701, 719 (D.C. Cir. 1977) (civil servant); Conn v. United States, 376 F.2d 878, 180 Ct. Cl. 120 (1967) (military servicemember); Matlovich v. Secretary, 591 F.2d 852 (D.C. Cir. 1978) (military servicemember).

[62] *See* Doe v. Hampton, 566 F.2d 265, 280-81 (D.C. Cir. 1977); Lindsey v. United States, 214 Ct. Cl. 574, 584 n.10 (1977); McGlasson v. United States, 397 F.2d 303, 308-09, 184 Ct. Cl. 542 (1968); Greenway v. United States, 175 Ct. Cl. 350, *cert. denied*, 388 U.S. 881 (1966).

[63] American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538 (1970); Matlovich v. Secretary, 591 F.2d 852 (D.C. Cir. 1978); Allgood v. Kenan, 470 F.2d 1071, 1 MIL. L. REP. 2051 (9th Cir. 1974) (AR 635-212, governing discharges of personnel for unsuitability or unfitness, and AR 635-200, ch. 10, governing requests for discharge to avoid trial by court-martial, exist solely for the benefit of the Army; and the failure to discharge in a given case is committed to the sole discretion of the Army); Silverthorne v. Laird, 460 F.2d 1175, 5 MIL. L. REP. 3379 (5th Cir. 1972) (same). *Contra*, Patterson v. Stancliff, 330 F. Supp. 110, 4 SEL. SERV. L. REP. 3643 (D. Vt. 1971).

[64] *See* Doe v. Hampton, 566 F.2d 265, 281 (D.C. Cir. 1977) (counseling and reassignment provision of Federal Personnel Manual); Donovan v. United States, 433 F.2d 522, 523-24 (D.C. Cir. 1970) (provisions of FAA Employee Performance Improvement Handbook not mandatory); Nordstrome v. United States, 342 F.2d 55, 59, 169 Ct. Cl. 632 (1965) (general CSC instruction issued by way of amendment to FPM not mandatory); Aflague v. United States, 309 F.2d 753, 755-56, 159 Ct. Cl. 80, 86-87 (1962) (counseling provision of Executive Order not mandatory); Khuri v. United States, 154 Ct. Cl. 58, 63-64, *cert. denied*, 368 U.S. 913 (1961) (regulation intended as a guide and to set forth separation policies for foreign service posts but which left promulgation of separation regulations to individual Foreign Service posts not mandatory). The determination whether a provision is mandatory or general guidance (precatory) hinges upon the intent of the agency in authorizing it. The determination of an agency's intent may be ascertained by an examination of (1) the language of the provision, (2) the context of the provision, and (3) any available extensive evidence. Doe v. Hampton, 566 F.2d at 281. The use of words such as "shall," "must," or "will" normally signify that a provision is mandatory. Directory (guidance) terms include "should" or "may." The use of "should," however, is not automatically determinative of the issue. Superficial indications of intent must be weighed against strong expressions of executive and congressional policy where present. Doe v. Hampton, 566 F.2d at 281-82. *But see* Khuri v. United States, 154 Ct. Cl. 58, *cert. denied*, 368 U.S. 913 (1961). Similarly, while the word "may" ordinarily connotes discretion, such an interpretation is not always true. *See* Thompson v. Clifford, 408 F.2d 154, 158-59 (D.C. Cir. 1968) (and cases cited therein).

[65] Aside from the factual underpinning, this issue may involve a question of interpretation of the regulation itself. Since a regulation is a written instrument, the general rules of construction of written instruments apply. 1A SUTHERLAND, STATUTORY CONSTRUCTION 362 (4th ed. 1972). The plain meaning rules of statutory construction apply to the interpretation of administrative regulations. Whelan v. United States, 529 F.2d 1000, 208 Ct. Cl. 688 (1976); Selman v. United States, 498 F.2d 1354, 1354-58, 208 Ct. Cl. 678, 681-83, 2 MIL. L. REP. 2179 (1974); Akins v. United States, 439 F.2d 175, 179, 194 Ct. Cl. 477, 486 (1971). Hence, the ordinary and commonly understood meaning shall be attributed to the terms employed in a regulation unless a contrary meaning is clearly intended. NLRB v. Coca-Cola Bottling Co., 322 U.S. 607, 618 (1944); Whelan v. United States, 529 F.2d 1000, 208 Ct. Cl. 688 (1976); Benton v. United States, 488 F.2d 1017, 1020, 203 Ct. Cl. 263, 269 (1973); Akins v. United States, 194 Ct. Cl. at 486, 439 F.2d at 179; Ricker v. United States, 396 F.2d 454, 184 Ct. Cl. 402 (1968). Where the literal construction of the regulation conflicts with its purpose, the object of the purpose may be controlling. *Cf.* United States v. American Trucking Assoc., 310 U.S. 534, 543 (1940) (statutory construction); Fox v. United States, 283 F.2d 951, 151 Ct. Cl. 611 (1960) (same). If the meaning of the words used in a regulation is in doubt, great deference is accorded the interpretation given the regulation by the officers or agency charged with its administration unless it is plainly erroneous or inconsistent with the terms of the regulation. INS v. Stanisic, 395 U.S. 62 (1969); Thorpe v. Housing Authority of Durham, 393 U.S. 268, 276 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Leefer v. NASA, 543 F.2d 209, 213 (D.C. Cir. 1976); Rosetti Contracting Co., Inc. v. Brennan, 508 F.2d 1039, 1042 (7th Cir. 1974); Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also* Ehlert v. United States, 402 U.S. 99, 105, 4 SEL. SERV. L. REP. 3001 (1971) (the Army normally construes its own regulations); Emma v. Armstrong, 473 F.2d 656, 1 MIL. L. REP. 2043 (1st Cir. 1973) (same). To sustain an administrative interpretation of a regulation, it is not necessary to find that the agency construction is the only reasonable one. JNO McCall Coal Co. v. United States, 374 F.2d 689, 691 (4th Cir. 1967); Saracena v. United States, 508 F.2d 1333, 1335-36 (Ct. Cl. 1975); John V. Carr & Son, Inc. v. United States, 347 F. Supp. 1390 (Cust. Ct. 1972). This is particularly so where there has been a long continued administrative interpretation of a regulation. *Cf.* Lindsey v. United States, 214 Ct. Cl. 574 (1977) (longstanding, consistent administrative interpretation of statutory provisions); Kantor v. United States, 205 Ct. Cl. 1, 7 (1974); Benton v. United States, 488 F.2d 1017, 203 Ct. Cl. 263 (1973); Cornman v. United States, 492 F.2d 230, 233, 187 Ct. Cl. 486, 492, *cert. denied*, 396 U.S. 960 (1969). On the other hand, if the administrative construction has not been uniform, the rule which attaches great weight to administrative interpretation is inapplicable. Lindsey v. United States, 214 Ct. Cl. 574 (1977) (inconsistent GAO decisions); Ferrell Lines, Inc. v. United States, 499 F.2d 587, 204 Ct. Cl. 482 (1974).

The military is bound by interpretations of its regulations by the military appellate courts. Owings v. Secretary, 298 F. Supp. 849, 855 (D.D.C. 1969), *rev'd on other grounds*, 447 F.2d 1245 (D.C. Cir. 1971); Martin v. Secretary of the Army, 455 F. Supp. 634, 637, 5 MIL. L. REP. 2412 (D.D.C. 1977). In the absence of a previous court interpretation, prior interpretation by the DRB, the BCMR, and the Judge Advocate General for the service in question would be significant. *Cf.* Giles v. Secretary, 475 F. Supp. 595, 7 MIL. L. REP. 2524 (D.D.C. 1979), *aff'd*, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980) (JAG Opinion referenced for regulatory interpretation).

As a general rule, a regulation meant for the benefit of the employee should be read liberally in his/her favor to give the full mea-

- The violation was both "substantial" and "prejudicial."[66]

The last requirement is the one most frequently in issue.

The normal inquiry is: was the error "prejudicial"? Unfortunately, there is no simple way to decide. At best, an advocate can use some basic principles, precedent, and common sense to argue that an error prejudiced the proceedings to the detriment of the servicemember. If, for example, the servicemember's length of service was misrecorded in the commander's report by a few days, it is highly unlikely that this would be considered prejudicial error. On the other hand, denial of counsel when required by regulation would be. Most errors lie between these extremes.

The authors advise the following rule of thumb:

> When the error, taking the record as a whole, may *arguably* have made someone along the chain of decision-making that led to the discharge make a less beneficial decision than would have been made absent the error; or the error somehow made it more difficult for the servicemember to make an informed decision as to his or her course of action when confronted with the discharge proceedings.

The rule contained in the DoD DRB regulation is: "Such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made . . . ."[66a] This DRB rule may be too restrictive and, without more guidance, could permit arbitrary decision-making. During the rule-making period prior to the promulgation of the DRB regulation, DoD rejected suggestions that it give examples of prejudicial errors and that it consider certain errors to be automatic *(per se)* errors.[67] The Army DRB's *Standard Operating Procedures*, however, does list errors that "may" be prejudicial.[68] One useful approach when the error occurred at a crucial stage (*e.g.*, denial of proper counsel, denial of a hearing) is to argue that it is impossible for the DRB to conclude that the discharge would have been the same without the error because there is no way to do more than merely speculate what another counsel would have done or what would have resulted at a hearing.

The presumption of regularity can pose a serious problem as well. The DRB regulations read: "[T]here is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption."[69] Because there is no guidance for the application of this presumption, the DRBs tend to invoke it to solve difficult problems (*e.g.*, what is prejudicial error in a particular case?). The presumption, however, is normally designed to be applied only to questions of fact. For example, if military records recorded the servicemember as AWOL, the DRB can presume this to be correct absent substantial rebuttal evidence. This is far different from presuming that a required procedure actually was followed when there is no supporting evidence in the service record.[70]

12.5.1.3 Prejudicial Error Should Result in An Honorable Discharge

Logically, when a prejudicial procedural error is found, an HD should result; in effect, the Board finds that the discharge was "illegal" and should not have occurred. This is particularly true when the error relates to the decision to discharge (as opposed to a decision on the *type* of discharge). The logic compelling an HD is similar to that in suits by former government employees for back pay. There, the employee is given all back pay if the discharge is found to have been procedurally defective; however, the employer can try to fire the employee again, this time using the proper procedure. Reinstatement and

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[65] (continued)
sure of protection which the regulation apparently was meant to confer. Matlovich v. Secretary of the Air Force, 591 F.2d 852, 6 MIL. L. REP. 2569 (D.C. Cir. 1978); Piccone v. United States, 407 F.2d 866, 872-73, 186 Ct. Cl. 752 (1969).

[66] Doe v. Hampton, 566 F.2d at 277; Dozier v. United States, 473 F.2d 866, 868 (5th Cir. 1973); Widner v. United States, 556 F.2d 526, 214 Ct. Cl. 157, 5 MIL. L. REP. 2320 (1977); Murphy v. United States, 209 Ct. Cl. 352, 4 MIL. L. REP. 2189 (1976); Wathen v. United States, 527 F.2d 1191, 1200 n.9, 208 Ct. Cl. 342, 357, 4 MIL. L. REP. 2179 (1975), *cert. denied*, 429 U.S. 821 (1976); Hart v. United States, 498 F.2d 1405, 204 Ct. Cl. 925, *cert. denied*, 419 U.S. 1049 (1974); Haynes v. United States, 418 F.2d 1380, 190 Ct. Cl. 9 (1974); Cohen v. United States, 369 F.2d 976, 177 Ct. Cl. 599 (1966), *cert. denied*, 387 U.S. 917 (1967). However, a procedural error is not made harmless simply because the government employee appears to have had little chance of success on the merits anyway. Bell v. United States, 366 U.S. 393, 413-14 (1961); Mazaleski v. Treusdale, 562 F.2d 701, 719 n.41 (D.C. Cir. 1977); Gratehouse v. United States, 512 F.2d 1104, 1108 n.3, 206 Ct. Cl. 288 (1975); Hanifan v. United States, 354 F.2d 358, 173 Ct. Cl. 1053 (1965); Garrott v. United States, 340 F.2d 615, 169 Ct. Cl. 186 (1965). However, the courts have been cautious in applying the doctrine of harmless administrative error when basic procedural rights have been implicated. Doe v. Hampton, 566 F.2d at 277-78 n.29; Yiu Fong Cheung v. INS, 418 F.2d 460, 464 (D.C. Cir. 1969); Braniff Airways, Inc. v. CAB, 379 F.2d 453, 465 (D.C. Cir. 1967); Ryder v. United States, 585 F.2d 482, 488-89, 6 MIL. L. REP. 2467 (1978) ("procedural violation going to the heart of the whole administrative process"). Some rights, such as assistance of counsel, are so basic to a fair hearing that their infraction can never be treated as a harmless error. Yiu Fong Cheung v. INS, 418 F.2d at 464.

Two courts have rejected an argument by the government that a "but for" test for prejudice should be applied to cases of procedural error — that is, the error is harmless where the government can show by a preponderance of the evidence that it would have reached the same decision in the absence of the violation. *See* Dilley v. Alexander, 603 F.2d 914, 7 MIL. L. REP. 2033 (D.C. Cir. 1979) (Army officer passed over for promotion by improperly constituted promotion board); Ryder v. United States, 585 F.2d 482, 6 MIL. L. REP. 2467 (1978) (dismissal of Army civilian employee tainted by improper *ex parte* communication). *See also* Doyle v. United States, 599 F.2d at 993-97.

A procedural error may be cured, provided, however, the corrective action occurs within a reasonable period of time. The consequences of a refusal to accept an agency's offer to remedy a possible, though disputed, procedural error will depend upon the timing and the nature of the offer. *See* Mazaleski v. Truesdell, 562 F.2d at 719-20; Gratehouse v. United States, 512 F.2d at 1109.

[66a] 32 C.F.R. § 70.6(b)(1).

[67] 43 Fed. Reg. 13,567 (Mar. 31, 1978).

[68] ADRB SOP, Annex F-1, para. 2.a. (1)-(4), 44 Fed. Reg. 25,069 (Apr. 27, 1979).

[69] 32 C.F.R. § 70.5b.(12)(vi).

[70] The presumption of regularity which attaches to administrative actions should not apply where the record is silent as to essential procedural requirements. *See* Olenick v. Brucker, 273 F.2d 819 (D.C. Cir. 1959); Army DRB SOP, Annex F-1, para. 2.a.(3), 44 Fed. Reg. 25,069 (Apr. 27, 1979). *See* § 9.3.3 *supra* (further discussion of the presumption of regularity).

another discharge proceeding cannot occur in a military discharge case (the DRBs cannot reinstate; a BCMR can reinstate only if the veteran so requests), so the Boards are reluctant to grant an HD just because a procedural error is found. The best practice is to argue also that the character of the veteran's service was honorable. The following approaches can help.

The DRB regulations are silent on this problem, and the courts have seldom dealt with it. The best argument is that the applicant's service should be characterized in accordance with his/her conduct and efficiency (or proficiency) ratings.[71] The argument could be stated as follows: "Since you have now found that the unfitness discharge was improper, the presumption in favor of a UD does not apply. You should look at the character of service, and see what the veteran would have gotten had (s)he had the same record at expiration of his/her term of service."

Some Boards will follow this logic. Others look at the number of punishments in the record without referring to the regulatory criteria for characterizing a discharge at normal separation. For example, once a discharge for unfitness or misconduct is changed to one "for the convenience of the government," the Navy DRB will normally look at an applicant's conduct and efficiency marks to see if (s)he is entitled to an HD or GD.[72] If there are disciplinary records in the servicemember's file, argue that they were, among other things, minor, remote, or improper.[73]

There is some case law to support an argument that the Board should assume that the veteran completed his/her term of service and should further assume good ratings for this fictional period.[74] In *Carter v. United States*,[75] the Court of Claims found a discharge to be in error because there was no psychiatric diagnosis as required to support a discharge for a character and behavior disorder.

The court ordered the Army to "determine, as best it can, what character of discharge plaintiff would have received if he had fully served out his enlistment," despite the fact that the DRB had already denied the plaintiff an upgrade. The ADRB upgraded Carter's discharge from GD to HD after "awarding him creditable ratings from the time of his actual separation to the prejudicial expiration of the term of service" despite a rather poor disciplinary record.[76] The ADRB followed similar logic in a similar factual setting and stated: "In extending the applicant's record to ETS the majority felt most likely the applicant would have received a fully Honorable Discharge as required by regulations in effect at that time."[77]

The Boards tend to accept the *Carter* approach more often in unsuitability cases than unfitness/misconduct cases. The unsuitability regulations, while not explicitly presuming an HD in all services,[78] are concerned with a servicemember's *ability* to serve as opposed to his or her record of misconduct. However, this distinction is without logic. A procedural impropriety should void the *reason* for discharge in all cases.

12.5.1.4 Scope of This Section

Specific types of procedural errors in the military administrative discharge process are discussed below. However, this discussion covers only the most common errors, and it provides an extensive list of cases for further research. For convenient reference, the remainder of this section is divided into subsections according to critical stages in the discharge process and the errors that can occur at those stages.

DRB decisions, through the DRB Index's eighth supplement, that seemed to find prejudicial procedural errors are included in the footnotes. When a particular procedural requirement is applicable to a particular reason for discharge, *e.g.*, a psychiatric opinion as to homosexuality, relevant DRB cases are discussed in the chapter dealing with that particular reason for discharge.

Do not use the following discussion as an all-inclusive checklist. Possibilities for procedural errors are everywhere. Refer to the specific regulatory requirements in each case by looking at the discussion in the chapters dealing with the particular reason for

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[71] *See* § 12.8 *infra* (discussion of computing and challenging ratings).

[72] *See* ND 78-01620; ND 78-0502.

[73] *See* Ch. 22 *infra*.

[74] In a recent opinion on a motion for clarification of a previous decision (Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979)), the D.C. Circuit discussed the concept of "making whole" officers illegally discharged for failure to be promoted. Dilley v. Alexander, 627 F.2d 407, 8 MIL. L. REP. 2324 (1980). The logic applied should equally apply to fabricating constructive periods of "good time" for those illegally given bad discharges. The court stated:

> [S]ince the litigation that was thus forced on the Reserve officers by the Army's wrongful conduct has itself exacerbated the wrongs inflicted upon these deserving appellants, the relief applied must remedy not only the original, but also the additional and continuing wrongs.

Id. at 411.

> Judicial relief provided to military servicemen who have been wrongfully discharged from service has been premised upon one central principle: Making the injured men "whole." Courts attempt to return successful plaintiffs to the position that they would have occupied "but for" their illegal release from duty. In order to grant such relief, courts have not been reticent to apply the legal fiction of "constructive service"; as appellants have never been lawfully terminated from active duty, they are deemed to have served during the time of their illegal release. Accordingly, it is fully consistent with the holding in our previous opinion in this case to award appellants retroactive reinstatement to the positions they held on their respective dates of separation, with full active duty pay, allowances and other benefits of service, including active duty credits for retirement purposes.

[74] (continued)

Id. at 413.

Any attempt on the part of a DRB to find error, "void" the discharge, and in effect to retry the case at the DRB without the procedural rights afforded at the initial discharge proceeding should be resisted as was done in Giles v. Secretary, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980).

[75] 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977).

[76] AD 77-00348 (one SPCM with suspended sentence revoked; two Art. 15s, and 10 months of unsatisfactory conduct and fair efficiency ratings out of a total of 18 months service).

[77] AD 77-07130 (four Art. 15s and three months of unsatisfactory ratings in 15 months total service).

[78] *See* §§ 12.8.5, 16.1 *infra*.

discharge in question and by ordering copies of the pertinent regulations.[79]

12.5.2 PREDISCHARGE ACTION: COUNSELING AND REHABILITATIVE EFFORTS

12.5.2.1 General Rules

Many discharge regulations require rehabilitative efforts by the command prior to the initiation of discharge proceedings.[80] This may include counseling and/or a rehabilitative transfer.

The purpose of counseling is to notify the servicemember of (1) the areas of his/her performance that are inadequate and (2) the improvement that is necessary. The requirement benefits the command since discharges are inefficient because of the cost of training a servicemember and the cost of training a replacement. Counseling also benefits the servicemember because it provides an opportunity to demonstrate adequate performance and avoid discharge.

The counseling requirement can result in two kinds of errors: failure to counsel, which includes no attempt to counsel or inadequate counseling;[81] and failure to give the servicemember a fair opportunity to correct deficiencies both after counseling[82] and before discharge action is initiated.[83]

In the mid-1960s, the Army discharge regulation required a rehabilitative transfer to another unit to give the servicemember an opportunity to improve performance and to have it fairly evaluated by unbiased superiors. The transfer requirement can also result in two kinds of errors: failure to make the transfer or an inadequate transfer,[84] and failure to give a fair opportunity to demonstrate improvement following the transfer and before discharge action is initiated.[85]

The regulation which provided for rehabilitative transfers, however, also authorized commanders to waive the transfer in certain situations. Possible waiver errors include: waiver of transfer by someone without authority to do so,[86] and waiver when the required findings are not supported by the facts.[87] Because the waiver standards changed frequently, consult the regulatory changes in effect at the time of the waiver.

12.5.2.2 Relevant DRB Index Categories

Predischarge Action: Counseling and Rehabilitative Transfer: A24.02 (SM not properly counseled by command); A24.06 (SM not in unit from which separated required period of time).

Trainee Discharge: A25.06 (Trainee not properly counseled by command before discharge).

Discharge for Unsuitability: A40.02 (Counseling requirements *not* met or waived); A40.04 (Rehabilitation requirements *not* met or waived).

Discharge for Unfitness: A50.02 (Counseling requirements *not* met or waived); A50.04 (Rehabilitation requirements *not* met or waived).

12.5.2.3 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2. Also note that the specific example provided there involves a rehabilitative transfer.]

#. [Include appropriate boilerplate contentions from Section 12.1.2.]

#. The applicant was given a rehabilitative transfer on [date].

#. The applicant was discharged on [date].

#. The applicant was given an inadequate amount of time to benefit from the rehabilitative transfer.

#. [Include appropriate contentions from Section 12.1.2.]

#. The discharge proceedings were begun on [date] which was before the rehabilitative transfer.

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[79] *See* Ch. 5 *supra*.

[80] *See, e.g.*, DoD Dir. 1332.14, encl. (5). *See also* Army ADRB SOP, Annex F-1, para. 2.a.(1)(b), 44 Fed. Reg. 25,069 (Apr. 27, 1979).

[81] Counseling should be a constructive experience for the servicemember. Where it conflicts with the purpose described above, such as a "counseling" session which consists of a series of threats "or else" without any specific direction as to what areas in which improvement is necessary or how to improve, it is a sham, and should be argued as such. The DRBs are receptive to this type of argument.

See AD 78-01028; AD 7X-05787; AD 7X-11050; AD 77-09209; FD 79-00190; MD 78-00295; MD 7X-05167. *See also* App. 12A *infra* (digests of these cases).

[82] *See* AD 77-027275 (commander gave insufficient time after counseling for applicant to demonstrate improvement prior to initiation of recommendation for discharge); ND-1855 (failure to give opportunity to correct deficiencies required by BUPERSMAN 6210120.16).

[83] Reale v. United States, 413 F.2d 556, 188 Ct. Cl. 586 (1969) (where special observation period has been initiated by placing officer on Control Roster; a separation action under AFR 36-35 or AFR 36-2 based upon the same reasons for which officer was originally placed on Control Roster should await outcome of the observation period). The court noted: "Indeed, it is usually essential that our interpretation (of regulations) take into account the interrelationship and inter-action of the various available procedures — looking toward a unified and rational personnel management system and not a fragmented hodge-podge of unique, isolated, and contradictory rules." 413 F.2d at 590-91.

[84] *See* AD 78-01018 (UD upgraded to GD because applicant was transferred within the same battalion and within the same compound in violation of regulations). *See also* AD 77-02278; AD 77-06837; *See* AD 7X-01010A (GD upgraded to HD because no rehabilitative transfer nor waiver of transfer occurred). *Accord*, AD 7X-01015; AD 77-12707; AD 77-002511A; AD 78-03148; AD 79-01845; AD 79-03849; AD 77-09225.

[85] *See* AD 79-01913 and AD 78-00928 (time limits in EDP regulations violated); AD 78-00922; AD 77-11678; ND 78-00444. *See also* App. 12A *infra* (digests of these cases).

[86] Usually, the discharge authority was the official authorized to waive rehabilitative transfer requirement or the regulation required the person to be of a specified rank. This responsibility cannot be delegated to a subordinate. *See* JAGA 1968/4121, 20 Jun. 1968, 68-19 JALS 12; 1971/4324, 21 May 1971; 1971/5655, 23 Dec. 1971.

[87] It has been held, however, that the discharge authority's waiver of a rehabilitative transfer without any explanation or affirmative findings as to the reason therefor was not a prejudicial error where the waiver was granted pursuant to a recommendation by the immediate commanding officer when the latter provided a sufficient statement of reasons for the waiver. *See* Martin v. Secretary of the Army, 455 F. Supp. 634, 637-8 n.4, 5 MIL. L. REP. 2412 (D.D.C. 1977). *See also* DAJA-AL 1971/5248, 22 Oct. 1971 (sufficient evidence that soldier would create serious disciplinary problems when GC reviewed record and interviewed unit commander and CO); DAJA-AL 1976/5986, 24 Sep. 1976 (not abuse of discretion where had four Art. 15s and had a personality disorder).

#. It was improper to suspend a discharge proceeding while the applicant was undergoing rehabilitative transfer.

#. [Include appropriate contentions from Section 12.1.2.]

#. The transfer to another unit within the same compound was improper and was not the type of transfer contemplated by AR 635-200, ¶ 13-7.

12.5.3 INITIATION OF DISCHARGE: NOTICE

12.5.3.1 General Rules

A discharge for cause which can result in imposition of a less than honorable discharge is initiated by a servicemember's immediate commander by written notice issued to the servicemember.[88] Service regulations require that the notice include the basis for the proposed discharge action and the servicemember's procedural rights.

Adequate notice is a fundamental requirement of due process.[89] The purpose of notice is to advise the servicemember of the reason(s) for the proposed discharge action, and the right to contest the action, so that a meaningful defense may be prepared.[90] Close adherence to notice requirements is essential to a fair proceeding.[91]

Notice may be inadequate for several reasons. When notice of reasons for discharge is given *after* discharge, the discharge is in violation of controlling regulations, and is invalid.[92] Dates on witness statements attached to a commander's report should be checked to see if they were dated *after* a waiver of rights based on the purported notice. Too short a notice may not afford the servicemember a reasonable amount of time to reply or prepare a defense.[93] An almanac may be consulted to see if Friday notice required a Monday reply. A discharge based upon reasons not contained in the notice is improper.[94]

The notice must be reasonably specific as to the regulatory reason for discharge. Notice which cites "misconduct" as the basis for discharge, without stating the specific category, is improper.[95]

Frequently, regulations or statutes require that the notice state specific, detailed reasons for the action. In such cases, the regulation or statute in question may impose a more stringent standard of notice than would otherwise be required by the due process clause of the United States Constitution.[96]

Finally, due process requires that sanctions be imposed on individuals only if they could reasonably have known in advance that their questioned behavior was proscribed.[97] A statute or regulation that does not provide such notice may be found void for vagueness because the individual must be apprised in advance of the specific prohibited conduct.[98] Vagueness in a statute or regulation cannot be cured by subsequent explanation of the acts that fall within its scope.[99] "Shirking," a generally undefined term in military law, given as a reason for separation without any further specified misconduct may not provide adequate notice.[100]

12.5.3.2 Relevant DRB Index Categories

Initiation of Discharge: Notice: A01.02 (Separation action *not* properly initiated); A01.04 (SM *not* properly notified of separation action).

12.5.3.3 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation], in effect at the time of applicant's discharge required that the applicant be advised of [rights A, B, and C] and the specific reason for discharge.

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[88] The only exception is when the servicemember requests discharge to avoid court-martial. *See* note 227 *infra*.

[89] Clackum v. United States, 296 F.2d 226, 148 Ct. Cl. 404 (1960).

[90] *Cf.* Money v. Anderson, 208 F.2d 34 (D.C. Cir. 1953). *See also* Connelly v. Nitze, 401 F.2d 416, 424 n.10 (D.C. Cir. 1968); Kutcher v. Higley, 235 F.2d 505, 507 (D.C. Cir. 1956); Deak v. Pace, 185 F.2d 997 (D.C. Cir. 1950); Massman v. Secretary of HUD, 332 F. Supp. 894, 900 (D.D.C. 1971); Sells v. United States 146 Ct. Cl. 1, 5 (1959); Engelhardt v. United States, 125 Ct. Cl. 603, 606 (1953).

[91] *See* Burkett v. United States, 402 F.2d 1002, 185 Ct. Cl. 631 (1968) (charges not sufficiently specific).

Air Force regulations have required notice to a reservist not on active duty to include "proof of delivery" of notice, such as a receipt from registered or certified mail. If the letter is returned unclaimed, then it is to be remailed uncertified to the address, after checking its accuracy with postal authorities, and if it is not returned as undeliverable, a presumption of service occurs. If these procedures are followed, a UD can issue. OpJAGAF 1979/42, 22 May 1979. *See* § 12.4 *supra* (all reservist cases).

See AD 7X-04789; AD 77-08637; AD 77-08635; FD 78-01997; MD 78-01198. *See also* App. 12A *infra* (digests of these cases).

[92] *See* Watson v. United States, 142 Ct. Cl. 731 (1958). *See* AD 78-00957 (UD upgraded to HD because applicant was discharged while in prison and without prior notification; applicant's previous HD, service in Korea with decorations, and drug addiction considered mitigating factors).

[93] JAGA 1965/3790 (failure to provide with required number of days notice was in error but was cured where servicemember stated he had sufficient time to prepare).

[94] *Cf.* Urbina v. United States, 180 Ct. Cl. 194 (1967); Shadrick v. United States, 151 Ct. Cl. 408 (1960); Blackmar v. United States, 120 F. Supp. 408, 128 Ct. Cl. 693 (1954); Wittner v. United States, 76 F. Supp. 110, 110 Ct. Cl. 231 (1948). *See also* NLRB v. Majestic Weaving Co., 355 F.2d 854, 861 (2d Cir. 1966); Northeastern Indiana Building & C.T. Council v. NLRB, 352 F.2d 696 (D.C. Cir. 1965); Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962) (Board of Immigration Appeals, in deportation proceeding, could not rely upon convictions of violating statutes which were not referred to in charge against alien).

See AD 77-12606 (intermediate command initially recommended separation for unfitness, then changed reason to homosexuality; discharge found improper for failure to notify applicant of change, and UD upgraded to HD).

[95] *See* DAJA-AL 1974/3846, 13 Mar. 1974; [July 1974] ARMY LAW. 19-20 (notice of general reasons without specifics too broad; however, attaching witness statements to notice can cure the error). *See also* AR 635-200, para. 1-10(a) (Army cases).

[96] *See, e.g.*, AR 15-6, para. 5-5. *Cf.* MacLeod v. INS, 327 F.2d 453 (9th Cir. 1964) (deportation order set aside where order to show cause did not contain any of the factual allegations required by INS regulations established to control proceedings to determine deportability); Massman v. Secretary of HUD, 332 F. Supp. 894 (D.D.C. 1971) (dismissal of HUD employee invalidated where notice of termination failed to state reasons for the proposed action with sufficient specificity and detail in violation of Veterans Preference Act, 5 U.S.C. § 7512(b) (1970)).

[97] diLeo v. Greenfield, 541 F.2d 949, 953 (2d Cir. 1976).

[98] *See* Smith v. Goguen, 415 U.S. 566, 573 (1974); Grayned v. Rockford, 408 U.S. 104, 108-09 (1972); *diLeo*, 541 F.2d at 953.

[99] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

[100] *See* note 95 *supra*. *But cf.* Arnett v. Kennedy, 416 U.S. 134, 159 (1974); Davis v. Vandiver, 494 F.2d 830, 831 (5th Cir. 1974); Meehan v. Macy, 392 F.2d 822, 835 (1968), *modified*, 425 F.2d 469, *aff'd en banc*, 425 F.2d 472 (D.C. Cir. 1969).

#. Applicant was notified of the discharge proceeding on [date].

#. No other notice was given.

#. The notice did not contain advice that applicant had the right to [C].

#. The notice merely stated that the reason for discharge was "unfitness."

#. No statements were attached to the notice that informed the applicant of the specific category of "unfitness" for which (s)he was being discharged.

12.5.4 MEDICAL AND PSYCHIATRIC EXAMINATIONS

12.5.4.1 General Rules

Medical and psychiatric examinations are usually required before discharge to determine whether the servicemember has a mental or physical disability which might warrant medical processing for discharge. Discharges have been held invalid when:

- Servicemembers were discharged for unsuitability without being referred to a medical board, and their service records contained evidence of a mental or physical disability;[101]
- The required examinations were not conducted,[102] or if conducted, were too far removed in time to be useful;[103]
- The findings were not forwarded to the discharged authority.[104]

The psychiatric examination is meant to determine competency (*i.e.*, to understand the discharge proceedings and intelligently choose a course of action) and legal sanity. The psychiatric examination usually must be performed by a psychiatrist unless one is not reasonably available.[105]

Special psychiatric findings are necessary under the regulations for particular discharges. A servicemember may not be discharged for unsuitability because of a personality disorder (formerly "character and behavior disorder") unless the existence of the disorder has been medically determined.[106] Similarly, failure to obtain a psychiatric diagnosis of homosexuality, in violation of regulations, has been held to be prejudicial error when the servicemember denied charges of attempted homosexual acts.[107]

Service regulations usually require that if, during the first four months of service, the servicemember

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[101] Sofranoff v. United States, 165 Ct. Cl. 470 (1964); Smith v. United States, 155 Ct. Cl. 682 (1961); *see also* Russell v. United States, 183 Ct. Cl. 802 (1968).

See AD 7X-00036A (applicant diagnosed six weeks after separation to have condition that should have been apparent during the separation medical processing; consequently command did not have to make decision whether to process applicant medically or to continue administrative processing; absent this decision process, the discharge was improper, but applicant's upgrade from UD to GD under the SDRP was not affirmed [The DRB seemed to want the ABCMR to make the ultimate determination whether a medical discharge should be substituted, but this should not have prevented affirming upgrade under the SDRP based on impropriety.]).

[102] The ADRB has found the absence of MSE or NP evaluations prejudicial to the rights of applicants discharged under 635-200 (misconduct/frequent incidents). In the following cases the ADRB upgraded the applicants' UDs to GDs: AD 78-00401; AD 78-02045; AD 77-08912; AD 78-02511; AD 7X-021736; AD 79-02133; AD 79-02223; AD 79-2391; AD 78-01195; AD 77-07226; AD 77-09469; AD 77-08912; AD 78-00259; AD 79-00005; AD 77-10310; AD 77-11501; AD 77-07015; AD 79-00577; AD 79-00570; and AD 79-02942. *See also* AD 78-00401; AD 77-09456; AD 77-09280; AD 7X-021940 (UDs upgraded to HDs apparently because of applicants' prior disciplinary records).

See AD 79-04181; AD 79-02922 (UDs for shirking were upgraded to GDs based on failure to conduct an MSE or NP). *See also* AD 79-00008 (UD upgraded to HD for failure to conduct an MSE or NP and also for failure of the ADB to specify the category of misconduct as required by regulation); AD 77-06875 (UD (GOS) upgraded to GD for failure to conduct MSE as required by regulations; evidence of mental illness also existed).

[103] *See* AD 78-04329 (UD upgraded to GD because MSE used in discharge process was conducted seven months prior to the discharge action). *See also* AD 7X-12678 (nine months prior); AD 77-12258 (one year); AD 78-01664 (UD upgraded to HD because NP was conducted 16 months prior to separation and was signed by social worker rather than qualified medical doctor as required by regulations).

[104] *See* MD 7X-00873A (UD upgraded to HD where medical reports not sent to DA in violation of regulations).

[105] *See* Russell v. United States, 183 Ct. Cl. 802 (1968). *See also* § 16.7.2 *infra* (discussion of Lipsman v. Brown, 6 MIL. L. REP. 2064 (1978)).

The ADRB upgraded applicants' UDs under AR 635-200 (frequent incidents) to GDs based on MSE or NP not signed by qualified medical doctor as required by regulations in the following cases: AD 79-00153; AD 77-05903; AD 77-05905; AD 77-06558; AD 78-03450; AD 77-10711; AD 77-04620; AD 77-00609; AD 77-11742; AD 77-07065; AD 77-11915; AD 77-10216; AD 77-08620; AD 77-06783; AD 77-08480; AD 77-02397; AD 77-12596; AD 77-12074; AD 77-12685; AD 77-12737; AD 77-09778; AD 77-07021; AD 78-02356; AD 77-02759; AD 78-02752; AD 78-02796; AD 78-01148; AD 78-00707; AD 78-00328; AD 78-02160; AD 78-00644; AD 78-00512; AD 78-02529; AD 78-03682; AD 78-01326; AD 78-04155; AD 78-04149; AD 78-03902; AD 78-01064; AD 78-02408; AD 79-01044; AD 79-03184; AD 79-01912; AD 79-01475; AD 79-00085; AD 79-00367; AD 79-01664; AD 79-02538; AD 79-02380; AD 79-02471; AD 79-01916; AD 79-01664; AD 79-00279; AD 77-08709. *See also* AD 79-00329 (misconduct/shirking).

The ADRB upgraded applicants' UDs under 635-200 (frequent incidents) to HDs in the followiing cases: AD 77-05879; AD 77-08994; AD 77-06598; AD 77-02267; AD 78-03340 (reason for upgrade in these cases appears to be applicants' records of relatively few acts of indiscipline).

The ADRB upgraded applicants' GDs under 635-200 to HDs because MSE or NP was not signed by a qualified medical doctor as required by regulations in the following cases: AD 77-06533; AD 78-04394; AD 78-03802; AD 77-07517; AD 78-03550; AD 79-00518; AD 78-03960; AD 79-02424; AD 78-01206; AD 7X-16269A; AD 77-12776; AD 79-00718; AD 77-11481; AD 77-11074 (all under 635-200 (unsuitability/C&B or personality disorder)); AD 77-08864; AD 79-00809; AD 79-01700; AD 77-06260; AD 78-02199; AD 77-07184; AD 79-00190 (all under 635-200 (unsuitability/apathy)).

See AD 78-04209 (ADRB refused to upgrade applicant's GD under 635-200 (unsuitability/apathy), even though MSE or NP was not signed by a qualified medical doctor as required by regulations, because of numerous acts of indiscipline). *See also* AD 77-02274 (same); AD 77-08191 (unsuitability/C&B).

[106] *See* Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977); *see also* § 16.7.4.2 *infra*.

The ADRB upgraded applicants' GDs under 635-200 (unsuitability/C&B, personality disorder, or apathy) to HDs because MSE or NP did not support the reason for discharge in the following cases: AD 77-11932; AD 78-02642; AD 78-01916; AD 78-01285; AD 78-00612; AD 78-02082; AD 78-02062; AD 78-02531; AD 78-02642; AD 77-11308; AD 77-11515; AD 77-08062; AD 77-07914; AD 77-10901; AD 77-10208; AD 77-09115; AD 77-07663; AD 77-06781; AD 77-08841; AD 79-02356; AD 79-02026; AD 79-02405; AD 77-11481; AD 79-02778; AD 79-01695; AD 77-012342; AD 78-02471; AD 78-02877; AD 77-09558; AD 78-03464; AD 78-02122; AD 77-08186; AD 77-12752; AD 77-07854; AD 77-05554; AD 77-11213; AD 77-12769; AD 77-12205; AD 77-10805; AD 77-07972; AD 77-06661; AD 77-08190; AD 77-08621; AD 77-06655; AD 77-05689; AD 77-09331; AD 79-00528; AD 78-02800. *See also* AD 7X-22565; AD 7X-19359; AD 77-06516 (DRB refused to upgrade applicants' GDs, even though MSE failed to support the reason for discharge (unsuitability/C&B), because of past records of indiscipline). *But see* § 12.5.1.3 *supra* (*Carter* court's requirement, under similar circumstances, that DRB assume that applicant completed his enlistment).

[107] Cruz-Casado v. United States, 553 F.2d 672, 213 Ct. Cl. 498, 5 MIL. L. REP. 2053 (1977).

becomes medically disqualified for further service,[108] (s)he must be given this information to decide whether to apply for a medical discharge.[109] Failure to so inform a servicemember has been held to deprive a subsequent court-martial of jurisdiction over the accused when there was a causal relationship between the medical problem and the criminal offense.[110] Because the error is jurisdictional, the same result should obtain in the case of a discharge issued administratively.[111]

12.5.4.2 Relevant DRB Index Categories

Medical and Psychiatric Examination: A01.06 (Improper physical examination at separation); A40.06 (Mental status evaluation (when required) *not* conducted); A40.08 (Requested psychiatric or psychological report *not* conducted); A42.02 (Neuropsychiatric (NP) evaluation *not* proper/present); A46.06 (Psychiatric/psychological evaluation (when required) *not* performed).

Discharge Unfitness: A50.06 (Mental status evaluation (when required) *not* conducted); A50.08 (Requested psychiatric or psychological report *not* conducted).

Homosexual Acts: A57.06 (Psychiatric/psychological evaluation (when required) *not* conducted).

Discharge Misconduct: A61.08 (Mental status evaluation (when required) *not* conducted).

Fraudulent Enlistment: A62.04 (Mental status evaluation (when required) *not* conducted).

Prolonged AWOL: A63.04 (Mental status evaluation (when required) *not* conducted).

Personality Disorder: A86.02 (No NP evaluation); A86.04 (No NP evaluation diagnosing a personality disorder); A86.06 (NP evaluation *not* conducted by proper medical authority).

12.5.4.3 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation R], in effect at the time of applicant's discharge required that (s)he be given a medical examination and a psychiatric examination by a doctor.

#. The medical examination revealed that the applicant was suffering from _____, a disease that would have supported a discharge for disability.

#. The medical examination was not forwarded to the discharge authority.

#. The discharge authority was unable to exercise his/her discretion under [regulation R] to determine which reason for discharge was appropriate.

#. Or if the medical examination was forwarded to the discharge authority, (s)he abused his/her discretion in not discharging the applicant by reason of disability.

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation R], in effect at the time of applicant's discharge required that (s)he be given a medical examination and a psychiatric examination by a doctor.

#. The psychiatric examination was not performed by a psychiatrist [or doctor].

#. The medical records indicate that the psychiatric exam was conducted by a psychiatric social worker.

#. The evidence [list] indicates that the applicant was suffering from a personality disorder, character and behavior disorder.

#. Because of [#s[above, the discharge proceeding was improper in that [regulation R] required a psychiatric examination by a psychiatrist [or doctor] and such an examination would likely have detected the psychiatric disorder.

12.5.5 WAIVER OF RIGHTS

12.5.5.1 General Rules

As mentioned above, the notice of discharge should advise the servicemember of the rights to which (s)he is entitled. These rights may be waived and, in fact, are waived in the overwhelming majority of cases. Such waivers may be motivated by coercion, fear, inadequate advice, a desire to get out of jail, or a desire to get out of the military. Servicemembers who waive their rights are usually immature and do not realize the life-long consequences of a bad discharge. Many waive the rights because they fear worse things will happen if they do not take an administrative discharge. The test for the propriety of a waiver of rights is whether it was knowing, intelligent, and voluntary.[112]

A waiver induced by inadequate notice is invalid. It must be made with knowledge of the basis for the discharge action.[113] Supporting statements sometimes are dated after the date of the waiver. A waiver of an unsuitability hearing cannot be regarded as a waiver of an unfitness hearing.[114] The same thing is

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[108] *See, e.g.*, AR 40-501.

[109] *See* AR 40-3.

[110] Vallecillo v. David, 360 F. Supp. 896, 1 MIL. L. REP. 2275 (D.N.J. 1973) (servicemember absented himself, without authority, to seek civilian medical attention for a disqualifying medical condition which the Army had failed to diagnose); *cf.* Grosso v. Resor, 322 F. Supp. 670, 4 SEL. SERV. L. REP. 3053 (S.D.N.Y. 1971), *aff'd*, 439 F.2d 233 (2d Cir. 1971).

[111] *See* § 12.6.2.3 *infra*. *But see* ADRB SOP, Annex F-1, para 2.a.(5), 44 Fed. Reg. 25,069 (Apr. 27, 1979). The Army DRB apparently views this type error as merely affecting the equity of the discharge.

[112] *See* Brady v. United States, 397 U.S. 742, 748 (1970); Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See also* Fay v. Noia, 372 U.S. 391, 439 (1951) (an intentional relinquishment or abandonment of a known right or privilege); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (same); Vance v. Cirone, 469 F. Supp. 420, 421 (E.D. Tenn. 1978); Swarb v. Lennox, 314 F. Supp. 1091, 1100 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191, *rehearing denied*, 405 U.S. 1049 (1972). *Cf.* Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972) (mental disability in military case).

[113] *See* JAGA 1965/4155, 65-23 JALS 9. (waiver of right to a hearing before a board of officers not effective unless made with the knowledge of the ground for the discharge action contemplated).

[114] *See* JAGA 1968/4204, 11 Jul. 1968, 68-21 JALS 20 (applicant's waiver of ADB for unsuitability discharge was not waiver of hearing for unfitness discharge); AD 77-08449 (waiver of ADB for unsuitabil-

true when a servicemember waives a hearing (before an ADB) because the commander has said that (s)he is recommending an HD. If the servicemember is not also told that, in spite of the CO's recommendation, (s)he could still get a GD or UD, the waiver is not considered "knowing and intelligent."[115]

An affirmative misadvice of rights, intentional or innocent, that works to the servicemember's detriment also invalidates a waiver.[116] In older cases, servicemembers were often advised by inexperienced, nonlawyer counsel, or by their commanders.[117] In such cases, an argument can be made that the servicemember's understanding of the situation was impaired.

A waiver may be invalid when the servicemember does not understand his/her rights for reasons unrelated to the action of the command (for example, when the servicemember is intoxicated by drugs or alcohol, is mentally incompetent, or is otherwise unable to comprehend the proceedings).[118]

A waiver may be involuntary when it is obtained by:

- Duress;
- Intimidation or coercion;
- Time pressure;
- Deception; or
- Any other misconduct on the part of a representative of command.[119]

A coerced waiver may occur when the servicemember is threatened with a court-martial if (s)he does not waive his/her rights. Proof of coercion can only rarely be found in a service record, but a strong indication that it occurred may be shown by demonstrating that court-martial charges and an administrative discharge were being processed simultaneously. This was reportedly a common practice at Fort Meade (Army) in 1971-72. A waiver that occurs while a servicemember is illegally confined pending administrative discharge proceedings may be invalid, especially when the servicemember executed the waiver to accelerate his/her discharge and consequent release from confinement.[120]

A waiver may be improper when the servicemember is not given a reasonable time to consider it or is not provided counsel. The regulations require that a servicemember be given a minimum time within which to exercise or waive rights. Failure to make an election, however, is deemed a waiver. The requirement is intended to give the servicemember an opportunity to consult with an attorney and, thus, make an informed decision. If, for example, the period for making the election falls on a weekend during which legal counsel is not available, the subsequent waiver is invalid.[121]

The procedures for withdrawal of a waiver are frequently set forth in the discharge regulation.[122] Re-

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[114] (continued)

ity and subsequent separation for unfitness was improper). *See also* MD 7V-03965A; AD 77-08081.

[115] When the commander advises the respondent that he is recommending him for a general or honorable discharge, and the respondent thereupon waives his right to an administrative discharge proceeding, the waiver of rights must be considered a conditional waiver only unless the Marine is also apprised that he could be separated with an undesirable discharge, despite the more favorable recommendation of his commanding officer. Unless he is so advised, it is considered that the respondent has not intelligently and knowingly waived his right to an administrative discharge board.

59 OFF THE RECORD 39-40 (1975).

See FC 77-01075 (where servicemember applied for discharge by reason of physical disability in lieu of meeting a physical evaluation board and conditioned his request on the understanding that he would be "honorably discharged" if application were approved, it was error to separate him with a GD because the phrase "honorably discharged" denotes an HD).

[116] *Cf.* Manzi v. United States 198 Ct. Cl. 489, 494-95 (1972); Ainsworth v. United States, 180 Ct. Cl. 166 (1967); Phelan v. United States, 146 Ct. Cl. 218, 222 (1959); Atkins v. United States, 158 F. Supp. 136, 141 Ct. Cl. 88, 89-90 (1958); Travis v. United States, 146 F. Supp. 847, 853-54, 137 Ct. Cl. 148, 157 (1956). *See* AD 78-02779; AD 78-02175; AD 78-01710; AD 7X-13342; AD 77-12757; AD 77-09707; ND 7X-00097A. *See also* App. 12A *infra* (digests of these cases).

[117] *See, e.g.*, Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977). Since January 1, 1974, counsel in an unfitness case has had to be a lawyer. *See* note 141 *infra*.

[118] *Cf.* Manzi v. United States, 198 Ct. Cl. 489 (1972) (resignation of civil servant held invalid where mental illness precluded him from exercising free will or from understanding the transaction); Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972) (servicemember in hospital after mental breakdown).

See AD 7X-23459 (applicant may not have understood his rights, in part because he had only a 10th grade education; written notification of pending discharge required him, without benefit of counsel, to write a letter containing pertinent information in order to obtain an ADB); AD 78-00954 (applicant may not have fully understood the proceedings because of learning disabilities and illiteracy).

[119] *Cf.* Rosenblatt v. United States, 497 F.2d 928, 204 Ct. Cl. 910

[119] (continued)

(1973), *cert. denied*, 419 U.S. 1032 (1974). *See* AD 7X-22557 (waiver of ADB not voluntary because ADB did not convene until several months after initial request; no reason given for delay or cancellation); AD 77-08983 (similar).

[120] *See* § 12.5.10 *infra* (discussion of duress and coercion). Service regulations have uniformly prohibited confinement while an administrative separation was pending, unless the confinement was the result of the sentence of a CM.

See AD 77-08122 (applicant placed in pretrial confinement while being processed for administrative separation, one month after SJA's office had stated there would be no trial because of illegal search).

[121] *See* Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961) (employee told by personnel officer, "If you do not resign now, I will press charges immediately."); Perlman v. United States, 490 F.2d 925, 203 Ct. Cl. 397 (1974) (inducement that, if he retired by a certain date, employee would receive an annuity increase rendered retirement involuntary).

See AD 77-09854 (applicant not provided an opportunity to confer with counsel as required by regulations); AD 77-08536 (same); NC 78-0067 (BCNR corrected applicant's naval record to show that he was issued a GD for misconduct rather than a UD in part because the applicant had not had counsel to aid him in preparing a statement at the time of discharge); *cf.* AD 77-11588 (UD upgraded to HD because applicant's waiver of rights was not knowing; he had been counseled in a group with three or four others and was briefly told by TJAG that if he wanted out of service he could sign request for discharge in lieu of CM).

[122] JAGA 1967/3673, 25 Apr. 1967, 68-26 JALS 11; JAGA 1968/4205, 5 Aug. 1968, 68-26 JALS 11; (serviceman given UD but not yet separated entitled to revoke prior waiver of ADB). *Cf.* Hankins v. United States, 183 Ct. Cl. 32 (1968) (separation void where officer requested withdrawal of resignation because resignation was influenced by two adverse officer efficiency reports which he subsequently discovered were false; Secretary gave no reason for denying withdrawal request). *See also*, Wilson v. Schultz, 475 F.2d 997 (D.C. Cir. 1973); Goodman v. United States, 424 F.2d 914 (D.C. Cir. 1968); Haine v. Googe, 248 F. Supp. 349 (S.D.N.Y. 1965); Cunningham v. United States, 423 F.2d 1379, 191 Ct. Cl. 471 (1970). These cases involved federal employees who attempted to withdraw resignations before the effective dates of the resignations. In *Goodman*, the court observed that a refusal to accept a withdrawal must be supported by some reason, unrelated to a simple desire not to go through a contested hearing, which would affect adversely the agency's administration of its personnel requirements. 424 F.2d at 919.

fusal to allow the withdrawal of a waiver can be error when the withdrawal was attempted prior to final action by the discharge authority.

From 1966 to 1975, the Marine Corps frequently permitted Marines confined in civilian jails to waive their right to a hearing before being discharged for misconduct/civilian conviction. The regulations specifically did *not* permit such a waiver. The NDRB has refused to acknowledge that this is per se (automatic) prejudicial error.[123]

A servicemember will sometimes elect to submit a written statement to the discharge authority instead of requesting an ADB. The statement will usually be a request for an HD or GD. It would be error if no one considered the statement, but nonconsideration is difficult to prove. The record will sometimes include a legal review prepared for the discharge authority; if no mention of the statement is made, it may be inferred that the discharge authority was unaware of the statement.

If the veteran was poorly advised by counsel not to submit a statement to the discharge authority, this fact can be raised. For example, an inexperienced or nonlawyer counsel may say, "If you submit a statement, you might make him angry and he might court-martial you."

12.5.5.2 Relevant DRB Index Categories

Waiver of Rights: A02.04 (SM *not* properly notified of rights to request Board hearing); A02.06 (SM *not* properly notified of right to submit statements); A02.08 (Improper counsel for consultation); A02.10 (Waiver of Board hearing not proper); A02.12 (Improper counsel for consultation); A02.16 (Improper counsel for representation); A02.18 (Ineffective assistance of counsel); A02.30 (Withdrawal of waiver not properly considered).

Trainee Discharge: A24.08 (SM did *not* consent to discharge); A24.10 (Improper counsel for consultation (when required)); A25.06 (Trainee not properly counseled by command before discharge).

Discharge GOS (analogous situation): A70.08 (SM *not* properly counseled by counsel for consultation); A70.10 (Request for withdrawal of GOS discharge *not* processed/considered); A70.12 (SM could *not* knowingly request GOS discharge at the time).

12.5.5.3 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. The notice to the applicant stated that the commander was recommending a GD.

#. The applicant waived his right to an ADB.

#. The applicant relied on the commander's recommendation when he waived the ADB.

#. It was contrary to Marine policy to include the commander's recommendation in the notice [citation].

#. Because of #s above, the applicant's waiver was not knowing or intelligent and the resulting UD is improper.

#. [Include appropriate contentions from Section 12.1.2.]

#. When the applicant executed the waiver of the ADB, (s)he was confined to [stockade].

#. The applicant had been apprehended for AWOL but no formal charges had been referred to trial.

#. The applicant was advised by his/her counsel that (s)he should waive the ADB, because if (s)he did not, (s)he would be court-martialed for AWOL and then sent to an ADB where (s)he would still likely receive a UD.

#. [Regulation R] prohibits confinement prior to an ADB.

#. Confinement prior to referral of charges and while an ADB is pending was coercive and caused the applicant to waive the ADB.

#. [Include appropriate contentions from Section 12.1.2.]

#. Marine regulation R prohibited a Marine in civil confinement from waiving an ADB considering discharge for civilian conviction.

#. The applicant received notice of an ADB while in confinement dated [date].

#. That notice stated that the applicant had the right to waive the ADB.

#. The applicant waived the ADB.

12.5.6 THE COMMANDING OFFICER'S REPORT

12.5.6.1 General Rules

In addition to giving the servicemember written notice of a discharge action, the commanding officer (CO) will prepare a report of the case for the discharge authority (DA). By regulation, the report must summarize the servicemember's military record and recommend a particular disposition. The service summary includes information such as the servicemember's age, military aptitude scores, overall conduct and efficiency ratings, medals and awards, prior service, length of current term of service, disciplinary history, and medical record.

Because the CO's report must be approved or disapproved by intermediate COs, and ultimately by

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[122] (continued)

See AD 79-00622 (command refused to allow applicant to withdraw request prior to separation; none of the listed charges authorized issuance of BCD, and applicant not given sufficient legal counsel). *See also* AD 77-10862.

See AD 78-02297 (good faith effort to withdraw waiver of rights under regulations prior to discharge authority's final order); AD 78-00913 (refusal to allow applicant to withdraw request for GOS improper where commander and applicant's counsel knew that central witness had acknowledged applicant's innocence).

[123] This attempt to "retry" the case at the DRB would appear to be illegal. Giles v. Secretary, 627 F.2d 554, 8MIL. L. REP. 2318 (D.C. Cir. 1980).

See MD 78-01102 (waiver of ADB while in the hands of civil authorities was improper because regulations required that ADB be conducted); *contra*, MD 78-01206 (pre-uniform standards case) and MD 7X-05697 (waiver of ADB violated regulations but was not prejudicial to applicants rights).

The Army appears to apply a different rule. *See* AD 77-12177 (UD upgraded to GD because commander included applicant's request for an ADB only as an enclosure in his report and there was no record that applicant was provided counsel or an ADB); AD 7X-017436 (applicant requested ADB and counsel but did not receive them).

the DA, it is an extremely important document. This is particulary true when the servicemember has waived his/her right to an ADB. If the CO's report is inaccurate, the DA could not have made informed decisions whether to discharge and, if so, what kind of discharge to issue.

Common errors in the CO's report are:

- Failure to include favorable information such as prior service, significant medals and awards,[124] and good performance ratings;
- Inclusion of erroneous and damaging information (*e.g.*, adverse preservice or prior service history; extracts from court-martial convictions when there was an acquittal or reversal after review;[125] evidence of drug abuse obtained through a program that guaranteed immunity;[126] subjective statement of the CO's suspicions as to drug abuse not based on the servicemember's record; military and/or civilian arrest record during the current period of service, when the arrest(s) did not result in prosecution; significantly inaccurate statement of performance ratings or length of service[127]);
- No clear explanation of the category for discharge or why the servicemember should not be discharged for a more favorable reason.[128]

12.5.6.2 Relevant DRB Index Categories

The Commanding Officer's Report: A01.10 (Characterization based in part on prior service). A01.12 (Characterization based in part on preservice record). A01.14 (Evidence in record does not support reason for discharge). A01.20 (SM's ratings/grades were not properly calculated or administered). A01.30 (Exempt evidence (alcohol/drug rehabilitation program) improperly considered). A01.32 (Other evidence improperly considered, including defective records of disciplinary offenses). A02.02 (Commander's report improper). A02.04 (SM not properly notified of rights to request Board hearing).

12.5.6.3 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation R], in effect at the time of the applicant's discharge required that the commander's report include a list of the servicemember's performance ratings.

#. The same regulation prohibited the consideration of misconduct that occurred in a prior enlistment for purposes of characterizing an applicant's service.

#. The same regulation required the commander to explain why (s)he did not recommend a discharge for unsuitability.

#. The commander's report included evidence of two Article 15s in a prior enlistment.

#. The commander's report did not list X's performance ratings.

#. The applicant's performance ratings were all "Excellent."

#. The psychiatric diagnosis found the applicant suffering from a passive-aggressive personality.

#. A passive-aggressive personality is a character and behavior disorder as defined in [Regulation R, para. (p)] and was a ground for discharge for unsuitability.

#. The commander's report did not explain why the applicant should not be discharged for unsuitability as opposed to unfitness.

#. The commander's report was forwarded to the Discharge Authority.

#. The DA relied on the contents of the commander's report when (s)he directed a UD.

12.5.7 THE HEARING: ADMINISTRATIVE DISCHARGE BOARD (ADB)

12.5.7.1 Introduction

If the servicemember is entitled to and requests a hearing, the convening authority will convene a board of officers for that purpose. Only proper authority can convene an administrative discharge board (ADB); otherwise, the board action is a nullity.[129] The hearing as a whole must meet "minimum

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[124] Failure to mention a Bronze Star for Valor, for example, is a damaging omission. Often during wartime, servicemembers were entitled to awards such as the Purple Heart but their records do not show actual receipt because some commanders felt the paperwork for processing the awards was too much of an administrative burden. Proof of entitlement to a Purple Heart may be found in service medical records or the notification to the servicemember's family of the wound.

See AD 7X-05565 (UD upgraded to HD because commander stated in report to DA that applicant had no prior service when he in fact had nine months prior honorable service); MD 7X-00873A (commander violated regulations requiring him to include medical and psychiatric reports for consideration by the DA when the existence of physical and psychiatric problems was indicated).

[125] *See* ADRB SOP, Annex F-1, para. 2.a.(2)(b), 45 Fed. Reg. 25,069 (Apr. 27, 1979); AD 78-04434; AD 78-03454; AD 78-01504; AD 78-00622; AD 77-12463; AD 7X-16439A; AD 7X-03612; MD 76-52197; *cf.* AD 77-10497. *See also* App. 12A *infra* (digests of these cases).

[126] *See* DAJA-AL 176/4405 (16 Jun. 1976), *reported in* [Feb. 1977] ARMY LAW. at 15 (inclusion of forbidden information in file invalidated entire discharge proceeding because file improperly influenced each official in chain of command). *Cf.* Giles v. Secretary of the Army, 475 F. Supp. 595, 7 MIL. L. REP. 2524 (D.D.C. 1979), *aff'd*, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980).

[127] *See* note 125 *supra*; § 12.8 *infra* (performance ratings); AD 77-07186; AD 77-01799; MD 78-00171; ND 78-00796. *See also* App. 12A *infra* (digests of these cases).

[128] *See* AD 78-01607 (commander failed to include in separation document reason applicant was not separated for unsuitability). *See also* AD 77-06061, AD 77-06745, AD 78-02246 (all similar). *Cf.* AD 77-10420 (GD upgraded to HD because commander failed to state reason for discharge and gave applicant rating of fair/unsatisfactory despite no record of indiscipline).

[129] 59 OFF THE RECORD 38 (1975) stated:

> UNAUTHORIZED DELEGATION OF AUTHORITY TO CONVENE
>
> Paragraph 6024.1 of the MARCORSEPMAN delineates who has the authority to convene administrative discharge boards, and limits that authority to GCM convening authorities, Marine Corps District Directors, commanding officers of Marine Barracks, and subordinate commanding officers and officers in charge when specifically authorized to do so by a superior commander exercising general court-martial jurisdiction. Staff officers may not be delegated such

standards of fundamental fairness,"[130] and must conform to "fair practices of Anglo-Saxon jurisprudence."[131]

An almost endless number of errors can occur at the hearing, many of which may be lost (waived) by an applicant's failure to raise them. However, in the case of fundamental rights, such as the right to counsel or confrontation and cross-examination, every reasonable presumption is to be indulged against waiver.[132] Even if a failure to object in a particular case does amount to a waiver of an error, the discharge might nevertheless be invalidated under the "plain error" doctrine when a wholesale violation of regulations is apparent.[133] The cumulative effect of small errors can be prejudicial.[134] The record must show compliance with the regulations in spite of the DRB presumption of regularity rule.[135]

12.5.7.2 ADB Composition

The membership of an ADB is prescribed by discharge regulations. A minimum number of members and minimum qualifications are usually specified.[136] An improperly constituted ADB is without jurisdiction and its proceedings, including the improper removal or release of assigned members,[137] are void.[138]

In boards with a legal adviser (LA), (s)he must remain impartial. Questioning by the LA designed to elicit unfavorable information is error.[139] The proceedings of an ADB have been held invalid when the recorder (prosecutor) had a prior attorney-client relationship with the respondent (servicemember) and may have used information gained from that relationship against him.[140]

12.5.7.3 Right to Counsel

A servicemember has always been entitled to representation by appointed military counsel at the ADB. However, until 1966, the regulations did not require that the appointed military counsel be an attorney. The revised directive defined the "counsel" required in a proceeding that could result in issuance of a UD:

> Counsel — a lawyer within the meaning of Article 27(b) (1) of the Uniform Code of Military Justice unless appropriate authority certifies in the permanent record the nonavailability of a lawyer so qualified and sets forth the qualifications of the substituted nonlawyer counsel.[141]

Thus, at an unfitness or misconduct board where a UD *could* issue but only a GD did, these requirements apply. They do not apply in an unsuitability proceeding, absent service regulations to the contrary.

The right to counsel, guaranteed by the regulations, is so basic to a fair hearing that an infraction

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[129] (continued)
authority. When there is a proper delegation, the order appointing the board must contain specific reference to the source of such delegated authority. Should an administrative discharge board be convened by one who has no authority to convene such a board, there is no jurisdiction and the proceedings are a nullity.

[130] Dunmar v. Ailes, 230 F. Supp. 87 (D.D.C. 1964), *aff'd*, 348 F.2d 51 (D.C. Cir. 1965).

[131] *Cf.* Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); Tadano v. Manney, 160 F.2d 665, 667 (9th Cir. 1947).

[132] Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1939); Glasser v. United States, 315 U.S. 60, 70 (1942) (counsel); Martin v. Secretary of the Army, 455 F. Supp. 634, 640, 5 MIL. L. REP. 2412, 2414 (D.D.C. 1977) (waiver doctrine will not be applied to a failure of counsel to object at ADB, at least where evidence was admitted in violation of Army regulations); Bray v. United States, 515 F.2d 1383, 207 Ct. Cl. 60, 3 MIL. L. REP. 2207 (Ct. Cl. 1975) (same). *Cf.* Vitarelli v. Seaton, 359 U.S. 535, 540 (1959). As the *Martin* case implies, the quality of counsel may be a factor in this regard. *See also* Gastall v. Resor, 334 F. Supp. 271 (D. Mass. 1971). *See* note 150 *infra*.

[133] Martin v. Secretary of the Army, 455 F. Supp. 634, 640 n.8 (D.D.C. 1977); *accord*, Estelle v. Williams, 425 U.S. 501, 514 n.2 (1976).

[134] Crawford v. Davis, 249 F. Supp. 943, 948 n.5 (E.D. Pa. 1966), *cert. denied*, 383 U.S. 921 (1966); *cf.* Martin v. Secretary of the Army, 455 F. Supp. 634 (D.D.C. 1977).

[135] Olenick v. Brucker, 273 F.2d 819 (D.C. Cir. 1959); ADRB SOP, Annex F-1, para. 2.a.(3), 44 Fed. Reg. 25,069 (Apr. 27, 1979).

[136] To determine the composition requirements, consult the applicable service discharge regulation. In Army and Air Force cases, AR 15-6, AFR 11-31, or their predecessors set forth additional composition requirements that apply unless they are inconsistent or conflict with those of the specific discharge regulation.

[137] The following appeared in 59 OFF THE RECORD 38 (1975):
UNAUTHORIZED DELEGATION OF EXCUSAL OF MEMBERS
Paragraph 6023.2e of the MARCORSEPMAN provides a designated member of an administrative discharge board must attend the proceedings of the board at the appointed time unless prevented by illness, or ordered away, or excused by the convening authority. Paragraph 6024.2g further provides that the board can proceed in the absence of a member only if authorized and directed to do so by the convening authority. It should be emphasized that there is no authority to delegate the authority to excuse a designated member of an administrative discharge board.

[138] If fewer than three officers are present at an ADB, the proceeding is invalid. If the number of those present is fewer than half the number designated in the original appointing orders of a board of more than five members, and if the convening authority has not designated this lesser number as a separate and distinct board, such proceedings would be invalid under Army regulations. JAGA 1959/5542, 27 Jul. 1959, 9 Dig. Ops., Enlisted Men § 75.35. *Cf.* Ricker v. United States, 396 F.2d 454, 457, 184 Ct. Cl. 402, 407 (1968) (Navy continuation board convened to determine eligibility for promotion was constituted in violation of statute); Henderson v. United States, 175 Ct. Cl. 690, 699 (1966), *cert. denied*, 368 U.S. 1016 (1967) (Air Force faculty board convened to investigate alleged "flying deficiency" of officer was constituted in violation of AFR 11-1). *Cf.* Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979) (although improperly constituted officer promotion board was reversible error, court declined to hold that proceedings were void ab initio because this would create untenable situation for Army with regard to officers who actually were promoted by boards). *See also* Doyle v. United States, 599 F.2d 984 (Ct. Cl. 1979); Harvey v. Secretary, 6 MIL. L. REP. 3000 (D.D.C. 1978) (new NDRB hearing ordered following nonobservance of regulation requiring the president of an NDRB panel hearing Marine cases to be a Marine officer).
See AD 78-00687 (president of the ADB was captain rather than field grade officer required by regulation).

[139] *See* JAGA 1968/3466, 15 Feb. 1966, 68-8 JALS 20 (questioning of respondent's witnesses found prejudicial error; advisor also erred when he told elimination board that its findings should support its recommendation); AD 77-07390 (digested at note 154 *infra*).

[140] *Id.*

[141] DoD Dir. 1332.14, 20 Dec. 1965, para. IV.K. This definition of counsel has remained unchanged. DoD Dir. 1332.14, 29 Dec. 1976, encl. 1, para. K. *See* ADRB SOP, Annex 0-1, SFRB Memo # 17, 22 Nov. 1976, 44 Fed. Reg. 25,085 (Apr. 27, 1979) (distinction drawn between counsel for consultation and representation at an unfitness hearing and such council at an unsuitability proceeding).

can never be treated as harmless error.[142] Some of the ways in which this right may be denied are:

- Failure to provide counsel;[143]
- Untimely appointment of counsel (*e.g.*, insufficient time to consult with the servicemember and prepare a defense);[144]
- Failure to certify the nonavailability of an Article 27(b) (1) lawyer in the permanent record when nonlawyer counsel is appointed,[145] and to include a statement of reasons for nonavailability;[146]
- Certification of the nonavailability of a lawyer by an improper authority;[147]
- Failure to certify in the permanent record the qualifications of the substituted nonlawyer counsel;[148]
- An unreasonable denial of a request by counsel to communicate with a servicemember in civilian confinement for the purpose of preparing a defense;[149]
- Inadequate or ineffective assistance of counsel;[150] and/or
- Unqualified counsel.[151]

12.5.7.4 Notice of Hearing

Service regulations frequently require that the servicemember be given notice a specified number of days prior to the hearing. Failure to provide such notice, however, may be waived when the servicemember states that (s)he had sufficient time to prepare for the hearing, and no prejudice is shown.[152]

Notice is intended to give the servicemember a reasonable opportunity to prepare for the hearing. This due process requirement may be violated by the denial of a request for a continuance to interview additionally scheduled witnesses,[153] or by failure to inform the servicemember of the names of government witnesses who appear and testify.[154]

12.5.7.5 Burden of Proof

The government bears the burden of proof in a discharge proceeding. Thus, a regulation which exposed a servicemember to a stigmatizing discharge, and placed the burden upon him/her to show cause why (s)he should not receive such a discharge, was held either to exceed statutory authority or violate due process.[155]

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[142] *Cf.* Yiu Fong Cheung v. United States, 418 F.2d 640, 644 (D.C. Cir. 1969). *See also* Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and too absolute to allow courts to engage in nice calculations as to the amount of prejudice arising from its denial."). Military criminal law is also quite rigid in this regard. *See, e.g.*, United States v. Maness, 23 C.M.A. 41, 48 C.M.R. 512, 2 MIL. L. REP. 2084 (1974).

[143] *See* § 12.5.1.3 *supra*. *See also* AD 79-03667 (applicant's separation by board of officers without benefit of counsel prejudicial error).

In the following cases, the Naval DRB found the failure to provide or allow requested counsel at applicants' ADB hearings to be prejudicial error: MD 78-00052; MD 78-00041; MD 78-00036; MD 78-00034; MD 78-00050; MD 78-00044; MD 78-00025; MD 78-00020.

[144] *Cf.* Shapiro v. United States, 69 F. Supp. 207 (1947) (denial of motion for continuance to prepare defense where officer was given only 80 minutes before court-martial).

[145] Gastall v. Resor, 334 F. Supp. 271 (D. Mass. 1971) (evidence failed to show either that Army could not furnish lawyer counsel or that substitute nonlawyer counsel was qualified to act in the role of counsel for servicemember facing discharge, in violation of Army regulation).

See also Bird v. Secretary, C.A. No. 76-1897 (D.D.C. filed Oct. 13, 1976) (NDRB upgraded the plaintiff's discharge before the court acted). Since the error in *Bird* seemed to have occurred on a large scale, counsel petitioned the Secretary of the Navy to find and act in similar cases. The NDRB was directed to act, but many of the cases were not located due to cost. Improper certification occurred with some frequency at the Marine Corps Reserve Forces Headquarters at Kansas City from 1966 to 1976, but the NDRB did not view this error as *per se* prejudicial in each case, despite the results in Bird's case.

[146] *See* NDRB MC5-1055 (1976) (failure to state in record reasons for nonavailability of JAG counsel and qualifications of substitute counsel); Gastall v. Resor, 334 F. Supp. 271 (D. Mass. 1971).

[147] Normally, the "appropriate authority" for certification of nonavailability purposes is the official empowered to convene a GCM. *See* 59 OFF THE RECORD 40 (1975). Arguably, certification by an official whose interests are adverse to the servicemember, such as the recorder who represents the government and prosecutes the case, is suspect and, therefore, inadequate.

[148] *See* NDRB MC5-1055 (1976) (digested at note 146 *supra*).

[149] *See* NDRB MC5-2197 (1976) (denial of counsel's request for temporary duty orders to travel on weekend, during off-duty hours, to civilian prison to interview servicemember following unsuccessful attempts to communicate with servicemember by telephone and mail).

[150] *See, e.g.*, Carter v. United States, 213 Ct. Cl. 727, 3 MIL. L. REP. 2056 (1977) (servicemember's counsel *gratuitously* recommended that servicemember be given a GD, which was the lesser of the two discharges which could have been issued under the circumstances). Ineffective assistance of counsel also can be demonstrated by a showing of no preparation, no discussion of the case with the servicemember, no objections, no cross-examination, *etc.*). *Cf.* Martin v. Secretary of the Army, 455 F. Supp. 634, 5 MIL. L. REP. 2412, (D.D.C. 1977); Bray v. United States, 515 F.2d (1383), 3 MIL. L. REP. 2207 (Ct. Cl. 1975). *See also* Gastall v. Resor, 334 F. Supp. 271 (D. Mass. 1971) (nonlawyer pharmacy officer not "experienced" as required by the regulations). *See* AD 77-07390 (digested at note 154 *infra*).

[151] *See* AD 77-09104 (counseling by a nonlawyer officer in violation of regulations is prejudicial error); AD 77-09766, AD 77-08394 (same).

[152] JAGA 1965/3790, 31 Mar. 1965, 65-12 JALS 13 (where respondent was present and stated he had been given sufficient time to prepare his case, failure to provide 15-day notice required by applicable regulations did not prejudice respondent's substantial rights).

See AD 78-01535 (notice of the hearing on the same day as the hearing was inadequate and prejudicial; UD upgraded to HD, even though he had five Art. 15s); AD 78-01845 (one day notice prior to the ADB hearing was prejudicial error; UD upgrade to HD despite three Art. 15s and one SCM); AD 79-02774 (same).

[153] JAGA 1963/4736, 13 Dig. Ops., Enlisted Men, § 45 (failure to grant continuance prior to hearing to interview six additional witnesses the government planned to call violated regulatory right to reasonable notice).

[154] Martin v. Secretary of the Army, 455 F. Supp. at 637. *See* § 12.5.7.8.2 *infra*.

See AD 77-08799 (failure to notify applicant of witness to appear against him was prejudicial; UD upgraded to HD despite three Art. 15s and three days lost time); AD 77-07390 (failure to notify applicant of all witnesses who appeared before the board and counsel's advice not to cross-examine any witness and to make unsworn testimony prejudicial; UD upgraded to HD, despite two Art. 15s, one SCM, two SPCM, and 192 days lost time).

[155] Carter v. United States, 509 F.2d 1150, 206 Ct. Cl. 61, 3 MIL. L. REP. 2182 (1975), *modified*, 518 F.2d 1199, 207 Ct. Cl. 316, 3 MIL. L. REP. 2185 (1975), *cert. denied*, 423 U.S. 1076 (1976). *Cf.* Speiser v. Randall, 357 U.S. 513, 523-24 (1958) (legislature cannot declare an individual guilty or presumptively guilty of a crime, or place on him/her the burden of going forward with the evidence); Shaw v. United States, 357 F.2d 949, 174 Ct. Cl. 899, (1966) (Navy could not convict officer of embezzlement offense on proof of shortage of funds which officer failed to explain.)

12.5.7.6 How Much Evidence (Standard of Proof)

The government must by regulation prove its case for discharge by a fair preponderance (51%) of the evidence. Thus, when the record reflects that the ADB used a more lenient standard, it has committed reversible error.[156] An argument can be made that clear and convincing evidence is required when a stigmatizing discharge may result.[157]

12.5.7.7 Command Influence

Command influence or interference can occur when the result desired by the command is communicated to the ADB. This occurred in one case when the command official who had signed the order convening the ADB conducted a prehearing briefing of the ADB, outside the presence of the servicemember and his counsel. In the briefing, the command official instilled in the Board members a sense of duty to aid in the elimination of "unsuitable officers," made comments regarding "undue compassion for the respondent," and warned against allowing the main issue of dismissing unworthy officers to become confused through technicalities or tactics employed by the servicemember or his counsel.[158]

Command interference also occurs when an ADB admits into evidence the prejudicial recommendations of superiors.[159] Military law normally requires that doubt as to the existence and effect of command interference is to be resolved in the servicemember's favor.[160]

12.5.7.8 Evidence

12.5.7.8.1 General Rules

Strict adherence to the common law rules of evidence is not required[161] in administrative hearings.[162] Administrative hearings, however, must comport with the principles of fundamental fairness inherent in due process of law.[163] This protection includes an opportunity to know the claims of the opposing party, to present evidence in support of contentions, and to cross-examine witnesses for the other side.[164]

Generally, to be admissible in administrative discharge hearings, evidence must be relevant and material.[165] The form of evidence may affect its usefulness (weight), but not admissibility.[166] Evidence should be the most trustworthy type reasonably available.[167]

12.5.7.8.2 Hearsay and Confrontation of Witnesses

In the absence of agency regulations to the contrary, hearsay is admissible in an administrative hearing. Hearsay may, by itself, constitute substantial evidence in support of an administrative decision.[168] This rule applies to hearsay military ADBs.[169] The weight of evidence is the key factor when rendering a decision. Uncorroborated hearsay, rumor, or hearsay countered by live testimony arguably could lack sufficient weight, as a matter of law, to sustain a decision.[170] Some courts hold that written witness state-

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[156] *See* Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976) (court rejected the use of a "substantial evidence" test as a standard of proof in an administrative proceeding). The court in *Charlton* observed that "in American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating something less than the weight of the evidence." 543 F.2d at 907.

[157] It is unclear if any vitality remains in *Charlton* and similar cases, *e.g.*, Collins Securities Corp. v. SEC, 562 F.2d 820 (1977), Wise v. United States, 603 F.2d 182 (Ct. Cl. 1979), after the decision in Steadman v. SEC 49 U.S.L.W. 4174 (1981).

[158] Cole v. United States, 171 Ct. Cl. 178 (1965).

[159] JAGA 1965/3536, 25 Feb. 1965, 65-9 JALS 6 (endorsements of intermediate superiors, ordering respondent's immediate commanding officer to initiate elimination action against him and endorsements recommending general discharge even if the ADB found that respondent should not be eliminated, which were submitted to the ADB, are some evidence of an effort to exercise improper command influence over the ADB under applicable regulations; any speculation whether the board remained independent and impartial must be resolved in the respondent's favor). *See* MOYER, JUSTICE AND THE MILITARY (1972) § 3-100 (discussion of command influence in courts-martial, applicable by analogy to the administrative discharge process). *See also* Carter v. United States, 509 F.2d 1150, *modified*, 518 F.2d 1199 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1076 (1976); ADRB SOP, Annex F-1, para. 2.a. (1)(a). *See* MC 76-2392 (UD upgraded to GD because presence of commanding officer as senior member of ADB presented the appearance of command influence; if challenged for cause, he would have had to appoint a new member to replace himself); *cf.* AD 78-02741 (during hearing before ADB, president asked the commander what type of discharge he recommended; president explained types of discharges that applicant could receive, but failed to state that HD could be recommended).

[160] JAGA 1965/3536, *supra* note 159. A 1977 Navy investigation prompted by a letter and petition by the authors led to the NDRB being ordered to review cases occurring at the Second Marine Aircraft Wing, Cherry Point, N.C., from January to June 1974. As of this writing, it appears that the NDRB was not instructed to consider the command influence; the General Counsel of the Navy has agreed to look into the matter.

[161] *See, e.g.*, Dixon v. Love, 431 U.S. 105, 115 (1977); FTC v. Cement Inst., 333 U.S. 683, 705-06 (1948); Crowell v. Benson, 285 U.S. 22 (1932); McClelland v. Andrus, 606 F.2d 1278 (D.C. Cir. 1979); Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); Gilbert v. Johnson, 419 F. Supp. 859, 880 (N.D. Ga. 1976); Prater v. United States, 172 Ct. Cl. 608, 615 (1965); Horn v. United States, 177 F. Supp. 438, 147 Ct. Cl. 234 (1959); Atkinson v. United States, 144 Ct. Cl. 585 (1959).

[162] *See* DoD Dir. 1332.14, para. V.B.

[163] Southern Stevedoring Co. v. Voris, 190 F.2d 275 (5th Cir. 1951).

See MD 7X-00620A (UD upgraded to GD because not afforded an opportunity to include statements on his behalf, call witnesses, or have proper representation).

[164] *See* Hornsby v. Allen, 326 F.2d at 608 (and cases cited therein).

[165] JAGA 1966/3997, 29 Jun. 1966, 67-27 JALS 24, 68-1 JALS 19 (documentary evidence does not violate due process, when such evidence is relevant and material).

See AD 77-04787 (ADB's refusal to admit applicant's NP evaluation at his request was error, but was not prejudicial because the ADB had sufficient medical evidence to support its findings).

[166] JAGA 1966/3997, *supra* note 165.

[167] *Id.*

[168] *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 402 (1972); Klinestiver v. DEA, 606 F.2d 1128 (D.C. Cir. 1979); Gilbert v. Johnson, 419 F. Supp. 859, 880 (N.D. Ga. 1976); Kowal v. United States, 412 F. Supp. 867, 188 Ct. Cl. 631 (1969); Johnson v. United States, 628 F.2d 187 (D.C. Cir. 1980) (and cases cited therein).

[169] Waller v. United States, 461 F.2d 1273, 198 Ct. Cl. 908 (1972). JAGA 1965/3644, 65-14 JALS 10 (unsigned, unsworn statement made by respondent is admissible as long as ADB weighs it accordingly, since an ADB may consider any oral or written matter provided it is relevant and material and accorded the weight warranted under the circumstances).

[170] *See* Consol. Edison Co. v. NLRB, 305 U.S. 197, 230 (1938); NLRB v. Imparato Stevedoring Corp., 250 F.2d 297, 302-03 (3d Cir. 1957); Chun Kock Quon v. Proctor, 92 F.2d 326, 329 (9th Cir. 1937); Reil v.

ments deny a servicemember's right to confront and cross-examine.[171] Accordingly, the admission of sworn or unsworn written statements of adverse absent government witnesses is improper when the opposing party objects to the statement's admission and requests the production of the witness for cross-examination, and the government made no effort to produce the witness.[172] The above rule applies even when the attendance of the witness could not have been compelled.[173] But the error may be lost (waived) when:

- The servicemember fails to object to the admission of the statement;[174]
- The servicemember, notified in advance that the government intends to introduce the statement, fails to make a timely request for the production of the witness;[175]
- A party fails to compel the witness' attendance when subpoena power is available;[176]
- The witness is under the servicemember's control.

Moreover, the admission of such statements is not error, or is harmless error, when:

- The witness is asked by the government to come to the hearing but refuses and cannot be compelled to testify;[177]
- The government shows that the witness is not reasonably available;[178]
- The statement merely corroborates the servicemember's testimony[179] or corroborates the testimony of other witnesses who were subject to cross-examination.[180]

In 1969, the Comptroller General ruled that the Joint Travel Regulations for the Uniformed Services could provide for payment of travel expenses for voluntary witnesses when the president of an ADB felt the testimony would be "substantial, material and necessary and that an affidavit would not be adequate."[181] The authors know of no DRB, TJAG, or court rulings on this issue; it could be argued, however, that when a respondent at an ADB requested a witness, the ADB should have ruled on the request using these standards.

When a harmful written statement is received by an ADB in violation of a regulation, its admission is improper. This is so despite the servicemember's failure to object.[182] Examples of such regulatory violations are:

- Admission of the statement of an essential witness who was permitted to leave the area on rotation and, therefore, was not available;
- Regulations which provide that a witness normally will not be reassigned from the jurisdiction of the command until the discharge proceeding is closed or the witness is no longer required;[183]
- Use of a statement from an essential witness when the command made no attempt to contact the witness, after notice of discharge was given, at his/her new post for an affidavit or deposition in contravention of regulation;[184]
- Admission into evidence of affidavits and unattested partial transcripts of tape-recorded conversations of witnesses who were on active duty locally, when the government has made no attempt to show that the witnesses were unavailable (the government is required to arrange attendance at discharge hearings of military personnel on active duty locally);[185]
- Receipt of unsworn witness statements taken during investigation by the fact-finding body, without affording the servicemember the opportunity to be present, with counsel, and to cross examine the witnesses, in violation of the regulation governing the conduct of investigations by fact-finding bodies;[186]

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[170] (continued)

United States, 456 F.2d 777, 197 Ct. Cl. 542 (1972); Jacobowitz v. United States, 424 F.2d 555, 191 Ct. Cl. 444 (1970); *but see* Richardson v. Perales, 402 U.S. 389 (1971); K. DAVIS, ADMINISTRATIVE LAW § 14.08 (3d ed. 1972).

[171] Bland v. Connally, 393 F.2d 852 (D.C. Cir. 1961); Davis v. Stahr, 292 F.2d 860 (D.C. Cir. 1961); Story v. Secretary, 2 MIL. L. REP. 2237 (D. Ariz. 1974) (unpublished); Scofield v. United States, 297 F. Supp. 1353 (D.P.R. 1969). *See also* NC 79-02549 (loyalty board's failure to grant servicemember's request to cross-examine author of confidential letter questioning his loyalty constituted prejudicial error; discharge upgraded to HD).

[172] Story v. Secretary, 2 MIL. L. REP. 2237 (D. Ariz. 1974) (unpublished). *Cf.* Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966); Southern Stevedoring Co. v. Voris, 190 F.2d 275 (5th Cir. 1951).

[173] Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966). *See also* NC 79-02549 (servicemember's failure to appear before loyalty board not conclusive of waiver of right to confrontation).

[174] *See, e.g.,* Waller v. United States, 461 F.2d 1273 (Ct. Cl. 1972); cf. Richardson v. Perales, 402 U.S. 389 (1971); Klinestiver v. DEA, 606 F.2d 1128 (D.C. Cir. 1979); Reynolds v. United States *ex rel.* Koleff, 70 F.2d 39 (7th Cir. 1934).

[175] *See,* e.g., Brown v. Gammage, 377 F.2d 154 (D.C. Cir.), *cert. denied*, 389 U.S. 858 (1967); *cf.* Williams v. Zuckert, 371 U.S. 531 (1963) (discharging agency may have some duty to assist when denied witnesses are employees of that agency); DeNigris v. United States, 169 Ct. Cl. 619, 623 (1965); Umglesby v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965).

[176] *See, e.g.,* Richardson v. Perales, 402 U.S. 389 (1971); Klinestiver v. DEA, 606 F.2d 1128 (D.C. Cir. 1979). ADB's do not have subpoena power. *But see* 48 Comp. Gen. 644, Comp. Gen. Op. B-1644551 (Mar. 24, 1969) (ADB could have invitational travel orders issued at government expense).

[177] *See, e.g.,* Brown v. Gammage, 377 F.2d 154 (D.C. Cir.), *cert. denied*, 389 U.S. 858 (1967); *cf.* Brown v. Macy, 340 F.2d 115 (5th Cir. 1965); DeNigris v. United States, 169 Ct. Cl. 619 (1965).

[178] This might include such reasons as unsuccessful efforts to contact witness after all reasonable methods had been attempted or the physical or mental incapacity of the witness made it impossible to attend the hearing. Military criminal law normally rejects conclusory statements of unavailability without a factual showing.

[179] Waller v. United States, 461 F.2d 1273 (Ct. Cl. 1972).

[180] *See, e.g.,* Brown v. Gammage, 377 F.2d 154 (D.C. Cir.), *cert. denied*, 389 U.S. 858 (1967); *cf.* Holman v. United States, 383 F. Supp. 411, 181 Ct. Cl. 1 (1967).

[181] *See* note 176 *supra. See* Joint Travel Regulations, C 5000.2(10) (C 53), (2 Jan. 1970).

[182] *See* Martin v. Secretary of the Army, 455 F. Supp. 634, 640 (D.D.C. 1977); Bray v. United States, 515 F.2d 1383 (Ct. Cl. 1975). *Cf.* Story v. Secretary, 2 MIL. L. REP. 2237 (D. Ariz. 1974) (unpublished). Often the regulations are not clear in this regard. It can be argued when the regulations list alternatives to live testimony, *e.g.,* depositions or affidavits, that this list is in order of preference (AR 15-6 and AFR 11-31 or their predecessors usually contained these requirements). Unclear regulations should be read in favor of the servicemember. Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

[183] Bray v. United States, 515 F.2d 1383 (Ct. Cl. 1975).

[184] *Id. See also* Williams v. Zuckert, 372 U.S. 765 (1963).

[185] Cason v. United States, 471 F.2d 1225, 200 Ct. Cl. 424, 1 MIL. L. REP. 2016 (1973); *cf.* Fletcher v. United States, 392 F.2d 266, 183 Ct. Cl. 1 (1968).

[186] Conn v. United States, 376 F.2d 878, 180 Ct. Cl. 120 (1967).

- Admission of a "certificate" which purported to summarize an investigative report, including the statement of an adverse witness, when the government made no showing that it was impracticable or impossible to have the witness appear;[187]
- Admission of statements of witnesses when the government failed to give the servicemember notice that the statements would be used and made no showing of the unavailability of the witnesses when regulations require that the personal appearance of a witness is to be obtained whenever possible, and that if evidence is to be by written statements, the servicemember is to be given reasonable opportunity to meet allegations contained in the statements;[188]
- Refusal to grant a continuance to interview additionally scheduled witnesses.[189]

12.5.7.8.3 Relevance and Materiality

The use of irrelevant or immaterial evidence may be prejudicial error. Examples of such evidence are:

- Prejudicial psychiatric reports in cases where the mental or emotional stability of the servicemember is not relevant to the basis for discharge;[190]
- Evidence of preservice conduct;[191]
- A record of an arrest for a serious crime which did not result in a conviction;[192]
- Evidence of political beliefs;[193]
- Evidence of adverse incidents from prior enlistment;[194]
- A record of a remote nonjudicial punishment or reprimand which, pursuant to regulation, should have been removed from the servicemember's personnel file;[195]
- Evidence of an untried criminal charge;[196]
- Evidence of a desire not to reenlist.[197]

12.5.7.8.4 Illegally Obtained Evidence

There is some support for the proposition that a less than honorable discharge may not be based on illegally seized evidence.[198] Recently, a court held that a less than honorable administrative discharge based on evidence detected by compelled urine samples, in violation of the servicemember's rights under Article 31, U.C.M.J. (the military right against self-incrimination), was error.[199]

Use of illegally obtained confessions may be challenged. Regulations governing the conduct of all military investigations require the warnings included in Article 31, U.C.M.J., prior to questioning. The U.S. Court of Military Appeals has held that Article 31, U.C.M.J., applies to administrative discharges as well as courts-martial.[200] However, a servicemember's consent to the admission of the statement may waive any objection.[201] Use of a statement obtained during a psychiatric examination aimed at eliminating the servicemember with a GD for a personality disorder, not preceded by Article 31 warnings, may be improper. The issue has not yet been decided.

12.5.7.8.5 Double Jeopardy

When evidence of offenses for which the servicemember has been acquitted at a court-martial is admitted at an administrative discharge hearing, a regulatory violation may result. For example, since 1966, AFM 39-12 has specifically prohibited a UD when it is based in any way on evidence of an offense for which a servicemember has been acquitted.[202] Double jeopardy, in the form of two discharge hearings for the same act, is governed by the applicable regulations. For example, failure to prove unsuitabil-

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[187] Glidden v. United States, 185 Ct. Cl. 515 (1968).

[188] Martin v. Secretary of the Army, 455 F. Supp. at 637, 5 MIL. L. REP. at 2413 (D.D.C. 1970).

[189] *See* note 153 *supra*.

[190] Story v. Secretary, 2 MIL. L. REP. 2237 (D. Ariz. 1974) (unpublished); NDRB N5-1843 (1976).

[191] *See* note 56 *supra* ND 76-51843 (digested at note 192 *infra*); ADRB SOP, Annex F-1, para. 2.a.(2)(b).

[192] JAGA 1967/4739, 68-8 JALS 22 (ADB's receipt of irrelevant material, *i.e.*, housebreaking charges for which applicant was never tried, and failure to consider relevant matters, *i.e.*, two psychiatric reports and a medical report considered by the board but not sent to the JAG office, may have influenced the characterization of discharge recommended).

See ND 76-51843 (UD upgraded to GD because of use of arrest report not resulting in conviction, preservice arrest record waived for enlistment, and irrelevant psychiatric diagnosis). *See also* note 125 *supra*; note 218 *infra*.

[193] *Cf.* United States v. Garza, 20 C.M.A. 536, 43 C.M.R. 376, 4 SEL. SERV. L. REP. 3231 (1971); Stapp v. Resor, 314 F. Supp. 475 (S.D.N.Y. 1970).

[194] Murray v. United States, 154 Ct. Cl. 185 (1961). Service regulations usually permit such evidence as relevant to the decision to discharge but not as relevant to character of discharge. *See* note 125 *supra*.

[195] Martin v. Secretary of the Army, 455 F. Supp. at 637; *see* AR 27-10, para. 3-15(d); ADRB SOP, Annex F-1, para. 2.a.(2)(a), 44 Fed. Reg. 25,069 (Apr. 27, 1979); Grimm v. Brown, 291 F. Supp. 1011 (N.D. Cal. 1968), *aff'd on other grounds*, 449 F.2d 6540 (1971).

[196] *See* JAGA 1967/4739, *supra* note 192; *cf.* Story v. Secretary, 2 MIL. L. REP. 2237 (D. Ariz. 1974) (unpublished). *See* AD 77-09117 (recorder improperly stressed a seven-day AWOL for which applicant was not punished).

[197] DAJA-AL 1974/3846, 13 Mar. 1974.

[198] Committee for GI Rights v. Callaway, 370 F. Supp. 934, 2 MIL. L. REP. 2275 (D.D.C. 1974), *rev'd on other grounds*, 518 F.2d 466, 3 MIL. L. REP. 2523 (D.C. Cir. 1975); Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966) (civilian employee of Air Force); Saylor v. United States, 374 F.2d 894, 179 Ct. Cl. 151 (1967) (same); Crawford v. Davis, 249 F. Supp. 943 (E.D. Pa. 1966), *cert. denied*, 383 U.S. 921 (1966); Denton v. Seaman, 315 F. Supp. 279 (N.D. Cal. 1970); *cf.* United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797, 2 MIL. L. REP. 2063 (1974). *See also* United States v. Roberts, 2 M.J. 31, 4 MIL. L. REP. 2555 (C.M.A. 1976); United States v. Thomas, 1 M.J. 397, 4 MIL. L. REP. 2250 (C.M.A. 1976) (Fletcher, C.J., concurring).

[199] Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980). *See* Ch. 15 *infra*. *See* AD 78-00722 (digested at App. 12A *infra*).

[200] United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797, 2 MIL. L. REP. 2063 (1974); Giles v. Secretary of the Army, 475 F. Supp. 595, 7 MIL. L. REP. 2524 (D.D.C. 1979). *See also* Lane, *Evidence and the Administrative Discharge Review*, 55 MIL. L. REV. 95, 127 (1972). *Ruiz* should not be read narrowly in light of *Giles*. *See* § 12.9.4 *infra*. *But see* United States v. Armstrong, 9 M.J. 374, 8 MIL. L. REP. 2523 (C.M.A. 1980).

[201] Waller v. United States, 461 F.2d 1273 (Ct. Cl. 1977). *But see* Martin v. Secretary of the Army, 455 F. Supp, 634 (D.D.C. 1977) (concerning waiver in ADB proceedings); *See* § 12.9.4 *infra* (description of how to deal with confessions) and Ch. 15 *infra* (discussion of the use of "exempt" drug evidence).

[202] *See* FD 77-01984 (digested at App. 12A *infra*); notes 221-24 *infra*.

ity to a first ADB precludes reference to a second ADB to consider a discharge for homosexuality.[203]

12.5.7.9 Communications by Decision-Maker Unknown to Servicemember

As a general rule, an unsolicited, undisclosed (*ex parte*) communication by an adversary (such as the servicemember's commanding officer) to a decision-maker in an adjudicatory proceeding, such as an ADB or the discharge authority, violates due process and invalidates the proceeding.[204] However, it is permissible for the decision-maker to solicit additional evidence such as medical advice, from a disinterested person.[205]

12.5.7.10 ADB Findings and Recommendations/ Proper Basis for Decision

The findings and recommendation of the ADB must conform to the evidence adduced at the hearing.[206] The ADB may not base its decision on evidence which has not been specifically brought before it.[207] Hence, consideration of prejudicial, extraneous matter not contained in the record of the ADB proceedings, without giving the servicemember notice and an opportunity to refute or explain, is error when the ADB relies upon such matter in reaching its conclusion.[208]

On the other hand, an ADB finding that is supported by substantial evidence will not be rejected by the courts merely because the ADB also incidentally mentioned incompetent or irrelevant material.[209] The possibility of prejudice from the admission of incompetent evidence may be dispelled by showing that the matter involved was not relied upon.[210]

A finding that is unsupported by evidence is harmless error when it is demonstrably a subsidiary finding and the ADB did not rely on that finding to make its recommendation.[211] A court will affirm the decision of an administrative tribunal if all the important basic findings made by the tribunal are supported by substantial evidence on the whole record.[212]

When required by regulation, the ADB must articulate clearly and precisely its reasons for findings and recommendations that are adverse to the servicemember.[213] Thus, an Air Force discharge for homosexuality was remanded for further explanation when the discharge regulation provided for an exception to the general policy of separation and neither the ADB, the DA, nor the BCMR adequately explained why the case did not fall within the exception.[214] The mere conclusion, tracking the language of the regulation, that sufficient "unusual circumstances" did not exist in the case did not adequately comply with the requirement for a statement of reasons.[215] This rationale should apply to an ADB which merely recommends a UD without stating why a GD or HD is not appropriate, when the regulations permit better than a UD. No court has ruled on the issue, however.

Even without a regulatory requirement, an ADB should give reasons for its findings and recommendations so that they will be accorded the usual

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[203] JAGA 1968/4912; 20 Nov. 1963, 13 Dig. Ops., Enlisted Men § 81; § 12.9.3 *infra*.

Cf. AD 77-09587 (UD upgraded to GD because applicant had been acquitted by court-martial of the charges for which he requested a discharge in lieu of court-martial).

[204] *See, e.g.,* Doe v. Hampton, 566 F.2d 265, 276 (D.C. Cir. 1977); Ryder v. United States, 585 F.2d 482 (Ct. Cl. 1978); Jarett v. United States, 451 F.2d 623, 629, 195 Ct. Cl. 320, 331 (1971); Camero v. United States, 375 F.2d 777, 179 Ct. Cl. 520 (1967); Hertzog v. United States, 167 Ct. Cl. 377 (1964).

[205] Doe v. Hampton, 566 F.2d 265, 276 (D.C. Cir. 1976); Fitzgerald v. United States, 623 F.2d 696 (Ct. Cl. 1980). This however, does not dispose of the error which flows from failure to give the parties an opportunity to comment thereon. *See* Morgan v. United States, 304 U.S. 1 (1938); Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964). *See also* Gonzalez v. United States, 348 U.S. 407, 415 (1955); Rohe v. Froehlke, 500 F.2d 113, 2 MIL. L. REP. 2477 (2d Cir. 1974); Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971).

[206] *Cf.* Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); Tadano v. Manney, 160 F.2d 665 (9th Cir. 1947).

See AD 79-03008; AD 78-04244; AD 78-01727; AD 7X-04209. *See also* App. 12A *infra* (digests of these cases).

[207] *Cf.* United States v. Abilene & Southern Ry., 265 U.S. 274, 288-90 (1924).

[208] *Id.*; Chin Quong Mew *ex rel.* Chin Bark Keung v. Tillinghast, 30 F.2d 684 (1st Cir. 1929); Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Jones v. United States, 203 Ct. Cl. 545 (1974); Glidden v. United States, 185 Ct. Cl. 515 (1968); Hertzog v. United States, 167 Ct. Cl. 377 (1964); Clackum v. United States, 296 F.2d 226 (1960). *Cf.* Hart v. United States, 498 F.2d 1405, 204 Ct. Cl. 925 (1974), *cert. denied*, 419 U.S. 1049 (1974) (reliance by hearing examiner upon rejected exhibit was harmless error when there existed testimony under oath at the hearing that substantially recounted the facts contained in the exhibit).

[209] *Cf.* Braniff Airways, Inc. v. CAB, 379 F.2d 453, 466 (D.C. Cir. 1967).

[210] *Accord, id.*; Sisto v. CAB, 179 F.2d 47, 51-52 (D.C. Cir. 1949); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 686-87 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949). *See also* Haynes v. United States, 418 F.2d 1380, 190 Ct. Cl. 9 (1969) (submission of prejudicial letter in administrative proceeding was harmless error where there was no showing that it was relied on by the examiner).

[211] Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967). *Accord*, Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1, 67 (1961).

[212] Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967). *Accord*, M&M Transportation Co. v. United States, 128 F. Supp. 296, 302 (D. Mass.), *aff'd per curiam*, 350 U.S. 857 (1955).

[213] *See* Matlovich v. Secretary of the Air Force, 591 F.2d 852, 858, 6 MIL. L. REP. 2569 (D.C. Cir. 1978) (and cases cited therein). *See also* Craft v. United States, 544 F.2d 468, 210 Ct. Cl. 170, 4 MIL. L. REP. 2351 (1976). The absence of articulated standards governing discretionary administrative determinations also violates due process of law. White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605, 610, 612 (5th Cir. 1964). This principle of reasoned explanation serves three interrelated purposes: (1) enabling a court to give proper review of the administrative determination; (2) helping to keep the administrative agency within proper authority and discretion and to avoid and prevent arbitrary, discriminatory, and irrational action by the agency; and (3) informing the aggrieved person of the grounds of the administrative action so that (s)he can plan a course of action. Matlovich v. Secretary of the Air Force, 591 F.2d at 857. Standards for rational action in an area of formal or informal adjudication can be developed by agencies in two ways: (1) advance promulgation of written rules, directives, or formulated criteria; and (2) case-by-case decision-making. Matlovich v. Secretary of the Air Force, 591 F.2d at 861; Standard Rate and Data Service, Inc. v. United States Postal Service, 584 F.2d 473 (D.C. Cir. 1978) (concurring opinion of Judge Leventhal); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 596, 598 (D.C. Cir. 1971).

[214] Matlovich v. Secretary of the Air Force, 591 F.2d 852, 6 MIL. L. REP. 2569 (D.C. Cir. 1978).

[215] *Id.* at 860. *See also* United States *ex rel.* Checkman v. Laird, 469 F.2d 773 (2d Cir. 1972); Beckham v. United States, 392 F2d 619, 183 Ct. Cl. 628, 636 (1968).

degree of finality by a reviewing court.[216] A reviewing court will give more weight to the ADB's determination if supported by detailed findings, and explanations of, its conclusion.[217]

12.5.7.11 Relevant DRB Index Categories

The Hearing: Administrative Discharge Board (ADB): A02.04 (SM not properly notified of rights to request board hearing); A02.12 (Improper denial of request for board hearing); A02.14 (Improper composition of board); A02.16 (Improper counsel for representation); A02.18 (Ineffective assistance of counsel); A02.20 (Request for witness improperly denied); A02.22 (Command intervention (influence) improper); A02.24 (Improper denial of request to appear in person); A02.26 (Recommendation of board improper); A01.22 (Evidence obtained in violation of Article 31, U.C.M.J. (self-incrimination) improperly considered); A01.24 (Evidence obtained from unlawful search improperly considered); A01.26 (Hearsay evidence improperly considered); A01.28 (Unsworn testimony or statements improperly considered); A01.30 (Exempt evidence (alcohol/drug rehabilitation program) improperly considered); A01.32 (Other evidence improperly considered, including defective records of disciplinary offenses); A01.10 (Characterization based in part on prior service); A01.12 (Characterization based in part on preservice record).

12.5.7.12 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation R] in effect at the time of the applicant's discharge required that:

(a) An ADB be composed of at least three officers one of whom must be in the rank of major or higher.

(b) The servicemember be represented by an attorney unless the GCM authority certified the nonavailability of a lawyer and set forth the qualifications of the nonlawyer substitute.

#. The ADB panel was composed of Captains A, B, and C.

#. A panel composed of only three captains violated [regulation R].

#. An improperly constituted panel such as described in #s above renders a discharge proceeding void [citations].

#. Such a violation described in #s above is per se error where prejudice is presumed.

#. Such a violation was also prejudicial error because _____.

#. The GCM authority did not certify the unavailability of lawyer counsel and did not set forth the qualifications of the substitute counsel.

#. Such a violation of regulation _____ is per se prejudicial error [citations].

#. Such a violation was also prejudicial error because _____.

#. [Include appropriate contentions from Section 12.1.2.]

#. The ADB used the standard of proof of "preponderance of the evidence" contained in regulation _____.

#. When an ADB awards a stigmatizing discharge, the law requires that the standard of proof be "clear and convincing evidence" [citation].

#. [List evidence to support the discharge and argue that this is merely a preponderance and not "clear and convincing."]

#. There was insufficient evidence to meet the clear and convincing evidence standard.

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation R] required that:

(a) All reasonably available witnesses appear at an ADB.

(b) The servicemember be notified of all witnesses who will appear.

(c) All witnesses who are anticipated to present evidence will not be reassigned.

#. At the applicant's ADB:

(a) Sgt. A did not appear and a sworn statement was used.

(b) Sgt. A's statement contained _____ damaging testimony.

(c) Capt. B testified.

(d) The applicant was not notified Capt. B would testify.

(e) Sgt. C's written statement was presented.

(f) Sgt. C was assigned to the same unit at the same location as the applicant at the time of the discharge proceedings were initiated.

(g) Sgt. C was reassigned prior to the ADB.

(h) Sgt. C's and Capt. B's testimony contained

(i) _____ damaging testimony.

(ii) _____ damaging testimony.

#. The violation of [regulation R] contained in #s above was prejudicial error because _____.

#. The failure of the applicant's counsel to object to the violation of [regulation R]did not waive the error because _____.

12.5.8 THE LEGAL REVIEW

12.5.8.1 General Rules

Some regulations require a review of an ADB by a legal officer (SJA). Theoretically, the purpose of these reviews is to ensure that an action is "legally sufficient." However, in some commands, particularly

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[216] *See* Boyce v. United States, 543 F.2d 1290, 1294, 211 Ct. Cl. 57 (1976); Kowal v. United States, 412 F.2d 867, 873, 188 Ct. Cl. 631, 643 (1969); AD 79-00008 (ADB did not specify type of misconduct).

[217] *See* Smith v. United States, 168 Ct. Cl. 545, 553 (1964); *cf.* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-69 (1962); Loral Electronics Corp. v. United States, 387 F.2d 925, 980, 181 Ct. Cl. 822, 832 (1976); Craft v. United States, 544 F.2d 468, 210 Ct. Cl. 170, 4 MIL. L. REP. 2351 (1976).

in the Air Force, this review became a vehicle to summarize the facts of the case for the DA. Check the review for the following possible errors:

- Misstatements of facts;
- Addition of adverse matter that the servicemember did not know was being considered;
- Omission of favorable information (*e.g.*, recommendation for a GD by an endorsing commander).

Additionally, the absence of a review may be prejudicial error because the regulations often require a legal review, in cases where an ADB is convened, before a UD can be issued.[218]

Military criminal law places a great deal of emphasis on an SJA's post-trial review. An apt analogy can be made: "[The SJA's] post-trial review must fairly summarize the evidence on both sides of an issue and provide the convening authority with adequate guideposts by which to determine the guilt or innocence of the accused."[219]

12.5.8.2 Relevant DRB Index Category

The Legal Review: A01.18 (JAG (legal) review (when required) defective).

12.5.8.3 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation R], in effect at the time of the applicant's discharge required that the findings and recommendations of an ADB be referred to a Judge Advocate for a review for legal sufficiency prior to review by the DA.

#. There was no referral in the applicant's case.

#. There was _____ regulatory error in the case.

#. The lack of referral was prejudicial because the _____ regulatory error may have prejudiced the applicant's case and without a contemporaneous legal review it is impossible to determine whether the error was harmless. [Give reasons.]

12.5.9 THE DECISION: DISCHARGE AUTHORITY (DA)

12.5.9.1 General Rules

Upon receipt of the record of the ADB proceedings the DA may take one of several actions specified in the regulations.[220] Currently, the DA may not direct a result that is more severe than that recommended by the ADB [221] or after a better discharge has been issued (executed).[222] The DA may not set aside the findings and recommendations of an ADB and refer the case to a new ADB without stating the reasons for the disapproval.[223] Nor may (s)he change the reason after a decision because of additional misconduct before actual discharge.[224]

Normally, only an officer with authority to convene GCM, or a higher authority, may direct a UD.[225] In the absence of an express regulatory provision to the contrary, this authority may not be delegated.[226]

12.5.9.2 Relevant DRB Index Categories

The Decision: A01.08 (Discharge authority *not* proper); A01.06 (SM not separated within reasonable time after approval); A02.28 (Discharge authority's approval improper in light of Board recommendation); A02.32 (Improper vacation of suspended administrative discharge); A80.06 (Request *not* forwarded to military department by GCM authorities (officer case)).

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[218] *See* AD 79-01545; AD 77-09463; FD 77-01984A; MD 78-00104. *See also* App. 12A *infra* (digests of these cases).

[219] United States v. Bennie, 10 C.M.A. 159, 27 C.M.R. 233 (1959).

[220] *See* DoD Dir. 1332.14, para. V.D., 20 Dec. 1976. Prior to 1965, the DA could ignore the recommendations of the ADB or could refer the case to other ADBs until the desired results were achieved. *See* § 12.9.3 *infra*.

[221] If the DA desires separation and the ADB has recommended retention, the DA must refer the case to the Secretary for determination. In such a case, the servicemember should be afforded an opportunity to respond to any submission of the DA to the Secretary. *See* Morgan v. United States, 304 U.S. 1 (1938); note 205 *supra*. If the Secretary disagrees with the ADB recommendation and direct separation, (s)he must give reasons supported by the evidence of record. *Cf.* Bray v. United States, 515 F.2d 1383, 3 MIL. L. REP. 2207 (Ct. Cl. 1975).

See AD 7X-18745 (GCM authority could not change the ADB recommendation of discharge for unsuitability to one for unfitness); AD 78-03656 (DA did not follow regulations requiring return of case to the initiating command when DA disagreed with the command's recommendation of HD); AD 77-08486 (similar).

[222] *See* AD 78-02606 (DA improperly changed HD to GD the day after the discharge was executed). DRBs have upgraded applicants' discharges when they found that an administrative error resulted in the applicants' recieving lesser discharges than the DAs directed. *See also* AD 78-03240; AD 7X-12422; AD 79-01047; AD 77-09368; MD 78-01186; MD 78-03676; ND 78-01572; MD 78-01294; MD 78-01480; MD 78-01924; MD 77-03898; MD 78-00864.

[223] Bray v. United States, 515 F.2d 1383, 207 Ct. Cl. at 77-78, 3 MIL. L. REP. 2207 (1975). *Cf.* Craft v. United States, 544 F.2d 468, 4 MIL. L. REP. 2351 (Ct. Cl. 1976). *See* ND 78-01112 (applicant was discharged erroneously when he was processed a second time for an administrative discharge for civil conviction after his ADB recommended retention); FD 78-01812 (DA violated regulations in directing that a new ADB be appointed when he disagreed with the first ADB's recommendation of retention; regulations only permitted the "approving authority" to direct a new ADB, and made the power nondelegable).

[224] *See* ND 7X-02930 (error when Chief of Naval Personnel directed separation for unsuitability with the type of discharge warranted by service record, and sufficient time existed before applicant's subsequent UA for the applicant to have been discharged prior to the commanding officer's new recommendation that applicant be separated UD/unfit).

[225] DoD Dir. 1332.14, encl. 6, para. E. *See* AD 78-0359; AD 78-04609; AD 78-00075 (GD under EDP upgraded to HD because the discharge was approved by a grade 4 acting commander rather than the grade 5 as required by regulations). *But see* AD 79-01541 (approval by a grade 4 officer rather than a grade 5 officer was improper but not prejudicial). Such error would seem to be *per se* prejudicial, however. *See* note 138 *supra*.

[226] *See generally* Neary v. Greenbaugh, 120 F. Supp. 833 (D. Me. 1954); JAGA 1959/4273; 59 JALS 15/18, 9 Dig. Ops., Enlisted Men, § 57.1. Army regulations require that the officer exercising GCM jurisdiction personally sign any action directing a UD. This authority cannot be delegated. Under current regulations, this authority may be delegated to a general or flag officer in command who has a judge advocate or law specialist on his/her staff for cases arising in that command. *See* DoD Dir. 1332.14, *supra* note 225. *Cf.* FD 78-01812 (digested at note 223 *supra*).

12.5.9.3 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation R], in effect at the time of the applicant's discharge did not permit the DA to direct a discharge for unfitness when the ADB recommended one for unsuitability.

#. The ADB recommended a GD for unsuitability and the DA directed a GD for unfitness.

#. The DA's action violated [regulation R].

#. Because of the applicant's record of _____, (s)he is entitled to an HD once the reason for discharge becomes unsuitability.

12.5.10 DISCHARGE FOR THE GOOD OF THE SERVICE (GOS) TO AVOID TRIAL BY COURT-MARTIAL

12.5.10.1 General Rules

A discharge for the good of the service (GOS) is the only administrative discharge for cause that is not formally initiated by the command. It is initiated by a servicemember against whom court-martial charges have been preferred, to avoid court-martial and the possibility of receiving a punitive discharge.[227]

During the Vietnam era, this separation procedure was used to eliminate thousands of servicemembers with moderate to lengthy periods of unauthorized absences. In particular, the Army established Special Processing Detachments (SPDs), renamed Personnel Control Facilities (PCFs), at various locations throughout the country. Court-martial charges were preferred against an AWOL servicemember who surrendered or was returned to military authorities at these processing centers. The servicemember would request discharge to avoid a court-martial and would be discharged administratively, usually with a UD. The processing often resembled an assembly line. The Army DRB, at least, is aware of that type of situation and does not condone it.[228]

A servicemember who requests discharge to avoid a court-martial waives the right to a trial and is exposed to a stigmatizing administrative discharge. Consequently, such a request must be made knowing, intelligently, and voluntarily, or it is invalid.[229] A less than honorable discharge grounded upon a resignation made to avoid a court-martial is void when the court-martial is a legal impossibility,[230] or when the court-martial has already been held.[231] The failure to afford a servicemember the opportunity to consult with legal counsel prior to requesting a discharge, in violation of a regulation, also renders the discharge void.[232] It can also be improper to permit a GOS request prior to preferral of charges.[233]

A request for discharge that is the product of duress or coercion is invalid.[234] Duress and coercion are measured by objective tests,[235] not the servicemember's subjective evaluation of the situation. The following elements are necessary to show duress:

- One side (*i.e.*, the servicemember) involuntarily accepted the terms of another (*i.e.*, the command);
- The circumstances permitted no other alternative;
- The circumstances were the result of coercive acts of the opposite party (*i.e.*, the command).[236]

However, a request for discharge or resignation is not involuntary merely because the servicemember is faced with a choice between two unpleasant alternatives — criminal prosecution or less than honorable administrative discharge.[237]

As with waivers of rights in other kinds of administrative discharges for cause, a request for discharge may be involuntary when the servicemember is mentally incompetent or incompetent by reason of drug or alcohol intoxication when the request is executed.[238]

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[227] *See* DoD Dir. 1332.14, encl. 2, para. J; Ch. 19 *infra* (discussion of GOS cases).

[228] *See* ADRB SOP, Annex F-1, para. 1.d, 44 Fed. Reg. 25,068 (Apr. 27, 1979). *Cf.* AD 77-10836, note 230 *infra*.

[229] *See* note 112 *supra*; Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972); AD 7X-06310A (counsel did not make applicant fully aware of the options available and his request was not an informed decision); AD 7X-13230 (although applicant's rights were explained to him, he did not fully understand alternatives; charges of disrespect to a captain, DOLO, and wrongful communication of a threat arising out of one incident did not warrant UD). *See also* MD 7X-00801A (mentally incompetent) (digested at note 238 *infra*). *Cf.* AD 77-10085.

[230] Neal v. United States, 177 Ct. Cl. 937 (1966) (court-martial charge for which insufficient evidence existed as matter of law illegally preferred); Middleton v. United States, 170 Ct. Cl. 36 (1965) (court-martial illegal where it tried Navy servicemember for same offense of which civilian court had previously acquitted him). *Cf.* Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972) (GOS improperly accepted under circumstances of mental illness and clear innocence of major charge). *See* AD 78-00722; AD 77-10836; AD 77-10173; AD 77-10085. *See also* App. 12A *infra* (digests of these cases).

[231] *See* AD 77-09587 (applicant had been acquitted by the CM of the charges for which he requested a GOS); AD 7X-02495 (applicant had requested discharge for a pending AWOL charge which went to an SPCM where he was convicted).

[232] Ingalls v. Zuckert, 309 F.2d 659 (D.C. Cir. 1962).

[233] *See* AD 78-01959 (submission and acceptance of the GOS request prior to the preferring of the court-martial charge was improper).

[234] *See* Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972). *Cf.* Dobney v. Freedman, 358 F.2d 533, 534, 535 (D.C. Cir. 1965); Pasoczy v. Hodges, 297 F.2d 439, 441 n.4 (D.C. Cir. 1961).

[235] *Cf.* Christie v. United States, 518 F.2d 584, 587, 207 Ct. Cl. 333, 3 MIL. L. REP. 2563 (1975); Dorl v. United States, 200 Ct. Cl. 626, 633 (1972); Pitt v. United States, 420 F.2d 1028, 190 Ct. Cl. 506 (1970); McGucken v. United States, 407 F.2d 1349, 187 Ct. Cl. 284, *cert. denied*, 396 U.S. 894 (1969).

[236] Taylor v. United States, 591 F.2d 688 (Ct. Cl. 1979); Roskos v. United States, 549 F.2d 1386, 1389 n.11, 213 Ct. Cl. 34 (1977); Christie v. United States, 518 F.2d at 587 (Ct. Cl. 1975); Leone v. United States, 204 Ct. Cl. 334, 339 (1974); McGucken v. United States, 407 F.2d at 1351, *cert. denied*, 396 U.S. 894 (1969); Popham v. United States, 151 Ct. Cl. 502, 506 (1960). The foregoing cases involve resignations of civil service employees, but logically govern this situation.

[237] *Cf.* Taylor v. United States, 5o1 F.2d at 692; Roskos v. United States, 549 F.2d at 1389; Christie v. United States, 518 F.2d at 587-88.

[238] Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972); *cf.* Manzie v. United States, 198 Ct. Cl. 489 (1972). *See* MD 7X-00801A (discharge improper because applicant lacked mental capacity and competency to request voluntarily and rationally a GOS discharge); *cf.* AD 77-

Even though it may be impossible to prove that a waiver or request for discharge was improper, the inquiry does not end there. A DRB can often be persuaded that an equitable basis exists for upgrading a discharge by using evidence of a coercive atmosphere or a situation in which the veteran did not make a knowing or informed request.[239]

A request for discharge may be submitted only when the court-martial charge carries a maximum permissible punishment of a punitive discharge.[240] Prior to 1975, the military could refer to Section B of the Table of Maximum Punishment (TMP),[241] which authorizes a punitive discharge upon conviction of two or more offenses, which, standing alone, would not result in a punitive discharge under Section A of the TMP.[242] In 1975, however, the regulation was amended to exclude consideration of Section B when requests for discharge are made to avoid trial by court-martial.[243] A similar rule permits a punitive discharge if there have been recent prior convictions even though the current offense does not normally permit a discharge.[244] As with all waivers, refusal to permit the withdrawal of a request can be improper.[245]

12.5.10.2 Relevant DRB Index Categories

Discharge for the Good of the Service to Avoid Trial by Court-Martial: A70.02 (Charges *not* preferred); A70.04 (Offense charged *not* punishable by a punitive discharge); A70.06 (SM did *not* request GOS discharge); A70.08 (SM *not* properly counselled by counsel for consultation); A70.10 (Request for withdrawal of GOS discharge *not* processed/considered); A70.12 (SM could *not* knowingly request GOS discharge at the time); A70.14 (No U.C.M.J. jurisdiction over the person); A70.16 (No U.C.M.J. jurisdiction over the offense).

12.5.10.3 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. [Regulation R], in effect at the time of the applicant's discharge

(a) Permitted a GOS discharge when the charged offense could result in a punitive discharge.

(b) Required the DA to consider a request to withdraw a request for a GOS discharge.

#. The applicant was charged with two periods of AWOL, each less than 30 days long.

#. [Regulation R] did not permit the use of paragraph 127 of the *Manual for Courts-Martial*, which permits a punitive discharge if two non-punitive discharge offenses are charged, to support a GOS discharge.

#. The applicant made a written request to withdraw his request for a GOS discharge.

#. The written request was not forwarded to the DA.

12.6 ERRORS RELATING TO FAILURE TO DISCHARGE FOR REASONS OTHER THAN CAUSE OR TO ACQUIRE JURISDICTION OVER A SERVICEMEMBER

12.6.1 INTRODUCTION

A bad discharge cannot be based on conduct that occurred after a servicemember should have been separated from military service under nonstigmatizing circumstances. This approach is divided into two groups of factual situations:

- A servicemember should have been separated upon his/her request and was wrongfully refused,or was obstructed in the application process (for example, by reason of conscientious objection);
- A servicemember was improperly inducted or enlisted into the military and consequently should have been discharged upon discovery of the error (for example, erroneous enlistment of an underage person).

The two situations tend to blur in some cases, but the basic principle is similar: at some point the servicemember should have become a civilian again and, thus, any misconduct after that point should not be considered in characterizing the period of service.

The Boards resist applying the concept of propriety in most of these cases but will apply the concept of equity. Although courts view these cases as raising propriety issues it is wise to argue before the Boards that such a situation presents both a propriety and an equity ground for an upgrade.

12.6.2 FAILURE TO DISCHARGE

This subsection addresses the denial of a con-

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[238] (continued)

06875 (prejudice when command did not follow regulations requiring a psychiatric examination prior to approving a GOS when there is reason to believe that the applicant has mental problems; applicant had requested psychiatric help).

[239] *See* Chs. 19, 22 *infra*.

[240] *See* DoD Dir. 1332.14, encl. 2, para. J; ADRB SOP, Annex F-1, para. 2.a.(4), 44 Fed. Reg. 25,069 (Apr. 27, 1979). The maximum punishments for various offenses appear in the Table of Maximum Punishments contained in the *Manual for Courts-Martial* (MCM). *See* App. 17B *infra*.

The DRBs have upgraded applicants' UDs when the offenses charged are not punishable by a punitive discharge. *See* MD 78-01420; AD 77-05178; AD 7X-20527; AD 78-04343; AD 79-02093 (applicants' UDs upgraded to HDs). *See also* ND 78-00228; AD 79-01666; AD 77-00082; AD 79-00372; MD 77-03700; MD 77-03706; MD 78-00351; MD 78-04315; MD 78-01405; MD 78-01355; MD 78-03970 (applicants' UDs upgraded to GDs). The upgrade awarded appears to be based on disciplinary record, amount of time in the service, and number of days lost. *See also* § 19.2.2.3 *infra*.

[241] MCM ¶ 127d (1969 rev. ed.).

[242] *See* DoD Dir. 1332.14, 20 Dec. 1965.

[243] *See* DoD Dir. 1332.14, 30 Sep. 1975, encl. 2, para. 1. (effective 1 Jan. 1976).

[244] MCM § B TMP, para. 127d (1969 rev. ed.). *See* MD 7X-02352A (no single offense charged was by regulation punishable by a punitive discharge; applicant also did not have two prior courts-martial as required to proceed with GOS). *See also* MD 78-01803.

[245] *See* note 122 *supra*. *See* AD 78-00913 (refusal to permit withdrawal in view of apparent innocence improper).

scientious objector (CO),[246] hardship,[247] dependency,[248] or medical[249] discharge, followed by a less than honorable discharge based on conduct after the denial.

If the request for discharge was improperly denied, and the less than honorable discharge is based upon conduct related to the improper denial, the veteran may be entitled, as a matter of law, to a recharacterization of the discharge without reference to such conduct.[249a] The Army DRB, however, does not view a wrongful denial of a CO, hardship, or dependency discharge as invalidating a subsequent less than honorable discharge.[250] Instead, the Army DRB will only consider the impact of a "harsh or unjust" denial on the quality of service in determining the *equity* of the characterization of service.[251] The Air Force and Navy have no written position; their policies develop case by case.

12.6.2.1 Wrongful Denial of Conscientious Objector Discharge or Noncombatant Status

12.6.2.1.1 Introduction

Discharge from military service as a conscientious objector, or assignment to a noncombatant status after entry on active duty, is a privilege granted by the executive branch of the federal government, not a constitutional or statutory right.[252] The DoD directive authorizing CO discharges[253] extends to servicemembers the congressionally approved CO exemption for potential draftees or assignment to noncombatant duties (1-A-0 status). The directive provides for administrative discharge under the same standard prescribed for potential draftees.[254] Because the standard for civilian and military CO applications is the same,[255] cases involving potential draftees have precedential value for in-service applicants.

The standard for CO status consists of a three-pronged test:

- A sincerely held[256]
- Opposition to all war in any form
- Founded upon religious training and belief as construed by the United States Supreme Court in *United States v. Seeger*[257] and *Welsh v. United States*.[258]

In applying the third element of this test, the deciding authority must be concerned with the applicant as an individual rather than with its own interpretation of the dogma of the religious sect, if any, to which the applicant may belong.[259]

In addition, in-service applicants must make a fourth showing: his/her CO beliefs "crystallized" (*i.e.*, became fixed) *after* the date of enlistment or receipt of induction notice.[260] The "crystallization" requirement designates the proper forum for an individual to bring a claim; it is not a device for depriving certain unlucky persons of any forum at all.[261] For Class 1-A-0 conscientious objectors, a change in conception of noncombatant duties with respect to military mission is sufficient.[262]

The burden is on the CO discharge applicant to meet all four requirements establishing a prima facie case.[263] When the applicant makes nonfrivolous allegations that, if true, would be sufficient under the regulation to warrant granting the CO status,[264] a prima facie case is established. The determination is

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[246] DoD Dir. 1300.6, 20 Aug. 1971, *as implemented by* AR 600-43 (Army), AFR 35-24 (Air Force), BUPERSMAN 1860120 (Navy), MCO 1306.16C (Marine Corps). This chapter does not discuss noncombatant status separately as the principles are the same as for discharge.

[247] DoD Dir. 1332.14, encl. 2, sec. C, *as implemented by* AR 635-200 ch. 6 (Army), AFM 39-10 ch. 3 (Air Force), BUPERSMAN 3850240 (Navy), MARCORSEPMAN, para. 6014 (Marine Corps).

[248] *Id.*

[249] *See* AR 635-200, ch. 5, AR 40-3, ¶ 54.

[249a] Parisi v. Davidson, 405 U.S. 34, 5 SEL. SERV. L. REP. 3100 (1972); Bandoy v. Commandant, 495 F. Supp. 1092, 9 MIL. L. REP. 2439 (E.D. Pa. 1980).

[250] *See* ADRB SOP, Annex F-1, para. 2a(5), 44 Fed. Reg. 25,046, 25,067 (Apr. 27, 1979).

[251] *Id.*

[252] La Franchi v. Seamans, 536 F.2d 1259, 4 MIL. L. REP. 2173 (9th Cir. 1976); Nurnberg v. Froehlke, 489 F.2d 843, 1 MIL. L. REP. 2543 (2d Cir. 1973); DeWalt v. Commanding Officer, 476 F.2d 440, 442 (5th Cir. 1973). Similarly, conscientious objector status for civilians is a privilege accorded by statute. Gillette v. United States, 401 U.S. 437, 461 n.23, 3 SEL. SERV. L. REP. 3741 (1971); *In re* Summers, 325 U.S. 571 (1945); United States v. MacIntosh, 283 U.S. 605 (1931); Brooks v. United States, 147 F.2d 134 (2d Cir. 1945), *cert. denied*, 324 U.S. 878 (1945).

[253] This directive was originally issued in 1962 and was revised in 1968 and 1971. Applicants who are COs prior to 1962 must rely on the policy of retroactively applying current standards. *See* Ch. 21, *infra*; AD 77-11974 (Army DRB upgraded a pre-1962 UD of a CO).

[254] The standard is set forth at § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. app. § 456(j). *See* United States *ex rel.* Coates v. Laird, 494 F.2d 709, 2 MIL. L. REP. 2204 (4th Cir. 1974).

[255] *See* Baldwin v. Commanding Officer, 368 F. Supp. 580, 1 MIL. L. REP. 2535 (E.D. Pa. 1973). *See also* Parisi v. Davidson, 405 U.S. 34, 5 SEL. SERV. L. REP. 3100 (1972); Ehlert v. United States, 401 U.S. 99, 4 SEL. SERV. L. REP. 3001 (1971); Kemp v. Bradley, 457 F.2d 627, 5 SEL. SERV. L. REP. 3316 (8th Cir. 1972); Armstrong v. Laird, 456 F.2d 521, 5 SEL. SERV. L. REP. 3228 (1st Cir. 1972).

[256] DoD Dir. 1300.6, para. V.A.; Clay v. United States, 403 U.S. 698, 700, 4 SEL. SERV. L. REP. 3528 (1971); Scott v. Commanding Officer, 431 F.2d 1132, 3 SEL. SERV. L. REP. 3277 (3d Cir. 1972); Drake v. Stetson, 5 MIL. L. REP. 2321 (E.D. Cal. 1977); Reinhold v. Schlesinger, 379 F. Supp. 638, 2 MIL. L. REP. 2527 (D. Minn. 1974); Baldwin v. Commanding Officer, 368 F. Supp. 580, 1 MIL. L. REP. 2535 (E.D. Pa. 1973).

[257] 380 U.S. 163 (1965); DoD Dir. 1300.6, para. III.B.

[258] 398 U.S. 333, 3 SEL. SERV. L. REP. 3001 (1970); DoD Dir. 1300.6, para. III B.

[259] Baldwin v. Commanding Officer, 368 F. Supp. 580 (E.D. Pa. 1973); *cf.* Gillette v. United States, 401 U.S. 437, 461 n.23 (1971); Williams v. United States, 216 F.2d 350 (5th Cir. 1954).

[260] DoD Dir. 1300.6, para. V A2; Shaffer v. Schlesinger, 531 F.2d 124, 130, 4 MIL. L. REP. 2016 (3d Cir. 1976); Nurnberg v. Froehlke, 489 F.2d at 847 (2d Cir. 1973); Morrison v. Larsen, 446 F.2d 250, 253-55, 4 SEL. SERV. L. REP. 3335 (9th Cir. 1971); Helwick v. Laird, 438 F.2d 959, 965-66, 3 SEL. SERV. L. REP. 3778 (5th Cir. 1971); Gecina v. Brown, 6 MIL. L. REP. 2053 (D.S.C. 1978). It should be emphasized that, in the case of an in-service applicant who was inducted into the service, the critical date for purposes of the "crystallization" of CO beliefs is the date for the receipt of the induction notice rather than the date of entry into the service. Applegate v. Stillwell, 1 MIL. L. REP. 2472 (N.D. Cal. 1973).

[261] Applegate v. Stillwell, 1 MIL. L. REP. 2472 (N.D. Cal. 1973); Milton v. Commanding General, 316 F. Supp. 405, 406, 3 SEL. SERV. L. REP. 3665 (N.D. Cal. 1970).

[262] Frisby v. Larsen, 486 F.2d 244, 1 MIL. L. REP. 2417 (9th Cir. 1973); Borkenhagen v. Laird, 392 F. Supp. 637, 3 MIL. L. REP. 2367 (D. Mass. 1975).

[263] DoD Dir. 1300.6, para. V.D; Smith v. Laird, 486 F.2d 307, 310, 1 MIL. L. REP. 2655 (10th Cir. 1973); Drake v. Stetson, 398 U.S. 333 (1970); Singer v. Secretary of the Air Force, 385 F. Supp. 1369, 1373, 2 MIL. L. REP. 2694 (D. Colo. 1974).

[264] Hubbard v. Laird, 3 MIL. L. REP. 2156 (E.D. Cal. 1975). *See also* Mulloy v. United States, 398 U.S. 410, 416, 3 SEL. SERV. L. REP. 3011 (1970); Sanger v. Seamans, 507 F.2d 814, 816, 2 MIL. L. REP. 2692 (9th Cir. 1974).

made solely from the applicant's allegations, statements, and any supportive material submitted with the claim.[265]

Although the regulations governing CO discharges have varied slightly over the years, the procedures remain simple. The servicemember must file a written application describing his/her beliefs and answering specific questions set forth in the regulations. Statements of support may be attached. The servicemember is then interviewed by a psychiatrist, a chaplain, and an investigating officer (the latter two make findings as to sincerity). A report is sent up the chain of command to the Conscientious Objector Review Board (CORB) which renders the final decision. While awaiting decision the servicemember is placed in duties providing a minimum of conflict with his/her asserted beliefs.[266]

12.6.2.1.2 Scope of Review

When prima facie CO claims are denied, only a very limited judicial review is permitted.[267] Review is limited to a determination whether, at the time of denial, there existed a "basis in fact" for the application's denial,[268] and whether the applicant was accorded basic procedural fairness in both the application process and review of the claim.[269]

The scope of DRB or BCMR review of a denial of a CO discharge application is not so limited. A federal court, however, probably would not disturb an unfavorable finding by a DRB or BCMR as to the propriety of the denial of a CO discharge unless the denial lacked a basis in fact, or the applicant was denied procedural fairness in the CO application process.

12.6.2.1.2.1 Basis in Fact

The "basis in fact" test has been variously described by courts as:

- Whether there is any objective evidence in the record, though not preponderant or substantial, "affording a rational basis" for the denial of CO status;[270]
- Whether there are "hard, reliable, provable facts which would provide a basis for disbelieving the claimant";[271]
- Whether there is "something concrete in the record which substantially blurs the picture painted by the [CO] applicant."[272]

Under this review standard, a court must indulge in every fair and rational inference in favor of the reasons asserted for the denial.[273] However, an inference alone cannot satisfy the test, unless no other reasonable inference consistent with the applicant's claims can be drawn.[274] The reasons for denial will be measured against the entire record of the proceedings developed by the military.[275]

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[265] Drake v. Stetson, 398 U.S. 333 (1970).

[266] For a complete description of the process, see Advice for Conscientious Objector in the Armed Forces, listed in the materials available from CCCO in the bibliography.

[267] *See, e.g.,* LaFranchi v. Seamans, 536 F.2d 1259 (9th Cir. 1976); Nurnberg v. Froehlke, 489 F.2d 843 (2d Cir. 1973); Ames v. Laird, 450 F.2d 314, 315, 4 SEL. SERV. L. REP. 3594 (9th Cir. 1971); *cf.* United States v. Corliss, 280 F.2d 808, 810 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960). *But see* Cywinski v. Binney, 488 F. Supp. 674, 8 MIL. L. REP. 2462 (D. Md. 1980) (substantial evidence test more appropriate).

[268] LaFranchi v. Seamans, 536 F.2d 1259 (9th Cir. 1976); Sanger v. Seamans, 507 F.2d at 817; (9th Cir. 1974); Ferrand v. Seamans, 488 F.2d 1386, 1 MIL. L. REP. 2630 (2d Cir. 1973); Ward v. Volpe, 484 F.2d 1230, 1235, 2 MIL. L. REP. 2052 (9th Cir. 1973); Armstrong v. Laird, 456 F.2d 521, 522, 5 SEL. SERV. L. REP. 3228 (1st Cir. 1972); Christensen v. Franklin, 456 F.2d 1277, 1278, 5 SEL. SERV. L. REP. 3221 (9th Cir. 1972); Bartree v. Resor, 445 F.2d 776, 778, n.1, 781, 3 SEL. SERV. L. REP. 3788 (D.C. Cir. 1971); United States *ex rel.* Donham v. Resor, 436 F.2d 751, 753 (2d Cir. 1971); Bates v. Commander, First Coast Guard District, 413 F.2d 475, 477 n.2, 2 SEL. SERV. L. REP. 3214 (1st Cir. 1969); Hammond v. Lenfest, 398 F.2d 705, 716, 1 SEL. SERV. L. REP. 3108 (2d Cir. 1968); Reinhard v. Gorman, 471 F. Supp. 112, 7 MIL. L. REP. 2162 (D.D.C. 1979); Hubbard v. Laird, 3 MIL. L. REP. 2156 (E.D. Cal. 1975); Drake v. Stetson, 5 MIL. L. REP. 232 (E.D. Cal. 1977); Reinhold v. Schlesinger, 379 F. Supp. 638 (D. Minn. 1974); Baldwin v. Commanding Officer, 368 F. Supp. 580 (E.D. Pa. 1973); Stano v. Schlesinger, 367 F. Supp. 451, 1 MIL. L. REP. 2594 (D. Minn. 1973); United States *ex rel.* Tice v. Seamans, 362 F. Supp. 22, 1 MIL. L. REP. 2344 (S.D.N.Y. 1973); Logemann v. Laird, 346 F. Supp. 686, 1 MIL. L. REP. 2470 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1395, 1 MIL. L. REP. 2468 (3d Cir. 1973); United States *ex rel.* Armstrong v. Wheeler, 321 F. Supp. 471, 478, 3 SEL. SERV. L. REP. 3553 (E.D. Pa. 1970). *See also* Witmer v. United States, 348 U.S. 375, 381 (1955); Cox v. United States, 332 U.S. 442 (1947); Estep v. United States, 327 U.S. 114 (1946); United States v. Abbott, 425 F.2d 910, 2 SEL. SERV. L. REP. 3651 (8th Cir. 1970). The scope of review of denials of in-service and preservice requests is identical. Packard v. Rollins, 422 F.2d 525, 3 SEL. SERV. L. REP. 3066 (8th Cir. 1970); Pitcher v. Laird, 421 F.2d 1272, 2 SEL. SERV. L. REP. 3529 (5th Cir. 1970). The basis in fact test applies in late crystallization cases as well as all other cases. Nurnberg v. Froehlke, 489 F.2d 843 (2d Cir. 1973); Polsky v. Wetherill, 455 F.2d 960, 962, 5 SEL. SERV. L. REP. 3279 (10th Cir. 1972); Grubb v. Birdsong, 452 F.2d 516, 519, 4 SEL. SERV. L. REP. 3744 (6th Cir. 1971); Morrison v. Larsen, 446 F.2d at 256 (9th Cir. 1971); Bolen v. Laird, 443 F.2d 457, 460, 4 SEL. SERV. L. REP. 3169 (2d Cir. 1971); Helwick v. Laird, 438 F.2d at 965.

[269] *See, e.g.,* Friedberg v. Resor, 453 F.2d 935, 5 SEL. SERV. L. REP. 3028 (2d Cir. 1971); Crotty v. Kelly, 443 F.2d 214, 4 SEL. SERV. L. REP. 3170 (1st Cir. 1971); Stano v. Schlesinger, 367 F. Supp. 451 (D. Minn. 1973); Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1395 (3d Cir. 1973). *Cf.* Morico v. United States, 399 U.S. 526, 3 SEL. SERV. L. REP. 3098 (1970); Gonzalez v. United States, 348 U.S. 407, 415 (1955); Dickinson v. United States, 346 U.S. 489 (1953); Vaughn v. United States, 404 F.2d 586, 1 SEL. SERV. L. REP. 3277 (8th Cir. 1968); United States v. Freeman, 388 F.2d 246 (7th Cir. 1967).

[270] Lovallo v. Resor, 433 F.2d 1262, 1264-65, 4 SEL. SERV. L. REP. 3171 (2d Cir. 1971), *cert. denied*, 411 U.S. 918 (1973). *Accord,* Chilgren v. Schlesinger, 499 F.2d 204, 2 MIL. L. REP. 2479 (8th Cir. 1974); Nurnberg v. Froehlke, 489 F.2d 843 (2d Cir. 1973); Ferrand v. Seamans, 488 F.2d 1386 (2d Cir. 1973); United States *ex rel.* Checkman v. Laird, 469 F.2d 773, 778 (2d Cir. 1972); United States *ex rel.* Donham v. Resor, 436 F.2d at 753 (2d Cir. 1971); Drake v. Stetson, 5 MIL. L. REP. 2321 (E.D. Cal. 1977); Chalamidas v. Warner, 2 MIL. L. REP. 2548 (C.D. Cal. 1974); United States *ex rel.* Applebaum v. Seamans, 365 F. Supp. 1177, 1 MIL. L. REP. 2419 (S.D.N.Y. 1973); Applegate v. Stillwell, 1 MIL. L. REP. 2472 (N.D. Cal. 1973).

[271] Helwick v. Laird, 438 F.2d at 963 (5th Cir. 1971); Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972).

[272] Shaffer v. Schlesinger, 531 F.2d 124 (3d Cir. 1976); Smith v. Laird, 486 F.2d at 310 (10th Cir. 1973); Kessler v. United States, 406 F.2d 151, 156, 1 SEL. SERV. L. REP. 3296 (5th Cir. 1969); Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1395 (3d Cir. 1973).

[273] Goldstein v. Middendorf, 535 F.2d 1339, 4 MIL. L. REP. 2343 (1st Cir. 1976); Corliss v. United States, 280 F.2d at 815 (2d Cir. 1960), *cert. denied*, 365 U.S. 884 (1960).

[274] Applegate v. Stillwell, 1 MIL. L. REP. 2472 (N.D. Cal. 1973).

[275] Stano v. Schlesinger, 367 F. Supp. 451 (D. Minn. 1973); Logemann v. Laird, 346 F. Supp. 686, 1 MIL. L. REP. 2470 (E.D. Pa. 1972). *Cf.* Cox v. United States, 332 U.S. 442 (1947); United States v. Rutherford, 437 F.2d 182, 183, 3 SEL. SERV. L. REP. 3703 (8th Cir. 1971); Vaughn v. United States, 404 F.2d at 592-93.

The assessment of an applicant's sincerity and the determination of when beliefs crystallized is primarily a subjective inquiry. Thus, conclusions of higher reviewing officials will not establish a basis in fact for the denial of a CO discharge when officials who, pursuant to regulations, have personally interviewed the applicant and have made unequivocally favorable recommendations.[276] It has therefore been held that the interviewing chaplain is in the best position to determine if there is a religious core to an applicant's belief.[277]

Although the above test appears difficult, courts have sympathetically reviewed CO claims. The following factors, standing alone, cannot be used as a basis in fact for finding a lack of sincerity:

- Timing of CO discharge application[278] (six months before active duty reporting date;[279] in the face of impending military duty;[280] immediately upon receipt of notification of impending activation;[281] shortly after receipt of active duty orders;[282] shortly after, or coinciding with, receipt of discipline;[283] upon notification of deployment to combat zone[284]);
- Lateness after enlistment in filing CO discharge application;[285]
- Request for postponement of active duty obligation prior to filing CO discharge application;[286]
- Expression of interest in serving beyond current active duty commitment prior to filing CO discharge application;[287]
- Crystallization of CO beliefs after enlistment;[288]
- Belief that serving solely in a noncombatant role would assist the military mission;[289]
- Fact of assignment to noncombatant duties when the applicant objects to any form of military service;[290]
- Consultation with ACLU and law school legal assistance groups rather than military officials prior to filing CO discharge application;[291]
- Consultation with draft information center prior to filing CO discharge application;[292]
- Pro-abortion sentiment;[293]
- Pro-euthanasia sentiment;[294]
- Statements taken out of context;[295]
- Failure to adopt new lifestyle after crystallization of CO beliefs;[296]
- Willingness to render aid to another servicemember in an emergency;[297]
- Use of force to restrain wrongdoing;[298]
- Willingness to exert protective force;[299]
- Desire to advance moral beliefs politically;[300]
- First-hand impressions of insincerity gleaned from applicant's demeanor when hearing officer's assessment is seriously flawed by improper considerations;[301]

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[276] Chamoy v. Schlesinger, 371 F. Supp. 685, 2 MIL. L. REP. 2184 (D. Hawaii 1974). *Accord*, Tellez v. Chafee, 467 F.2d 218 (9th Cir. 1972); Miller v. Chafee, 462 F.2d 335, 5 SEL. SERV. L. REP. 3578, (9th Cir. 1972); Kinnell v. Warner, 356 F. Supp. 779, 1 MIL. L. REP. 2045 (D. Hawaii 1972). *See* Ferrand v. Seamans, 488 F.2d 1386 (2d Cir. 1973) (great weight must be given to the recommendations of the interviewing officials); Rastin v. Laird, 445 F.2d 645, 649, 4 SEL. SERV. L. REP. 3322 (9th Cir. 1972); United States *ex rel.* Donham v. Resor, 436 F.2d at 754 (2d Cir. 1971); Lindsey v. Middendorf, 4 MIL. L. REP. 2379 (S.D. Cal. 1976); United States *ex rel.* Tobias v. Laird, 413 F.2d 936, 2 SEL. SERV. L. REP. 3212 (4th Cir. 1969) (under these circumstances, government must have clear evidence of insincerity); Gecina v. Brown, 6 MIL. L. REP. 2053 (D.S.C. 1978); Katz v. Commanding Officer, 388 F. Supp. 22, 3 MIL. L. REP. 2046 (E.D. Pa. 1975) (record must contain facts or statements which point inescapably to the conclusion of insincerity); Arlen v. Laird, 345 F. Supp. 181, 4 SEL. SERV. L. REP. 3551 (S.D.N.Y. 1972).

[277] United States *ex rel.* Greenwood v. Resor, 439 F.2d 1249, 1251, 4 SEL. SERV. L. REP. 3040 (4th Cir. 1971); United States *ex rel.* Tice v. Seamans, 362 F. Supp. 22 (S.D.N.Y. 1973).

[278] Bohnert v. Falkner, 438 F.2d 747, 3 SEL. SERV. L. REP. 3760 (6th Cir. 1971); Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972); United States *ex rel.* Armstrong v. Wheeler, 321 F. Supp. at 480 (E.D. Pa. 1970); Goodwin v. Laird, 317 F. Supp. 863, 3 SEL. SERV. L. REP. 3151 (N.D. Cal. 1970).

[279] Goldstein v. Middendorf, 535 F.2d 1339 (1st Cir. 1976); Lovallo v. Resor, 443 F.2d at 1264-65; Daly v. Claytor, 472 F. Supp. 752, 7 MIL. L. REP. 2435 (D. Mass. 1979).

[280] United States *ex rel.* Greenwood v. Resor, 439 F.2d 1249 (4th Cir. 1971).

[281] Lobis v. Secretary of the Air Force, 519 F.2d 304, 3 MIL. L. REP. 2348 (1st Cir. 1975).

[282] La Franchi v. Seamans, 536 F.2d 1259 (9th Cir. 1976).

[283] Cohen v. Laird, 439 F.2d 866, 868, 3 SEL. SERV. L. REP. 3866 (4th Cir. 1971); Gecina v. Brown, 6 MIL. L. REP. 2053 (D.S.C. 1978); Krubsack v. Commanding Officer, 2 MIL. L. REP. 2165 (W.D. Wis. 1974).

[284] Rothfuss v. Resor, 443 F.2d 554, 1 SEL. SERV. L. REP. 3208 (5th Cir. 1971); Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1395 (3d Cir. 1973); Champ v. Seamans, 330 F. Supp. 1127, 4 SEL. SERV. L. REP. 3688 (M.D. Ala. 1971); Nachand v. Seamans, 328 F. Supp. 753, 1 SEL. SERV. L. REP. 3538 (D. Md. 1971).

[285] Chilgren v. Schlesinger, 499 F.2d 204 (8th Cir. 1974); Dietrich v. Tarleton, 473 F.2d 177, 179 (D.C. Cir. 1972); Tressan v. Laird, 454 F.2d 761 (9th Cir. 1971); Katz v. Commanding Officer, 388 F. Supp. 22 (E.D. Pa. 1975); Chamoy v. Schlesinger, 371 F. Supp. 685 (D. Hawaii 1974); United States *ex rel.* Applebaum v. Seamans, 365 F. Supp. 1177 (S.D.N.Y. 1973); Arlen v. Laird, 345 F. Supp. at 185 (S.D.N.Y. 1972).

[286] United States *ex rel.* Greenwood v. Resor, 439 F.2d 1249 (4th Cir. 1971); Borkenhagen v. Laird, 392 F. Supp. 637 (D. Mass. 1975); United States *ex rel.* Martinez v. Laird, 327 F Supp. 711, 4 SEL. SERV. L. REP. 3441 (N.D. Fla. 1971).

[287] Borkenhagen v. Laird, 392 F. Supp. 637 (D. Mass. 1975); United States *ex rel.* Martinez v. Laird, 327 F. Supp. 711 (N.D. Fla. 1971).

[288] Bates v. Commander, First Coast Guard District, 413 F.2d at 478 (1st Cir. 1969); United States *ex rel.* Tice v. Seamans, 362 F. Supp. 22 (S.D.N.Y. 1973).

[289] Goldstein v. Middendorf, 535 F.2d 1339 (1st Cir. 1976).

[290] La Franchi v. Seamans, 536 F.2d 1259 (9th Cir. 1976).

[291] Goldstein v. Middendorf, 535 F.2d 1339 (1st Cir. 1976).

[292] United States *ex rel.* Greenwood v. Resor, 439 F.2d at 1252 (4th Cir. 1971); Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972).

[293] Goldstein v. Middendorf, 535 F.2d 1339 (1st Cir. 1976).

[294] *Id.*

[295] Richmond v. Larsen, 476 F.2d 1038 (9th Cir. 1973); United States *ex rel.* Robinson v. Laird, 457 F.2d 741, 743, 5 SEL. SERV. L. REP. 3266 (7th Cir. 1972).

[296] Daly v. Claytor, 472 F. Supp. 752 (D. Mass. 1979); Drake v. Stetson, 5 MIL. L. REP. 2321 (E.D. Cal. 1977); Singer v. Secretary of the Air Force, 385 F. Supp. at 1375 (D. Colo. 1974); Arlen v. Laird, 345 F. Supp. at 188 (S.D.N.Y. 1972); Mann v. Laird, 335 F. Supp. 824, 4 SEL. SERV. L. REP. 3776 (D. Colo. 1971) (no requirement of "positive action and sacrifices").

[297] Daly v. Claytor, 472 F. Supp. 752 (D. Mass. 1979).

[298] Ferrand v. Seamans, 488 F.2d 1386 (2d Cir. 1973). *Cf.* United States v. Purvis, 403 F.2d 555, 563 (2d Cir. 1963).

[299] Ferrand v. Seamans, 488 F.2d 1386 (2d Cir. 1973). The area of force permitted without sacrificing CO status is confined to (1) defense of home and family, and (2) defense against immediate acts of aggressive violence toward other persons in the community. Rosenfeld v. Rumble, 3 MIL. L. REP. 2165 (1st Cir. 1975), *aff'g* 386 F. Supp. 416 (D. Mass. 1974), *cert. denied*, 3 MIL. L. REP. 2501 (1975). *See also* Gillette v. United States, 401 U.S. 437, 448, 3 SEL. SERV. L. REP. 3741 (1971); United States v. St. Clair, 293 F. Supp. 337, 343-44, 1 SEL. SERV. L. REP. 3224 (E.D.N.Y. 1968).

[300] Daly v. Claytor, 472 F. Supp. 752 (D. Mass. 1979).

[301] Goldstein v. Middendorf, 535 F.2d at 1342 (1st Cir. 1976); Daly v. Claytor, 472 F. Supp. 752 (D. Mass. 1979).

- Acceptance of educational benefits from the military prior to filing CO discharge application;[302]
- Late crystallization of CO beliefs;[303]
- Lack of respect for the military;[304]
- Mere desire for discharge in the absence of any evidence of record that applicant would engage in a falsehood to get out of military service;[305]
- Lack of philosophical depth to CO beliefs;[306]
- Applicant's preference for a different chaplain at a second interview from the chaplain who concluded applicant was insincere on his first application;[307]
- Improper hypothetical questions;[308]
- Applicant's efforts to postpone confrontation between military obligation and conscience;[309]
- Efforts to avoid induction;[310]
- Voluntary enrollment in ROTC;[311]
- Military ancestors;[312]
- Crystalaization of CO beliefs shortly after entering active duty;[313]
- Acceptance of appointment in Medical Corps of Navy Reserve;[314]
- Voluntary assumption of military obligation;[315]
- Advanced stage of military training at time of CO discharge application;[316]
- Opposition to Vietnam War.[317]

The following factors, standing alone, do not constitute a basis in fact for a finding that a CO discharge applicant's views cyrstallized before enlistment or receipt of an induction notice:

- Failure of applicant to state that he was not a CO prior to induction;[318]
- Efforts to avoid induction;[319]
- Manifestation of some beliefs objecting to war prior to entry into service.[320]

12.6.2.1.2.2 Procedural Error in the Processing of CO Discharge Application

The denial of a CO discharge application will be overturned if the applicant is denied basic procedural fairness.[321] CO discharge regulations must be complied with scrupulously.[322]

If a CO discharge application is denied, the reasons for the decision must be made a part of the record and provided to the servicemember.[323] This requirement applies to all denials, including those in which a prima facie case is allegedly not established.[324] The denial must stand or fall on the reasons stated.[325] Failure to state reasons for the denial of a CO discharge application is almost always prejudicial error.[326] In meeting this requirement, the test is whether the reasons can be determined from the agency record with reasonable certainty.[327] A denial based on conclusory statements of an investigating officer, with no factual support, is not sufficient.[328] If the deciding authority makes no finding about a disputed statement of an investigating officer, that statement should be ignored.[329]

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[302] Drake v. Stetson, 5 MIL. L. REP. 2321 (E.D. Cal. 1977); Singer v. Secretary of the Air Force, 385 F. Supp. 1369 (D. Colo. 1974).

[303] Lobis v. Secretary of the Air Force, 519 F.2d 304 (1st Cir. 1975); Bates v. Commander, First Coast Guard District, 413 F.2d at 478 (1st Cir. 1969); Drake v. Stetson, 5 MIL. L. REP. 2321 (E.D. Cal. 1977); Reinhold v. Schlesinger, 379 F. Supp. 638 (D. Minn. 1974).

[304] Gecina v. Brown, 6 MIL. L. REP. 2053 (D.S.C. 1978).

[305] Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1395 (3d Cir. 1973).

[306] Reinhard v. Gorman, 471 F. Supp. 112 (D.D.C. 1979).

[307] Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1395 (3d Cir. 1973).

[308] *Compare* Logemann v. Laird, *id.*, *with* Rosenfeld v. Rumble, 3 MIL. L. REP. 2165 (1st Cir. 1975), *aff'g* 386 F. Supp. 416 (D. Mass. 1974), *cert. denied*, 3 MIL. L. REP. 2501 (1975).

[309] Shaffer v. Schlesinger, 531 F.2d 124 (3d Cir. 1976); Smith v. Laird, 486 F.2d at 313 (10th Cir. 1973); Tressman v. Laird, 454 F.2d at 763 (9th Cir. 1971); United States *ex rel.* Brooks v. Clifford, 409 F.2d 700, 707, 2 SEL. SERV. L. REP. 3019 (4th Cir. 1969).

[310] Shaffer v. Schlesinger, 531 F.2d 124 (3d Cir. 1976); United States *ex rel.* Greenwood v. Resor, 439 F.2d 1249 (4th Cir. 1971).

[311] *Id.*

[312] Shaffer v. Schlesinger, 531 F.2d 124 (3d Cir. 1976).

[313] *Id.*

[314] United States *ex rel.* Martinez v. Laird, 327 F. Supp. 711 (N.D. Fla. 1971).

[315] United States *ex rel.* Greenwood v. Resor, 439 F.2d 1249 (4th Cir. 1971).

[316] *Id.*

[317] United States *ex rel.* Lehman v. Laird, 430 F.2d 96, 98, 3 SEL. SERV. L. REP. 3207 (4th Cir. 1970). However, opposition to that war alone ("selective objection") is insufficient to support a claim.

[318] Strait v. Laird, 464 F.2d 205, 5 SEL. SERV. L. REP. 3621 (9th Cir. 1972); Applegate v. Stillwell, 1 MIL. L. REP. 2472 (N.D. Cal. 1973). *See also* Morrison v. Larsen, 446 F.2d 250 (9th Cir. 1971).

[319] Applegate v. Stillwell, 1 MIL. L. REP. 2472 (N.D. Cal. 1973).

[320] Ward v. Volpe, 484 F.2d 1230 (9th Cir. 1973); Polsky v. Wetherill, 455 F.2d 960 (10th Cir. 1972); United States *ex rel.* Barr v. Resor, 443 F.2d 707, 3 SEL. SERV. L. REP. 3999 (D.C. Cir. 1971); Rothfuss v. Resor, 443 F.2d 554 (5th Cir. 1971); Bolen v. Laird, 443 F.2d 457 (2nd Cir. 1971); Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971); Goodwin v. Laird, 317 F. Supp. 863 (N.D. Cal. 1970); Rautenstrauch v. Secretary of Defense, 313 F. Supp. 170, 176, 3 SEL. SERV. L. REP. 3213 (W.D. Tex. 1970). The issue is not when the CO beliefs first manifested themselves but when they "crystallized" into commitment. Ward v. Volpe, 484 F.2d 1230 (9th Cir. 1973).

[321] *See* cases cited note 269 *supra*.

[322] United States *ex rel.* Brooks v. Clifford, 409 F.2d at 706 (4th Cir. 1969); Drake v. Stetson, 5 MIL. L. REP. 2321 (E.D. Cal. 1977).

[323] *See* DoD Dir. 1300.6, para. VI.G. The reasons requirement is dictated by basic considerations of fairness. Sanger v. Seamans, 507 F.2d at 817 (9th Cir. 1974). It serves three interrelated purposes: (1) informing the applicant of the grounds of the administrative action so that (s)he can plan a course of action (*i.e.*, a further appeal to the courts); (2) enabling a court to give proper review to the denial, including ensuring against the danger that a judicial decision on appeal might center on false grounds not relied upon by the military; and (3) helping to keep the military within proper authority and discretion, as well as helping to avoid and prevent arbitrary, discriminatory, and irrational action by the military. *See* Matlovich v. Secretary of the Air Force, 591 F.2d 852, 857, 6 MIL. L. REP. 2569 (D.C. Cir. 1978); United States *ex rel.* Checkman v. Laird, 469 F.2d at 787 (2d Cir. 1972); Hubbard v. Laird, 3 MIL. L REP. 2156 (E.D. Cal. 1975).

[324] United States *ex rel.* Coates v. Laird, 494 F.2d 709 (4th Cir. 1974) (distinguishing pre-1971 Selective Service cases which were based upon prior provision of statute).

[325] *Id.*; Kemp v. Bradley, 457 F.2d 627 (8th Cir. 1972); United States *ex rel.* Checkman v. Laird, 469 F.2d at 780 (2d Cir. 1972); Baldwin v. Commanding Officer, 368 F. Supp. 580 (E.D. Pa. 1973); United States *ex rel.* Tice v. Seamans, 362 F. Supp. 22 (S.D. N.Y. 1973).

[326] Wallace v. Schlesinger, 500 F.2d 117, 2 MIL. L. REP. 2192 (9th Cir. 1974); United States *ex rel.* Coates v. Laird, 494 F.2d 709 (4th Cir. 1974); Hubbard v. Laird, 3 MIL. L. REP. 2156 (E.D. Cal. 1975); Baldwin v. Commanding Officer, 368 F. Supp. 580 (E.D. Pa. 1973).

[327] Hubbard v. Laird, 3 MIL. L. REP. 2156 (E.D. Cal. 1975).

[328] Krubsack v. Commanding Officer, 2 MIL. L. REP. 2165 (W.D. Wis. 1974).

[329] *Id.*

Listing separate grounds for denial, both valid and invalid, does not avoid the error of reliance on improper grounds.[330] Under such circumstances, the denial will not be sustained if there is "a real likelihood that the impermissible consideration tainted the . . . decision on the arguably valid grounds."[331]

When the investigation of the servicemember's CO claim is completed, the applicant must be given a copy of the record, including all interviews with chaplains or doctors, evidence received as a result of a hearing before the investigating officer, and that officer's findings and recommendation.[332] The applicant must be informed of his/her right to submit a rebuttal of the investigating officer's report within the time prescribed by regulation.[333] Failure to forward the record, and failure to advise the applicant of the right to submit a rebuttal is prejudicial error if the record contains adverse information.[334]

The failure to provide the applicant with a copy of the unit commander's report, in violation of regulations, is not prejudicial when:

- The report was substantially based upon the hearing, and the investigating officer's report was supplied to the applicant, who rebutted it in writing; and
- The denial was grounded upon the evidence contained in the investigating officer's report and did not rely upon anything in the unit commander's report that was not already known to the applicant or related to any issue raised by the applicant.[335]

The regulations required that an applicant be given an opportunity to rebut "additional information . . . which is adverse to the [CO discharge] applicant." The failure to provide an applicant with a copy of a Staff Judge Advocate's adverse recommendation or give the applicant an opportunity for comment or refutation is not a violation of the regulations when the adverse recommendation was made:

- On the record as previously compiled without additional factual basis;
- In the course of the decision process; and
- Not as part of any additional investigative efforts.

Under such circumstances, the recommendation was not "additional information" within the meaning of the regulation.[336] On the other hand, the entry of a notation as to the value of and need for the applicant's continued service, after the applicant had signed a statement indicating that (s)he had reviewed the record, and the time for rebuttal had run out, has been held to be a prejudicial violation of the right to comment on matters in the record.[337]

The regulations authorize returning to an applicant, without action, any application based on the same grounds, or supported by essentially the same evidence, as the prior disapproved application.[338] In one case, however, it was held that the failure to process an application on this ground was improper when the command had not returned it immediately. Enough doubts existed about the application's similarity to the initial application, however, to refer the applicant to a psychiatrist and a chaplain, each of whom conceded that differences existed between the initial and subsequent applications.[339]

12.6.2.1.3 Relief for Wrongful Denial of CO Discharge

The most common challenge to wrongful denial of a CO discharge has been to seek a writ of habeas corpus, in federal court, for release from military custody. In addition to ordering release from military custody,[340] courts have also ordered the expungement of a court-martial conviction for offenses, related to the servicemember's CO beliefs committed after a wrongful denial of CO discharge.[341] Furthermore, a servicemember was held to be entitled to a discharge in which the character of service was determined without reference to any misconduct which related to his CO beliefs, or which resulted from the wrongful denial of the CO discharge.[342]

Servicemembers who could not obtain counsel to challenge the denial of a CO discharge, and who refused to perform weapon-related duties, often received less than honorable administrative or punitive discharges. The authors are unaware of any reason why these individuals should not be permitted to litigate the propriety of the CO discharge in discharge review proceedings in the same manner as before a federal district court in a habeus corpus proceeding. In fact, the scope of review by a DRB or a BCMR is much greater than that of the federal courts.[343] The concept of judicial deference to the military's exercise of discretion is inapplicable to a DRB or BCMR review of a CORB. Because the improper denial of a CO discharge may not be raised as a defense to

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330 Goldstein v. Middendorf, 535 F.2d 1339 (1st Cir. 1976).

331 *Id. See also* Clay v. United States, 403 U.S. 698 (1971); Brown v. United States, 456 F.2d 983, 5 SEL. SERV. L. REP. 3231 (5th Cir.), *cert. denied*, 409 U.S. 886 (1972).

332 *See* DoD Dir. 1300.6, para. VI.D.3f.

333 *Id.*

334 Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971). *Cf.* Gonzalez v. United States, 348 U.S. 407 (1955); Chilgren v. Schlesinger, 368 F. Supp. 1374, 2 MIL. L. REP. 2144 (D. Minn.), *rev'd on other grounds*, 499 F.2d 208, 2 MIL. L. REP. 2479 (8th Cir. 1974) (harmless error where record did not contain any adverse information for applicant to rebut).

335 Nurnberg v. Froehlke, 489 F.2d 843 (2d Cir. 1973).

336 Cole v. Clements, 494 F.2d 141, 2 MIL. L. REP. 2190 (10th Cir. 1974) (construing AFR 35-24, ¶13, which implements DoD Dir. 1300.6, para. VI.G.).

337 Moser v. Middendorf, 4 MIL. L. REP. 2457 (S.D. Cal. 1976).

338 *See* DoD Dir. 1300.6, para. V.G.

339 Logemann v. Laird, 346 F. Supp. 686 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1395 (3d Cir. 1973).

340 Ludlum v. Resor, 2 MIL. L. REP. 2268 (D. Mass. 1974), *rev'd on other grounds*, 507 F.2d 398, 2 MIL. L. REP. 2680 (1st Cir. 1974).

341 Baldwin v. Secretary of the Navy, 3 MIL. L. REP. 2557 (E.D. Pa. 1975); Hubbard v. Laird, 3 MIL. L. REP. 2156 (E.D. Cal. 1975). *See also* Parisi v. Davidson, 405 U.S. 34 (1972); Logemann v. Laird, 475 F.2d 1395 (3d Cir. 1973); Miller v. Laird, 464 F.2d 533, 535, 5 SEL. SERV. L. REP. 3605 (9th Cir. 1972). Conrad v. Schlesinger, 507 F.2d 867, 2 MIL. L. REP. 2681 (9th Cir. 1974) (although CO discharge was wrongfully denied, issuance of writ of habeas corpus would be conditioned upon completion of court-martial sentence for sale of heroin and AWOL).

342 Baldwin v. Secretary of the Navy, 3 MIL. L. REP. 2557 (E.D. Pa. 1976); Hubbard v. Laird, 3 MIL. L. REP. 2156 (E.D. Cal. 1975).

343 Judicial review of an unfavorable decision by a DRB or BCMR on this issue, however, might be limited to the scope of review discussed above.

court-martial charges,[344] failure to raise that issue at a court-martial or during administrative discharge proceedings should not bar consideration of the issue by a DRB or BCMR.

12.6.2.1.4 Wrongful Obstruction of CO Application and Failure To Assign Temporarily to Noncombatant Duties

This approach can be used when the veteran claims that (s)he was given erroneous information by superiors or had an application misplaced or destroyed (*e.g.*, "The First Sergeant told me that Marines can't be COs and threw my application in the trash"). The service has a duty to process an application for a CO discharge and place a servicemember in duties not inconsistent with the asserted CO beliefs while the application is pending. The servicemember need only make his/her desire to file for a CO discharge known in a formal manner or indicate a need for information on the subject.[345]

At a court-martial for failure to obey orders, military courts have permitted the accused servicemember to claim as a defense that (s)he was improperly obstructed in applying for a CO discharge, or that a regulation was violated.[346] This defense acknowledges that if an accused had been properly permitted to apply, (s)he would automatically have been assigned to noncombatant duties. Therefore, any refusal to comply with orders was permissible because orders to perform certain duties (*e.g.*, rifle training or guard duty) were illegal. Because the military courts recognize such a defense, evidence of such refusal raises doubt as to the propriety of any discharge issued as a result of conduct following the obstruction of a would-be CO applicant.

If the veteran was a conscientious objector but never applied for CO status, or if there is no evidence of misinformation or obstruction, it may be possible to win a case on equity grounds. To do so requires presenting enough evidence to convince the Board that the person was a sincere CO and that those beliefs motivated his/her actions. The best approach is to compile enough evidence to show that a CO claim could be made if the veteran were applying for CO status at this time.[347]

12.6.2.1.5 Review Boards' Treatment of CO Claims

As indicated above, the Boards generally do not review denial of a CO claim except to determine whether the denial was inequitable. They will grant relief if the veteran can show:

- True sincerity of CO beliefs;[348]
- That application or the processing thereof was improperly hindered;[349]
- That no CO discharge procedures were available at the time of service.[350]

12.6.2.2 Wrongful Denial of Hardship or Dependency Discharge and Compassionate Reassignment

12.6.2.2.1 Introduction

As with CO discharges, separation on the basis of hardship or dependency is initiated by the servicemember rather than by the service. The servicemember must demonstrate that a "genuine dependency or undue hardship" exists and that:

- The hardship or dependency is not temporary;
- Conditions have arisen or have been significantly aggravated since entry into the military;
- The servicemember has made every reasonable effort to remedy the situation;
- The separation will eliminate or materially alleviate the conditions; and
- There are no means of alleviation readily available other than the separation.[351]

The servicemember must file a written application with supporting documents answering specific questions, which will then be reviewed by the chain of command and by the ultimate decision-making authority. When a servicemember does not qualify for a discharge, an alternative emergency leave or a "compassionate reassignment" to an installation near the family problem may be granted. A refusal to act on these alternatives could be improper or inequitable.

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[344] *See* United States v. Lenox, 21 C.M.A. 314, 319, 45 C.M.R. 88, 89, 5 SEL. SERV. L. REP. 3447 (C.M.A. 1972). In United States v. Logemann, 22 C.M.A. 525, 48 C.M.R. 10 (C.M.A. 1973), the U.S. Court of Military Appeals, on principles of comity, set aside a conviction for disobedience of an order where the Navy, in response to a writ of habeas corpus issued by a federal district court, released a servicemember. However, the court reaffirmed its "preference . . . for the principle that where a person feels aggrieved by action be considers unlawful he should seek his remedy through lawful means and not through disobedience of military law." 22 C.M.A. at 527, 48 C.M.R. at 12.

[345] United States v. Blake, 40 C.M.R. 781 (A.C.M.R. 1971); United States v. Forrest, 44 C.M.R. 692 (A.C.M.R. 1971); United States v. Snow, 72-9 JALS 8 (13 Jul. 1972), JAAJ-ED SUCM 1972/1895 (Army Art. 69 appeal) (AR 635-20, para. 6 violated when applicant not assigned to appropriate noncombatant duties while application pending); United States v. Wells, 45 C.M.R. 501 (A.F.C.M.R. 1972) (applicants not given proper information by commander, as required by AFR 35-24 when they asserted their CO beliefs in response to an order to pick up weapons and guard the perimeter at Pha Cat, Vietnam); United States v. May, 41 C.M.R. 663 (A.C.M.R. 1969); United States v. Sanders, 4 SEL. SERV. L. REP. 3370 (A.C.M.R. 1969); United States v. Quirk, 39 C.M.R. 528 (A.C.M.R. 1968); United States v. Sigmon, 1 SEL. SERV. L. REP. 3054 (A.B.R. 1968).

[346] United States v. Lenox, 45 C.M.R. at 92-93, *quoting* United States v. Stewart, 20 C.M.A. 272, 43 C.M.R. 112, 3 SEL. SERV. L. REP. 3825 (1971). Claimed conscientious objection or a Secretary's denial of a discharge application by a conscientious objector is a defense to a court-martial only if the Constitution, a statute, or a regulation so provides.

[347] *See* § 12.6.2.1.1 *supra*; note 266 *supra*.

[348] *See* AD 7X-18337; AD 7X-17664; AD 7X-15859V; AD 7X-02996A; AD 7X-00070; FD 77-01660V; MD 78-00946; MD 77-00357; ND 77-02280. *See also* App. 12A *infra* (digests of these cases).

[349] *Cf.* note 345 *supra*.

[350] *See* AD 77-11974 (ADRB upgraded applicant's UD/misconduct to HD because the Army lacked procedures to process COs at the time he applied for CO status; Board applied present regulations retroactively and determined that applicant would have been given a CO discharge had those regulations been in effect while he was in the service).

[351] *See* DoD Dir. 1332.14, encl. 2, para. C; note 247 *supra* (service regulations).

12.6.2.2.2 Scope of Review

The scope of judicial review of the denial of a hardship or dependency discharge claim is limited to whether the denial:

- Lacks a basis in fact;[352]
- Is arbitrary and capricious; [353] or
- Violates basic precepts of procedural fairness, including a prejudicial failure to follow regulations.[354]

The military is not required to give reasons for the denial of a hardship or dependency discharge application unless the servicemember presents a prima facie case showing all the required elements of a claim.[355] If the servicemember makes out a prima facie case, the military must state factual reasons for denial or the denial will lack a basis in fact.[356] A mere statement that the servicemember does not meet the criteria of the regulation is inadequate.[357]

12.6.2.2.3 Relief for Wrongful Denial of Hardship or Dependency Discharge

12.6.2.2.3.1 Introduction

Again, as with the denial of a CO discharge claim, the denial of a hardship or dependency discharge may be challenged by the filing of a petition for a writ of habeas corpus in federal district court. In *Norr v. Schlesinger*,[358] a servicemember had gone AWOL for several years following the denial of a hardship discharge request. Upon return to military custody under the Ford Clemency Program, a court-martial charge of desertion was brought against him. While the court-martial proceedings were pending, the servicemember petitioned the federal court for a writ of habeas corpus.

The court found that the servicemember's hardship discharge request was wrongfully denied and ordered the servicemember released from the military. It stayed its order, however, for a short period to allow the Army to discharge the servicemember in accordance with its hardship discharge regulation. The court specified that the character of the servicemember's discharge must be based on his military record *prior* to the date of the wrongful denial of his hardship discharge claim (*i.e.*, without reference to the AWOL offense which resulted from the wrongful denial).

12.6.2.2.3.2 Review Boards' Treatment of Hardship Claims

A DRB or BCMR may grant relief from a less than honorable discharge based on behavior that occurred after the wrongful denial of an application for a hardship discharge or compassionate reassignment. Because of the limited scope of judicial review of these claims, access to the Boards can be extremely important to many veterans who had no recourse to federal court while on active duty. A DRB or BCMR can correct any injustice, whether grounded on procedural error or on any error which makes the discharge inequitable or unfair.

As with the CO cases, the lines between propriety and equity are not always clear. Below is a list of situations in which the Boards have held a discharge improper or inequitable:

- The servicemember was never notified of the approval of his/her hardship discharge,[359] or never received it;[360]
- The service erred in not awarding a hardship discharge;[361]
- The service failed to state specific reasons for denial;[362]
- The service failed to consider the case individually on its merits;[363]
- The service's denial was arbitrary and capricious[364] or otherwise an abuse of discretion,[365] or violated procedural requirements;[366]

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[352] United States *ex rel.* Hutcheson v. Hoffman, 439 F.2d 821, 823-24, 3 SEL. SERV. L. REP. 3788 (5th Cir. 1971); Harris v. Middendorf, 4 MIL. L. REP. 2608 (S.D. Cal. 1976); Jenkins v. Commandant, First Naval District, 303 F. Supp. 1150, 1153, 3 SEL. SERV. L. REP. 3226 (D. Mass. 1969).

[353] Rickson v. Ward, 359 F. Supp. 328, 1 MIL. L. REP. 2269 (S.D. Cal. 1973); Regan v. Warner, 1 MIL. L. REP. 2697 (N.D. Cal. 1973); Townley v. Resor, 323 F. Supp. 567, 569, 4 SEL. SERV. L. REP. 3221 (N.D. Cal. 1970). In *Rickson*, the court characterized the "basis in fact" and "arbitrary and capricious" tests as "different sides of the same coin." The courts have characterized administrative action as "arbitrary and capricious" where it is "not supportable on any rational basis." NLRB v. Jas. H. Matthews & Co., 342 F.2d 129, 131 (3d Cir. 1965); Gilbert v. Johnson, 419 F. Supp. 859, 869, 4 MIL. L. REP. 2611 (N.D. Ga. 1976).

[354] Norr v. Schlesinger, 3 MIL. L. REP. 2556 (S.D. Ind. 1975).

[355] Rickson v. Ward, 359 F. Supp. 328 (S.D. Cal. 1973); Townley v. Resor, 323 F. Supp. 567 (N.D. Cal. 1970).

[356] Regan v. Warner, 1 MIL. L. REP. 2697 (N.D. Cal. 1973).

[357] *See* Bandoy v. Commandant, 495 F. Supp. 1092, 9 MIL. L. REP. 2439 (E.D. Pa. 1980) (recent compilation of cases concerning hardship discharges); Norr v. Schlesinger, 3 MIL. L. REP. 2556 (S.D. Ill. 1976).

[358] 3 MIL. L. REP. 2556 (S.D. Ind. 1976).

[359] *See* AD 79-03099 (UD to HD; applicant was not notified that his hardship discharge had been approved). *See also* AD 77-01815A (UD to GD; applicant went AWOL a few days before approval of a compassionate transfer; implied a duty to notify member of approval of transfer); AD 79-01375 (charged with AWOL when first sergeant said hardship discharge had been approved several days before and to go home).

[360] *See* AD 7X-016616A (UD to GD; applicant failed to receive his hardship discharge after its approval).

[361] *See* MD 77-03510 (UD to HD; improperly denied a hardship discharge; "[i]t was difficult to understand why applicant was not given a Hardship Discharge when the humanitarian transfer did not solve his problems").

[362] *See* MD 79-00940 (UD to HD; request for hardship discharge was denied without stating specific reasons as required by MARCORSEPMAN, para. 6014.9e (1976)).

[363] *See* MD 79-00940 (UD to HD; request for a hardship discharge was not "carefully and sympathetically considered and decided on its individual merits as required by MARCORSEPMAN, para. 6014.2"; request for a hardship discharge had been denied because approval "would establish precedent that would be unfair to many other Marines in similar circumstances who have had their requests disapproved").

[364] *See* MD 77-03510 (UD to HD; wrongful denial of request for a hardship discharge for no apparent reason). *See also* AD 77-06474; AD 77-04135.

[365] *See* AD 79-01205 (request for a hardship discharge was twice denied because of failure to include a minister's statement; the record "amply justified a Hardship Discharge" and an abuse of discretion that command failed to waive this requirement as permitted by regulations).

[366] *See* FD 78-01997 (CO recommended hardship discharge applicant for a GD but, contrary to regulations, failed to advise applicant

- The type of discharge received was contrary to the type directed by the approving authority;[367]
- Denial of the hardship discharge mitigated the applicant's misconduct;[368]
- The applicant was advised by the command not to apply for hardship discharge;[369]
- There was unnecessary delay in releasing the applicant following approval of the hardship discharge, during which time the applicant went AWOL;[370]
- The applicant went AWOL after applying for a hardship discharge that was lost and never processed;[371]
- The applicant had a valid hardship which warranted a hardship discharge, even if it was never applied for;[372]
- The hardship discharge was approved shortly after the applicant went AWOL.[373]

12.6.2.3 Wrongful Denial of Medical Discharge

Under service regulations, if it is determined within four months of enlistment that a servicemember does not meet entry medical standards,[374] (s)he is entitled to be discharged. Each such servicemember must be informed of this right and must state in writing whether (s)he elects to request discharge or remain in the service.[375] If the servicemember requests a discharge, (s)he is entitled to a discharge for the convenience of the government by reason of erroneous enlistment or induction due to failure to meet entry medical standards. The characterization of service is either HD or GD as warranted by the servicemember's military record.[376]

In *Vallecillo v. David*,[377] the Army authorities knew within four months of the date of enlistment that a servicemember did not meet entry medical standards but failed to advise the servicemember of his/her right to request a discharge or to remain in the service. The court held that the Army was required to "turn back the clock" and give the servicemember an opportunity to make the choice(s) he had been denied. Furthermore, the court held that if the servicemember requested the discharge, the Army must characterize the discharge solely on the basis of the military record established prior to the date the Army discovered (s)he did not meet entry medical standards. That is, the discharge had to be without reference to a court-martial conviction and BCD for an AWOL, which resulted from frustration with the Army's inability to deal with his/her medical problem. In fashioning this remedy, the court expressly relied upon the precedents established in the cases of wrongful denials of CO discharges.[378]

Servicemembers sometimes become medically disabled while on active duty and qualify for disability retirement pay for life.[379] It is beyond the scope of this manual to detail the various rules governing medical retirement. A few simple rules will help you determine whether this might be an issue in your case:

- Even though a servicemember might be able to perform some duties, service regulations usually require medical retirement if the servicemember no longer qualifies for a full range of duties after a service-connected injury or disease;
- If the servicemember was being separated for unfitness, misconduct, or for the Good of the Service, and (s)he is also eligible for medical retirement, the discharge authority may choose which route to follow (in cases of unsuitability, the DA must follow the medical route);
- Although DRBs are not empowered to change

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[366] (continued)
in writing that he was recommending him for less than an HD and failed to afford the applicant an opportunity to rebut).

[367] *See* MD 78-01294 (GD to HD because the discharge authority had directed an HD).

[368] *See* AD 77-10088 (UD to HD; 108-day AWOL began shortly after denial of request for compassionate transfer, personal problems mitigated the misconduct); AD 79-01020 (UD to GD; of application for compassionate reassignment triggered a lengthy AWOL; personal problems mitigated applicant's acts of indiscipline); AD 79-00610 (UD to HD; although unable to meet the criteria for a compassionate transfer, personal problems mitigated AWOL); AD 77-09661 (UD to GD; personal problems and denial of requests for hardship discharge and compassionate reassignment mitigated the misconduct); AD 77-0973 (UD to GD; commission of two offenses resulting in Art. 15s led to the discharge and were directly caused by denial of request for a hardship discharge); AD 77-12199A (UD to HD; while awaiting disposition of request for compassionate reassignment, went AWOL to be with his sick wife; personal problems mitigated the misconduct); FD 78-00159 (UD to GD; denial of a hardship discharge and personal problem mitigated misconduct); AC 78-00670 (DD to GD; AWOL was due to personal problems and triggered by denial of the application for a hardship discharge); MD 79-01862 (GD to HD; family problems prompted the two AWOLs after applicant had applied for and was denied a hardship discharge and a humanitarian transfer).

[369] *See* AD 77-06351 (UD to HD; four and one-half years AWOL; failed to submit the paperwork for a hardship discharge when CO advised it would take the remaining time before normal separation to process the discharge; the applicant went AWOL because he was needed at home; family problems mitigated).

[370] *See* AD 79-03430 (UD to HD; requested a hardship discharge following an accident in which father died and mother was critically injured; discharge approved and applicant was placed in administrative hold status pending receipt of his records; applicant went AWOL after four months; applicant should have been placed on excess leave status shortly after approval).

[371] *See* AD 7X-014811 (UD to GD; applied for a hardship discharge after a series of emergency leaves to be with his sick wife and child; application was lost and never processed).

[372] *See* FC 77-00279 (UD to HD; applicant "had a valid hardship and, had he applied for a Hardship Discharge, it is likely it would have been approved").

[373] *See* AD 77-01815A (UD to GD; request for compassionate transfer was approved a few days after he went AWOL for 157 days; upgrade because of personal problems); AD 79-01375 (UD to GD; SM told by sergeant that hardship discharge had been approved and that he need not return from emergency leave; hardship discharge was, in fact, approved only after the applicant was reported AWOL; applicant had no reason to assume that his discharge approval was not valid and the command should have attempted to contact the applicant once the discharge was approved).

[374] *See, e.g.*, AR 40-201 (c.2).

[375] *See* AR 40-30, para. 54(e)(3); AR 635-200, para. 5-9.

[376] *See* AR 635-200 (c.5).

[377] Vallecillo v. David, 360 F. Supp. 896, 1 MIL. L. REP. 2275 (D.N.J. 1973).

[378] *Id.* The court cited Parisi v. Davidson, 405 U.S. 34 (1972), as authority for its remedy.

[379] 10 U.S.C. §§ 1201-1221, 1372-1373, 1401-1403. *See generally* Wellen, *Armed Forces Disability Benefits — A Lawyer's View*, 27 JAG J. (1974); D. ADDLESTONE, S. HEWMAN, & F. GROSS, THE RIGHTS OF VETERANS (1978).

a bad discharge to a form of medical retirement, BCMRs are.

One case illustrates the importance of these issues.[380] In 1968, a private stationed in Vietnam received a shrapnel wound to his eye. Due to the crowded hospital conditions following the Tet Offensive, he was prematurely discharged from the hospital. He received no help at his new assignment, even though he could not see with his injured eye. A series of AWOLs resulting from frustration led to a UD. The Army BCMR found that it was an abuse of discretion not to have processed him for disability retirement when he received his UD. The records were corrected to show no discharge but a retroactive retirement for disability. He received $7,000 in back retirement pay and became eligible for the increased VA ratings for his medical condition, which were higher than the several hundred dollars a month to which he had been entitled based on his rank and years of service.

12.6.2.4 Miscellaneous Reasons for Early Discharge Upon Application of Servicemember

There are various provisions in military regulations for early release upon application of the servicemember; however, the decision to release is generally discretionary with the service. Many of these reasons only permit release a few months before the full term of service has expired. Cases may arise, however, where it could be argued that it was improper to deny early release. Possible circumstances in which discretionary early release may be sought are:[381]

- Separation of women for pregnancy or childbirth;[382]
- Sole surviving son/daughter or certain other family members;
- Insufficient service time remaining to warrant permanent change of station or retraining in a new skill;
- To accept public office;
- To attend certain schools, to engage in certain seasonal employment, or to accept certain jobs; and
- Nonfulfillment of guaranteed training program.

12.6.2.5 Relevant DRB Index Categories

A07.00 (Early separation under directed programs); A10.00 (Sole surviving son/daughter or family member); A15.00 (Inability to perform duties due to parenthood); A22.00 (Discharge for pregnancy or marriage); A23.00 (Discharge for conscientious objection); A35.00 (Discharge for dependency or hardship); A93.08 (Marital/family problems); A93.10 (Personal problems); A93.26 (Matters of conscience); A93.02 (Application for CO status); A99.04 (Application for hardship discharge); A99.10 (Enlistment option not satisfied or waived); A99.12 (Application for compassionate reassignment); A00.44 (Conscience (SDRP)); A00.40 (Personal distress (SDRP)).

12.6.2.6 Sample Contentions

This section consists of a complete sample argument for upgrading a discharge in a case in which CO status had been denied to an applicant seeking discharge on grounds of conscientious objection.

> The applicant's discharge should be recharacterized as fully Honorable on the basis of each of the following contentions:
>
> #. The Conscientious Objector Review Board's (CORB) finding of a lack of sincerity, which resulted in a denial of the applicant's request for discharge as a Conscientious Objector, was based on four reasons that were factually erroneous.
>
> (a) The applicant did not delay in filing his request from May to September of 1969.
>
> (b) The misspelling of the name "Paul Tillich" was a typographical error, admitted and explained by the Army Clerk who typed the applicant's application for discharge as a Conscientious Objector.
>
> (c) The letter providing the basis for CORB's finding that the applicant had a recent history of getting drunk and picking fights shows, when read in its entirety, that these incidents occurred over three years before the applicant's request for discharge as a Conscientious Objector, and had been discussed in the letter only to show how dramatically the applicant's behavior and attitudes towards violence had changed since that time.
>
> (d) There is no evidence whatsoever to support CORB's finding that the chaplain and hearing officer were unaware of any delay in the processing of the applicant's application.
>
> Therefore, CORB's denial of the applicant's request for discharge as a Conscientious Objector was wrongful.
>
> #. Even if the four reasons supporting CORB's denial of the applicant's request for discharge as a Conscientious Objector had been factually accurate, they did not constitute a legally sufficient basis in fact for the finding that the applicant was not a sincere Conscientious Objector, and CORB's denial was therefore wrongful.
>
> #. The AWOL offenses for which the applicant was discharged occurred after and as a direct result of CORB's wrongful denial of his request for discharge as a Conscientious Objector. Therefore, those acts cannot be considered

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[380] *In re* Thomas A. (unnumbered Army BCMR case, approved Jun. 24, 1975 by Undersecretary of Army) (on file with David Addlestone c/o NVLC).

[381] The discharge may be either HD or GD "as warranted by the member's military record." DoD Dir. 1332.14, encl. 2, at 1. (Dec. 29, 1976). There are other instances where early release is mandatory, *e.g.*, minority. *See* § 12.6.3.4 *infra*.

[382] Separation for pregnancy and childbirth was mandatory until 1975 when the DoD changed its policy in the face of Supreme Court review. Struck v. Secretary, 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 947, *vacated and remanded for consideration of the issue of mootness*, 409 U.S. 1071 (1972).

in evaluating the character of the applicant's service. *Parisi v. Davidson*, 405 U.S. 34 (1972); *Bandoy v. Commandant*, 495 F. Supp. 1092, 9 MIL. L. REP. 2439 (E.D. Pa. 1980).

#. The applicant's transfer away from the garrision at Fort Lewis to a remote post while his initial request for discharge as a Conscientious Objector was pending was in violation of AR 635-20, ¶ 6(b).

#. The Army's violation of AR 635-20, ¶ 6(b), substantially prejudiced the applicant in that it caused a delay in the processing of his request that CORB wrongfully attributed to the applicant. The AWOL offenses for which the applicant was discharged occurred after and as a direct result of CORB's denial of his request on the ground of insincerity, which was based in part on the delay in the processing of his request. Therefore, those acts cannot be considered in evaluating the character of the applicant's service.

#. The applicant's discharge should be recharacterized as Honorable since his military record, after exclusion of events occurring after CORB's wrongful denial of his request and the Army's violation of AR 635-20, ¶ 6(b), satisfied the four criteria for mandatory issuance of an Honorable Discharge under AR 635-200, ¶ 1-9(d)(2).

#. Acceptance of a discharge for the Good of the Service under AR 625-200, ch. 10, does not constitute a waiver of an Honorable Discharge.

12.6.3 FAILURE OF JURISDICTION

12.6.3.1 Introduction

There are four situations in which the military fails to acquire or lacks jurisdiction over individuals:

- Improper activation of Ready Reservists or members of the National Guard;[383]
- Erroneous induction or enlistment;[384]
- Minority enlistments;[385] and
- Involuntary enlistments or those procured by recruiter misconduct.[386]

The issue is raised most often in the context of a court-martial in which jurisdiction over the accused must be affirmatively shown by the military. As in the wrongful failure to discharge cases, a failure of jurisdiction should render subsequent misconduct irrelevant in grading a discharge.

[383] *See* § 12.6.3.2 *infra*.
[384] *See* § 12.6.3.3 *infra*.
[385] *See* § 12.6.3.4 *infra*.
[386] *See* § 12.6.3.5 *infra*.

12.6.3.2 Improper Reservist Activation

12.6.3.2.1 Introduction

When a military draft is in effect, a Ready Reservist can fulfill his/her service obligation by participating in at least 48 unit training assemblies (UTAs)[387] and 14 days active duty for training (ADT)[388], or by performing ADT up to 30 days annually.[389] Similarly, an Army or Air Force National Guard member must satisfactorily participate in a minimum of 48 UTAs and 15 days of ADT annually.[390]

Satisfactory participation consists of:

- Attendance and satisfactory completion of initial ADT;
- Attendance and satisfactory performance at all scheduled UTAs unless excused by proper authority;
- Attendance and satisfactory completion of annual ADT;
- Satisfactory performance on proficiency examinations;
- Responding to a call or order to active duty; and
- For a reservist in an "administrative control group," attendance and satisfactory performance of ADT up to 30 days each year when directed.

A failure in any one of these requirements is considered "unsatisfactory participation." Such failure subjects a reservist to being ordered to active duty for between 45 days and 24 months, depending upon the amount of time already served on active duty and the reserve obligation remaining.[391]

One of the most frequently litigated reasons for involuntary activation by reason of unsatisfactory participation is failure to attend UTAs and/or annual ADT. Each branch of service has its own standards, enforcement measures, and activation procedure.[392]

Involuntary activation due to unsatisfactory participation is commonly referred to as "punitive activation." One court, however, has held that involuntary activation is not punishment but rather a tool for the purpose of maintaining military proficiency otherwise preserved by UTAs. Hence, it was held that such activation does not violate the eighth amendment prohibition against cruel and unusual punishment.[393]

[387] Commonly referred to as "drills" or "meetings."
[388] Commonly referred to as "summer camp."
[389] *See* 10 U.S.C. § 270(a).
[390] *See* 10 U.S.C. § 502(a).
[391] *See* Exec. Order No. 11,366, 32 Fed. Reg. 11,411 (1967), *reprinted in* 10 U.S.C. § 673a; DoD Dir. 1215.13.
[392] *See* AR 135-91 (Army); AFR 35-41 (Air Force); BUPERSMAN 1040400 (Navy); MCO P1001R.1D (Marine Corps). The number of unexcused absences from UTAs that a reservist may accumulate within a 12-month period without being subject to involuntary activation varies with each branch of service: Army (four) (AR 140-1, para. 4-4; AR 135-91, para. 12); Air Force (four) (AFR 35-41, Vol. II, para. 1-3a); Navy (five) (BUPERSMAN 1040400, 1040410); Marine Corps (none) (MCO P1001R.1D, ¶ 3001).
[393] Sullivan v. Mann, 431 F. Supp. 695, 5 MIL. L. REP. 2325 (M.D. Pa. 1977).

12.6.3.2.2 Activation Procedures[394]

Enlisted members of the Guard (ARNG) or Reserve (USAR) may not accrue five or more unexcused absences in any one year. Furthermore, members will not receive credit for attendance at a scheduled unit training assembly unless they are in proper uniform, present a neat and soldierly appearance, and perform their assigned duties in a satisfactory manner as determined by the unit commander. Members who do not meet these requirements will be charged with an unexcused absence. Authority to excuse absences and authorize equivalent training generally rests with the unit commander or acting commander. State adjutants general (ARNG) and general officer commanders (USAR), however, are also authorized to excuse absences.

To ensure that members fully understand their obligations, the prerequisites for satisfactory participation, and the consequences of unsatisfactory participation, the unit commander, unit personnel officer, or personnel NCO must counsel each newly-assigned enlistee. A statement must be secured from each member indicating that (s)he understands the participation requirements and enforcement procedures. That statement must be filed in the member's Military Personnel Records Jacket (MPRJ) as a permanent document.

Every unauthorized absence from a unit training assembly or multiple unit training assembly must be documented, and unit commanders must follow established procedures and ensure that the required documentary evidence is contained in the MPRJ before requesting that a member be activated.

Following each unexcused absence, a letter of instruction must be delivered advising the member, in part, of the requirement to attend training assemblies, the number of assemblies (s)he has missed, the criteria used by the command to grant excused absences, the procedures for requesting that an absence be considered excused, and the policy that five or more unexcused absences within one year may subject the member to activation with the United States Army. When the absence does not constitute the fifth absence within one year, the letter will be mailed to the member by certified mail, restricted delivery, return receipt requested. Mail refused, unclaimed, or otherwise undelivered does not amount to a defense to the unexcused absences when it was correctly addressed to the latest official mailing address furnished by the member to his/her unit.

After the fifth unexcused absence within one year, the unit commander must personally contact the member. If personal delivery is impracticable, the letter will be forwarded by certified mail. A statement indicating that the letter was personally delivered or explaining why it was not so delivered must be prepared by the unit commander. The commander's statement must verify that the address to which it was sent was the last address the member furnished. The member is to be interviewed to determine if a cogent or emergency reason existed which prevented him/her from attending the training, and the unit commander's statement must reflect whether such a reason accounts for the fifth unexcused absence. The basis of that determination must appear in the statement.

In addition, the commander must make an attempt to deliver a notice of unsatisfactory participation and a letter outlining the member's appeal rights. The unit's failure to adhere to applicable regulations invalidates the activation. Upon being informed that active duty may be ordered, the member may appeal within 15 days. The member may examine the MPRJ and all other documents supporting the activation. The member may request discharge (*e.g.*, dependency, hardship) or request a delay in reporting for active duty based on conditions which are temporary in nature.

Counsel should not accept "boilerplate" assertions of commanders that they investigated and found no cogent reason for the member's absence. If there is no detailed factual basis underlying the commander's conclusion that no cogent reason existed, the decision is not a discretionary administrative act protected by the presumption of administrative regularity. If the member did not receive notice due to government negligence, the notice is defective.[395]

12.6.3.2.3 Scope of Review

Judicial review of an involuntary activation is limited to determining whether:

- The military complied with statutory requirements and regulations governing the issuance of active duty orders;[396]
- The procedures employed by the military comported with due process in light of the context in which the procedures operate;[397] and

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[394] The description of Reservist Activation relies heavily on Twiss, *An Attack on Court-Martial Jurisdiction: Activation From the Army National Guard and Army Reserve*, 12 THE ADVOCATE 1 (1977). *See also* AR 135-91 (25 Jul. 1977) (current Army regulations).

[395] *See* § 12.6.3.2.4 *infra* (relevant case law).

[396] Hall v. Fry, 509 F.2d 1105, 3 MIL. L. REP. 2034 (10th Cir. 1975); O'Mara v. Zebrowski, 447 F.2d 1085, 1090, 3 SEL. SERV. L. REP. 3921 (3d Cir. 1971); Ansted v. Resor, 437 F.2d 1020, 3 SEL. SERV. L. REP. 3710 (7th Cir.), *cert. denied*, 404 U.S. 827 (1971); Schatten v. United States, 419 F.2d 187, 2 SEL. SERV. L. REP. 3448 (6th Cir. 1969); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Hayes v. Secretary of the Army, 468 F. Supp. 1252, 7 MIL. L. REP. 2352 (W.D. Pa. 1979); Narez v. Wilson, 449 F. Supp. 141, 6 MIL. L. REP. 2150 (E.D. Mo. 1977); Febus Nevarez v. Schlesinger, 440 F. Supp. 741, 5 MIL. L. REP. 2411 (D.P.R. 1977); United States *ex rel.* Niemann v. Greer, 394 F. Supp. 249, 3 MIL. L. REP. 2549 (D.N.J. 1975); Hoersch v. Froehlke, 382 F. Supp. 1235, 2 MIL. L. REP. 2610 (E.D. Pa. 1974); Tobiczyk v. United States, 381 F. Supp. 345, 2 MIL. L. REP. 2606 (E.D. Mich. 1974); Herrick v. Cushman, 379 F. Supp. 1143, 2 MIL. L. REP. 2529 (E.D.N.C. 1974); Feeny v. Smith, 371 F. Supp. 314, 1 MIL. L. REP. 2640 (D. Utah 1973); Alston v. Schlesinger, 368 F. Supp. 537, 2 MIL. L. REP. 2140 (D. Mass.), *aff'd*, 502 F.2d 1160 (1st Cir. 1974); United States v. Kilbreth, 22 C.M.A. 390, 392, 47 C.M.R. 327, 329, 1 MIL. L. REP. 2414 (1973); United States v. Reynolds, 3 MIL. L. REP. 2606 (N.C.M.R. 1975).

[397] Keister v. Resor, 462 F.2d 471, 5 SEL. SERV. L. REP. 3481 (3d Cir. 1972), *cert. denied*, 409 U.S. 894 (1973); O'Mara v. Zebrowski, 447 F.2d 1085 (3d Cir. 1977); Antonuk v. United States, 445 F.2d 592, 4 SEL. SERV. L. REP. (6th Cir. 1971); Ansted v. Resor, 437 F.2d 1020 (7th Cir.), *cert. denied*, 404 U.S. 827 (1971); Sullivan v. Mann, 431 F. Supp. 695 (M.D. Pa. 1977); Hoersch v. Froehlke, 382 F. Supp. 1235 (E.D. Pa. 1974); Tobiczyk v. United States, 381 F. Supp. 345 (E.D. Mich. 1974); Herrick v. Cushman, 379 F. Supp. 1143 (E.D.N.C. 1974);

- The military acted within the scope of its statutory or constitutional authority.[398]

The military must strictly adhere to its regulatory procedure for involuntary activation.[399] Noncompliance with statutory and regulatory requirements which results in substantial prejudice to a reservist invalidates the activation order.[400]

12.6.3.2.4 Procedural Errors

In the case of involuntary activation by reason of unsatisfactory participation, the following violations of regulations and statutes have been held to invalidate an active duty order:

- Failure to notify the reservist of activation and his/her right to appeal the action;[401]
- Failure of the reservist's unit commander to investigate whether there were any "cogent or emergency reasons" for the unexcused absence which triggered the involuntary activation;[402] and
- Failure of the unit commander to consider personal, family, or economic hardship to the reservist that would result from activation prior to proceeding with such action.[403]

An often litigated issue regarding notice and the right to appeal has been what happens when the reservist fails to receive actual notice of the activation orders even though the military authorities tried to notify the reservist by registered or certified mail sent to the last known address. The courts have resolved this issue by weighing the extent of the efforts of the reserve unit to notify the reservist and the conduct of the reservist under the circumstances. Lack of actual notice will not invalidate an involuntary activation when the reservist intentionally avoided receipt of the notice of active duty orders and appeal rights.[404] When there is no intentional refusal to accept correspondence, however, the cases are split. One court has held that the mailing of two registered letters to the reservist's last known address served as constructive notice of their contents.[405] Another court, however, held that the presumption that mail sent was received was rebutted when the letter was returned to the military authorities marked "unclaimed." The court noted that this "unclaimed" correspondence was not necessarily refused. Since the reserve unit made no attempt to contact the reservist by other available means, the notice was defective.[406] In the case of a National Guard member, lack of actual receipt of an activation order was not fatal to activation proceedings when the member had received

[397] (continued)
Feeny v. Smith, 371 F. Supp. 314 (D. Utah 1973); Caruso v. Toothaker, 331 F. Supp. 294 (M.D. Pa. 1971).

[398] Sullivan v. Mann, 431 F. Supp. 695 (M.D. Pa. 1977); Hoersch v. Froehlke, 382 F. Supp. 1235 (E.D. Pa. 1974); Feeny v. Smith, 371 F. Supp. 314 (D. Utah 1973); Winters v. United States, 281 F. Supp. 289 (E.D.N.Y.), *aff'd*, 390 F.2d 879 (2d Cir. 1968), *cert. denied*, 393 U.S. 910 (1968).

[399] Tobiczyk v. United States, 381 F. Supp. 345 (E.D. Mich. 1974).

[400] *See, e.g.*, Hall v. Fry, 509 F.2d 1105 (10th Cir. 1975) (activation of reservist for unsatisfactory participation); Lytle v. Brown, 6 MIL. L. REP. 2469, *reconsideration denied*, 6 MIL. L. REP. 2471 (N.D. Ohio 1978) (unreported activation of Berry Plan doctor reservist).

[401] Schatten v. United States, 419 F.2d 187 (6th Cir. 1969); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Hayes v. Secretary of the Army, 468 F. Supp. 1252 (W.D. Pa. 1979); Donahue v. O'Conner, 387 F. Supp. 129, 3 MIL. L. REP. 2037 (E.D. Wis. 1975); United States v. Kilbreth, 22 C.M.A. 390, 47 C.M.R. 327, 1 MIL. L. REP. 2414 (1973); *cf.* Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971) (failure to inform reservist of right to appeal activation order was harmless error where reservist in fact did initiate proceedings which resulted in consideration of all substantive matters he presented); Winters v. United States, 281 F. Supp. 289 (E.D.N.Y.), *aff'd*, 390 F.2d 879 (2d Cir. 1968), *cert denied*, 393 U.S. 910 (1968) (failure to inform reservist of right to appeal activation order was harmless error when the existence of any circumstance that reasonably could have affected the decision to order the reservist to active duty was unlikely).

While the courts have agreed that determination of the validity of excuses for absences from UTAs is within the discretion of the unit commander, there is a split of authority over whether the exercise of that discretion is beyond the scope of judicial review. *Compare* Russo v. Luba, 400 F. Supp. 370, 3 MIL. L. REP. 2649 (W.D. Pa. 1975) *and* Wolf v. Secretary of Defense, 399 F. Supp. 446, 3 MIL. L. REP. 2638 (M.D. Pa. 1975) (no judicial review) *with* Corona v. Laird, 357 F. Supp. 1357, 1 MIL. L. REP. 2287 (E.D. Wis. 1973) *and* Mielke v. Laird, 324 F. Supp. 165 (E.D. Wis. 1971) (judicial review available under arbitrary and capricious action standard).

[402] Hall v. Fry, 509 F.2d 1105 (10th Cir. 1975); Febus Navarez v. Schlesinger, 440 F. Supp. 741 (D.P.R. 1977); Feeny v. Smith, 371 F. Supp. 314 (D. Utah 1973). *Cf.* White v. Callaway, 501 F.2d 672, 2 MIL. L. REP. 2606 (5th Cir. 1974) (where unit commander was aware that reservist's medical discharge claim had been denied, he complied with AR 135-91, para. 11(b)(1) by making an adequate investigation into the reasons for the reservist's failure to participate and was not required to contact reservist for additional information). Some courts have held that where the reason given by the reservist for unsatisfactory participation is medical unfitness, the reservist must first report to his active duty station for a medical examination before a court will review the propriety of the activation order. *See* Karpinski v. Resor, 419 F.2d 531, 2 SEL. SERV. L. REP. 3557 (3d Cir. 1969); Hickey v. Commandant, Fourth Naval District, 461 F. Supp. 1085, 6 MIL. L. REP. 2581 (E.D. Pa. 1978); Lizzio v. Richardson, 378 F. Supp. 986, 2 MIL. L. REP. 2219 (E.D. Pa. 1974). These cases imply that any failure on the part of the reserve authorities to consider medical

[402] (continued)
excuses for unsatisfactory participation may be cured by a subsequent examination at the active duty station. *But see* Tobiczyk v. United States, 381 F. Supp. 345 (E.D. Mich. 1974) (failure to give reservist a medical examination upon receipt of reservist's statement that he was medically unqualified for active duty due to knee problems was prejudicial error since it deprived unit commander of relevant information at the time that he initially recommended activation of the reservist). A distinction should be drawn between claims of temporary and permanently disqualifying medical conditions. Where a reservist alleges that a drill was missed due to illness from which (s)he recovered prior to activation, a later medical examination by active duty station authorities cannot undermine validity of the excuse. Conversely, where a continuing medical unfitness for duty is claimed, examination by medical authorities at the active duty station is appropriate. *See* Lizzio v. Richardson, 378 F. Supp. 986 (E.D. Pa. 1974).

[403] United States *ex rel.* Sledjeski v. Commanding Officer, 478 F.2d 1147, 1 MIL. L. REP. 2266 (2d Cir. 1973); Cappa v. Secretary of the Navy, 2 MIL. L. REP. 2265 (E.D.N.Y. 1974); McSweeney v. United States, 338 F. Supp. 350, 5 SEL. SERV. L. REP. 3142 (N.D. Ohio 1971); United States v. Reynolds, 3 MIL. L. REP. 2606. The error is not cured by entertaining an application for a hardship discharge after the issuance of activation orders. Cappa v. Secretary of the Navy, 2 MIL. L. REP. 2265 (E.D.N.Y. 1974).

[404] United States *ex rel.* Niemann v. Greer, 394 F. Supp. 249 (D.N.J. 1975); Clark v. Schlesinger, 383 F. Supp. 1017, 2 MIL. L. REP. 2607 (N.D. Tex. 1974); Myrick v. Evatt, No. 6523 (E.D. Tenn. Oct. 19, 1972). *See also* Alston v. Schlesinger, 368 F. Supp. 537, *aff'd*, 502 F.2d 1160 (1st Cir. 1974).

[405] Narez v. Wilson, 449 F. Supp. 141 (E.D. Mo. 1977).

[406] Donahue v. O'Conner, 387 F. Supp. 129 (E.D. Wis. 1975). *See also* United States v. Reynolds, 3 MIL. L. REP. 2606 (1975) (accused not barred from raising defect in activation process where he did not intentionally avoid receipt of military correspondence); Musikov v. Secretary of Defense, 357 F. Supp. 526, 1 MIL. L. REP. 2199 (D. Minn. 1973) (absent extraordinary circumstances, military orders, including involuntary activation orders, are not effective unless and until actually received).

other notice of discharge from the National Guard and impending activation proceedings.[407]

Failure actually to receive mail containing activation orders may or may not be a bar to activation, but lack of actual notice is a defense to a criminal charge of AWOL.[408] This is because actual knowledge of the time and place of reporting to service is an essential element of the offense. The issue would be significant in the case of a reservist who refused receipt of activation orders and who, upon return to military custody, requested a discharge to avoid trial by court-martial for AWOL, and received a GD or UD.

Although a reservist is not constitutionally entitled to a formal hearing on appeal of an involuntary activation,[409] (s)he is entitled, as a matter of procedural due process, to a meaningful review of his/her appeal.[410] The right to file an appeal and to make a statement to the appeal board includes the right to submit a statement based upon all the facts in the file, made with an awareness of all recommendations and arguments to be countered.[411] Thus, in one case, the failure to make the reservist's personnel file available to him/her during the first two levels of administrative review of his/her activation order invalidated the adverse decision of the reviewing authority.[412]

12.6.3.2.5 Waiver of Defects in Activation

A reservist being involuntarily activated for unsatisfactory participation can argue that constitutional defects in the activation procedure give him/her the right to challenge the jurisdiction of a court-martial. In *United States v. Kilbreth*,[413] however, the Court of Military Appeals (C.M.A.) indicated that this right is waived if the reservist has already knowingly and voluntarily waived his/her right to challenge his/her status as a person subject to the Uniform Code of Military Justice.

In *Kilbreth*, the reservist failed to report for active duty and was subsequently court-martialed on a charge of AWOL. The reservist pleaded guilty and was sentenced to confinement and a reduction in grade. The confinement portion of the sentence was suspended and he was ordered to an Army active duty unit at Fort Hood, Texas. The reservist again failed to report and was convicted of AWOL by another court-martial. He challenged the jurisdiction of the second court-martial on the grounds that procedural defects in the activation process invalidated the active duty order. C.M.A. agreed, rejecting the government's argument that the reservist's guilty plea at the first court-martial and his acceptance of the order to report to Fort Hood constituted a knowing and voluntary waiver of his right to challenge any defect in the activation procedure.[414]

In *United States v. Barraza*,[415] however, C.M.A. found that a reservist waived his right to challenge the propriety of his involuntary activation. In that case, the accused had received notice of his right to appeal the activation prior to reporting for active duty. He did not raise his challenge to the activation orders until six months after the call-up, at a court-martial for unrelated drug offenses.

The concept of waiver of defects in the involuntary activation process might apply to an administrative discharge proceeding as well as to a court-martial, if the jurisdiction of the military, for the purposes of issuing a less than honorable administrative discharge, is challenged on the ground of an invalid involuntary activation.

12.6.3.2.6 Miscellaneous Errors

It has been held that when a reservist did not receive or intentionally avoid orders to active duty until after the reserve enlistment term expired, the reservist is not subject to involuntary activation even though (s)he has not been formally discharged.[416]

Army regulations require that ADT start not later than six months after enlistment. If the Army waits two years to call up a reservist to active duty, the order is invalid.[417] The order need not be very specific: it need only set forth the training period as explicitly as permitted by the nature of the reservist's military commitment. An order to active duty for MOS training for "21 weeks or upon completion of MOS training but not less than 4 months" has been held to be as specific as required by the National Guard regulations.[418]

12.6.3.2.7 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. On [date] the applicant was a member of the National Guard.

#. On [date] the applicant was sent a notice by his/her commander that his/her performance was unsatisfactory and that (s)he was being activated.

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[407] Hoersch v. Froehlke, 383 F. Supp. 1235 (E.D. Pa. 1974).

[408] *See* United States v. Moore, 44 C.M.R. 496, 4 SEL. SERV. L. REP. 3660 (A.C.M.R. 1971).

[409] Keister v. Resor, 462 F.2d 471 (3d Cir. 1972); O'Mara v. Zebrowski, 447 F.2d 1085 (3d Cir. 1971); Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971); Ansted v. Resor, 437 F.2d 1020 (7th Cir.); Sullivan v. Mann, 431 F. Supp. 695 (M.D. Pa. 1977); Tobiczyk v. United States, 381 F. Supp. 345 (E.D. Mich. 1974); Herrick v. Cushman, 379 F. Supp. 1143 (E.D.N.C. 1974); Mickey v. Barclay, 328 F. Supp. 1108, 4 SEL. SERV. L. REP. 3574 (E.D. Pa. 1971). AR 15-6, which mandates formal hearings in certain situations, does not apply to involuntary activation under AR 135-91. Sullivan v. Mann, 431 F. Supp. 695 (M.D. Pa. 1977).

[410] Rohe v. Froehlke, 500 F.2d 113, 2 MIL. L. REP. 2477 (2d Cir. 1974); Feeny v. Smith, 371 F. Supp. 314 (D. Utah 1973). *Cf.* Gonzalez v. United States, 348 U.S. 407, 415 (1955) (review of requests for conscientious objector exemption); Crotty v. Kelly, 443 F.2d 214, 4 SEL. SERV. L. REP. 3170 (1st Cir. 1971) (review of in-service application for conscientious objector discharge).

[411] Rohe v. Froehlke, 500 F.2d 113 (2d Cir. 1974).

[412] Feeny v. Smith, 371 F. Supp. 314 (D. Utah 1973).

[413] 22 C.M.A. 390, 47 C.M.R. 327, 1 MIL. L. REP. 2414 (C.M.A. 1973).

[414] *Accord*, United States v. Craft, 6 MIL. L. REP. 2215 (N.C.M.R. 1977).

[415] 5 M.J. 230, 6 MIL. L. REP. 2255 (C.M.A. 1978). *See also* United States v. Bridgeford, 9 M.J. 79, 8 MIL. L. REP. 2360 (C.M.A. 1980).

[416] Musikov v. Secretary of Defense, 357 F. Supp. 526 (D. Minn. 1973) (nonreceipt not fault of reservist).

[417] Myers v. Parkinson, 398 F. Supp. 727, 3 MIL. L. REP. 2551 (E.D. Wis. 1975).

[418] United States v. Hudson, 5 M.J. 413, 6 MIL. L. REP. 2373 (C.M.A. 1978).

#. [Regulation R], in effect at the time, required that a National Guard member being activated for unsatisfactory performance be informed of a right to appeal.

#. The notice to the applicant contained no information about his/her right to appeal.

#. The applicant's activation was effective on [date] and (s)he did not report for activation.

#. The activation was improper because of #'s above.

#. The applicant received a UD for GOS based on his/her failure to report for activation.

The applicant's UD should be recharacterized to HD since the procedures followed to activate him/her were improper and the Army never legally acquired jurisdiction over him/her.

12.6.3.3 Erroneous Induction or Enlistment

12.6.3.3.1 General Rules

It is beyond the scope of this manual to discuss Selective Service case law. It is important to be aware, however, that it is possible to attack a less than honorable discharge on the grounds that the veteran's original induction was illegal.[419] The possibilities for error in the discharge process are legion.[420]

Very few Selective Services System (SSS) records[420a] still exist; only a few violations of SSS or induction regulations can be proven from a reference to these files. Some examples of violations are:

- Illegal induction during time permitted for an appeal;
- Other violations of appeal rights;
- Illegal classification as a "delinquent"; and
- Violation of the "order of call."

A less than honorable discharge can also be challenged by asserting that the enlistment was erroneous: the applicant would never have been permitted to enlist had the recruiter been aware of the relevant facts and/or had followed the enlistment regulations.[420b] The Boards will upgrade when a recruit should not have been enlisted or inducted, but will usually rely on equity even though a legal error occurred when the recruit/inductee:

- Had too low test scores or aptitude;[421]
- Possessed a disqualifying criminal record;[421a]
- Was medically or psychiatrically disqualified;[421b]
- Was disqualified due to number of dependents;[421c] or
- Was otherwise disqualified.[421d]

12.6.3.3.2 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. On [date] the applicant asked his/her draft board to classify him/her as a Conscientious Objector and provided medical evidence of his/her disqualification for military service.

#. Selective Services regulations in effect at the time required the local draft board to rule on a CO claim upon proper application and to reclassify a registrant with _____ medical condition.

#. The applicant's CO application was in proper form.

#. The applicant's medical condition of _____ made him/her ineligible for induction.

#. Because of the improper processing of applicant's CO claim and/or request for medical exemption applicant's induction was improper.

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[419] *See* H. MOYER, JUSTICE AND THE MILITARY §§ 1-210 to 1-213, 1-218, 1-219, 1-225 (1978); §§ 12.6.3.4, 12.6.3.5 *infra*. *See generally Selective Service Law Reporter.*

Military authorities believe that a person who wears the uniform, accepts pay and allowances, and otherwise appears to act like a servicemember is a servicemember. Consequently, when servicemembers assert that for some reason they should never have been in the military, they are routinely told that it is too late: they have constructively enlisted. In some cases, this doctrine has been extended to cover inductees. On occasion, however, COMA has held that an enlistment, whether constructive or contractual, must be voluntary. *See* United States v. Jenkins, 7 C.M.A. 261, 22 C.M.R. 51 (1961); *cf.* United States *ex rel.* Norris v. Norman, 296 F. Supp. 1270, 2 SEL. SERV. L. REP. 3273 (N.D. Ill. 1969). Under *Jenkins*, there is a presumption that an induction is involuntary; therefore, any flaw in the induction proceedings cannot be unknowingly waived so as to effect a constructive induction. *See, e.g.*, Bradley v. Laird, 449 F.2d 898, 4 SEL. SERV. L. REP. 3665 (10th Cir. 1971), Andre v. Resor, 313 F. Supp. 957, 2 SEL. SERV. L. REP. 3684 (N.D. Cal. 1970), *aff'd*, 443 F.2d 921, 4 SEL. SERV. L. REP. 3196 (9th Cir. 1971).

Constructive enlistments only arise where either (a) the recruit misrepresents facts in order to defraud the service into accepting him/her, or (b) where a minor error not crucial to the purpose of the enlistment proceedings, makes the proceedings technically invalid (*e.g.*, where an outdated form was erroneously substituted for a current version). In either situation, the servicemember is not allowed to complain of his/her own wrongdoing (except in a minority enlistment, when the member complains while still too young to enlist). *See* United States v. Graham, 22 C.M.A. 75, 46 C.M.R. 75 (1972).

[420] A valuable 1968-73 index of Selective Service cases prepared by PLEI and Central Committee for Conscientious Objectors is available from: *The Military Law Reporter*, 1346 Connecticut Ave., N.W., Washington, DC 20036. *See generally* 6 SEL. SERV. L. REP. No. 5.

[420a] SSS records can be obtained from: National Headquarters, Selective Service System, 600 E Street, N.W., Washington, D.C. 20435, Attn: Records Manager.

Access to existing records maintained by the SSS can be obtained under the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, SSS regulations, 32 C.F.R. § 1608.1-.22, and the SSS Registrants' Processing Manual (RPM) § 608.1-.17 (rev. March 1975).

420a (continued)

According to information received from Mr. C. E. Boston, SSS Records Manager, only two SSS records are available from records created prior to 1975. They are the Registration Card (SSS Form 1 and SSS Form 1-Mailer) and the Classification Record (SSS Form 102 and SSS Form 102-S). *See* RPM app. 1 (sample forms and procedural directives). These records are maintained until age 85. All other records have apparently been destroyed for this period by a 1978 order of the U.S. Archivist. If anyone has contrary information, please inform the authors.

[420b] *See* Ch. 7 *supra* (various relevant standards, *e.g.*, test scores and health); § 12.6.3.5 *infra* (improper recruitment).

[421] *See* § 22.5.2 *infra*. *See* AD 79-01817; AD 78-03509; AD 77-08341; NC 78-03522; NC 77-03378. *See also* App. 12A *infra* (digests of these cases).

[421a] *See* AD 78-01519; AD 77-09046; MD 78-03540; NC 77-06080. *See also* App. 12A *infra* (digests of these cases).

[421b] *See* § 22.5.7 *infra*. *See* AD 79-06522; AD 78-00649; AD 77-04006; AD 7X-05278; FD 79-00840; MD 79-02481; MD 7X-04052. *See also* App. 12A *infra* (digests of these cases).

[421c] *See* § 22.5.4 *infra*. *See* AD 7X-16593A; AD 7X-08118; AD 77-10158. *See also* App. 12A *infra* (digests of these cases).

[421d] *See* AD 79-01423; AD 7X-10481; MD 7X-01902A. *See also* App. 12A *infra* (digests of these cases).

#. The applicant's discharge should be recharacterized to HD since his/her induction was improper and the Army never legally acquired jurisdiction over him/her.

12.6.3.3.3 Relevant DRB Index Categories

A06.00 (Erroneous induction or enlistment); A09.00 (Lack of jurisdiction); A99.06 (Improper enlistment); A99.08 (Improper induction).

12.6.3.4 Minority Enlistments

12.6.3.4.1 Introduction

Until 1974, by statute, the minimum age for enlistment was 17 years for males and 18 years for females. A male who was at least 17 but less than 18 years of age and a female who was at least 18 but less than 21 years of age could not enlist without the written consent of his/her parents or legal guardian.[422] Three groups of individuals are thus created by the statutory requirements:

- Persons who are too young to enlist;
- Persons who may enlist only with parental consent; and
- Persons who may enlist without parental consent.

12.6.3.4.2 Entry Below the Minimum Age for Enlistment

A person who, at the time of enlistment, is below the minimum age is statutorily incompetent to acquire military status.[423] Any enlistment, therefore, is void.[424] If such a person commits an offense while still under age, (s)he is not subject to court-martial jurisdiction.[425] A less than honorable administrative discharge under these circumstances would also be invalid.[426]

A "constructive enlistment" may occur when an underage individual reaches the minimum age for enlistment while in the service.[427] A constructive enlistment normally is shown by the performance of assigned duties and acceptance of pay and other entitlements of military service.[428] The presence of such factors, however, is not conclusive evidence of constructive enlistment; it may be overridden by evidence of continuing protest, such as words or conduct, to further military service.[429]

In *United States v. Brown*,[430] C.M.A. carved out a major exception to the constructive enlistment doctrine as applied to minority enlistments. The court held that, as a matter of fairness, the government was barred from asserting a constructive enlistment when:

- Recruiter gross negligence or misconduct made the enlistment possible if the recruiter would have discovered the individual's fraudulent enlistment and been able to prevent his/her entry into military service but for such negligence or misconduct;
- The individual notified the military authorities of his/her true age and fraudulent enlistment before his/her 17th birthday, giving the government an opportunity to discharge him/her before the commission of any court-martial offenses; and
- The government failed to act to administratively separate the individual before (s)he committed the court-martial offenses; the government is not allowed to complain of a situation that it could have avoided.

The *Brown* exception to constructive enlistment, however, has been eliminated for current enlistments. A recent statutory change to Article 2 of the U.C.M.J. redefines personal jurisdiction. It is uncertain whether this amendment applies to cases that occurred before its enactment, precluding the assertion of the *Brown* doctrine in the case of a punitive or administrative discharge issued before its effective date.[431]

12.6.3.4.3 Entry Without Parental Consent

If a parent's consent is required, but not obtained, the parent (but not the child)[432] has the option

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[422] 10 U.S.C. § 505(a) was amended by Pub. L. No. 93-290, 88 Stat. 173 on May 2, 1974, eliminating the higher age requirement for women. *See* Ch. 7 *supra*; note 439 *infra*.

[423] *See, e.g.*, United States v. Harrison, 5 M.J. 476, 6 MIL. L. REP. 2396 (C.M.A. 1978).

[424] *Id. See* H. MOYER, JUSTICE AND THE MILITARY §§ 1-214 to -217 (1972).

[425] United States v. Blanton, 7 C.M.A. 664, 23 C.M.R. 128 (1957).

[426] *See* FC 78-02462 (applicant's enlistment contract and entire record of service voided after evidence was presented that the applicant was age 15 at the time of enlistment and the offenses for which he was convicted all occurred before the applicant's 17th birthday); FD 78-00631 (UD to HD; applicant established he was 14 at the time of enlistment; his difficulties with the service understandable); AD 78-00933 (UD to HD; applicant proved he was 14 at the time of his enlistment); FD 77-02483 (UD to HD; applicant erroneously enlisted at the age of 17 with an 8th grade education; AF regulations in effect at the time prohibited the enlistment of non-high school graduates under the age of 18); FD 78-00942 (UD to HD; applicant erroneously enlisted at age 16 without documentary proof of guardianship or age).

[427] United States v. Harrison, 6 MIL. L. REP. 2396 (C.M.A. 1978); United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778, 2 MIL. L. REP. 2079 (1974); United States v. Graham, 22 C.M.A. 75, 46 C.M.R. 75 (1972); United States v. Overton, 9 C.M.A. 684, 688, 26 C.M.R. 464, 468 (1958).

[428] *See, e.g.*, United States v. Harrison, 6 MIL. L. REP. 2396 (C.M.A. 1978); United States v. Overton, 9 C.M.A. 684, 26 C.M.R. 464 (1958).

[429] United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758, 2 MIL. L. REP. 2065 (1974); United States v. Graham, 22 C.M.A. 75, 46 C.M.R. 75 (1972); United States v. Hurd, 8 M.J. 555, 7 MIL. L. REP. 2417 (N.C.M.R. 1979).

[430] 23 C.M.A. 162, 48 C.M.R. 778 (C.M.A. 1974). *Accord*, United States v. Howard, 1 M.J. 557, 3 MIL. L. REP. 2711 (A.F.C.M.R. 1975). *Cf.* United States v. Harrison, 6 MIL. L. REP. 2396 (C.M.A. 1978) (*Brown* exception to constructive enlistment not applied where servicemember did not give notice of disqualification to authorities before 17th birthday and no recruiter misconduct involved). *See also* United States v. McGowan, 5 M.J. 860, 6 MIL. L. REP. 2302 (N.C.M.R. 1978) (fact that servicemember gave notice of disqualification merely renders enlistment voidable at option of military rather than void where no recruiter misconduct involved).

[431] *See* § 12.6.3.5 *supra*.

[432] United States v. Bean, 13 C.M.A. 203, 32 C.M.R. 203 (1962); United States v. Scott, 11 C.M.A. 655, 29 C.M.R. 471 (1960); United States v. Overton, 9 C.M.A. 684, 26 C.M.R. 464 (1958).

to void the enlistment.[433] The parent must do so within 90 days of the date of enlistment.[434]

Problems arise when the lack of parental consent is posed as a defense to court-martial jurisdiction. Generally, a demand for discharge by the nonconsenting parent before the formal complaint (preferral) of court-martial charges will deprive the military of its jurisdiction over the member.[435] The military retains court-martial jurisdiction, however, if the parent does not demand discharge until *after* the preferral of charges, if the charges are serious, and even if the parent did not learn of the enlistment until after the charges had been brought.[436] Moreover, a parent who has not given the requisite written consent may forfeit the right to do so by knowingly acquiescing in the enlistment.[437]

When a servicemember who enters without parental consent at age 17 reaches age 18, the nonconsenting parent's right to void the enlistment expires. It is not certain what effect a servicemember's 18th birthday would have on the disposition of a demand for discharge made before the birthday by the nonconsenting parent. The authors are not aware of any case law on this point. As a matter of policy, however, the parent's right to request discharge should not be extinguished. Otherwise, in cases where the demand for discharge is made near the servicemember's 18th birthday, the military authorities would be encouraged to defeat the parent's statutory right by delay.[438]

12.6.3.4.4 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. On [date] the applicant enlisted in the Army.

#. On that date, the applicant was 17 years 4 months old.

#. Enlistment regulations required parental consent for a person under 18.

#. There was no parental consent to the applicant's enlistment.

#. The applicant's parents asked that the applicant's enlistment be voided on [date].

#. Regulations permitted a nonconsenting parent to request that an enlistment be voided if the request was within 90 days of enlistment.

#. Since the Army failed to honor the applicant's parent's request, the applicant's continued service, begun [date] was improper.

#. All offenses the applicant committed after [date] were during a period when the Army lost jurisdiction over the applicant as a result of points listed above.

#. Because of points listed above, the applicant is entitled to an HD.

12.6.3.4.5 Relevant DRB Index Category

A34.00 (Discharge for minority).

12.6.3.5 Involuntary Enlistments and Enlistments Procured by Recruiter Fraud

12.6.3.5.1 General Rules

Many veterans now burdened with less than honorable discharges should never have been permitted to enter the military in the first place. Others should have been given HDs prior to the incident(s) that led to the unfavorable discharge. The errors made during the enlistment process may present possible grounds for discharge upgrading.

During the 1970s, C.M.A. held that two types of "enlistment" could not change a civilian into a member of the Armed Forces:

- An involuntary enlistment; and
- An enlistment procured by recruiter misconduct.

Such enlistments were held void; as such, they were insufficient to confer court-martial jurisdiction. C.M.A.'s position generated a great deal of controversy, prompting Congress to amend the personal jurisdiction article of U.C.M.J. The amendments wiped out the current effect of most law created by C.M.A. as it relates to current court-martial practice.

12.6.3.5.2 Involuntary Enlistments

In *United States v. Catlow*,[439] and subsequent decisions,[440] C.M.A. held that a civilian charged with a crime who is given a choice between military enlistment and civilian criminal prosecution, and who choses enlistment, has been involuntarily enlisted and such enlistment is void. However, where the enlistment applicant or his/her legal representative initiates the alternative of military service to avoid prosecution or confinement, the enlistment is voluntary.[441] Furthermore, consent to induction in exchange for the dismissal of indictments charging an individual with violations of Selective Service laws is not illegal coercion.[441a]

An enlistment procured by misrepresentation is also considered involuntary. In one case, officials in-

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[433] *See, e.g.*, United States v. Graham, 46 C.M.R. 75 (C.M.A. 1972); United States v. Bean, 13 C.M.A. 203, 32 C.M.R. 203 (1962); United States v. Willis, 7 M.J. 827, 7 MIL. L. REP. 2346 (C.G.C.M.R. 1979).

[434] DoD Dir. 1332.14, encl. 2, para. D2.

[435] United States v. Overton, 9 C.M.A. 684, 26 C.M.R. 464 (1958). *See* MD 79-02657 (UD to GD; applicant enlisted at age 17 without valid parental consent; applicant's mother notified military authorities of her son's enlistment without consent while he was still 17; because MARCORSEPMAN § 6017.3b states that enlistment of a minor without proper parental consent will not by itself be considered fraudulent enlistment, the discharge should be upgraded).

[436] United States v. Bean, 13 C.M.A. 203, 32 C.M.R. 203 (1962).

[437] United States v. Scott, 11 C.M.A. 655, 29 C.M.R. 471 (1970).

[438] See H. MOYER, JUSTICE AND THE MILITARY §§ 1-214 to -217 (1972) (unlawful enlistment because of minority).

[439] 23 C.M.A. 142, 48 C.M.R. 758, 2 MIL. L. REP. 2065 (1974).

[440] United States v. Barrett, 23 C.M.A. 474, 50 C.M.R. 493, 1 M.J. 74, 3 MIL. L. REP. 2421 (C.M.A. 1975); United States v. Dumas, 23 C.M.A. 278, 49 C.M.R. 453, 3 MIL. L. REP. 2231 (1975). For lower court decisions to this effect, see United States v. Martinez, 2 M.J. 1255, 4 MIL. L. REP. 2266 (A.C.M.R. 1976); United States v. McNeal, 49 C.M.R. 688, 3 MIL. L. REP. 2291 (A.C.M.R. 1974).

[441] United States v. Wagner, 5 M.J. 461, 5 MIL. L. REP. 2452 (C.M.A. 1978); United States v. Lightfoot, 4 M.J. 262, 6 MIL. L. REP. 2069 (C.M.A. 1978); United States v. Fialkowski, 2 M.J. 858, 4 MIL. L. REP. 2277 (A.C.M.R. 1976).

[441a] United States v. Wood, 2 M.J. 555, 54 C.M.R. 345, 4 MIL. L. REP. 2649 (A.C.M.R. 1976).

duced an enlistment by representing to the applicant that he would be a hospital corpsman. The enlistment documents were subsequently changed, without the individual's knowledge or consent, to reflect enlistment as a mess management specialist.[441b]

Where improper coercion creates an involuntary enlistment, a constructive enlistment may occur after the coercion is vitiated (*i.e.*, civilian charges dropped or probation/parole terminated).[442] Similarly, an enlistment induced by misrepresentation can become a constructive enlistment if the individual fails to object to continued military service after discovering the misrepresentation.

12.6.3.5.3 Enlistments Procured by Recruiter Fraud

In *United States v. Russo*[443] and subsequent decisions,[444] C.M.A. held that the enlistment of an individual with a nonwaivable regulatory impediment to enlistment is void if the recruiter deliberately violated recruiting regulations (*i.e.*, actually knew of the enlistment disqualification). A nonwaivable regulatory impediment is a disqualification which exists for the benefit of both the enlistment applicant and the military.[445] Where the regulation precluding enlistment exists solely for the benefit of the government, the enlistment is voidable at the military's option.[445a]

The *Russo* doctrine does not apply to an enlistment procured by recruiter misconduct regarding a *waivable* disqualification.[445b] Moreover, the enlistment of an ineligible applicant resulting from simple negligence by a recruiter is voidable at the option of the servicemember provided such option is exercised before the commission of an offense and action leading to a court-martial.[446] In *United States v. Valadez*,[446a] C.M.A. suggested that wanton and willful negligence used to avoid discovery of a recruiting disqualification, coupled with the existence of such a disqualification, may be sufficient to void an enlistment.[446b]

Recruiter misconduct in an initial enlistment may affect a subsequent enlistment where the second recruiter has no knowledge of the previous misconduct. In *United States v. Torres*,[447] C.M.A. held a second enlistment void when the disqualification for the first enlistment still existed, and the first recruiter's misconduct paved the way for, and precluded the possibility of a constructive enlistment after the second enlistment. In *Torres*, the individual enlisted in a delayed entry program and could not refuse the second enlistment; the first recruiter counseled the individual to conceal the disqualification at the second enlistment.[447a]

Manipulation of test scores, assistance with entrance tests, and evidence of high school diplomas are other frequently alleged forms of recruiter misconduct.[447b] C.M.A. has held that fraud associated with test scores affects court-martial jurisdiction.[448]

C.M.A., as a matter of public policy, has barred the government from asserting a constructive enlistment as the basis for court-martial jurisdiction when enlistments of ineligibles are procured by recruiter misconduct.[449] As in *Catlow v. United States*,[450] many involuntary enlistments involve recruiter participation in, or knowledge of, the "jail or military" alternative. In such cases, a *Russo*-type enlistment is also present because recruiting regulations absolutely prohibit enlistments under such circumstances. Accordingly,

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[441b] *See* United States v. Hurd, 8 M.J. 555, 7 MIL. L. REP. 2417 (N.C.M.R. 1979).

[442] *See* United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758, 2 MIL. L. REP. 2065 (1974).

[443] 1 M.J. 134, 23 C.M.A. 511, 50 C.M.R. 560, 3 MIL. L. REP. 2432 (1975), *aff'd*, 5 M.J. 470, 6 MIL. L. REP. 2393.

[444] United States v. Murawsky, 7 M.J. 353, 7 MIL. L. REP. 2399 (C.M.A. 1979); United States v. Little, 23 C.M.A. 328, 53 C.M.R. 39, 1 M.J. 476, 4 MIL. L. REP. (C.M.A. 1976), 2547; United States v. Muniz, 23 C.M.A. 530, 50 C.M.R. 669, 3 MIL. L. REP. 2429, *pet. denied*, 3 MIL. L. REP. 2689, (C.M.A. 1975). *See also* United States v. Burden, 23 C.M.A. 510, 50 C.M.R. 649, 1 M:J. 89, 3 MIL. L. REP. 2432 (C.M.A. 1975) (*Russo* followed in an induction case). For lower court decisions to this effect, see United States v. Brede, 1 M.J. 1157, 5 MIL. L. REP. 2242 (N.C.M.R. 1977) and United States v. Brunnell, 49 C.M.R. 64, 2 MIL. L. REP. 2618 (A.C.M.R. 1974). *See* § 18.2.4 *infra*. *See also* AD 7X-11960 (GD to HD; possibility of improper recruiting influence surrounding the act of fraudulent entry; denied enlistment because of juvenile record; upon receiving his Selective Service notice classifying him as 1A, he returned to the same recruiting office and tried to enlist again; applicant disclosed his record but was permitted to enlist). *Cf.* FD 78-00631 (UD to HD; recruiter should have identified the fact that the applicant was only 14 at the time of enlistment or requested verification of the applicant's age); MD 7X-040502 (UD upgraded; SM had a diagnosed neurosis at the time of enlistment making him ineligible for service; recruiter aware of psychiatric history; failure to investigate further constituted either negligence or an intentional failure to follow prescribed procedure amounting to misconduct).

[445] United States v. Russo, 1 M.J. 134, 23 C.M.A. 511, 50 C.M.R. 560, 3 MIL. L. REP. 2332 (1975).

[445a] United States v. Harris, 3 M.J. 627, 5 MIL. L. REP. 2231 (N.C.M.R. 1977).

[445b] United States v. Stone, 8 M.J. 140, 8 MIL. L. REP. (C.M.A. 1979).

[446] United States v. Valadez, 5 M.J. 470, 6 MIL. L. REP. 2393 (C.M.A. 1978).

[446a] *Id.*

[446b] 5 M.J. at 475. *See also* United States v. Robbins, 7 M.J. 618, 619 n.1, 6 MIL. L. REP. 2536 (N.C.M.R. 1978), *rev. denied*, 7 M.J. 112 (C.M.A. 1979).

[447] 7 M.J. 102, 7 MIL. L. REP. 2180 (C.M.A. 1979).

[447a] *See also* United States v. Long, 5 M.J. 800, 6 MIL. L. REP. 2305 (N.C.M.R. 1978). *Cf.* United States v. Ivery, 5 M.J. 509 (A.C.M.R. 1978) *and* United States v. Cook, 1 M.J. 682, 3 MIL. L. REP. 2704 (N.C.M.R. 1975), *pet. denied*, No. 31,611, 3 MIL. L. REP. 2397 (C.M.A. March 1, 1976) (recruiter misconduct not considered after void enlistment contract expires where second enlistment is not required under first enlistment contract and second recruiter did not know and should not have known of disqualification).

[447b] *See* Ch. 7 *supra* (discussion of scores required for recruits).

[448] United States v. Little, 24 C.M.A. 328, 52 C.M.R. 39, 1 M.J. 476, 4 MIL. L. REP. 2547 (1976). It is possible to find out if a Marine recruiter has a pattern of recruits whose test scores in basic training do not comport with those on the enlistment AFQT. There is a Monthly Recruiter Report which lists by recruiter's social security number, each recruit, and each recruit's test scores at enlistment and basic training. This report is located at the Recruiting Branch, Marine Corps, Room 4101, Navy Annex, Washington, D.C. 20370 ((202) 694-2523 or 694-4166). In Army cases, a Freedom of Information Act request to C.G., U.S. Army Command, Attn: Director of Recruiting Force Management, Ft. Sheridan, Ill. 60037 ((312) 926-2370), can get the record of recruits by a particular recruiter.

[449] *See* United States v. Russo, 1 M.J. 134, 23 C.M.A. 511, 50 C.M.R. 560, 3 MIL. L. REP. 2332 (1975). *But see* United States v. Westfield, 7 M.J. 936, 7 MIL. L. REP. 2338 (N.C.M.R. 1979) (when enlistee has been offered an opportunity to avoid an enlistment procured by recruiter misconduct but refuses to do so and fails to raise an additional disqualification for enlistment of which the recruiter had knowledge, fairness does not prevent the government's assertion of a constructive enlistment).

[450] 23 C.M.A. 142, 48 C.M.R. 758, 2 MIL. L. REP. 2065 (1974).

under the *Russo* doctrine, a constructive enlistment is precluded.[451]

Congress has amended Article 2 of the U.C.M.J.,[452] effective November 9, 1979, eliminating both the *Russo* doctrine and the exception to constructive enlistment in *United States v. Brown*,[453] and codifying constructive enlistment law. Accordingly, an enlistment procured by recruiter misconduct is not void, and notice to the government of a void enlistment prior to the commission of an offense does not preclude the assertion of a constructive enlistment.

It is unclear whether the 1979 amendment to Article 2 of the U.C.M.J. is retroactive. Legislative history provides no specific guidance on the question. The Army maintains that the amendment is permissibly retroactive to all persons on active duty as of November 9, 1979.[454] Arguably, the rules announced in *Catlow, Russo,* and *Brown* may apply to veterans discharged before November 9, 1979, even though the veterans' challenges occur in discharge review proceedings after that date.[455]

12.6.3.5.4 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. The applicant informed the recruiter who enlisted him/her that (s)he did not have a high school diploma.

#. The regulations in effect at the time required nonhigh school graduates to have at least three aptitude test scores in the 70th percentile.

#. The applicant's aptitude scores were all below the 70th percentile.

#. The recruiter improperly enlisted the applicant.

#. Since the applicant was improperly enlisted, the Army never acquired jurisdiction to give him/her a less than honorable discharge.

12.6.3.5.5 Relevant DRB Index Categories

A09.00 (Lack of jurisdiction); A93.28 (Waiver of moral standards for enlistment); A62.06 (Recruiter misconduct).

12.7 DISCHARGES BASED ON IMPROPERLY CONSIDERED MILITARY DISCIPLINARY ACTIONS

12.7.1 INTRODUCTION

There are many veterans who may have received bad discharges on the basis of misconduct that resulted in formal disciplinary proceedings by their commanders. It is frequently possible to argue that any bad discharge based in whole or in part on such proceedings is improper[456] on the grounds that the disciplinary proceedings were illegal, unfair, too remote, or because a regulation required that they not be considered.

There are several types of disciplinary actions that are to be used, or because of the frequency of their occurrence, justify a bad discharge. The possible types of disciplinary actions, in descending order of seriousness, are:

- General court-martial (GCM);
- Special court-martial (SPCM);
- Summary court-martial (SCM);[457]
- Nonjudicial punishment or Article 15 punishment (NJP, Art. 15, Captain's Mast, or Mast);[458] and
- Reprimand (oral or written).[459]

All reprimands and nonjudicial punishments need not necessarily be considered in the characterization of discharge. The following sections discuss common approaches to avoiding or minimizing the negative impact of these disciplinary actions on the servicemember's discharge.

12.7.2 NONJUDICIAL PUNISHMENT UNDER ARTICLE 15, U.C.M.J.

12.7.2.1 Introduction

The purpose of Article 15 punishment was to avoid the stigma of the court-martial process for minor offenses. Unfortunately, its lax procedures

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[451] *Id. See also* note 440 *supra* (and cases cited therein).

[452] 10 U.S.C. § 802, which reads:

> (b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section, and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.
>
> (c) Notwithstanding any other provision of law, a person serving with an armed force who —
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military pay or allowances; and . . .
>
> (4) performed military duties; is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

[453] Discussed in § 12.6.3.4.2 *supra*.

[454] *See* DA message 131800Z (14 Nov. 1979).

[455] *See* Schueter, *Personal Jurisdiction Under Article 2, U.C.M.J.: Whither* Russo, Catlow, *and* Brown, [Dec. 1979] ARMY LAW. (DA Pam. 27-50-84) (discussion of the amendment). *Cf.* § 18.2.4 *infra* (recruiter connivance in fraudulent enlistment cases).

[456] *See* Grimm v. Brown, 219 F. Supp. 1011, *aff'd on other grounds*, 449 F.2d 654 (1971); Martin v. Secretary, 455 F. Supp. 634, 5 MIL. L. REP. 2412 (D.D.C. 1977).

[457] Court-martial procedures are contained in the Uniform Code of Military Justice (U.C.M.J.) 10 U.S.C. §§ 801-940 (which replaced the Articles of War in 1950) and the *Manual for Courts-Martial*, which has seen several revisions. *See* Ch. 4 *supra* (overview of the military justice system); Ch. 20 *infra* (various attacks on court-martial convictions, BCDs and DDs).

[458] Article 15, U.C.M.J., 10 U.S.C. § 815. Various service regulations also contain procedures for imposing NJP.

[459] Procedures for imposing reprimands are governed by service regulations although a court-martial sentence can include a reprimand.

have been the source of many claims of unfairness over the years.[460]

There are two types of Article 15s. The first is given by a company grade officer (0-3 or below). The second is given by a field grade officer (0-4 through 0-6). The two types differ only in the extent of the punishment that can be given. The company grade officer can give no more than:

- Confinement on bread and water up to three consecutive days while attached to or embarked on a vessel;
- Correctional custody (which is physical restraint, and may include extra duty, fatigue duty, or hard labor) for seven consecutive days;
- Forfeiture of seven days of pay;
- Reduction to next lower pay grade;
- Extra duty for four consecutive days; and
- Restriction for 14 consecutive days.

The field grade officer may impose a maximum of:

- Three days of confinement on bread and water if attached to or embarked on a vessel;
- Thirty days of correctional custody;
- Forfeiture of half pay for two months;
- Reduction to the lowest pay grade;
- Forty-five days of extra duty; and
- Sixty days of restriction.

Service regulations may provide further restrictions. For example, Naval regulations have been interpreted to limit field grade officers' authority to reduction of only one pay grade, and then only if the officer possesses the general authority to promote the enlisted person to the grade currently held.[460a]

The procedures for imposing Article 15 punishment, subject to various service regulations, are:

- A commander informs a servicemember of his/her intent to impose Article 15 punishment;
- The servicemember, unless attached to a ship, may elect within 48 hours to submit to the punishment or refuse the proceedings and risk a court-martial;
- The servicemember may introduce matters to defend and/or to mitigate against the offense; while counsel can be brought and witnesses called, there are relatively few of the procedural rights available at a court-martial;[461]
- An appeal, usually to the next highest commander, is permissible;[462] and
- The permissible punishment includes "correctional custody," restriction, reduction in rank, forfeiture of pay, reprimand, or suspended punishment (probation); a suspended punishment may later be vacated and punishment imposed.

The vast majority of servicemembers submit to Article 15 procedures on the basis that a court-martial, with its increased sentence potential, is too risky. Most passively accept the procedure because they think a finding of guilt is a foregone conclusion or because they are afraid to disagree with the commanding officer.

12.7.2.2 Punishable Offenses

Nonjudicial punishment may be imposed only for offenses under the U.C.M.J. Thus, if an Article 15 does not state an offense under the U.C.M.J., it is invalid. Reference should be made to the *Manual for Courts-Martial* (MCM) for the resolution of questionable cases.

12.7.2.3 Improper Processing of an Article 15

The U.C.M.J., MCM, and various service regulations, require that, at a minimum, a servicemember be given notice of a proposed Article 15 punishment, time to consider the option of demanding a court-martial in lieu thereof, and the right to answer the charge. In addition, as of September 1971, the Army has accorded the servicemember the right to consult with an attorney and, as of January 1973, all services have provided servicemembers with the following rights in an Article 15 proceeding:

- Right to counsel with counsel prior to the hearing;
- Right to present a full defense to the commander, either in writing, in person, or both;
- Right to testify and to present witnesses;
- Right to a public hearing; and
- Right to have punishment stayed pending appeal, and right to assistance of counsel in preparing appeal.

Service regulations have refined these rights in subsequent changes to the implementation of the DoD reforms; prejudicial violation of any of these rights would invalidate any Article 15 adjudication.[463]

Article 15(e) U.C.M.J. requires the commander to refer to a military lawyer (JAG) for advice on the appeal of cases involving the following punishments:

[460] *See generally* Note, *The Unconstituted Burden of Article 15* 82 YALE L.J. 1481 (1973). Complaints from commanders that not enough punishment could be given, and from servicemembers that they should be able to refuse Art. 15 punishment and receive SPCMs where counsel was available instead of SCMs, led to two amendments to the U.C.M.J., in 1956 and in 1962. The 1962 amendment to increase punishments possible under Art. 15 was passed in part to reduce the number of courts-martial and consequently the number of bad discharges being given because of a record of multiple court-martial convictions. *See Hearings Before Subcomm. of the Comm. on Armed Services on HR 11257*, 87th Cong., 2d Sess. (July 17, 1962) (statement of Sen. Ervin). There are approximately 300,000 Art. 15s given each year.

While designed for minor offenses, an Art. 15 can be used for serious offenses. United States v. Rivera, 45 C.M.R. 582 (N.C.M.R. 1972); Cappella v. United States, 624 F.2d 976, 8 MIL. L. REP. 2334 (Ct. Cl. 1980); *cf.* United States v. Harding, 11 C.M.A. 674, 29 C.M.R. 490 (1960).

[460a] *See* 83 OFF THE RECORD 14 (28 Aug. 1980) (interpretation of JAGMAN § 01016(7)'s limitation on *Manual for Courts-Martial*, para. 131 (b)).

[461] Dumas v. United States, 620 F.2d 247, 8 MIL. L. REP. 2248 (Ct. Cl. 1980); Cappella v. United States, 624 F.2d 976, 8 MIL. L. REP. 2334 (Ct. Cl. 1980).

[462] *See Manual for Courts-Martial*, para. 128 (1969 rev. ed.). Each service has implemented additional procedural requirements. *See* AR 27-10 (Army); AFR 111-9 (Air Force); JAGMAN § 0101 (Manual of the Judge Advocate General JAG INST. 5800.7B) (Navy and Marines). A BCMR can expunge an Art. 15 from a military record.

[463] *See* Hagerty v. United States, 196 Ct. Cl. 66, 449 F.2d 352 (1971).

- Arrest in quarters for more than seven days;
- Correctional custody for more than seven days;
- Forfeiture of more than seven days of pay;
- Reduction of one or more pay grades from the fourth or a higher pay grade;
- Extra duties for more than 14 days;
- Restriction for more than 14 days; or
- Detention of more than 14 days of pay.

If a military lawyer is not consulted, the Article 15 is arguably invalid. The Army Article 15 forms have a space for a JAG opinion on the appeal.

12.7.2.4 Article 15s That by Regulation Should Not Have Been Considered

Discharge regulations frequently disallow consideration of certain Article 15s in characterizing a discharge.[464] The regulations also often preclude the consideration of remote Article 15s when discharge is based on a pattern of misconduct.[465]

A significant Army regulation, AR 27-10, controlling the effective "lifespan" of an Article 15, has been held applicable to the discharge upgrade process. In *United States v. Cohan*,[466] COMA held that certain Article 15s could not be used against an accused in a court-martial. This interpretation of AR 27-10 made it clear that the record of an Article 15 should have been removed from the personnel file of the accused and destroyed after certain events, as described below, had occurred. In *Martin v. Secretary of the Army*,[467] the *Cohan* rule was applied to the use of an Article 15 in an administrative discharge proceeding. The court held that consideration by an ADB of an Article 15 that should have been destroyed pursuant to AR 27-10 was a prejudicial error. The case was remanded to the Army for a reconsideration of the propriety of the veteran's discharge without reference to the improperly considered Article 15.[468]

The Army must remove and destroy all records of Article 15 punishments from a servicemembers's personnel records when the conditions of AR 27-10, para. 3-15d are met.

From February 1, 1963, to December 15, 1971,[469] the applicable regulations required that Article 15 records be destroyed when:

- All aspects of the punishment were invalidated; or
- Two years had expired from the date of imposition of punishment; or
- The servicemember was transferred, *and* (1) one year since the imposition of the punishment had passed, and (2) all aspects of the punishment were executed, and (3) if an appeal was taken, all action thereon was completed.

From December 16, 1971, to September 22, 1972, the records were destroyed when:

- An individual was separated from the Army;
- An Article 15 punishment was set aside; or
- Two years had passed from the date of the imposition of the punishment (lost time does not count in the calculation of the two years).

Since September 23, 1972, the rule has been:

- If the individual has more than three years active service at the time of the offense(s), the filing in the personnel file is permanent.
- If the individual has less than three years active service at the time of the offense(s), filing rules are the same as for the period December 15, 1971, to September 22, 1972, as indicated above.

"Transfer" is defined as the reassignment from one unit whose command has authority to impose an Article 15 to another such unit.[470] *Cohan* held that, if a servicemember is transferred within one year of the imposition of an Article 15, the record of punishment must nevertheless be destroyed at the end of one year provided the other two conditions are met. Even if the records are not administratively destroyed, they are deemed legally destroyed when the conditions of the regulation are met and, therefore, may not be used against the servicemember.[471] The Army DRB recognizes and follows the *Cohan* rule.[472]

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[464] They may be considered relevant to the decision to discharge, however. See AD 78-00622 (improper consideration of Art. 15 from previous enlistment). See *also* AD 79-01630; AD 77-06711; AD 79-01998; FD 78-0066.

[465] DoD Dir. 1332.14, 12 Feb. 1963, para. IV.B.1; 20 Dec. 1965, para. VC; 30 Sep. 1975, encl. 3, para. A, D; 29 Dec. 1976, encl. 3, para. A, D. See Ch. 17 *infra* (DRB cases where certain Art. 15s were improperly considered in discharges for "frequent involvement").

[466] 20 C.M.A. 469, 43 C.M.R. 309 (1971). The DRBs must follow COMA interpretations of military regulations. Martin v. Secretary, 455 F. Supp. 634, 5 MIL. L. REP. 2412 (D.D.C. 1977).

[467] Martin v. Secretary, 455 F. Supp. 634, 5 MIL. L. REP. 2412 (D.D.C. 1977).

[468] *Id.*, 455 F. Supp. at 637.

[469] Prior to August 1, 1969, the retention of Art. 15s in an Army member's records was governed by AR 22-15, para. 14d (1 Feb. 1963) and AR 27-15, para. 14d (19 Aug. 1965). Each of these regulations contained the same rule interpreted in *Cohan*. Thus, the *Cohan* rule governs the retention of Art. 15s from February 1, 1963, to December 15, 1971.

The history of these regulations was described by the *Cohan* court:

> Originally, the record of disciplinary or nonjudicial punishment imposed upon an individual was not part of his personnel file. . . .
>
> . . . .
>
> The Manual for Courts-Martial, United States, 1951, paragraph 135b, at page 235, authorized the keeping of "such additional records" as might be provided by regulation. In practice, however, with certain exceptions, the transfer of an enlisted person from one organization to another gave the transferee a "clean slate" in the new unit because there was "simply no way by which personnel there . . . [could] determine from his records that he has been punished under Article 15." [citation omitted] Historically, therefore, transfer from an organization accorded the individual an opportunity to take his place in a new unit free from the burdens and the stigma incident to the punishment imposed upon him in his former organization. [citation omitted] An intention to preserve this salutary concept, albeit in modified form, is manifest in that part of the regulation which reduces the two-year retention life of the record if the individual is transferred.

43 C.M.R. at 312.

[470] United States v. Turner, 21 C.M.A. 356, 45 C.M.R. 130 (1972).

[471] *Id.*

[472] ADRB SOP, SFRB Memo # 16-79, 3 Dec. 1979, 45 Fed. Reg. 16,309 (Mar. 13, 1980) states in pertinent part:

The policy of discarding old Article 15 proceedings resulted from hearings held by Congress on nonjudicial punishment in 1962. It was the Armed Services Committees that sought some time limitations on the use of nonjudicial punishment records characterizing the administrative separation of personnel.[473] Thereafter, the Department of Defense promulgated DoD Directive 1332.19,[474] regulating the use of records of nonjudicial punishment. The Navy implemented DoD Directive 1332.19 with SECNAVIST 1900.8.[475] The Air Force regulations, however, are unclear as to the removal of written Article 15s from a servicemember's records.[476]

12.7.2.5 Miscellaneous Issues: Charleston, S.C., Naval Station Cases

An investigation was conducted into alleged command influence on the part of Rear Admiral R. F. Hoffman and was found to have had an adverse impact on the command of Capt. T. W. Pstrak. (Charleston Naval Station (June 26, 1976 to June 1, 1978)). Of the 1600 NJPs reviewed, relief was granted in only four cases, as well as several courts-martial. It may be possible to argue that all questionable disciplinary actions imposed in that command, particularly petty offenses, should be viewed in the light of the prevailing atmosphere there. The documents relating to the investigations are on file at the National Veterans Law Center.

12.7.2.6 Relevant Index Categories

DRB: A01.32 (Other evidence improperly considered, including defective records of disciplinary offenses); A03.06 (Characterization based on isolated acts of indiscipline); A92.24 (Record of nonjudicial punishment (indicates isolated/minor offenses)).

BCMR: 126.00 (Nonjudicial punishment); 126.01 (Improperly filed); 126.02 (Excessive punishment); 126.04 (Expunge record).

12.7.3 REPRIMANDS

12.7.3.1 General Rules

Reprimands (also known as letters of censure or admonitions) are governed entirely by service regulations[477] unless issued as the punishment of an Article 15 or court-martial. Reprimands can be issued for criminal or noncriminal conduct;[478] however, almost any dereliction of duties is punishable under the U.C.M.J. While certain off-base misconduct is not subject to court-martial jurisdiction, it may be grounds for reprimand if it amounts to service-discrediting conduct.

The following rules generally apply to the administration of a reprimand:

- Written notice of reasons for and intent to impose reprimand is sent to the servicemember;
- Opportunity to respond in writing is provided;
- No hearing is allowed;
- An appeal or right to include disagreement in the record is available; and
- There is a time limit on the inclusion of the reprimand in the records.

Although a reprimand has little effect on an enlisted member's career, it will frequently destroy an officer's career. A reprimand can be removed from the service record by order of a BCMR.

12.7.3.2 Relevant Index Categories

DRB: A01.32 (Other evidence improperly considered, including defective records of disciplinary actions).

BCMR: 125.03 (Removal of reprimands).

12.7.4 COURTS-MARTIAL

Courts-martial procedures are discussed elsewhere in this manual.[478a]

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[472] (continued)

> 1. The filing of the record of Article 15 proceedings has varied. . . . [T]o evaluate the propriety . . . of these records in discharge actions, you should be guided by the following summary. . . . If the Article 15 record should not have been in the MPRJ at the time of the separation process, it will be treated as a regulatory error which must then be weighed for prejudicial effect. . . .
>
> 2. [Y]ou should keep in mind that "lost time" must be excluded in the calculations of time. . . . TJAG has issued an opinion that failure of a respondent to object to the admissibility of an Article 15 record in a *Board* proceeding constitutes a waiver if the respondent was represented by *legally* qualified counsel . . . (emphasis added).

The exception contained in para. 2 is questionable. The *Cohan* court did not discuss the issue and the court in Martin v. Secretary, 455 F. Supp. 634 (D.D.C. 1977) following current CMA attitudes toward waiver, rejected that argument. In any event, the exception applies only when a servicemember was represented by a lawyer before an ADB; most servicemembers waive the ADB.

[473] 18 OFF THE RECORD 8 (1969).

[474] DoD Dir. 1332.19 (12 Feb. 1963) was superseded by DoD Dir. 1332.14. *See* note 465 *supra*.

[475] 20 Feb. 1963.

[476] The Air Force regulations discuss the use of unfavorable information at courts-martial and maintenance of an "unfavorable information file," while the Army regulation interpreted in *Cohan* concerned maintenance of records of Art. 15s in local personnel files, the files used at courts-martial and administrative discharge proceedings. It is unclear if the Air Force rule requiring removal of the adverse information within one year or upon promotion or reenlistment applies to ADBs, as the *Cohan* rule does. *See* AFM 111-1, para. 5-13, 25 Aug. 1975 (amended 17 Mar. 1980), referenced in United States v. Terrell, 8 M.J. 705, 8 MIL. L. REP. 2208 (A.F.C.M.R. 1980); AFR 111-9, 24 Jul. 1974; AFM 12-50, tables 111-1 and 35-5, 1 Oct. 1969; AFR 35-2; AFM 35-14.

[477] AR 600-37 (Army); JAGMAN § 0102 (Navy/Marine Corps). JAGMAN divides the letter of censure into "admonitions" and the more severe "reprimand."

[478] DAJA-AL 1973/4715, 6 Aug. 1973 (reprimand for poor judgment proper).

[478a] *See* Ch. 4 *supra* (courts-martial process); Ch. 20 *infra* (upgrading discharges awarded by courts-martial and appealing old court-martial convictions).

12.7.5 IMPROPER DISCIPLINARY ACTIONS, LOSS OF GOOD TIME, AND OTHER ADVERSE ACTIONS AGAINST MILITARY PRISONERS

Army and Air Force servicemembers who have been sentenced by court-martial to long periods of confinement serve their time either at "retraining centers," with a view toward restoration to duty, or at the U.S. Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas. Before June 30, 1973, Navy and Marine prisoners were sent to the Naval Disciplinary Command (NAVDISCOM), Portsmouth, New Hampshire, and to Leavenworth thereafter.

It is beyond the scope of this manual to deal with all the irregularities that could occur at military prison proceedings. Be aware of the following possible issues:

- Denial of due process or failure to follow Discipline and Adjustment Board (D&A Board) procedures;[479]
- Improper failure to consider restoration to duty;
- Failure to give adequate opportunity for rehabilitation at a retraining center;[480] and
- Improper consideration of confinement records upon restoration of a prisoner to duty or failure to transfer a prisoner to a new unit after restoration.[481]

12.7.6 IMPROPERLY RECORDED BAD OR LOST TIME

Servicemembers lose good time credit whenever they are in confinement before or after a conviction by a military or civilian court, when they are injured due to their own misconduct, or when they have been determined to have been absent without leave.[482]

Military regulations govern the calculation of lost time.[483] The Army DRB has provided additional guidance.[484]

12.7.7 SAMPLE CONTENTIONS

#. [Include appropriate contentions from Section 12.1.2.]

#. The applicant received two nonjudicial punishments and one reprimand which were considered by the DA who issued a UD.

#. The NJP received on [date], for which the applicant was sentenced to 30 days correctional custody and a reduction in grade, was appealed by the applicant.

#. An NJP resulting in correctional custody of more than seven days and/or a reduction in grade where there is a right to appeal must be referred to a Judge Advocate for legal review.

#. The NJP in question was not referred for a legal review.

#. Failure to obtain a legal review rendered the NJP legally insufficient.

#. The DA should not have considered the improper NJP.

#. The NJP, received on [date], occurred more than two years before the initiation of discharge proceedings.

#. AR 27-10 in effect at the time required NJPs more than two years old to be removed from a servicemember's file.

#. The NJP in question was not removed.

#. The DA improperly considered the NJP.

#. Without either or both of the improper NJPs and the resulting punishment, the applicant's record was not poor enough to warrant a discharge for frequent involvement of a discreditable nature or, if it did, to warrant a UD.

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[479] DAJA-AL 1973/3353, 27 Sep. 1972, cites the following relevant regulations: AR 210-170, 10 Apr. 1964; AR 190-37, 2 Jun. 1972 (D&J Boards); AR 633-30, 10 Apr. 1964; AR 190-4, 12 Jun. 1969 (good time forfeiture). A settlement in a lawsuit required substantial changes in the USDB procedures. Berenguer v. Froehlke, C.A. No. L-2455 (D. Kan. 1975).

[480] *See* AD 78-00622 (UD upgraded to GD because veteran was discharged only one month after sent to retraining brigade); AD 77-11678 (UD upgraded to GD because veteran had insufficient time to prove self at retraining brigade); AD 78-00922 (improper amount of time to improve and wrongful failure to transfer pursuant to AR 600-332, para. 8e).

ADRB SOP, Annex F-1, para. 3.r, 44 Fed. Reg. 25,072 (Apr. 27, 1979) provides guidance in this area:

> Cases are often seen in which the basis for discharge was failure of rehabilitation. This is frequently seen in administrative separation by the Retraining Brigade. . . . Whenever the commander has determined that correctional training or other rehabilitation is appropriate, he has clearly indicated that the offender deserves another chance. Having done so, clear evidence is required that the offender did, in fact, fail all proper and reasonable efforts at rehabilitation before an administrative separation with a UD is appropriate. While it is legally correct to use a few very minor infractions, together with all prior offenses, to attempt to justify a UD for failure of rehabilitation, serious questions must be asked as to the equity of such action. . . .

[481] *See* AD 78-00922 (digested in App. 12A *infra*).

[482] 10 U.S.C. § 972.

[483] *See* App. 7A *supra*.

[484] The Army DRB SOP, Annex 0-1, SFRB Memo # 11-78, Sep. 27, 1978, 44 Fed. Reg. 25,097 (Apr. 27, 1979) states in part:

> a. Persons assigned to an SPD or PCF are not in confined status in the meaning of AR 190-3. Days spent in SPD or PCF are duty days, not days of bad time.
>
> b. Pretrial or other confinement may only be served in a facility described as a stockade, correctional facility or confinement facility (terms differ, depending on the timeframe involved), after the responsible commander has executed a DA Form 497. . . .
>
> c. The same principle applies to correctional custody, served as the result of punishment under Article 15, UCMJ. . . .
>
> 2. A similar problem has been noted with computations of days lost for personnel assigned to the U.S. Army Retraining Brigade. . . . The following principles should be applied in such cases:
>
> a. For persons assigned to USARB after 1 Feb. 78, look for an order in the file in which the unexecuted portion of the sentence to confinement is suspended, or a FR Form 222 in which the sentence to confinement is deferred. On the effective date of suspension or deferral, the soldier ceases being a prisoner and becomes a trainee, and all subsequent days should be counted as duty days. Absent the order or FR 222, follow the next rule.
>
> b. For all other personnel assigned to USARB or USACTF, days of lost time should equal either the number of days from the approval of the sentence to

12.8 IMPROPER PERFORMANCE RATINGS

12.8.1 INTRODUCTION

Each branch of the Armed Forces has its own method of rating the conduct and performance of its officers and enlisted personnel. Ratings are important in discharge reviews for the following reasons:

- Good ratings impress the DRBs and BCMRs;
- Erroneous ratings are likely to prejudice the characterization of service and subsequent discharge;
- Poor ratings alone may result in a GD at expiration of service without notice, a hearing, or a chance for rebuttal (particularly in the Navy and Marine Corps); and
- Final rating averages are the most important factors in determining whether an HD or GD is appropriate (except when misconduct, unfitness, in lieu of court-martial, are reasons for discharge).

The following are examples of improper ratings:

- Errors in mathematical calculations;
- Ratings given at a point in time not provided for in the regulations;[485]
- Assignment of low marks given without explanation;[486]
- Assignment of numerical ratings not permitted or supported by specific acts of misconduct as specified by regulation;[487]
- Ratings motivated by irrelevant and prejudicial matters;[488]
- Failure to permit ratees to comment on an adverse rating as required by some regulations;[489]
- Ratings based on bad faith of the rater which make the rating punitive in nature, or poor ratings which coincide with the last day of service, when a decision to separate has already taken place;[490]
- Rating officers subject to command influence to give a low rating;[491] and
- Ratings that were awarded while the servicemember was working outside of the occupational specialty for which (s)he was trained.

12.8.2 RATING POLICIES OF THE SERVICES

Current rating policy for enlisted personnel[492] is set forth in each service's regulations.[493] A general description of the ratings methods of each service is set out below.

12.8.2.1 Army

The ratings are entered on the DA Form 20 at Item 38. They consist of "excellent" (exc.), "good," "poor," or "unsatisfactory" (unsat.). In practice, anything less than an "excellent" rating is considered mediocre. E-5s and above receive written evaluations on DA Form 2166-4. Sometimes the written evaluations conflict with the Form 20 evaluations; the latter are sometimes entered all at once to support a case for a bad discharge. The Army rating system leaves much to be desired, especially in cases involving records reconstructed after loss of the originals. Part of the problem is that there is no real written guidance explaining the difference between "excellent" and the other ratings.[494] The guidance provided by the ADRB helps resolve many of the ambiguities and resultant unfairness caused by this vague system.[495]

12.8.2.2 Air Force

Airman Performance Reports (APRs) rate the servicemember on specific qualities and overall performance. The rating is endorsed by one or more persons superior to the ratee, and the overall rating is the most important. In recent years, ratings have been numerical, the highest being "9." Until 1980, unlike the Navy and the Marines, there was no requirement for an HD if the servicemember had an overall rating of a specific number. At that time an HD at ETS became mandatory.[495a] Because the APRs are

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[484] (continued)

> the minimum release date or the successful completion of the retraining program, whichever is earlier.
>
> (1) Minimum release date can be computed by taking the sentence to confinement and deducting 2½ days per month (allowable good time). . . .
>
> (2) In the event an individual's minimum release date occurs before graduation from USARB/USACTF, that person's status will be considered as changed from "confined" to "trainee" on that date, and all subsequent days counted as duty days. . . .
>
> 3. . . . [A] good rule to follow in the matter of computing the number of days lost . . . is to lean in the direction of the applicant whenever there is doubt. . . .

[485] *See* MD 78-00610; MD 78-00171; NC 78-02778; ND 78-02256; ND 78-00107. *See also* App. 12A *infra* (digests of these cases).

[486] *See* MD 78-03676; ND 78-02322. *See also* App. 12A *infra* (digests of these cases).

[487] *See* MD 79-01385; MD 79-01050; MD 78-01420; MD 78-01290; MD 78-00940; MD 78-00171; MD 77-03809; MD 77-03748; MD 77-02896; MD 7X-06053A; MD 7X-00153; NC 78-02778; ND 79-05605; ND 79-01902; ND 78-02256; ND 78-01476; ND 78-00796; ND 78-00726; ND 78-00357; ND 78-00283; ND 78-00091; ND 7X-04027; ND 7X-03139A. *See also* App. 12A *infra* (digests of these cases).

[488] *See* MD 77-02896; NC 76-02666; ND 7X-04181A. *See also* App. 12A *infra* (digests of these cases).

[489] *See* ND 78-02322 (digested in App. 12A *infra*).

[490] *See* ADRB SOP, Annex 0-1, SFRB Memo # 6-79, 15 Aug. 1979, 45 Fed. Reg. 16,244 (Mar. 13, 1980). *See* MD 78-01290; MD 7X-00153. *See also* App. 12A *infra* (digests of these cases).

[491] Skinner v. United States, 594 F.2d 824, 7 MIL. L. REP. 2043 (Ct. Cl. 1979) (officer efficiency report found defective due to command influence).

[492] A huge body of caselaw has developed around the review of BCMR handling of possible errors in various officer rating systems. *See* Sanders v. United States, 594 F.2d 804, 7 MIL. L. REP. 2046 (Ct. Cl. 1979) (exhaustive discussion of the subject).

[493] AR 600-200 ch. 8 (Army), AFR 39-62 (Air Force), BUPERSMAN 5030360 (Navy), MCO P1070.12 (IRAM) para. 4008 (Marine Corps).

[494] *See* App. 12C *infra* (partial text of ADRB SOP, Annex 0-1, SFRB Memo # 3-79, 4 Apr. 1979, 44 Fed. Reg. 25,098 (Apr. 27, 1979)); § 12.5.1.3 *supra*; Ch. 16 *infra* (unsuitability discharges).

[495] *See* App. 12B *infra* (comparison of NDRB and ADRB guidance in this area).

[495a] AFR 39-10, IMC 80-1, 20 Jun. 1980, mandates an HD at ETS and for convenience of the government discharges, minority discharges, dependency discharges, and hardship discharges.

usually inflated, an "average" rating is in reality bad. Sometimes there are extremely poor APRs called "referral APRs" which, by regulation, the servicemember can attempt to rebut. If the servicemember was not permitted to rebut, it can be argued the APR should be removed from the records.[496] APRs sometimes can be attacked by arguing that a rater used the APR to make the servicemember look bad.[497] For example, if a constant such as "ability" was consistently rated high and then was suddenly lowered along with everything else, such an argument is plausible.

12.8.2.3 Navy

Rating is normally done semiannually or upon transfer based on a 4.0 scale. When a rating (mark) of less than 3.0 is given and the service record contains no entries to substantiate the mark, an entry of explanation must be made.[498] Such an entry is referred to as a "page 13" which refers to the Service Record Book (SRB). The marks are found on the Form NAVPERS 601-9 in the SRB.

The following are the permissible ratings:

- 4.0 or 3.8: exemplary — no offenses of any kind;
- 3.6 or 3.4: good — no offenses;
- 3.2 or 3.0: satisfactory — no offenses;
- 2.8 or 2.6: marginal — not more than one summary court or not more than two NJP; or
- 2.0 or 1.0: unsatisfactory — repeated minor offenses or conviction for major offense.

A sailor needs a minimum 2.7 overall trait average (OTA) and a minimum of 3.0 average in military behavior in order to receive an HD and recommendation for reenlistment (other criteria are also involved in reenlistment eligibility).[499] What constitutes minimum required marks changes from time to time. Check the appropriate regulation in effect at the time of discharge for the standards applicable to a specific client. Since the overall average of a servicemember's marks is important, the arithmetic should be checked.[500] Marks covering a short period should not be equally averaged with those covering a long period.

12.8.2.4 Marine Corps

The proficiency (pro) and conduct (con) rating is based on a 5-point system. The highest rating usually given, however, is 4.9. The ratings are given semiannually and whenever a person is transferred to a new unit. An enlisted member will usually need to maintain a 4.0 or better average in both ratings to be promoted. To receive an HD, a final average of 4.0 in conduct and 3.5 in proficiency is required.

12.8.3 ERRORS IN CALCULATION OF RATINGS

Besides challenging the calculation of the final averages[501] and the weighting of ratings covering only short periods of time, the method of calculation itself may be challenged. In one case, statistical analysis was used to wipe out a low average, resulting in a discharge upgrade from GD to HD. To obtain an HD, the regulations require an average military behavior mark of 3.0 or better. The only marks that can be given are 1.0, 2.0, 2.6, 2.8, 3.0, 3.2, 3.4, 3.6, 3.8, or 4.0. The veteran in this case had received marks of 2.8, 3.2, 3.4, 3.0, 3.0, 3.0, and 2.0, in that order. The challenge to the marks was that the averaging method used was unfair and invalid.

There are three ways of averaging numbers: mean, median, and mode. The mean is arrived at by adding up the marks (2.8 + 3.2+ 3.4+ 3.0 + 3.0 + 3.0 + 2.0 = 20.4) and then dividing the sum by the number of marks involved (20.4 ÷ 7). Here the mean came to just 2.9, or less than the minimum required for an Honorable Discharge. However, the mode and the median gave better results. The mode is the mark that shows up most often, here 3.0, since that mark showed up three times. The median is found by arranging the marks in numerical sequence (2.0, 2.8, 3.0, 3.0, 3.0, 3.2, 3.4) and then taking the middle position (the fourth). In this case, the median is 3.0. Both mode and median produced an average of 3.0 which warranted an Honorable Discharge for the veteran.

The objection to the use of the mean is that the base numbers are not equally spaced, there being 1.0 between some numbers and .2 between others, as in the list above. If the veteran had received marks of 2.6 or higher each time, or if he had received no marks other than 1.0, 2.0, 3.0, or 4.0, the mean would suffice. But he received a mixture of low marks (where the intervals are larger) and high marks ending in .2 and .4. Thus, the basic number system led to an erroneous average.

12.8.4 PRESUMPTION OF REGULARITY

Service records often contain no ratings for some periods of service. If a record reflects no adverse actions during such periods, the Boards have invoked a presumption in favor of the applicant.[502]

12.8.5 HONORABLE DISCHARGE REQUIRED WHEN DISCHARGE IS FOR UNSUITABILITY OR OTHER NOT-FOR-CAUSE REASON

12.8.5.1 Introduction

The services are not entirely consistent on what type of discharge should be issued when separation is for unsuitability or is not otherwise the fault of the servicemember. The general rule is that the regula-

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[496] *See* ND 78-02322 (digested in App. 12A *infra*).
[497] *See* note 491 *supra*.
[498] *See* note 486 *supra*; BUPERSMAN Art. C-7821 (1964), Art. 3410150 (1973 to present).
[499] BUPERSMAN Art. 3850120.
[500] *See* MD 79-02350 (citing IRAM para. 4007); MD 78-04777 (citing IRAM para. 4008.5); MD 78-02083 (error in math); MD 78-01086R (citing IRAM para. 4007); ND 79-00136 (error in math).

[501] *See* MD 78-04777 (noting IRAM para. 4008.5, which requires rounding off of final average to nearest tenth of a point); MD 79-01432; ND 79-00696. *See also* App. 12A *infra* (digests of these cases).
[502] *See* ND 79-00666, AD 78-01854 (digested in App. 12A *infra*). *See also* § 12.5.1.3 *supra* (good ratings arguably can be assumed for final average purposes when a discharge is found void due to procedural error affecting the validity of the discharge proceedings).

tions which govern whether a servicemember gets an HD or GD at expiration of term of service, or at expiration of obligated services (ETS or EOS), should also apply to miscellaneous reasons for discharge, such as conscientious objection, hardship, medical, and convenience of the government. This rule is most importantly applicable to cases in which the discharge was for unsuitability, marginal performance, trainee discharge, or when an unfitness, misconduct, or discharge in lieu of court-martial is *changed* to discharge for unsuitability by a Review Board.

12.8.5.2 Navy and Marines

These services have consistently followed the general rule applying the objective numerical system in these situations.[503]

12.8.5.3 Air Force

While the Air Force does not have a regulation requiring an HD when certain factors are present, an HD has been specifically presumed in unsuitability cases since 1966.[504]

12.8.5.4 Army

The Army has maintained that its ETS criteria are not mandatory even at ETS despite the use of the word "will" in the operative regulation. Litigation has established that Army members discharged between December, 1955 and May, 1975 at ETS, or for the various reasons that came under convenience of the government (*e.g.*, hardship, conscientious objection) are entitled to an HD if the ETS criteria are met.[505] The Army still maintains, however, that unsuitability discharge characterizations are based on the regulatory criteria contained in the unsuitability regulations.[506]

12.8.6 RELEVANT INDEX CATEGORIES

DRB: A01.20 (SM's ratings/grades were *not* properly calculated or administered); A03.12 (SM did meet regulatory criteria for Honorable Discharge); A03.04 (Personal decoration during current service *not* considered); A92.02 (Conduct and efficiency ratings).

BCMR: 114.00 (Fitness reports (Navy/Marine Corps)); 114.01 (Removal of officer reports); 114.03 (Enlisted performance evaluation-removal/modify).

12.8.7 SAMPLE CONTENTIONS

#. [Include appropriate contentions from Section 12.1.2.]

#. On [date] the applicant received a rating of 1.5.

#. The 1.5 rating was given 90 days after a yearly rating.

#. The regulations in effect at the time
(a) Did not permit a rating of 1.5 unless at least an SPCM occurred during the rating period.
(b) Did not permit a rating covering a period of less than a year unless there was a permanent change of station.

#. On [date] the applicant had not received PCS orders.

#. The SPCM at which the applicant was convicted during the rating period in question was disapproved on [date] and charges were dismissed.

#. The 1.5 rating was improper because of #'s above.

#. Because of #s above, the applicant's overall ratings would be 3.3 if the improper rating is excluded.

#. An overall rating of 3.3 requires that the applicant received an HD.

#. [Include appropriate contentions from Section 12.1.2.]

#. The applicant's final conduct rating was "unsatisfactory."

#. The rating was entered on the same date that the discharge proceedings were initiated.

#. The applicant's military record reflects no acts of misconduct during this last rating period.

#. The applicant's previous rating period was unrated.

#. The presumption of regularity prohibits assuming that adverse ratings occurred during that period.

#. The applicant's final rating of "unsatisfactory" was improper because
(a) The record reflects no misconduct to support it.
(b) The applicant was not given an opportunity to rebut the rating.

#. Because of #s above, the applicant's overall rating average was sufficient to require an HD.

12.9 MISCELLANEOUS PROPRIETY ISSUES

12.9.1 INTRODUCTION

This section discusses several legal problems which are touched on elsewhere in this manual or which cut across topic lines. Legal issues that relate solely to specific reasons for discharge are discussed in the chapters devoted solely to those reasons. (For example, whether three minor acts of misconduct will

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[503] *See* § 12.5.1.3 *supra*. *See also* MD 79-01432 (convenience of government/hardship); MD 78-610001 (EOS); MD 78-02096 (unsuitability/refusal to participate in an alcohol program); MD 78-01399 (convenience of government/pseudofolliculitis barbae); ND 79-00785 (convenience of government/substandard performance); ND 79-00696 (unsuitability); ND 79-00271 (same); ND 79-00136 (marginal performer or "non-potential petty officer"); ND 78-02681 (homosexuality, following January 20, 1978 change in policy).

[504] AFR 39-12, para. 2-3.

[505] *See* ADRB SOP, Annex 0-1, SFRB Memo # 3-79, 4 Apr. 1979, 44 Fed. Reg. 25,098 (Apr. 27, 1979) (partially reprinted in App. 12C *infra*) (discussion of results of Maness v. Secretary).

[506] *See* Ch. 16 *infra* (unsuitability discharges).

legally support a discharge for misconduct/frequent involvement is discussed in the chapter on unfitness/misconduct.) Many of the issues discussed in this section can often simply be classified as instances in which the servicemember was treated unfairly. If that is the case, it should be argued that the discharge was not only improper but inequitable.

12.9.2 IMPROPER USE OF THE ADMINISTRATIVE PROCESS

12.9.2.1 Introduction

This section is interrelated with the following section which discusses use of the administrative process after a court-martial acquittal or when successive ADBs are convened. This section, however, touches on the serious problem of a military commander who, to avoid the procedural requirements of the court-martial process under the Uniform Code of Military Justice, resorts to the relatively "efficient" administrative discharge system to punish a servicemember by issuing a bad discharge. While this is really a political problem requiring a major overhaul of the discharge system by DoD and/or Congress, some use may be made of the following approaches.[507]

12.9.2.2 General Rules

Almost all service regulations disapprove of the use of the administrative discharge process to circumvent the court-martial process.[508] Commanders, however, often took specific allegations of misconduct and included them in the "charges" at discharge boards. This often occurred when the witnesses were not available for a trial and written statements were used at the board, which in itself could also violate service regulations.[509]

The administrative process sometimes begins during a period of pretrial confinement. Waivers of these ADBs in such circumstances could be arguably invalid as coerced.

DoD directives prohibit pretrial confinement when an administrative discharge is the only pending action.

It should be noted that a commander sometimes uses the administrative process to spare the servicemember a worse fate at a court-martial when it appears that retraining at a rehabilitation center is not a likely possibility, even though service regulations often prohibit such motivating factors.

12.9.2.3 Relevant DRB Index Category

A94.12 (Arbitrary and capricious command actions).

12.9.2.4 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. The applicant was charged with disrespect to Sgt. Y on June 1, 1970.

#. The applicant denied (s)he was disrespectful and presented statements of three witnesses that Sgt. Y called him/her a "shitbird."

#. The court-martial charges were not referred to trial until June 10, 1970.

#. Sgt. Y was transferred to Germany on June 17, 1970.

#. The applicant was notified of administrative discharge proceedings for frequent involvement on June 18, 1970.

#. At the applicant's ADB, discharge was recommended for a UD for frequent involve-

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[507] As early as 1960, the Court of Military Appeals' Annual Report noted:

> The unusual increase in the use of the administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code. The validity of that suspicion was confirmed by Major General Reginald C. Harmon, then Judge Advocate General of the Air Force, [who] declared that the tremendous increase in undesirable discharges by administrative proceedings was the result of efforts of military commanders to avoid the requirements of the Uniform Code.

A statistical breakdown of less than GDs demonstrates the magnitude of the use of the administrative UD in place of court-martial proceedings which could have adjudged BCDs or DDs:

UDs AS A PERCENTAGE OF ALL LESS THAN HONORABLE DISCHARGES

FISCAL YEARS	ARMY	NAVY	MARINES	AIR FORCE
1950-54	64.49%	40.16%	42.62%	not available
1955-59	78.88%	59.66%	45.23%	74.76%
1960-64	86.96%	67.49%	61.49%	69.18%
1965-69	87.15%	69.77%	54.27%	73.75%
1970-73	92.30%	66.40%	80.50%	83.66%

From 1950 to 1973, 343,587 less than fully honorable discharges were issued by the Army, 120,271 by the Navy, 80,588 by the Marine Corps, and 51,432 by the Air Force.

The picture has not changed much in recent years as the following figures demonstrate:

FISCAL YEAR	HD	%	GD	%	UD	%	BCD	%	DD	%	TOTAL
1974	609,580	88.6	45,960	6.7	29,336	4.3	2,988	.4	315	.0	688,179
1975	609,058	88.3	48,999	7.2	27,015	4.0	3,598	.5	293	.0	682,952
1976	542,674	86.1	53,135	8.4	30,721	4.9	3,435	.5	229	.1	630,194
1977	509,693	89.5	38,922	6.8	18,104	3.2	2,349	.4	190	.1	569,258
1978	446,870	90.5	29,678	6.0	15,054	3.1	1,823	.4	160	.0	493,585

The effect of these trends has not gone unnoticed. *See generally* [1977-1978] REPORT OF THE JOINT-SERVICE ADMINISTRATIVE DISCHARGE STUDY GROUP Aug. 1978; Gen. Accounting Office Rep. B-197168 MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARTIES: CONGRESSIONAL REVIEW IS NEEDED Jan. 15, 1980.

[508] The reason for this requirement is two-fold. First, a serious offender should be criminally punished. Second, the administrative process allows fewer rights to the servicemember. The following are some of the rights usually unavailable (depending on the year) in an administrative proceeding leading to a bad discharge: lawyer-counsel; compulsory process of witnesses; suppression of illegally obtained evidence; formal rules of evidence; access to a judge; a higher standard of proof; a verbatim transcript; a separate sentencing hearing; mandatory appeal to a higher court; and access to a lawyer on appeal. Pointing out these differences in cases where there were factual disputes over acts of misconduct can be helpful in casting doubt on the propriety of the use of the administrative process. *See* DAJA-AL 1977/5067, 16 Aug. 1977 (no abuse of discretion to refer case to an ADB where motivation was based on mental status of rape victim and not lesser standard of proof, and dismissal of charges after an Article 32 investigation did not amount to prior acquittal).

[509] *See* § 12.5.7.8.2 *supra*.

ment based on two NJPs and the incident with Sgt. Y.

#. It was an abuse of discretion for the DA to allow the ADB to consider the charge of disrespect at a proceeding at which the applicant could not confront Sgt. Y.

12.9.3 DOUBLE JEOPARDY OR MULTIPLE BOARD PROCEEDINGS

12.9.3.1 Introduction

In some situations, the command tries to discharge the servicemember by using more than one proceeding. Over the years, service regulations have evolved to prohibit some forms of double jeopardy. The current standards approach is then available in such situations.[510]

12.9.3.2 General Rules

The double jeopardy issue is raised under the following circumstances:

- A servicemember was tried and convicted by a court-martial which could have, but did not, adjudge a punitive discharge, and an ADB followed;[511]
- A servicemember was acquitted or had charges dismissed at a court-martial and those charges, or some of them, were the subject of an administrative discharge proceeding;[512]
- A discharge authority, dissatisfied with the recommendations of a board, ordered a new board convened;[513]
- A new board was convened to hear charges known at the time of the first board but not presented;[514] or
- A suspended discharge was improperly vacated.[515]

These situations do not automatically render a discharge improper, although they raise serious questions about its fairness.

12.9.3.3 Relevant DRB Index Category

A02.32 (Improper vacation of suspended administrative discharge).

12.9.3.4 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. The applicant was convicted of possession of marijuana at a court-martial authorized to award a punitive discharge.

#. The court-martial sentenced the applicant to 30 days confinement on July 10, 1970.

#. On September 10, 1970, an ADB found that the applicant was a drug abuser because of the July 10 conviction and recommended a GD.

#. The GD for drug abuse was approved by the DA, the same official who had referred the possession charge to trial in July.

#. It was contrary to Navy policy to award a less than honorable discharge based on the same conduct for which a court-martial did not include a discharge in the sentence [citation].

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[510] *See* Ch. 21 *infra*.

[511] There is no prohibition against such an action in the DoD administrative discharge directive, but the Navy and Army have issued guidance on the matter.

The Judge Advocate General of the Navy has held that there is a strong Navy policy against basing an administratively-issued bad discharge on such facts, although it is legally permissible. In JAG: 131.4 RTH:cck, Ser. 145, 7 Jan. 1972, the TJAG stated in part:

> There has been long-standing concern expressed by the Secretary of the Navy, however, about administratively discharging members under conditions other than honorable for the same conduct for which the member was court-martialed but for which he was not sentenced to a punitive discharge. As early as 1955, Assistant Secretary Pratt stated that although a discharge under conditions other than honorable cannot be technically classified as punitive, the practical effect of such a discharge in the civilian community is similar to that of a punitive discharge. (*See* SecNav memo of 19 Jul. 1955 to CMC and CNP.) Furthermore, having such a practical effect, the discharge under conditions other than honorable in effect amounts to an increase of the sentence approved for the court-martial conviction. Secretary Pratt believed that only under the most extraordinary and compelling circumstances should such discharges under other than honorable conditions subsequent to court-martial conviction for the same conduct be approved — and then. . . always with care.

It was further reasoned that such a discharge in effect increased the punishment approved by the convening authority of the previous court-martial and that the 1955 policy was still valid. On August 22, 1974, an important change was issued to BUPERSMAN Art. 3420180, reading in part, "it is generally inappropriate to award an undesirable discharge if last UCMJ action was court-martial which could have awarded a punitive discharge and did not."

ADRB SOP, Annex F-1, para. 3.0, 44 Fed. Reg. 25,072 (Apr. 27, 1979) states the Army policy:

> Juxtaposition of Court-Martial Versus Board Action Processing. In some circumstances, board members will observe that there has been a processing of charge sheets and, simultaneously requests for administrative board action on an individual soldier and that the same offense is used as a catalyst in both circumstances. By itself this is not in error. In short, it is perfectly permissible for a commander to process charge sheets involving an offense while at the same time using the commission of this offense as being indicative of the culmination of a pattern of bad performance on the part of an individual. *However, if a court-martial has occurred and could have, but did not adjudicate a discharge, it is improper to use the offense as a catalyst for a Board Action.* Board members must insure that there is a clear separation in the manner in which a single offense is used to justify two separate and distinct actions [emphasis added].

[512] DoD Dir. 1332.14, encl. 5, para. G, 29 Dec. 1976, prohibits the issuance of a UD based in whole or in part on acts for which a servicemember was previously acquitted except when the disposition was based on a "legal technicality." The Air Force had such a prohibition as early as 1966 and currently omits the "legal technicality" exception. *See* note 508 *supra*; DAJA-AL 1973/3564, 1 Mar. 1973; FD 77-01984A.

[513] *See* DoD Dir. 1332.14, para. V.D. 7, encl. 5, para. H. (prohibits new board, except where there is evidence of fraud). Prior to 1965, the DA could ignore the ADB recommendations and refer the case to a new ADB. This improved the 1959 directive, which itself modified prior lax provisions. *See* note 223 *supra*; *but see* note 221 *supra*.

[514] *Cf.* JAGA 1968/4912; 20 Nov. 1963, 13 Dig. Ops., Enlisted Men § 81 (improper to refer to an ADB to consider discharge for homosexuality where "unsuitability" was not proved at the first board).

[515] DoD Dir. 1332.14, 29 Dec. 1976, para. VI. *See also* §§ 12.5.7.10, 12.5.9 *supra*. Notice and a chance for rebuttal are often required.

#. The GD that the applicant received was improper because of #s above.

12.9.4 IMPROPER CONFESSIONS

12.9.4.1 Introduction

The Court of Military Appeals in *United States v. Ruiz*[516] held that Article 31, U.C.M.J., the military equivalent of the fifth amendment privilege against self-incrimination, applies to administrative discharges. DoD, however, applies the case only to instances in which involuntary urine samples are used to support a discharge for drug abuse.[516a] Curiously, however, the DRB Index lists Article 31 violations as an issue.[517] A federal court has applied this holding to a large class of Army veterans who were discharged based on urine samples. The recent appellate ruling affirming the district court recognizes the broad sweep of the *Ruiz* holding.[518]

Despite the uncertainty of the legal effect of an invalid confession at an ADB, the issue is worth raising, if possible, before a Review Board. Since 1951, Article 31, U.C.M.J. has required that servicemembers be advised of the right to silence when suspected of an offense.[519] Military authorities know, understand, and unquestioningly obey Article 31. A violation is viewed as a gross violation of basic requirements. The average DRB member, like many senior officers, has an innate suspicion of professional investigators and might view an improper confession as a basis for an upgrade as a matter of fairness.

12.9.4.2 Violations of Article 31

Most confessions reduced to writing will be on a form which includes the advice and waiver of rights. However, proof of abusive questioning, if believable, can be effectively used to rally the sympathy of the Board. The extreme example would be physical coercion, but a detailed description of more subtle interrogation techniques can also produce the desired effect.

The regulations usually specifically require the reading of Article 31 during the discharge proceeding. This, in conjunction with *Ruiz*, requires that the warning be given, even if only an administrative discharge and not a court-martial is contemplated.[520]

Challenges to confessions can be for three purposes:

- To challenge admissibility due to lack of proper warning or its involuntary nature.
- To show that the contents of the confession are entirely false and should be disregarded.
- To show that some of the contents are not entirely true. This can often be done by relying on the language used in the confession. Some confessions are obviously written in language unknown to the servicemembers and some are obviously twisted to include street language. This is particularly true in homosexual discharge cases.[521]

Written confessions may contain several intentional typographical errors initialed by the servicemember. Sometimes this is done at the military authority's instance to make the reader think the signer has carefully read the confession.

After the *Miranda* decision (June 13, 1966), the Navy (NIS) confession forms did not include the advice of the right to counsel for some time, although NIS regulations required that the rights be given in all interrogations after August 23, 1966. Air Force (OSI) and Army (CID) regulations required the same advice. While there is currently no clear legal support for the exclusion of confessions obtained without the advice of the right of counsel, it could be argued that the violation of NIS, CID, or OSI regulations bars the use of the confession.[522]

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[516] 23 C.M.A. 181, 48 C.M.R. 797, 2 MIL. L. REP. 2063 (1974).

[516a] *See* § 12.5.7.8.4 *supra*; Ch. 15 *infra* (drug-related discharges).
Article 31, U.C.M.J., 10 U.S.C. § 831 reads:

> **COMPULSORY SELF-INCRIMINATION PROHIBITED**
>
> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

[517] A01.21/22.

[518] Giles v. Secretary, 475 F. Supp. 595, 7 MIL. L. REP. 2524 (D.D.C. 1979), *aff'd* 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980). *Giles* also held the *Ruiz* decision to be retroactive. *But see* United States v. Armstrong, 9 M.J. 374, 8 MIL. L. REP. 2523 (C.M.A. 1980).

[519] In April 1967, the Court of Military Appeals held that *Miranda* rights must also be read to a suspect in custody. United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967). This means the addition of the advice of the right to appointed counsel to the Art. 31 warning in a criminal investigation. *See* MOYER, JUSTICE AND THE MILITARY §§ 2-200 to 2-295 (1972) (discussion of the military law of confession).

[520] *See also* Giles v. Secretary, 475 F. Supp. 595 (D.D.C. 1979), *aff'd*, 627 F.2d 554 (D.C. Cir. 1980).

[521] *See* Ch. 14 *infra*.

[522] A letter from NIS to the authors reads in part as follows:

> On August 23, 1966, this Headquarters set forth a requirement to all NIS Special Agents that the following be added to the warning then being afforded to military suspects under Article 31 of the Uniform Code of Military Justice:
>
> "I advise you also that you have a right to consult with a lawyer, if you desire. You also have the right to have a lawyer present during this interview. You may obtain a lawyer of your own choosing, or if you wish, Navy (or Marine Corps) authority will appoint a lawyer for you."
>
> A ruling by the Court of Military Appeals (CMA) on April 25, 1967 (United States v. Tempia) confirmed the military suspect's right to the above advice. On February 14, 1968, following a CMA ruling on U.S. vs. Stanley, NIS added "without cost to you" to the above warning addition. Finally, on April 25, 1968, as the result of a CMA ruling in United States vs. Westmore

12.9.4.3 Relevant DRB Index Category

A01.22 (Evidence obtained in violation of Article 31, U.C.M.J., (self-incrimination) improperly considered).

12.9.4.4 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. On [date] the applicant was interrogated for six hours by CID agents and (s)he was threatened with a general court-martial if (s)he did not confess.

#. Prior to this interrogation, the applicant was not advised of his/her rights under Article 31, U.C.M.J.

#. The applicant had worked a 12-hour shift prior to this interrogation, had not eaten for 8 hours, and was suffering from the flu.

#. At the end of the interrogation, the applicant signed a confession.

#. At his/her ADB, the applicant denied the contents of the confession.

#. The applicant now denies the contents of the confession.

#. The confession was improperly considered because it was the result of coercion.

#. The confession was improperly considered because the applicant was not advised of his/her rights under Article 31, U.C.M.J. *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974) and *Giles v. Secretary*, 627 F.2d 554 (D.C. Cir. 1980).

#. The contents of the confession should not be considered because they are not true.

12.9.5 ERRONEOUS TRANSFER FROM THE NATIONAL GUARD

12.9.5.1 Introduction

Normally a person is *discharged* from the National Guard in order to enter active duty. A person is sometimes erroneously *transferred* from the Guard to the military. This cannot legitimately be done. If it is, any subsequent bad discharge will be void because the servicemember was never properly on active duty. If such a case arises, the appropriate regulations should be consulted.

12.9.5.2 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. On [date], the applicant was transferred from his/her National Guard unit into the Army.

#. Regulations in effect at the time required a discharge from the National Guard prior to active duty service.

#. The applicant's subsequent UD from the Army was improper because (s)he was never discharged from the NG and therefore the Army never legally acquired jurisdiction over him/her.

12.9.6 DISCHARGE AFTER EXPIRATION OF TERM OF SERVICE OR AFTER A CONSTRUCTIVE DISCHARGE

12.9.6.1 Introduction

Absent a national emergency, servicemembers may only be held beyond their normal term of service for trial by court-martial[523] (and in some cases for hospitalization).[524] However, there is no authority to hold a servicemember to subject him/her to an administrative discharge proceeding.[525]

Even though a servicemember has already been legally discharged, a command may decide to hold the proceedings over again in order to give the servicemember a worse discharge. In such cases, the legal issue is whether the servicemember was constructively discharged.[526] Constructive discharge involves the following issues:

- Was the first discharge legally issued by proper authority?[527]
- At what time did the first discharge become effective?[528]

12.9.6.2 Sample Contentions

#. [Include appropriate contentions from Section 12.1.2.]

#. On July 10, 1970, the applicant was given an HD as a conscientious objector.

#. On July 10, 1970, the applicant was given an HD certificate and a DD 214.

#. At 10:00 a.m., on July 11, 1970, while

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[522] (continued)
(February 23, 1968), NIS added to its warning requirements the following provisions:
"I further advise you that you have the right to terminate this interview at any time for any reason."

[523] 10 U.S.C. § 972; MANUAL FOR COURTS-MARTIAL (1969 rev. ed.), para. 11d.

[524] *See, e.g.*, 10 U.S.C. § 8446 (officers). *See also* 10 U.S.C. § 972 (permits extension of duty to make up lost time due to injuries resulting from misconduct). *See* JUSTICE AND THE MILITARY § 1-235; § 12.7.6 *supra*.

[525] DAJA-AL 1979/3767, 2 Nov. 1979, [June 1980] ARMY LAW. at 30.

[526] DA Pam. 27-21 quoted in DAJA-AL 1975/5171, 31 Oct. 1975 describes constructive discharge:

> In the absence of a valid formal discharge, it may be determined administratively that an enlisted person was constructively discharged from the Army when the conduct of both the member and the Army is such that it is clear that both acquiesce in his discharged status. Acquiescence may be demonstrated either by inactivity for a substantial time or by an affirmative act, such as another enlistment.
>
> The absence of a valid formal discharge usually is the result of an attempted discharge which is void. However, the mere giving of an invalid discharge, without more, is not sufficient to establish that the recipient has been constructively discharged. Army authorities must have, or be charged with, knowledge giving rise to a presumption of intent to discharge the member.

Military criminal cases often reach this issue. *See* JUSTICE AND THE MILITARY, § 1-242.

[527] *Id.*

[528] The discharge usually becomes effective at 12:01 a.m. the day after discharge is listed on the separation document. *See* JUSTICE AND THE MILITARY §§ 1-231 to 1-243.

visiting friends on the base, the applicant was informed that the HD was a mistake and that (s)he was being considered for discharge for using drugs.

#. On July 20, 1970, an ADB recommended a GD for drug abuse.

#. [Regulation R] in effect at the time, stated that a discharge was effective at 12:01 a.m. the date after discharge.

#. The applicant was properly discharged at 12:01 a.m. on July 11 and the 10:00 a.m. notification of the new discharge proceedings was improper.

#. [Include appropriate contentions from Section 12.1.2.]

#. The applicant's normal date of expiration of term of service was July 10, 1970.

#. The applicant had no lost time during his enlistment.

#. The applicant was held past his/her ETS to stand trial by court-martial on July 30, 1970.

#. The applicant was acquitted at this CM.

#. The applicant was forced to undergo an ADB on August 10, 1970, for the same charges for which (s)he was acquitted at the CM.

#. The ADB had no jurisdiction to award the applicant a less than honorable discharge because (s)he was beyond his/her ETS and could no longer be kept on active duty, the CM charges having been resolved.

12.10 PROPRIETY ISSUES CHECKLIST

12.10.1 INTRODUCTION

This checklist is designed to catalogue the most common propriety issues. It is not exhaustive. The basic regulation under which the client was discharged should also be reviewed to determine whether other errors could have occurred. The Army DRB has also published a checklist that corresponds to the current version of AR 635-200.[529] If no propriety issues are detected, the applicant should concentrate on equity issues.

The checklist is broken down into three sections:

- Propriety issues arising out of common factual situations such as an illegal discharge based on urinalysis testing;
- More general propriety issues, such as a bad discharge as a result of a wrongful denial of a discharge for hardship; and
- Regulatory violations (this category generally tracks the post-1966 discharge process).

The checklist then gives a reference to the appropriate section of this chapter, to the relevant DRB Index category, and any other relevant chapter(s). The authors have tried to list the most logical DRB Index category; however, cases are frequently not indexed as a legally-trained person would expect.

12.10.2 CHECKLIST

12.10.2.1 Frequently Occurring Illegal Discharges

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS-REFERENCE
GD or UD based in whole or in part on urinalysis testing pre-July 1974.	§ 12.5.7.8.4	A01.22[530]	Ch. 15
GD or UD based on urinalysis testing or on voluntary admission to drug treatment program post-July 1974.		A01.30; A94.36	Ch. 15
Marine discharged for civilian conviction where servicemember was improperly permitted to waive ADB (1966-1975).	§ 12.5.5	A02.10	Ch. 17
Marines discharged by Marine Corps Reserve Forces, Hq., Kansas City, from 1966-1976 with an improper certification of the nonavailability of lawyer counsel.	§ 12.5.7.3, n. 145	A02.16	Ch. 17
Marine cases at Second Marine Aircraft Wing, Cherry Point, N.C., Jan.-June 1974.	§ 12.5.7.7		
Marine common errors:			
• Unauthorized delegation of authority to convene ADB.	§ 12.5, n. 129	A01.08	
• Unauthorized delegation of authority to excuse members.	§ 12.5, n. 137	A01.08	
• No notice could receive UD when waived ADB.	§§ 12.5.3; 12.5.5, n. 115	A01.02; A01.04	

[529] ADRB SOP Annex H-2-1, 44 Fed. Reg. 25,076 (Apr. 27, 1979).

[530] A01.22 includes both A01.21/22. Just the second numbers, indicating a positive finding, are listed to conserve space. *See* Ch. 10 *supra* (how to use the DRB Index).

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS-REFERENCE
• ADB finding must recommend retention or discharge, and if the latter, what type.	§ 12.5.7.10	A02.26	
• Improper advice CO will recommend HD or GD but UD resulted.	§ 12.5, n. 115	A02.10; A02.08	
• Civil conviction and no evidence in file; Marine is not going to appeal.		A61.04	Ch. 17
• Lawyer counsel at ADB unless GCM authority certifies nonavailability of lawyer and states substitute's qualifications.	§ 12.5.7, n. 147	A02.16	
Discharge from retraining unit too early, before rehabilitation possible.	§ 12.7.5		Ch. 22
Where GD for unsuitability, at ETS, or for not-for-cause reasons and ratings qualify member for HD.	§ 12.8.5	A03.00	Ch. 16

12.10.2.2 General Propriety Issues

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS-REFERENCE
Discharge based on conduct having no adverse effect on military service or while veteran was serving in the inactive reserves.	§ 12.4	A92.28	Ch. 14 (homosexuality); Chs. 16 & 17 (bad debts; civilian convictions)
Discharge based on preservice or prior service conduct.	§§ 12.5.7.8.3; 12.7.2.4	A01.12; A01.10	
Servicemember should never have been in or should have been separated for reasons other than cause:			Ch. 22
• Improper induction/enlistment.	§ 12.6.3.3	A06.00; A09.00; A99.05; A99.08	
• Medical discharge.	§ 12.6.2.3	A28.00; A31.00; A93.22	
• Conscientious objector discharge or noncombatant status.	§ 12.6.2.1	A23.00; A93.26; A99.02; A99.44	
• Hardship discharge or compassionate reassignment.	§ 12.6.2.2	A35.00; A93.08; A99.04; A99.12	
• Improper transfer from National Guard.	§ 12.9.5		
• Improper activation of reservist.	§ 12.6.3.2		
• Too young to enlist.	§ 12.6.3.4	A34.00	
• Recruiter conduct.	§ 12.6.3.5	A09.00; A92.28; A62.05	
Disciplinary actions in record improper:	§ 12.7	A01.32	
• Reprimands or admonitions.	§ 12.8.3	125.03 (BCMR)	
• Article 15 or nonjudicial punishment:	§ 12.7.2	126.00; 126.01; 126.02; 126.04 (BCMR)	
(i) Not a U.C.M.J. offense.	§ 12.7.2.2		
(ii) Appeal not referred to JAG.	§ 12.7.2.3		
(iii) Remote or from another enlistment.	§ 12.7.2.4	A03.06	Ch. 17
(iv) Army Cases (1963-1971) where two years from date of punishment expired or servicemember transferred and one year from punishment had passed.	§ 12.7.2.4		
(v) Army cases (1971-present) when two years from date of punishment have passed;	§12. 7. 2. 4		
• Courts-martial.			Chs. 4, 20
• Improperly recorded lost time.	§ 12.7.5		
Improper performance ratings:	§ 12.8	A01.20; A92.02	

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS-REFERENCE
• Mathematical error.	§ 12.8.3	A01.20	
• No explanation for poor rating or failure to permit comment or rebuttal.	§ 12.8.1, nn. 486 & 489	A01.20	
• Rating given at a time not required by regulation.	§ 12.8.1, n. 485	A01.20	
• Rating motivated by irrelevant matters or not a numerical rating permitted by regulation or supported by misconduct required by regulation.	§ 12.8.1, nn. 487, 488 & 490	A01.20	
• Rating given while member worked outside his/her occupational speciality.	§ 12.8.1, n. 488	A01.20	
Administration process used to avoid court-martial:	§ 12.9	A94.12	Ch. 22
• ADB followed CM where no discharge awarded.	§ 12.9.3, n. 487	A94.12	
• ADB followed CM where acquittal of some or all charges occurred.	§ 12.9.3, n. 488	A94.12	
• Multiple ADBs.	§ 12.9.3, n. 489	A94.12	
• Improper confessions.	§ 12.9.4	A01.22	
Discharge after ETS or after constructive discharge.	§ 12.9.6		

12.10.2.3 Regulatory Errors

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS-REFERENCE
Counseling and rehabilitative efforts:	§ 12.5.2	A24.02; A24.06. *See also* listings under each reason for discharge.	Ch. 22
• Rehabilitative transfer improperly waived or inadequate.	§ 12.5.2, nn. 84, 86 & 87	A24.02; A24.04	
• Failure to counsel regarding deficiencies.	§ 12.5.2, n. 81	A24.02; A24.04	
• Failure to give adequate opportunity to improve.	§ 12.5.2, nn. 82, 83 & 85	A24.02; A24.04	
Improper notice of discharge proceedings:	§§ 12.5.3; 12.5.5	A01.02; A01.04	
• Basis.	§ 12.5.3, nn. 91, 94 & 96	A01.02; A01.04	
• Rights.	§ 12.5.3, n. 92	A01.02; A01.04	
• Method.	§ 12.5.3, n. 91	A01.02; A01.04	
• Timing.	§ 12.5.3, nn. 92 & 93	A01.02; A01.04	
• Too vague or general.	§ 12.5.3, nn. 95, 96 & 97	A01.02; A01.04	
• Type discharge recommended.	§ 12.5.5, n. 50	A01.02; A01.04	
Medical and/or psychiatric examination not properly completed:	§ 12.5.4	A01.06; A40.06; A40.08; A42.02; A46.06. *See also* listings under each reason for discharge.	
• By a nonpsychiatrist or nonphysician.	§ 12.5.4, n. 105	A01.06	Ch. 16 (unsuitability)
• When medical problems existed.	§ 12.5.4, nn. 101 & 108-111; § 12.6.2.3		
• Not conducted or too remote.	§ 12.5.4, nn. 102 & 103	A01.06	
• Not sent to DA.	§ 12.5.4, n. 104		
• Improper findings.	§ 12.5.4, n. 106	A01.06	
• Homosexuality.	§ 12.5.4, n. 107	A57.06	Ch. 14

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS-REFERENCE
Waiver of rights:	§ 12.5.5	A02.10	
• Attempted withdrawal.	§ 12.5.5, n. 122	A02.30	
• Coerced or not intelligent waiver.	§ 12.5.5, nn. 112, 113 & 118-121; § 12.5.10	A02.10	
• For another type of reason for discharge.	§ 12.5.5, nn. 114 & 115	A02.10	
• Based on misadvice of rights or inadequate counsel	§ 12.5, nn. 116, 117 & 121	A02.08; A02.06; A02.04; A02.12; A02.18	
• No waiver or waiver not permitted (Marine civil conviction cases 1966-1975).	§ 12.5.5	A02.10	
• Inadequate time to decide.	§ 12.5.5, n. 121	A02.10	
• Failure of DA to consider servicemember's statement.	§ 12.5.5		
Commanding officer's report:	§ 12.5.6	A01.02. *See also* listings under each reason for discharge.	
• Improper contents (arrests without convictions, improper conduct ratings, etc.)	§ 12.5.6, nn. 125 & 127; § 12.8 (performance ratings)	A01.20; A01.32	
• Omits favorable information (medals, prior service, mitigating medical report, etc.).	§ 12.5.6, n. 124	A02.02	
• Preservice or prior service conduct or evidence of acquittals.	§ 12.5.6, nn. 125 & 126	A01.10; A01.12	
• No clear reason for discharge or not explanation why not for another reason.	§ 12.5.6, n. 128	A01.14	
Discharge Board Procedures:	§ 12.5.7		
• Properly convened.	§ 12.5.7.1, n. 129	A01.08	
• Proper members.	§ 12.5.7.2, nn. 136-138	A02.14	
• Multiple minor errors.	§ 12.5.7.1, n. 134		
• Legal advisor biased or recorder previously represented servicemember.	§ 12.5.7.2, nn. 139 & 140		
• Improper or inadequate counsel:	§ 12.5.7.3	A02.16	
(i) Post-1965 in cases where UD could be issued, a lawyer required.	§ 12.5.7.3, n. 141	A02.16	
(ii) No counsel.	§ 12.5.7.3, n. 143	A02.16	
(iii) No time to consult.	§ 12.5.7.3, n. 144		
(iv) Failure to certify and state reason for, by proper authority, nonavailability of lawyer where nonlawyer used, and give qualifications for nonlawyer (post-1965).	§ 12.5.7.3, nn. 141 & 145-148	A02.16	
(v) Ineffective or unqualified counsel.	§ 12.5.7.3, nn. 150, 151	A02.18	
• Inadequate notice of hearing date, time to prepare or interview witnesses.	§ 12.5.7.4, n. 153		
• Burden and standard of proof improper.	§ 12.5.7.5-.6		
• Improper command influence or interference.	§ 12.5.7.7	A02.22	
• Evidence at ADB:	§ 12.5.7.8		
(i) Hearsay and lack of opportunity to question witnesses (use of written statements, failure to call witnesses requested by servicemember, etc.).	§ 12.5.7.8.2	A02.20; A01.26; A01.28	
(ii) Irrelevant but damaging evidence (psychiatric statements preservice or prior-service conduct arrest without conviction, etc.).	§ 12.5.7.8.3	A01.32; A01.10; A01.12	
(iii) Illegally obtained evidence (searches, con-	§ 12.5.7.8.4;	A01.24;	Ch. 15 (drugs)

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS-REFERENCE
fessions, compelled urinalysis).	12.9.4	A01.22	
(iv) Psychiatric exam as basis for unsuitability discharge with no Art. 31 warnings.	§ 12.5.7.8.4	A01.22	Ch. 16
(v) Evidence of an offense for which servicemember had been acquitted previously or where it was heard by another ADB.	§§ 12.5.7.8.5; 12.9.3	A01.32	
(vi) ADB finding unsupported by the evidence of record.	§ 12.5.7.10	A02.26	
• No ADB finding why better discharge *not* appropriate.	§ 12.5.7.10, nn. 213 & 214		
Legal review contains additional adverse matters, misstatements, or omits favorable information:	§§ 12.5.7.9; 12.5.8	A01.18	
• Legal review omitted after an ADB hearing.	§ 12.5.8, n. 218	A01.18	
Discharge Authority's Action:	§ 12.5.9	A01.08	
• More severe than ADB recommendation, or based on subsequent misconduct.		A02.28; A01.32	
• Improperly referred to the new ADB.	§§ 12.5.9; 12.5.7.8.5; 12.9.3		
• UD directed by officer without general court-martial convening authority (usually must be a general, full colonel, or Navy captain) or improperly delegated.	§ 12.5.9, nn. 223, 225 & 226	A01.08	
• Improper vacation of suspended discharge.	§§ 12.5.9; 12.9.3 n. 515	A02.32	
Discharge in lieu of court-martial ("good of service"):	§ 12.5.10		Ch. 19
• Court-martial could not have given a punitive discharge.	§ 12.5.10, nn. 240-243	A70.04	
• Was legally impossible.	§ 12.5.10, nn. 230 & 231	A70.14; A70.16	
• Request resulted from mass counseling in stockade.	§ 12.5.10, n. 228		
• Not intelligently made or a result of duress.	§ 12.5.10, nn. 229 & 234-238	A70.12	
• Without counsel.	§ 12.5.10, n. 232	A70.08	
• Prior to preferral of charges.	§ 12.5.10, n. 233	A70.02	
• Withdrawal or request denied.	§ 12.5.5, n. 122	A70.10	

APPENDIX 12A
DRB/BCMR DECISIONS

These cases are arranged numerically by service. The volume of cases and the imprecise manner in which they are indexed requires counsel to pursue his/her own research to assure completeness. The authors would appreciate having any other significant cases called to their attention.

A. CASE LISTS

These lists of cases are provided for convenience. They do not represent a complete listing of cases cited in Chapter 12. Other cases are digested in footnotes accompanying the text at places discussing the particular subjects at issue in these cases. Copies of cases cited in supporting briefs should accompany the briefs and may be obtained by contacting: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310.

1. ARMY DRB

AD 79-06522; AD 79-03008; AD 79-01913; AD 79-01817; AD 79-01545; AD 79-01423; AD 78-04434; AD 78-04244; AD 78-03509; AD 78-02779; AD 78-02175; AD 78-01854; AD 78-01710; AD 78-01519; AD 78-01504; AD 78-01277; AD 78-01028; AD 78-00928; AD 78-00922; AD 78-00722; AD 78-00649; AD 78-00622; AD 77-12757; AD 77-12463; AD 77-11678; AD 77-10836; AD 77-10497; AD 77-10173; AD 77-10158; AD 77-10085; AD 77-09707; AD 77-09463; AD 77-09209; AD 77-09046; AD 77-08637; AD 77-08635; AD 77-08341; AD 77-07186; AD 77-04006; AD 77-01799; AD 7X-18337; AD 7X-17664; AD 7X-16593A; AD 7X-16439A; AD 7X-15859V; AD 7X-13342; AD 7X-11050; AD 7X-10481; AD 7X-08118; AD 7X-05787; AD 7X-05278; AD 7X-04789; AD 7X-04209; AD 7X-03612; AD 7X-02996A; AD 7X-00070.

2. AIR FORCE DRB

FD 79-00840; FD 79-00190; FD 78-01997; FD 77-01984; FD 77-01660V.

3. MARINE DRB

MD 79-02481; MD 79-01432; MD 78-04777; MD 78-03676; MD 78-03540; MD 78-01420; MD 78-01290; MD 78-01198; MD 78-00946; MD 78-00940; MD 78-00610; MD 78-00295; MD 78-00171; MD 78-00104; MD 77-03809; MD 77-03748; MD 77-02896; MD 77-00357; MD 76-52197; MD 7X-06053A; MD 7X-05167; MD 7X-04052; MD 7X-01902A; MD 7X-00153.

4. NAVY BCNR

NC 78-03522; NC 78-02778; NC 78-02256; NC 77-06080; NC 77-03378; NC 76-02666.

5. NAVY DRB

ND 79-01902; ND 79-00696; ND 79-00666; ND 78-02322; ND 78-02256; ND 78-00796; ND 78-00444; ND 78-00107; ND 77-02280; ND 7X-04181A; ND 7X-0097A.

B. DIGESTS OF CASES RELIED UPON

1. ARMY DRB

AD 79-06522 (UD upgraded to GD because, although applicant had been discharged for unsuitability and medically disqualified from reenlistment, he was erroneously permitted to reenlist two months later).

AD 79-03008 (applicant had appeared before an ADB and was recommended for separation with a UD on basis of C&B and inability to adjust; DRB felt that applicant should have been discharged for unsuitability).

AD 79-01913 (GD upgraded to HD because six months continuous active service not completed prior to discharge as required by regulation). *See* AD 78-03863 (same).

AD 79-01817 (UD upgraded to HD; applicant had enlisted with AFQT of 28, and, prior to the 33-day AWOL for which he requested a GOS discharge, was being processed for an unsuitability discharge).

AD 79-01545 (JAG review of the discharge proceedings incorrectly stated that applicant had been convicted by SPCM for possession of a substantial amount of heroin; erroneous information prejudicial).

AD 79-01423 (UD upgraded to HD; applicant inducted into Army after being discharged from Navy with UD for drug involvement and homosexual activity; prior unconcealed and unwaivable UD was "moral bar" to induction).

AD 78-04434 (commander's report citing two Art. 15s from a previous enlistment was prejudicial to applicant; there was no MSE).

AD 78-04244 (ADB held three years after applicant received an SPCM and served his sentence in confinement; transcript of ADB revealed that reasons for separation were minor — the way applicant wore socks and the way he drove car).

AD 78-03509 (GD upgraded to HD because applicant should never have been inducted with an AFQT of 19, recognized as a mental deficiency severely curtailing ability to serve).

AD 78-02779 (UD upgraded to HD because applicant had been advised that he was facing SCM for AWOL and had requested GOS, but was later processed for GOS for an Art. 85 without being informed of change; personal problems and drugs were mitigating).

AD 78-02175 (applicant had waived right to ADB contingent upon receiving HD, but approving authority directed GD).

AD 78-01854 (upgrade "[i]n absence of any indication that the quality of service was below that which could be recognized as honorable service").

AD 78-01710 (applicant had waived his right to ADB, provided that he be given GD or HD).

AD 78-01519 (UD upgraded to HD because applicant was improperly inducted after informing military authorities of pending criminal charge for armed robbery).

AD 78-01504 (commander included SPCM from a prior enlistment in his report to discharge authority).

AD 78-01277 (separation for homosexual acts was not to be applied to those who engaged in homosexual acts due to immaturity or intoxication, as applicant had).

AD 78-01028 (UD upgraded to GD based on inadequate counseling, despite record of two Art. 15s, 1 SCM, and 24 days lost time).

AD 78-00928 (GD under EDP upgraded to HD based on discharge before applicants had been in their units 60 days). *See* AD 78-03817, AD 77-08708, AD 77-07420, AD 77-00878 (same).

AD 78-00922 (UD upgraded to HD; applicant requested a transfer under 600-332 para. 8e, requiring sealing of confinement records upon restoration of a prisoner; transfer denied, but applicant not given sufficient opportunity to improve before discharge action initiated).

AD 78-00722 (insufficient evidence to have charged applicant with offenses).

AD 78-00649 (UD upgraded to HD because applicant was erroneously inducted after having failed induction for physical reasons).

AD 78-00622 (an Art. 15 included from a previous enlistment; discharged one month after being sent to retraining brigade). *See* AD 79-01998, AD 79-01630, AD 77-06711, FD 78-0066 (similar).

AD 77-12757 (UD upgraded to GD because applicant had signed a statement acknowledging impact of a GD but not acknowledging impact of a UD).

AD 77-12463 (commander included SCM that had been set aside in his report to the discharge authority). *See* AD 78-00681.

AD 77-11678 (UD for frequent involvement upgraded to GD because applicant was given insufficient time to prove himself after being sent to retraining brigade, despite three Art. 15s, one SPCM, and 43 days lost time).

AD 77-10836 (considerable doubt whether the applicant could have been found guilty of the

charges, and he should not have been allowed to request discharge for offenses which command did not believe were credible).

AD 77-10497 (UD upgraded to GD because commander's report contained statement that "applicant during his AWOL period has been arrested by civil authorities for delivery of heroin and was pending trial for this offense").

AD 77-10173 (applicant's UD upgraded to GD where only evidence of guilt was weak statement by third party; applicant had four years and nine months of satisfactory service, and battalion and brigade commanders had recommended that he be given GD).

AD 77-10158 (GD upgraded to HD because applicant had been erroneously enlisted and charged with AWOL while under mistaken impression that her enlistment contract had been voided).

AD 77-10085 (applicant was not fully aware of weakness of evidence against him; commander forwarded charges long enough after receiving lab report to indicate he knew evidence did not support charges).

AD 77-09707 (rights were not adequately protected during EDP discharge process absent agreement in writing to receipt of GD).

AD 77-09463 (review by SJA did not include applicant's prior Vietnam service; thus DA did not have knowledge of applicant's service and awards earned there).

AD 77-09209 (GD under EDP upgraded to HD because there were no documents in applicant's file supporting counseling by CO).

AD 77-09046 (applicant with criminal record improperly inducted with recruiter's help; recruiting HQ directed that applicant's moral waiver not be approved, but DD Form 47 reflected that the moral waiver *was* granted, citing Recruiting Command's denial of waiver; record silent concerning attempts by applicant to secure release from service on grounds of erroneous induction).

AD 77-08637 (UD upgraded to GD in part because of command's failure to state reason for discharge; medical and family problems and good postservice record found mitigating).

AD 77-08635 (applicant not properly notified by certified mail of discharge action).

AD 77-08341 (UD upgraded to GD because applicant's AFQT score of 10 fell below minimum standard at time of applicant's entry; full relief denied because test scores not essential to AWOL that ultimately led to discharge).

AD 77-07186 (applicant reportedly failed to demonstrate promotion potential, but commander made report after applicant completed 38 weeks in missile school; applicant discharged five months later as E-4).

AD 77-04006 (UD upgraded to GD on suspicion that applicant did not qualify for induction because of history of psychiatric treatment and drug addiction, including two month hospitalization during year prior to induction).

AD 77-01799 (reservist's GD for failure to attend training upgraded because applicant had two previous HDs, did not have any remaining training obligation, and missed fewer drills than the number on record).

AD 7X-18337 (applicant was told he could not apply for CO discharge and therefore never pursued his application; applicant had been severely punished while in service for his antiwar-motivated misconduct and had received postservice psychiatric counseling).

AD 7X-17664 (discharge "reflected an attempt by the command to punish because of applicant's approved non-combatant status").

AD 7X-16593A (UD upgraded to HD because "severe family problems . . . served to mitigate the seriousness of the offenses for which he requested a separation").

AD 7X-16439A (use of preservice record was prejudicial). *See* AD 77-06289, FNC 76-4271 (same).

AD 7X-15859V (applicant's AWOL stemmed directly from religious belief and denial of his request for CO status; his request for CO status was approved by every commander except the Secretary of the Army).

AD 7X-13342 (no paper waiver because applicant had not signed a statement of intention not to appeal his conviction as required by civil conviction discharge procedures).

AD 7X-11050 (UD upgraded to GD because lack of counseling or rehabilitative efforts and lack of waiver found to violate regulations and be prejudicial).

AD 7X-10481 (UD upgraded to GD; applicant was conscientious objector at time of induction, but error on original DD Form 47 failed to note applicant's CO status).

AD 7X-08118 (UD upgraded to GD; applicant erroneously inducted after repeated attempts to secure 3A classification as being married and a father; Selective Service recommended discharge one year after applicant's first request, but additional seven months passed before recommendation implemented).

AD 7X-05787 (DRB found prejudicial error where record was silent concerning counseling and where rehabilitative transfer was not waived; disciplinary record consisted of two Art. 15s, one SCM, one SPCM, and 116 days lost time).

AD 7X-05278 (UD upgraded to GD; applicant had spent nine months in a mental hospital prior to induction but draft board ignored information; due to continual problems stemming from his inability to adjust or learn basic skills, applicant was recycled three times and finally went AWOL).

AD 7X-04789 (UD upgraded to GD because notice to applicant of impending separation cited "inability to adjust to Army life" and C&B diagnosis may have led applicant to believe he was being separated for unsuitability which, at worst, carries discharge of GD).

AD 7X-04209 (discharge was based primarily upon events, actions, and charges that were shown to be unsupported by Art. 32 investigation).

AD 7X-03612 (a civil conviction for possession of marijuana included, although evidence submitted indicating no criminal proceedings for alleged offense). *See* ND 7X-02556 (similar).

AD 7X-02996A (misconduct stemmed entirely from sincere objections to war; request for a CO discharge had been denied three times, although applicant had done everything possible to convince Army of his sincerity).

AD 7X-00070 (applicant inducted as noncombatant and later given UD/misconduct for frequent incidents because he refused to continue training and went AWOL; UD upgraded to GD because "acts of indiscipline were misguided attempts to correct the situation after his request for legal discharge as C/O was denied"). *See* AD 7X-00248 (same); AC 77-05274 (BCD to GD).

2. AIR FORCE DRB

FD 79-00840 (UD upgraded to HD because applicant was erroneously enlisted, having previously been medically discharged from Coast Guard for mental illness associated with alcohol abuse; recruiters were aware of applicant's prior discharge and failed to investigate details adequately).

FD 79-00190 (GD upgraded to HD where applicant had not been properly counseled by his commander, nor administered nonjudicial punishment, nor court-martialed for any offense for which he was discharged; not all available rehabilitative efforts were made prior to processing for discharge).

FD 78-01997 (applicant's rights prejudiced when commander failed to advise him in writing that he was being recommended for less than honorable discharge, as required by discharge directive).

FD 77-01984 (UD upgraded to HD because record failed to show that legal review or commander's review was made to insure that offense chargeable under U.C.M.J. had been committed; no evidence in record supported charges, and applicant's acquittal at court-martial should not have been considered or mentioned in recommendation for approval of his request for discharge).

FD 77-01660V (applicant's willful disobedience of direct order to report for duty motivated by conscience and objections to participation in Vietnam War; record included two years of outstanding service including one year in Southeast Asia prior to discharge).

3. MARINE DRB

MD 79-02481 (GD upgraded to HD because MARCORSEPMAN para. 6002.20 authorized HD for recruits administratively discharged prior to completion of recruit training; applicant was suffering from inguinal hernia at time of enlistment that was diagnosed by military physicians within two weeks of applicant's enlistment; applicant refused to undergo surgery and was discharged for COG/erroneous enlistment).

MD 79-01432 (Marine with final average conduct mark of 4.0 and final average duty proficiency mark of 3.0 should, under MARCORSEPMAN para. 6003.1b, have received HD).

MD 78-04777 (recomputation of applicant's final average conduct and proficiency marks showed them to be 3.975 for conduct and 3.975 for proficiency, or 4.0 and 4.0 when computed to the final tenth of a point as required by IRAM para. 4008.5).

MD 78-03676 (final conduct and proficiency marks of 2.5 and 1.9 were not supported, as required by MARCORSEPMAN para. 6004.3, by entries on page 11, 12, or 13).

MD 78-03540 (GD upgraded to HD where applicant had revealed extensive criminal record and probation status to recruiter, but was nevertheless enlisted; additional arrests and convictions were disclosed and applicant was administratively discharged, although his drill instructor had recommended retention).

MD 78-01420 (mark assigned for conduct was based on SPCM that was later disapproved and was too low to reflect period in which there were no violations of the U.C.M.J.).

MD 78-01290 (nothing in applicant's service record substantiated inference of disciplinary problems warranting GD; Board found marks assigned upon discharge to be punitive in nature).

MD 78-01198 (UD upgraded to GD because notice of recommendation for administrative discharge stating that process "could lead" to "a General Discharge under honorable conditions" was inadequate and could have led applicant to believe that he would receive at worst a GD).

MD 78-00946 (UD upgraded to GD because applicant's objections to war mitigated his missing 32 scheduled reserve drills, even though he failed to complete application for CO status).

MD 78-00940 (IRAM para. 4008 authorized a conduct mark of zero only for GCM conviction or for desertion; applicant received a zero in conduct despite not having deserted nor having had a GCM).

MD 78-00610 (two 3.0 conduct marks in twelve-day period prior to transfer were not justified nor reflective of applicant's thirteen months of service in Vietnam).

MD 78-00295 (UD upgraded to GD because applicant received no formal counseling).

MD 78-00171 (conduct marks of 3.0 and 3.6 awarded within one month, without indication in record that applicant was guilty of any infractions; Board held that the low marks, lacking any apparent justification, should be disregarded). *See* MD 78-00940 (similar).

MD 78-0104 (applicant's request for discharges GOS showed 58 days UA instead of the actual 28 days; error undetected by the SJA).

MD 77-03809 (IRAM suggests mark of 2.3 for not more than one SCM or 2 NJPs involving confinement or reduction in grade, or for negative performance in human relations; applicant was assigned 2.3 on record of 1 NJP and no courts-martial; Board found no record of negative performance or attitude in human relations by applicant except for statements made in discharge package).

MD 77-03748 (applicant had only eleven days creditable service between induction and admission to hospital and no marks until day of discharge, when he was assigned a 2.0; Board found the mark inconsistent with IRAM para. 4008.6 and punitive in nature).

MD 77-02896 (applicant's final conduct mark of 2.0 was not justified by any misconduct of record and should not be considered).

MD 77-00357 (UD upgraded to GD because applicant's acts of AWOL and missing movement resulted from serious objection to war; failure to apply for CO status excused because attributed to ignorance of procedure).

MD 76-52197 (CO's report contained extract of court-martial conviction for sale of drugs which failed to show that conviction had been reversed on review).

MD 7X-06053A (no evidence of charges brought before a court-martial in applicant's service record; conduct mark accompanying improper rank reduction was also considered improper and was ignored in recomputing average marks).

MD 7X-05167 (UD upgraded to GD because applicant received no counseling or rehabilitative efforts).

MD 7X-04052 (applicant had a diagnosed neurosis at time of enlistment, making him ineligible for service; failure of recruiter, who was aware of applicant's psychiatric history, to investigate further constituted either negligence or intentional failure to follow procedures; enlistment was erroneous and voidable by either applicant or government).

MD 7X-01902A (UD upgraded to GD on grounds that it was inequitable to discharge applicant with UD because of homosexuality which he had made known at the time of induction).

MD 7X-00153 (inappropriately low marks on last day). *See* ND 7X-03139A (similar).

4. NAVY BCNR

NC 78-03522 (GD upgraded to HD because BCNR found applicant who had enlisted with an AFQT score of 36 was unsuited to military life).

NC 78-02778 (average conduct mark was result of three marking occasions, the one on which applicant received a poor mark covering a period of nine days at beginning of applicant's hospitalization; Board noted that conduct marks are not generally issued for periods less than thirty days, that unfavorable marks are generally supported by disciplinary actions, that applicant's record contained no evidence of a disciplinary action, and that his medical condition explained his substandard performance over the nine-day period).

NC 78-02256 (BUPERSMAN 3410150.8(b)(1) requires a behavior grade report if a member's service record is closed out after 90 days of the current reporting period have elapsed; low grade received by applicant was not required because 90 days had not elapsed).

NC 77-06080 (voided discharge changed to GD and applicant credited with two years service because of recruiter's participation in concealment of applicant's prior criminal record).

NC 77-03378 (BCD upgraded to GD because of applicant's illiteracy (second grade education) and borderline intelligence (IQ 74)).

NC 76-02666 (the low marks assigned after decision to discharge applicant for unsuitability should be omitted from consideration).

5. NAVY DRB

ND 79-01902 (BUPERSMAN 3410150.10 states that a 2.0 or 1.0 is justified based on unsatisfactory conduct, disliking and flouting authority, undependability, repeated commission of minor offenses, or conviction of a major offense; Board found no page 13 entry in SR to substantiate the 2.0).

ND 79-00696 (numerical marks being higher than the standards set in BUPERSMAN 3410150.15, reliance on the letter marks is not appropriate).

ND 79-00666 (presumption of regularity was invoked to require that marks missing from applicant's service record for his first 20 months of service were sufficiently high to warrant HD).

ND 78-02322 (discharging command failed to comply with BUPERSMAN 3410150.12 requiring that adverse matters be referred for statement of the member and endorsed by the commanding officer, and that, if the member does not desire to make a statement, a page 13 entry be prepared and signed by the member stating this). *See* AD 77-10420, MD 78-01290, ND 79-02479, ND 79-02444, ND 79-00539, ND 79-00466, ND 79-00446, ND 78-02429, ND 78-00107, ND 7X-05685A, ND 7X-01766A (same).

ND 78-02256 (BUPERSMAN 3410150.13 suggests marks of 2.6 or 2.8 when a servicemember is occasionally lax in obeying commands/regulations, is of questionable dependability, or has not had more than one SCM conviction or more than two NJPs during the period of evaluation).

ND 78-00796 (upgraded to HD because commander had awarded applicant's conduct marks in violation of the guidelines provided in regulations). *See* ND 79-05605, ND 78-01476, ND 78-00726, ND 78-00357, ND 78-00283, ND 78-00091, ND 7X-04027 (similar).

ND 78-00444 (discharge issued while applicant was serving a sentence deprived him of rehabilitative effects of confinement).

ND 78-00107 (2.0 grade in military behavior was not adequately justified and was based, at least in part, upon an earlier NJP and therefore "duplicious" with the military behavior grade assigned the previous month).

ND 77-02280 (applicant applied for a CO discharge, but Navy delayed so long in approving it that command discharged him on other grounds in the meantime).

ND 7X-04181A (GD upgraded to HD because applicant's last set of marks was a result of the character and behavior disorder for which he was discharged and should be eliminated from consideration).

ND 7X-0097A (improper discharge procedures when the applicant waived his rights on the condition that he would receive a GD and the CNP failed to approve a GD).

APPENDIX 12B
COMPARISON OF NDRB AND ADRB RATING POLICIES

A. NDRB: Administrative Bulletin No. 16, 30 Aug. 1979

. . . In reviews in which . . . marks are substantial or determining factors affecting the type of discharge, it is essential that records of proceedings address the propriety and equity of the marks recorded in service records.

Where marks are not matters of issue, it is sufficient to include a statement . . . to the effect that the Board has examined the marks in the context of [cited regulations] effective at the time of discharge. . . .

Where marks are matters of issue . . . [f]indings regarding the issue must then be made so as to establish all the facts pertinent to the issue. . . .

B. ADRB SOP, Annex 0-1, SFRB Memo 6-79, 15 Aug. 1979 (*See also* App. 15C *infra*.)

. . . The following abbreviations will be used [for DRB report]:

Excellent	EX
Satisfactory	SAT
Good	GD
Fair	FR
Poor	PR
Unsatisfactory	UNS
Unknown	UNK
No entry	NE

2. Averaging rating as follows:

(a) Where the rating period is covered by a DA Form 2166-4, the most prevalent adjectival rating will be assigned as the representative rating for the period.

. . . If there is a split, the higher rating will be reflected. If there is a three way split, the middle rating (Above Average in the example) will be assigned as the rating for the period. If each of the 6 areas is rated differently, the rating reflected will be "Average." The following abbreviations will be used:

Oustanding	OSTDG
Excellent	EXC
Above Average	AB AV
Average	AVER
Below Average	BL AV
Unsatisfactory	UNS

(b) When the rated period is covered by a DA Form 2165-5 or DA Form 2166-5A, the numerical rating from section H, DA 2166-5 or section I, DA 2165-5 will be entered for the period.

(c) Where there are duplicative or overlapping ratings covering the same period of time, the higher rating will be used.

(d) If there are no entries or the record has been destroyed, the NE entry will be made for the entire period of service as a single line entry.

(e) Calculating periods covered.

C. AUTHOR'S DISCUSSION

The Army DRB resolves all doubt in favor of the applicant on all issues. ADRB SOP, Annex F-1, para, 1.h, 44 Fed. Reg. 25,068 (Apr. 27, 1979). Other common sense approaches to Army ratings appeared in the instructions issued during the Special Discharge Review Program (SDRP). *See* Ch. 23 *infra*; 4 MIL. L. REP. 6017, 6034-5 (1976). While these instructions apply only to the liberal SDRP, they might be useful by way of analogy, particularly the concepts of "looking behind" ratings and "overall ratings."

Overall Ratings. During the SDRP, the ADRB did look to the general ETS criteria for guidance in non-ETS cases. ADRB Memo. (Apr. 11, 1977) (discussed at 4 MIL. L. REP. 6017, 6035 (1976)).

AR 635-200, para. 1-9d(2) provides that a member's service will be characterized as honorable where the servicemember has "conduct ratings of at least 'Good' " and "efficiency ratings of at least 'Fair'."

The Army DRB memorandum indicates that the servicemember's ratings will be "totaled" and "averaged" to arrive at a rating in each category that characterizes the entire period of service.

Looking Behind Ratings. Low ratings may not always be an accurate reflection of conduct and efficiency during the entire rating period. The Army DRB memo of April 20, 1977, 44 Fed. Reg. 25,103 (Apr. 27, 1979) implicitly recognizes this problem and allows for "looking behind" the ratings to determine a "believable pattern of recording the . . . [conduct and efficiency] of an individual." Typical is a last entry of unsatisfactory coincidental with the awarding of a UD even though the records clearly suggest that a higher rating is appropriate.

Significantly, the Army Pre-Review Checklist instructs the preparer/analyst to "Disregard CON/EFF ratings at discharge, how many MOS [months] SVC was CON below GOOD _____, EFF below FAIR _____ . . . ." The Army DRB memorandum of April 11, 1977 emphasizes "the months of service that conduct and efficiency ratings, *prior to the last ratings given which were related to the final discharge procedure*, were below those necessary for award of an honorable discharge had a normal tour been completed." [Emphasis added.] *See also* Testimony of Secretary of Army Alexander (reported at 4 MIL. L. REP. 6034 (1976)).

APPENDIX 12C
MISCELLANEOUS REGULATIONS

A. ADRB SOP, Annex 0-1, SFRB Memo 3-79, 4 Apr. 1979, 44 Fed. Reg. 25,098 (Apr. 27, 1979) [Excerpts]

1. . . . paragraph 1-9(d)(2) of AR 635-200, as it read prior to 19 May 75, precluded the exercise of discretion and mandated an Honorable Discharge for any servicemember discharged by reason of ETS who . . . had:

a. conduct ratings of at least "GOOD."
b. efficiency ratings of at least "FAIR."
c. no conviction by a general court-martial and
d. not more than one conviction by special court-martial.

2. . . . characterization of other than ETS discharge is governed by specific guidance contained in the chapter of AR 635-200 which authorized applicant's separation prior to ETS, as well as the more general guidance of chapter one.

B. AR 635-200, ch. 1 [Excerpts]

(1) . . . Issuance of an honorable discharge will be conditioned upon proper military behavior and proficient performance of duty during the member's current enlistment of current period of service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability and has been cooperative and conscientious in doing his assigned tasks, he may be furnished an honorable discharge. Where there have been infractions of discipline, the extent thereof should be considered, as well as the seriousness of the offense(s). A member will not necessarily be denied an honorable discharge solely by reasons of a specific number of convictions by courts-martial or actions under Article 15 of the Uniform Code of Military Justice. It is the pattern of behavior . . . which should be considered the governing factor. . . .

(2) . . . an honorable discharge may be furnished when disqualifying entries are outweighed by subsequent honest and faithful service. . . . [W]hen, in the opinion of the office effecting discharge, these [offenses] have not been too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge may be awarded. When there is doubt as to whether an honorable or general discharge should be furnished, the doubt should be resolved in favor of the individual.

(3) Where otherwise ineligible, an individual may receive an honorable discharge if he has during his current enlistment period of obligated service, or any extension thereof, received a personal decoration, or is separated as a result of a disability incurred in line of duty.

(4) Regardless of previous record, a former prisoner with a suspended discharge who was restored to duty to complete an existing enlistment or obligation to serve will be furnished the type of discharge certificate to which his service subsequent to restoration entitles him.

CHAPTER 13
ALCOHOL ABUSE

13.1 INTRODUCTION

13.1.1 MAGNITUDE OF THE PROBLEM

In 1976, the General Accounting Office made several revealing estimates on the extent of alcohol abuse by active duty personnel.[1] Of enlisted Army personnel, 32% are heavy or binge drinkers; an additional 35% have drinking problems. Of enlisted Navy personnel, 37% have drinking problems described as critical, very serious, or serious.

The principal reasons noted for alcohol abuse are boredom, job dissatisfaction, and the easy availability of alcohol. Alcohol abuse results in lost duty time (an estimated 2,200 staff-years in the Army in 1973 alone) and the issuance of less than honorable discharges to those unable to meet required standards of behavior because of their alcohol use. Such discharges are among the easiest to upgrade.

13.1.2 DOD POLICY ON ALCOHOLISM UNTIL 1972

Between 1948 and 1959, chronic alcoholism was a basis for administrative separation with an Undesirable Discharge (UD) for unfitness.[2]

[1] GAO Report No. MDW-76-99, Alcohol Abuse Is More Prevalent in the Military than Drug Abuse (1976).

[2] *See* Memorandum from Secretary of Defense (Aug. 2, 1948).

Recognizing alcoholism as a disease warranting treatment rather than punishment, and realizing that unacceptable conduct might be beyond an alcoholic's control, DoD substantially revised its policy in 1959.[3]

Alcoholism was moved from the unfitness category to the unsuitability category, in which a General Discharge (GD) was the lowest discharge possible. The new policy, however, provided no system of identification and treatment. Since alcohol abuse was still not officially recognized as a mitigating factor when there were acts of misconduct, and since there were no guidelines to provide for consistent handling of the issue in such cases, unfitness discharges continued to be received for conduct grounded in a medical problem.

13.1.3 CURRENT POLICY

On March 1, 1972, Secretary of Defense Melvin Laird issued the first DoD directive expressly on alcoholism;[4] it has been implemented by each service.[5]

The directive established a policy of preventing alcohol abuse, restoring to effective service individuals with problems attributable to alcohol abuse, and humanely treating those who cannot be restored. The directive recognizes that alcoholism is a disease which can be treated and that a servicemember should not be discharged for alcoholism unless (s)he does not actively cooperate in treatment programs. The individual then "may be determined to be unsuitable for further military service and may be administratively separated."[6]

Commanders now have an affirmative duty to identify problem drinkers and to place them in mandatory rehabilitation programs that may offer medical evaluation, detoxification, and professional and peer group counseling.

Signs of potential or actual alcohol abuse include "deteriorating performance, errors in judgment, periods of absenteeism or being unfit for duty, and increasing or repetitive entries into service records, health records, or military records relating to alcohol abuse."[7]

Although the directive still permits disciplinary action to punish conduct resulting from alcohol abuse, it suggests "judicious use of suspended punishment to channel an alcoholic into an effective treatment program."[8]

Except in the Army, where an Honorable Discharge (HD) is mandated,[9] an unsuitability discharge due to failure to complete an alcohol rehabilitation program can result in either an HD or a GD, depending on the quality of service.[10]

13.2 PREPARATION OF CASES

Cases involving alcohol abuse may be divided according to whether or not the official reasons for discharge mention alcohol abuse. Some discharges specify, *e.g.*, unsuitability for failure to complete alcohol rehabilitation, unfitness for chronic alcoholism, undesirable habits and traits (where record specifies alcoholism) or court-martial for drunkenness.[11]

In many other discharges, alcohol abuse may be an unnamed contributing factor, *e.g.*, in discharges for unfitness or misconduct due to frequent involvement, and discharges issued in lieu of courts-martial for AWOLs.

13.2.1 DISCHARGES OFFICIALLY FOR ALCOHOL ABUSE

13.2.1.1 Case Theory

Current standards for discharge have, since March 31, 1978, been used to measure the equity of past discharges.[12] Current DoD policy towards alcohol abusers mandates rehabilitation; if that fails, HDs or GDs are to be awarded.[13] The policy is applied by each service's DRB.

The Army DRB has stated the question leading to retroactive application of current standards as "under current policies concerning alcoholism, would the applicant receive the same type of separation today?"[14] It has held that, in light of Army equity standards, the DRB must consider this question.[15] The Army BCMR recognizes the Army's "liberal view . . . relative to alcoholism."[15a]

The Naval DRB's language is very similar to the Army DRB's: "By current standards he would be offered rehabilitation and if not successful, discharged

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[3] DoD Dir. 1332.14, 14 Jan. 1959 (implemented by each service branch on April 14, 1959).

[4] DoD Dir. 1010.2, 1 Mar. 1972, Alcohol Abuse by Personnel of the Department of Defense, reprinted in 32 C.F.R. Part 62.

[5] *See* App. 13A *infra*.

[6] DoD Dir. 1010.2, 1 Mar. 1972, para. IV.A.2.

[7] DoD Dir. 1010.2, 1 Mar. 1972, encl. 4, para. 1.A. Even though these signs may be subtle, commands may be held responsible for identifying them. *See* ND 78-00098 (digested in App. 13C *infra*).

The Judge Advocate General of the Army, in a 1975 opinion, named "three key determinants" that must be considered by a prospective "initiator of elimination action for alcoholism" in the Army: "1. Is the subject unsuitable 'by reason of chronic alcoholism' or is it an 'occasional drunken episode'? 2. If the former, is the member 'chronically ineffective'? 3. If so, has he failed to cooperate with or succeed in an alcohol rehabilitation program?" DAJA-AL 1975/4903, 9 Sep. 1975.

[8] DoD Dir. 1010.2, 1 Mar. 1972, para. IV.A.1. The directive does not preclude a UD for misconduct being issued to a rehabilitative failure, though such an action is uncommon. DRBs routinely discount acts of misconduct attributed to alcoholism when determining whether or not discharges for misconduct were appropriate.

[9] AR 635-200, ch. 9.

[10] BUPERSMAN Art. 3420184; MCO 1900.16B, para. 6016; AFM 39-12, para. 2-4e.

[11] *See* App. 13A *infra* (regulations routinely used in discharging servicemembers for alcoholism).

[12] Although DRBs refer to the current standards rule as "discretionary," the rule must be applied retroactively within the framework of DoD Dir. 1332.28, 31 Mar. 1978, encl. 3, para. c.1, 32 C.F.R. § 70.6(c)(1).

[13] *See* § 13.1.3 *supra*.

[14] AD 78-01907.

[15] *Id. See also* AD 77-07689; AD 77-09549; AD 78-00853 (cases in which other language is used to describe retroactive application of current standards). Army equity standards are contained in AR 15-180, para. C-3a, 32 C.F.R. § 581.2, app. C.3.

[15a] AC 78-03888.

as unsuitable."[16] The Navy BCNR accepts the advisory opinion of the USN Alcoholism Prevention Program (which notes that, under current U.S. Navy Policies, attempts are made to treat individuals for alcoholism) and applies current standards retroactively.[17]

The language used by the Air Force DRB is also quite clear: "In the retrospective application of current policy, the applicant would no doubt have been identified, treated and entered into the Alcohol Abuse Control Program";[18] "under current policy [the] applicant would have been treated for alcoholism, rehabilitated or discharged as unsuitable."[18a]

In all cases in which veterans were discharged for alcoholism or alcohol abuse, applicants should request upgrades to HDs and changes in reason for discharge to unsuitability. Although time and money can be saved by requesting only a record review and submitting a brief, a hearing may still be worthwhile in view of the uncertainty that an HD will be awarded in every case.[18b]

13.2.1.2 Sample Contentions[19]

13.2.1.2.1 Contention A (for All Post-March 1, 1972 General Discharges for Unsuitability Due to Alcohol Abuse)

1. The applicant's discharge is inequitable and should be recharacterized to Honorable pursuant to DoD Dir. 1332.28 encl. 3, para. (c) 1 because:

(1) current standards differ in material respects from the policies and procedures under which the applicant was discharged in that they mandate an Honorable Discharge for a servicemember discharged for alcoholism;

(2) current standards represent a substantial enhancement of the rights afforded in such proceedings; and

(3) there is a substantial doubt that the applicant would have received the same discharge if current standards had been in effect at the time of the applicant's discharge since they mandate an Honorable Discharge for those separated for alcoholism.

13.2.1.2.2 Contention B (for All Pre-April 14, 1959 Undesirable Discharges Officially Specifying Alcoholism and All April 14, 1959 to March 1, 1972 General Discharges for Unsuitability Due to Alcohol Abuse)

To Contention A, add the following:

2. The applicant's discharge is inequitable and should be recharacterized to Honorable pursuant to DoD Dir. 1332.28 encl. 3 para. (c) because:

(1) DoD Dir. 1010.2 (1972) ("Alcohol Abuse by Personnel of the Department of the Defense") differs in material respects from the policies and procedures under which the applicant was discharged because, among other things, it requires that a servicemember not be discharged on the basis of alcoholism unless the servicemember does not actively cooperate in a treatment program;

(2) DoD Dir. 1010.2 (1972) represents a substantial enhancement of the rights afforded a respondent in such proceedings; and therefore

(3) if DoD Dir. 1010.2 (1972) had been in effect at the time of the applicant's discharge, there is substantial doubt that the applicant would have been separated before expiration of term of service with a less than Honorable Discharge if (s)he had first been provided adequate treatment for alcoholism.

3. To conclude that Contention #2 is not grounds for recharacterization to Honorable would violate due process and fundamental principles of administrative law because it would be inconsistent with the following cases in which Discharge Review Boards recharacterized pre-1972 discharges for alcoholism to Honorable because of DoD Dir. 1332.28, encl. 3 para. (c)1: AD 77-05088; AD 77-09549; AD 78-01706; FD 78-01007; AD 77-05228; AD 78-00785; AD 78-01907; FD 78-02027; AD 77-07689; AD 78-00853; FD 78-00490.

13.2.1.2.3 Contention C (for All Pre-April 14, 1959 Undesirable Discharges for Unfitness Due to Chronic Alcoholism)

To Contentions A and B, add the following:

4. The applicant's discharge is inequitable and should be recharacterized to Honorable pursuant to DoD Dir. 1332.28, encl. 3, para. (c) 1 because:

(1) DoD Dir. 1332.14 (effective April 14, 1959) differs in material respects from the policies and procedures under which the applicant was discharged because it removed alcoholism as a category of unfitness and as a basis for an Undesirable Discharge;

(2) DoD Dir. 1332.14 represents a substantial enhancement of the rights afforded a respondent in such proceedings; and therefore

(3) there is substantial doubt that the applicant would have received the same discharge if DoD Dir. 1332.14 (1959) had been in effect at the time of the applicant's discharge because the regulation prohibits issuance of an Undesirable Discharge for unfitness due to alcoholism.

13.2.2 DISCHARGES NOT OFFICIALLY FOR ALCOHOL ABUSE

13.2.2.1 Case Theory

In order for the particular arguments presented in this chapter to apply to an applicant's case, a clear relationship must be established between the of-

[16] MD 78-03516.
[17] *See, e.g.*, MC 49-02221; NC 76-01284.
[18] FD 78-02027.
[18a] FD 78-00490.
[18b] *See* § 9.2.7.5 *supra* (selecting a method of case presentation).
[19] *See also* § 13.3.2 *infra* (Contention H — applicable to all alcohol-related discharges).

fenses leading to discharge and alcohol abuse. Once this is established, the applicant's argument generally follows the argument used when alcohol abuse is the official reason for discharge: current standards, which mandate an HD for unsuitability, must be applied retroactively.

The applicant's own statement accompanying the brief is the starting point for such proof. It should, when possible, emphasize evidence that (s)he was or is an alcoholic;[20] evidence of post-discharge recovery or of efforts to seek assistance both in-service and post-service is particularly helpful to an applicant.

Boards are skeptical, however, if the only evidence offered is the applicant's word. Alcoholism is not likely to be totally private. The veteran's story must have corroborating documentation in order to be believable.[21]

13.2.2.2 In-service Evidence

A medical or psychiatric examination referring to or indicating alcoholism is the most readily accepted in-service evidence of alcohol abuse available on official active duty records.[22] Servicemembers were often given periodic medical examinations that might document drinking problems.[23]

Explicit evidence of alcohol abuse is commonly found in a veteran's disciplinary record. The specification of charges may include:

- Drunk on duty;[24]
- Drunk and disorderly;[25]
- Incapacitated for duty due to intoxication;[26]
- Drunk on post;[27] or
- Drunkenness.[28]

Sometimes, offenses are not obviously related to alcohol abuse. Nevertheless, Boards accept patterns of offenses as evidence of alcohol abuse, for example, when records show a "repetitive pattern of unauthorized absence,"[29] a "pattern of misconduct . . . in the [period] prior" to discharge,[30] or offenses "in consonance with [a] diagnosis of alcoholism."[31] Such evidence may suffice, even when the "record is void [as] to the extent" of involvement.[32]

13.2.2.3 Post-service Evidence

Most alcoholics do not recognize the disease in its early stages. A servicemember may not seek treatment nor attribute disciplinary problems to alcohol until several years after discharge.

Particularly when in-service evidence is not overwhelming, documentation of a continuing problem with alcohol or of satisfactory completion of a rehabilitation program is important. Testimony and medical documents showing hospitalization for alcoholism,[33] a letter from mother or friends explaining the seriousness of the current drinking problem,[34] and statements from a pastor and alcohol council administrator have been sufficient evidence.[35] Other potential sources of corroborating testimony are employers, psychiatrists, and therapists.

Documentation of membership in Alcoholics Anonymous or some other alcoholism control program is given great weight.[36] Especially in pre-1972 cases, Boards tend to view post-service records of rehabilitation as indicating that successful in-service rehabilitation (had there been such a program) was highly probable.[37]

Another useful source of post-service evidence is an arrest record for offenses that can be attributed to alcoholism.[38]

13.2.2.4 Pre-service Evidence

Sometimes documentation or testimony can be presented showing that a problem existed prior to an applicant's military service. Instances of being drunk for an induction physical, being expelled from junior high or grade school for drinking, and "doing some drinking" as a pre-service activity have supported some claims of alcohol abuse.[39] Pre-service arrests for public drunkenness, underage drinking, or driving while intoxicated may also provide useful evidence. The waiver of a bar to enlistment can be revealing,[40] and the environment in which the veteran grew up is sometimes significant.[41]

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[20] When possible, the applicant's statement should emphasize that the applicant did not recognize the extent to which alcohol abuse governed his/her conduct until after post-discharge recovery. This will help explain why (s)he did not seek help or admit to alcoholism while in service. Continued alcoholism is not, however, a basis for denying relief. *See* AD 77-09411.

[21] *But see* AD-00628; AD 78-01324; FD 79-00011; MD 78-03184 (applicants' statements found adequate in absence of documentation of alcoholism).

See § 9.1.3.1 *supra* (presumption of regularity). *See also* AD 78-00294; AD 78-00853; FD 79-00011 (cases in which presumption of regularity overcome).

[22] *See, e.g.,* AC 78-03308; AD 78-00934; FC 77-02458 (such evidence accepted as proof).

[23] *See* AD 77-12365. Medical reports are sometimes confusing. A diagnosis might, for example, read "character and behavior disorder manifested in excessive drinking." *See* Ch. 16 *infra* (unsuitability discharges, including those for character and behavior disorders).

[24] *See* AD 77-07689.

[25] *See* AD 77-09257; AD 78-00774; AD 78-01008; FD 78-00596; FD 78-00382; ND 77-02158.

[26] *See* AD 7X-21022.

[27] *See* AC 78-03308; FC 77-02458.

[28] *See* AC 78-02560; FD 78-01255; FD 78-01595.

[29] AD 77-07229; ND 78-00098.

[30] AC 78-02011 (2 SCMs, 3 SPCMs for breaking arrest, breaking restrictions, speaking disrespectfully).

[31] AD 78-00934 (missing bed check, failure to obey lawful order, off limits). *See also* AD 77-10668 (assault, 2-hour AWOL, in town without pass); FD 78-01765 (bounced checks written to liquor store; investigator noted alcohol on servicemember's breath).

[32] *See* FD 78-00436; AD 77-09429.

[33] *See* AD 77-08823; FD 78-00436.

[34] *See* AD 77-09411; AC 78-02011.

[35] *See* AD 78-00294.

[36] *See, e.g.,* AC 78-03308; AC 78-03888; AD 78-02059; FD 78-00382; FD 78-01255.

[37] *See* FD 78-00417; FD 78-00382.

[38] *See* FC 77-02458.

[39] *See* AD 77-08823; AC 78-03888; AD 78-00294; NC 59-01917.

[40] *See* MD 7X-01840 ("drinking" cited on waiver as partial basis for initial bar to enlistment).

[41] *See* FD 78-01007 (particular consideration given to growing up on Indian reservation).

13.2.2.5 Sample Contentions[41a]

13.2.2.5.1 Contention D (for Presenting Evidence of Alcohol Abuse)

1. The applicant's evidence of [here specify evidence] is sufficiently credible evidence to establish that (s)he had an alcohol abuse problem while in service and should have been discharged for alcohol abuse.

2. Failure to reach this conclusion would violate due process and fundamental principles of administrative law because an adverse conclusion is inconsistent with decisions in which similar evidence has been accepted by the Boards to prove alcoholism in: [here insert cases similar to the applicant's[42]].

13.2.2.5.2 Contention E (Retroactive Application of Current Standards, Post-March 1, 1972 Discharges)

1. The applicant's discharge is improper and/or inequitable and should be recharacterized to Honorable because applicant should have been treated for alcohol abuse and attempts made at rehabilitation pursuant to DoD Dir. 1010.2.

2. [Here insert Contention A.[42a]]

13.2.2.5.3 Contention F (Retroactive Application of Current Standards, April 14, 1959 to March 1, 1972 Discharges)

Use Contentions A and B.[43]

13.2.2.5.4 Contention G (Retroactive Application of Current Standards, Pre-April 14, 1959 Discharges)

Use Contentions A, B, and C.[43a]

13.3 EXTENT OF RELIEF

13.3.1 HONORABLE OR GENERAL DISCHARGE

Particularly in Navy, Marine, and Air Force cases, where regulations permit GDs, it is important to use previously decided cases to bolster an application for upgrade.[43]a

If a Board decides to change the reason for discharge to unsuitability, it usually will discount offenses attributable to alcohol and/or the period of service when alcohol abuse was prevalent. The decision of whether to upgrade to an HD or only to a GD is based on the rest of the applicant's record.[44]

When considering the remaining record, a Board generally uses the current standards for determining the character of a discharge to be issued at expiration of a normal term of service.[45]

Factors frequently cited by Boards as supporting full relief include:

- Extensive in-service alcohol involvement;
- Prior HDs;
- Overseas duty;
- Awards;
- Post-service good citizenship; and
- Post-service recovery from alcoholism.

Although this last factor is viewed with particular favor, a continuing problem with alcohol does not bar full relief.[46]

13.3.2 SAMPLE CONTENTION H (APPLICABLE TO ALL ALCOHOL ABUSE CASES)

1. The standards for determining character of service are to be applied to the applicant's overall record of service, excluding, however, those disciplinary actions taken against the applicant and/or those evaluation marks which were related to the applicant's alcohol abuse. An application of these standards would warrant an Honorable Discharge.

2. To conclude that the applicant deserves a less than Honorable Discharge in part because of acts of indiscipline and/or below-average evaluations which were related to the applicant's alcohol abuse is inconsistent with past Board decisions and therefore violates due process and fundamental principles of administrative law. The Board has considered alcohol-related acts of indiscipline and/or below-average evaluations in the following cases which were upgraded to Honorable because all or most of the acts of indiscipline and/or periods of below-average evaluations were related to the applicant's alcohol problem: [here insert cases in which upgrades to HDs were granted on records equal or inferior to applicant's[47]].

[41a] *See also* § 13.3.2 *infra* (Contention H — applicable to all alcohol-related discharges).

[42] *See* § 13.2.2 *supra* (cases explained); App. 13C *infra* (cases listed and digested).

[42a] *See* § 13.2.1.2.1 *supra*.

[43] *See* §§ 13.2.1.2.1, 13.2.1.2.2 *supra*.

[43a] *See* §§ 13.2.1.2.1, 13.2.1.2.2, 13.2.1.2.3 *supra*.

[44] This is true of Air Force and Army Boards; Navy Boards, however, continue to take alcohol-related offenses into account in assessing an applicant's overall record.

Matters excluded from consideration include AWOLs, lost time due to confinement, and even acts of violence (when the applicant can argue that alcohol reduced his/her ability to act with intent). *See, e.g.*, AD 77-12365 (HD after AWOLs of 12, 109, and 183 days); AD 7X-17103 (HD after 6 AWOLs totaling 281 days, military confinement of 283 days); FD 78-00382 (HD after 195 days lost time); FD 78-00897 (HD after AWOLs of 1, 40, and 122 days); ND 76-01284 (GD after UAs of 107 and 114 days); AD 77-05836 (HD after "striking with fist"); FD 78-01007 (HD after "unlawfully striking"); FD 78-02027 (HD after assault).

[45] *See e.g.*, ND 78-00098 (HD granted and unfitness changed to unsuitability, notwithstanding 8 NJPs, because "petitioner's Performance Evaluation Marks so qualify"); AD 77-06880 (applicant's C&E ratings did not warrant "characterization of service as less than fully honorable"). *See* § 5.4 *supra* (list of standards for an HD at expiration of term of service).

Boards occasionally describe alcohol abuse as "mitigating" acts of misconduct, but there is no discernible regularity in their method of applying this term.

[46] *See* AD 77-09411.

[47] *See* App. 13C *infra* (list and digest of cases). Research may also be conducted through the Discharge Index. *See* § 10.1 *infra*. If no

13.3.3 REASON CHANGED TO UNSUITABILITY

Part of the reason for seeking discharge review is to eliminate a stigmatizing reason for discharge. The relief requested should include a change in reason for discharge from "undesirable habits," "unfitness," or "misconduct" to "unsuitability." Such a request may be made on both DD 293 (at Block #7) and DD 149 (at Block #11). This is particularly critical when the reason for discharge may bar access to VA benefits.[48]

A Board should make this change as part of the recharacterization, but only the Air Force and Army Boards consistently do; the Naval DRB and the BCNR do not. When the Navy Boards do change the reason it is usually to "convenience of the government" and rarely to "unsuitability."

13.3.4 AGGRAVATING FACTORS

It is uncertain what factors the Boards consider aggravating, or as militating against full relief. The Naval DRB has violated the requirements established by *Urban Law Institute of Antioch College v. Secretary of Defense*[49] in numerous cases by not stating reasons for not granting full relief, thus making DoD-wide conclusions difficult to draw. In addition, many offenses leading to discharges that Boards later upgrade only to GDs (suggesting that the offenses are considered quite serious) in other cases lead to discharges that are later upgraded to HDs.

When Boards are not convinced of alcohol involvement in applicants' particular acts of misconduct, they do not grant full relief.

13.3.5 PROBLEM AT CORRECTION BOARDS

While DRBs routinely upgrade UDs to HDs, and will even upgrade Bad Conduct Discharges (BCDs) to HDs, BCMRs upgrade only to GD.

This result seems particularly unreasonable when a 1947 court-martial offense for possession and use of intoxicants resulted in a BCD or when a DD was awarded in part for being drunk and disorderly, since these offenses today might not even result in nonjudicial punishment. Even when a BCMR found that "conduct was attributable to the fact that applicant was an alcoholic with probable pathological mental deterioration," and further recognized that the offenses were simply "violations of military rules and regulations and not otherwise serious offenses against society" and that "the continuation of the stigma of a BCD is unjust," it concluded that, "when viewed in the most favorable light, the applicant's overall performance of duty cannot be characterized as honorable."

Each service's Correction Board acknowledges that current standards are more liberal. The Air Force BCMR changes reasons for discharge to unsuitability but the Navy BCNR leaves reasons as misconduct.

BCMRs are guided by the "injustice" standard of 10 U.S.C. section 1552 and not the mandate of DoD Dir. 1332.28.[50] Because the difference in standards is so substantial, every possible criterion for application to or reconsideration by a DRB should be examined before an application is submitted to a BCMR.[51]

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[47] (continued)

cases can be found in which applicants with records equal or inferior to the present applicant's record were granted HDs on Board review, Contention #2 of Contention F should be omitted.

[48] *See* 38 C.F.R. § 3.12.

[49] No. 75-0530 (D.D.C. Jan. 31, 1977) *See* § 9.1.3.1 *supra* (details of this case); Ch. 11 *supra* (past board practices).

[50] *But see* Ch. 24 *infra* (federal court review of BCMR decisions).

[51] *See* DoD Dir. 1332.28, encl. 2, para. (b)8. *See also* § 9.2.16 *supra*.

APPENDIX 13A
REGULATIONS

Copies of these regulations are available free from: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310.

Details on obtaining and using regulations are found at Ch. 10 *infra*.

A. REGULATIONS IMPLEMENTING DoD DIR 1010.2 ALCOHOL ABUSE BY PERSONNEL OF THE DEPARTMENT OF DEFENSE (MARCH 1, 1972)

1. **ARMY:** AR 600-85 Alcohol and Drug Abuse Prevention and Control Program (May 1, 1976)
2. **NAVY:** OPNAVINST 6330.1 Alcohol Abuse and Alcoholism Among Navy Personnel (May 29, 1973)
3. **AIR FORCE:** AFR 30-2 Social Actions Program (November 8, 1976)
4. **MARINE CORPS:** MCO 5370.6 Alcohol Abuse by Members of the Marine Corps (August 28, 1972)

B. REGULATIONS UTILIZED IN DISCHARGING ALCOHOLICS

1. ARMY

EFFECTIVE DATES	REGULATION	OFFICIAL REASON	CHARACTER OF DISCHARGE
Apr. 4, 1935, through Jul. 20, 1944	AR 615-360, ¶¶ 51-56; *see also* ¶ 13b.	Inaptitude or undesirable habits or traits of character	Blue unless HD authorized by Board
Jul. 20, 1955 through Mar. 7, 1945	AR 615-368, (20 Jul. 44) *see also* AR 635-360 ¶ 7b.	Undesirable habits or traits of character	Blue
Mar. 7, 1945 through May 14, 1947	AR 615-368 (7 Mar. 45)	Undesirable habits or traits of character chronic alcoholism	Blue
May 14, 1947 through Oct. 27, 1948	AR 615-368 (14 May 47)	Unfitness (undesirable habits or traits of character) — chronic alcoholism	Blue, UD, GD, HD
Oct. 27, 1948 through May 20, 1956	AR 615-368 (27 Oct. 48)	Unfitness — chronic alcoholism	UD
May 21, 1956 through Apr. 14, 1959	AR 635-368 (27 Oct. 48)	Unfitness — chronic alcoholism	UD
Apr. 14, 1959 through Jul. 14, 1966	AR 635-208 (17 Mar. 55) (14 Apr. 59)	Unsuitability — alcoholism	GD, HD
Jul. 15, 1966 through Jan. 14, 1973	AR 635-212 (15 Jul. 66)	Unsuitability — alcoholism	GD, HD
Jan. 15, 1973 through Nov. 21, 1977	AR 635-200 (15 Jan. 73)	Unsuitability — alcohol abuse	GD, HD
Nov. 21, 1977 through 1980	AR 635-200 Chapter 9	Alcohol abuse	HD

2. NAVY

EFFECTIVE DATES	REGULATION	OFFICIAL REASON	CHARACTER OF DISCHARGE
1940 through 1942	BUNAVMAN D-9110(1)(e)	Undesirable — unfitness	Blue
1942 through 1948	BUPERSMAN D-9112(3)	Unfitness — unclean habits	UD
1948 through 1959	C-10312(3)(2)	Unfitness — chronic alcoholism	UD
1959 through Jul. 1, 1969	C-10310(2)(3)	Unsuitability — alcoholism	GD
Jul. 11, 1969 through 1980	3420184.1.a.	Unsuitability — alcohol abuse	GD, HD

3. MARINE CORPS

EFFECTIVE DATES	REGULATION	OFFICIAL REASON	CHARACTER OF DISCHARGE
Jun. 3, 1940 through 1949	MCM ¶ 3-21(2)	Undesirable habits, traits of character	UD
1949 through 1959	MCM ¶ 10275.1.f	Unsuitability — alcoholism	GD, HD
1959 through Sep. 9, 1968	MCM ¶ 13265.1.f.	Unsuitability — alcoholism	GD, HD
June 1972 through Mar. 1978	MCO 1900.16A, ¶ 6016.1.f	Unsuitability — alcohol abuse	GD, HD
Mar. 1978 through 1980	MCO 1900.16B, ¶ 6016.1.e	Unsuitability — alcohol abuse	GD

4. AIR FORCE

EFFECTIVE DATES	REGULATION	OFFICIAL REASON	CHARACTER OF DISCHARGE
Jan. 25, 1951 through Apr. 14, 1959	AFR 39-17	Unfitness — chronic alcoholism	UD
Apr. 14, 1959 through Sep. 1, 1966	AFR 39-16	Unsuitability — alcoholism	HD, [GD]
Sep. 1, 1966 through 1980	AFM 39-12	Unsuitability — alcohol abuse	HD, [GD]

APPENDIX 13B
RESEARCH KEY

Copies of cases cited in supporting briefs should accompany the briefs. Copies are free from: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310.

Discharge Index

The Subject/Category Listing (1978 rev.) incorporated in quarterly Supplement 5 (November 1978) and each subsequent supplement contains the following entries relevant for researching the issue of alcoholism:

A01.29/30	Exempt Evidence (Alcohol/Drug Rehabilitation Program) Improperly Considered
A45.00	Discharge for Unsuitability: Alcohol Abuse
A69.00	Discharge for Alcohol/Drug Rehabilitation Failure
A69.01/02	SM was not Rehabilitative Failure
A69.03/04	SM was discharged prior to Minimal Treatment
A69.05/06	Discharge not properly characterized as Honorable
A69.07/08	Improper Counsel for Consultation
*A93.19/20	Capability to Serve; Factors Which Could Impair Ability to Serve: Alcohol
A00.45/46	SDRP: Drugs or Alcohol

The original Subject/Category Listing (1977) used in the Basic Index and each quarterly supplement through Supplement 4 (August 1978) contains the following entries useful in researching alcoholism (decisional documents written before July 1977 often contain little explanatory information, particularly SDRP documents):

06.00	Alcohol
06.01	Alcoholism
06.02	Alcohol-related offenses
18.06	Extenuating/Mitigating — alcohol related
66.01	Discharge for Unsuitability: alcohol abuse
67.27	SDRP: drugs or alcohol

APPENDIX 13C
DRB/BCMR DECISIONS

A. CASE LISTS

The cases listed here are those referred to in the footnotes accompanying various sections of the text. The lists are not exhaustive of all DRB and BCMR decisions covering the particular points addressed in this chapter. The Research Key (App. 13B *supra*) should be consulted before undertaking additional research.

Section 13.2.1: Discharges Officially for Alcohol Abuse

AC 78-03888; AC 78-03308; AC 61-00546; AD 78-01907; AD 78-01706; AD 78-00853; AD 78-00785; AD 77-09549; AD 77-07689; AD 77-05228; AD 77-05088; FD 78-02027; FD 78-01007; FD 78-00601; FD 78-00490; MC 49-02221; MD 78-03516; NC 76-01153.

Section 13.2.2.2: In-service Evidence

AC 78-03888; AC 78-03308; AC 78-02560; AC 78-02011; AC 61-00546; AD 78-02059; AD 78-01008; AD 78-00774; AD 78-00628; AD 78-00315; AD 78-00294; AD 77-12365; AD 77-11871; AD 77-10668; AD 77-10405; AD 77-09429; AD 77-09411; AD 77-09257; AD 77-08895; AD 77-07689; AD 77-07229; AD 7X-21022; AD 7X-17107; FC 77-02458; FD 79-00011; FD 78-01765; FD 78-01595; FD 78-01255; FD 78-01007; FD 78-00897; FD 78-00848; FD 78-00596; FD 78-00436; FD 78-00417; FD 78-00382; FD 77-02458; MD 7X-01840; NC 76-02911; NC 59-01917; ND 78-00098; ND 77-02158; ND 76-01284.

Section 13.2.2.3: Post-service Evidence

AC 78-03888; AC 78-03308; AC 78-02011; AD 78-02059; AD 78-00294; AD 77-09411; AD 77-08823; FC 77-02458; FD 78-01255; FD 78-00436; FD 78-00417; FD 78-00382; MD 78-03184.

Section 13.2.2.4: Pre-service Evidence

AC 78-03888; AC 61-00546; AD 78-01086; AD 78-00294; AD 77-08823; FD 79-00011; FD 78-01007; MD 7X-01840; NC 59-01917.

Section 13.3: Extent of Relief

AD 78-02059; AD 78-01907; AD 77-12365; AD 77-09411; AD 77-06880; AD 77-05836; AD 7X-17103; FD 78-02027; FD 78-01007; FD 78-00897; FD 78-00417; FD 78-00382; ND 78-00098; ND 76-01284.

B. DIGESTS OF CASES RELIED UPON

1. ARMY

AC 61-00546 (1945 DD (WDOLO) upgraded to GD under current standards and because "it is reasonable to presume that [applicant's] court-martial offense was attributable to his overindulgence in alcohol," given preservice and in-service alcoholism; NP evaluation diagnosed chronic alcoholism).

AC 78-02011 (1953 BCD/GCM (17-day AWOL) upgraded to GD because pattern of misconduct in 15 months prior to conviction was consistent with alcoholism and BCD appeared excessive; 2 SCMs; 3 SPCMs for breaking arrest, breaking restriction, and speaking disrespectfully).

AC 78-02560 (1945 DD (in part, drunk and disorderly) upgraded to GD; post-GCM diagnosis of

alcoholism; posttrial review recommended clemency because offenses were "probably committed because of applicant's propensity for liquor"; 5 SPCMs for drunkenness, wrongful use of government property, FTR, breach of arrest, willful disobedience).

AC 78-03308 (1946 DD (10-day AWOL) upgraded to GD because, "in retrospect, consideration in mitigation should be given to . . . the relatively minor nature of the offenses [which] stemmed from his chronic alcoholism and appears to lessen somewhat his culpability"; psychiatric diagnosis of chronic, severe alcoholism; 2 SCMs; 1 SPCM for drunkenness in uniform and drunkenness at post).

AC 78-03888 (1946 DD (larceny) upgraded to GD under current standards; record of trial included testimony that offense was committed while drunk; other evidence of alcoholism contained in applicant's affidavit, membership in AA, and statements from state hospital).

AD 77-05088 (1961 GD for unsuitability (alcoholism) upgraded to HD under current standards; 3 Art. 15s).

AD 77-05228 (1960 GD for unsuitability (alcoholism) upgraded to HD under current standards; offenses "basically mitigated by alcoholism"; 1 Art. 15 for 2-day AWOL; 3 SCMs for 1-day AWOL, drunkenness on duty, and DOLO; 1 SPCM for FTG).

AD 77-05836 (1975 GD for unsuitability (alcohol abuse) upgraded to HD because disciplinary record was sufficient to warrant upgrade; 3 Art. 15s for assault, drunken driving, and absence from formation; 16 days lost time).

AD 77-06880 (1973 GD for unsuitability (alcohol abuse) upgraded to HD because C&E ratings (EXC/EXC and GD/FAIR) and misconduct were insufficient to warrant less; 1 Art. 15 for drunkenness on duty).

AD 77-07229 (1975 UD for GOS (10-, 2-, and 4-day AWOLs, FTG) upgraded to GD because offenses were relatively minor in nature and repetitive pattern of unauthorized absence was associated with alcohol abuse through applicant's testimony; 4 Art. 15s for 6-, 5-, and 1-day AWOLS, FTG, and DOLO; 1 SPCM for 24-day AWOL).

AD 77-07689 (1969 GD for officer resignation upgraded to HD because of "changed standards and mores and the possibility that the Army should have given the applicant medical attention for his alcohol abuse problem"; 2 Art. 15s for drunkenness on duty, wearing uniform while intoxicated; applicant resigned in lieu of GCM for FTG, failure to obey regulation, and 2 specifications of drunk and disorderly and drunk in station).

AD 77-08895 (1956 GD (previously upgraded from UD) for habits or traits upgraded to HD based on overall record and possible alcohol problems; in-service evidence of alcoholism in statements by command; 3 Art. 15s for AWOL and FTG; 1 SCM for FTG; 1 SPCM for 30- and 70-minute AWOLs, FTG, and breaking restriction).

AD 77-08823 (1970 UD for misconduct (civil conviction for robbery of auto) upgraded to GD based on deprived background, low aptitude scores and alcoholism; applicant testified that he had been sent home twice for showing up drunk for induction physical and hospitalized several times for alcoholism; 24-day AWOL).

AD 77-09257 (1974 UD for GOS (drunk and disorderly, assault) upgraded to GD because drinking mitigated the indiscipline; 5 Art. 15s for 7-day AWOL, unlawfully striking, FTG, and drunk and disorderly; 1 SPCM for 29-day AWOL; 100 days lost time).

AD 77-09411 (1973 UD for GOS (apparently 3 AWOLs) upgraded to HD because drinking problem offset minor offenses; evidence of alcoholism in medical records and in letter from mother describing current alcoholism; 4 Art. 15s for absence from duty and FTG).

AD 77-09429 (1971 BCD issued by SPCM (unspecified) upgraded to GD because alcohol abuse was partially mitigating for acts of indiscipline; 4 Art. 15s; 3 SPCMs for unspecified reasons (apparently, in part, 8 periods of AWOL); 393 days lost time).

AD 77-09549 (1958 GD for unsuitability (alcohol abuse) upgraded to HD based on current standards; 3 Art. 15s for drunkenness on duty, drunkenness in public, and FTR due to being drunk; 2 SCMs for 6-day AWOL and drunk and disorderly; 40 days lost time).

AD 77-10405 (1965 UD for unfitness (frequent incidents) upgraded to GD because "excessive use of alcohol could have been contributing factor resulting in the offenses that led up to the applicant's separation"; evidence of alcoholism in applicant's testimony, psychiatric evaluation, disciplinary record; 6 Art. 15s for missing bed check, misappropriation of vehicle, absence from duty, DOLO, and drunkenness; 1 SCM for disrespect; 3 SPCMs for AWOL, FTG, DOLO; 109 days lost time).

AD 77-10668 (1964 UD for misconduct (frequent incidents) upgraded to GD, in part because "alcohol could have been a contributing factor resulting in offenses that led up to discharge"; 4 Art. 15s for assault, missing bed check, 2-hour AWOL, and in town without pass; 1 SPCM assault).

AD 77-11871 (1974 UD for unfitness (frequent incidents) upgraded to HD because "command took arbitrary and capricious action in discharging applicant," given limited number of moderate infractions and lack of rehabilitative efforts; 3 Art. 15s for absence from duty and DOLO; 30 counseling sessions (14 for bad checks, 16 for civil offenses)).

AD 77-12365 (1968 UD for GOS (109-day AWOL) upgraded to HD because command could have made better effort to assist applicant with alcohol problem rather than permitting him to continue with the disease; evidence of alcoholism in periodic physical that noted alcoholism and delirium tremens; psychiatric evaluation of "alcoholism, chronic, severe"; 1 Art. 15 for 12-day AWOL; 1 SPCM for 183-day AWOL; both AWOLs considered linked with alcohol abuse).

AD 77-12831 (1973 GD for unsuitability (alcohol abuse) upgraded to HD because "excessive alcohol was a contributing factor"; 7 periods of hospitalization for alcoholism, extensive rehabilitative efforts; 4 Art. 15s for drunk on duty, disrespect, and FTG on 12 days; 4 AWOLs totaling 10 days).

AD 7X-17107 (1968 UD for unfitness (frequent incidents) upgraded to HD because current standards in AR 635-200, ch. 9 (alcohol exemption policy) should be considered because testimony and documents indicated that AWOLs were a direct result of alcohol abuse; 5 SPCMs for 6 AWOLs totaling 281 days; 283 days military confinement).

AD 7X-21022 (1967 UD for GOS (leaving post, unlawfully touch, possession of marijuana) upgraded to GD because "acts of misconduct were related in some way to [applicant's] excess consumption of alcohol"; 3 Art. 15s for abandoning sentinel post, incapacitation for duty due to intoxication, and drunk and disorderly; 1 SCM for assault; 12 days confinement).

AD 78-00294 (1952 BCD issued by SPCM (possession of unauthorized pass) upgraded to HD because testimony of applicant that indiscipline was alcohol-related was accepted; history of preservice alcoholism established through applicant's testimony; postservice evidence contained in statements from pastor and county alcohol council administrator; 1 SPCM; 2 10-day AWOLs; 158 days bad time).

AD 78-00315 (1956 UD for unfitness (habits and traits) upgraded to HD given evidence of alcoholism and minor nature of some acts; in-service evidence of alcoholism found in statements to discharge board; 7 Art. 15s; 1 SCM; 1 SPCM; 70 days confinement).

AD 78-00628 (1955 UD for unfitness upgraded to GD because "alcohol abuse may have been mitigating to his acts of indiscipline"; 1 Art. 15 for 14-day AWOL; 1 SCM for FTG, absence; 2 SPCMs for stealing clothing, breaking restriction, and unclean shave).

AD 78-00774 (1949 BCD issued by SPCM upgraded to HD under current standards; 2 Art. 15s for drunk on duty and conduct prejudicial to discipline; 3 SCMs for drunk and disorderly, DOLO, and disrespect; 1 SPCM for disrespect to Major).

AD 78-00853 (1944 UD for habits and traits (alcoholism) upgraded to HD under current standards; applicant's testimony that, while drinking, he was beaten up, lost money and clothes, and then was picked up by police accepted in lieu of missing record).

AD 78-00934 (1955 UD for unfitness (habits and traits) upgraded to HD under current standards given doctor's diagnosis of alcoholism and offenses that were "in consonance with diagnosis of alcoholism"; Art. 15 for missing bedcheck; 1 SCM for public drunkenness; 2 SPCMs for FOLO and off limits).

AD 78-01008 (1959 UD for unfitness (frequent incidents) upgraded to HD; 2 SCMs for drunk and disorderly and FTR; discharge board testimony that "performance, in the absence of alcohol, was excellent").

AD 78-01086 (1951 UD for misconduct (fraudulent entry) upgraded to HD because fraudulent entry was based on prior UD received for a "very minor alcohol abuse problem").

AD 78-01324 (1947 UD for habits or traits upgraded to HD based on applicant's unsworn testimony that offenses were due to alcohol; 2 SCMs for 8-day AWOL and breaking restriction; 2 SPCMs for 22- and 17-day AWOLs).

AD 78-01706 (1945 UD for unfitness (habits and traits) upgraded to HD based on current standards and considering alcoholism as mitigating factor; 2 SCMs for drinking in uniform and 2-day AWOL; 3 SPCMs for drunkenness in uniform, drunkenness at command, and 5-day AWOL).

AD 78-01907 (1951 UD for unfitness (habits or traits) upgraded to HD because under current standards the applicant would not have received the same type of discharge; "alcoholism mitigated the offenses").

AD 78-02059 (1959 UD for unfitness (habits or traits) upgraded to HD since "once alcohol was removed from the record, the applicant's record warranted full relief"; in-service offenses determined to be alcohol-related; 4 Art. 15s for FTR, failure to comply, and disorderly conduct; 1 SCM for FTR; 1 SPCM for 1-day AWOL and drunk and disorderly; post-service record included membership in AA and "substantiates the fact that he was an alcoholic both during and after separation").

2. NAVY

NC 59-01917 (1940 BCD issued by SCM (10¼-hour and 3½-day UAs) upgraded to GD; applicant stated he "had been doing some drinking" and, on advice of a physician, had joined Navy to rehabilitate himself; 2 DCs for 95-minute and 1⅓-day UAs; 2 SCMs for 90-minute and 10¼ hour UAs; 3 CMs for 14¾-hour, 1¼-day, and 4-day UAs).

NC 76-01153 (1947 BCD issued by SCM (possession and use of intoxicants, incapacitation for duty) upgraded to GD because "under current U.S. Navy policies, attempts would have been made to treat individual for alcoholism").

NC 76-02911 (1945 BDC issued by SCM (2-day UA) upgraded to GD because, despite absence of in-service documentation supporting alcohol abuse, "the pattern of short unauthorized absences is typical of alcohol abusers"; 2 DCs (1¼-day and 1-day UAs; 1 SCM for 2¼-day UA; 2 CMs for 14½-hour and 17-hour UAs).

ND 76-01284 (1967 BCD issued by SPCM (107-day UA) upgraded to GD because drinking was involved in all UA offenses; psychiatric evaluation referred to drinking; applicant testified at CM that "he became drunk, found himself UA"; NJP for 16-hour UA; SCM for 5-day UA; 2 SPCMs for 114- and 107-day UAs).

ND 78-00098 (1975 GD for unfitness (frequent involvement) upgraded to HD because "normal curiosity into the causal factors behind the UCMJ infractions should have indicated the growing problem of alcoholism" and because evaluation marks qualified applicant for upgrade; NJPs for 4½-hour UA, sleeping on watch, 2 3½-hour UAs, and 32-hour UA; on consultation with alcohol rehabilitation counselor).

3. MARINE CORPS

MC 49-02221 (1948 BCD issued by GCM (drunkenness) upgraded to GD based on current standards).

MD 7X-01840 (1972 UD for GOS (115-, 48-, and 14-day UAs) upgraded to GD because service and medical records "show a well documented history of problems caused by use of alcohol"; enlistment waiver for drinking; psychiatric evaluation diagnosed habitual excessive drinker; 2 NJPs for assault on NCO, 2- and 14-day UAs; 1 SCM for striking with fist; 1 SPCM for DOLO and disrespect; 2 arrests by civil authorities for disturbing the peace and being drunk).

MD 78-03184 (1957 UD for unfitness (frequent involvement) upgraded to GD under current standards ("today [applicant] most likely would have received an opportunity for rehabilitation before his record reached its degree of severity"); 6 NJPs for 17-hour, 2- and 3-day UAs, FAPD, and D&D; SCM for 18-hour UA; SPCM for breaking restriction and 1- and 7-day UAs).

MD 78-03516 (1958 UD for unfitness (habits or traits) upgraded to GD because "by current standards he would be offered rehabilitation and if not successful, discharged as unsuitable"; discharge board found SM unfit because of inability to control drinking; 5 NJPs for drunk in public, incapacitating oneself for duty, drunk and disorderly, FAPD, and 1-day UA; 1 SCM for 10-day UA; 1 SPCM for 65 days in civilian custody and FOLO; 2 civil convictions for drunk and disorderly and drunk driving; 88 days lost time).

4. AIR FORCE

FC 77-02458 (1954 UD for unfitness (repeated offenses) upgraded to GD; alcohol-relatedness established where 8 incidents of misconduct involved drinking and psychiatric evaluation found drinking "managed to cause his difficulties"; 2 Art. 15s for drunk and disorderly; 1 SCM for drunkenness on duty); 1 SPCM; postservice record included FBI report which "reflects a number of minor arrests for offenses which could be attributable to alcoholism").

FD 78-00382 (1958 UD for unfitness (habits and traits) upgraded to HD because today "applicant would have been rehabilitated or discharged as unsuitable prior to compiling the derogatory record resulting in his discharge"; 2 CMs for disorderliness in quarters, DOLO, and drunk and disorderly; 195 days lost time; postservice evidence of participation in alcohol rehabilitation program).

FD 78-00417 (1953 UD for unfitness (habits and traits) upgraded to HD because today applicant would have been rehabilitated or discharged as unsuitable prior to accumulating the record of misconduct; 3 SCMs for drunk and disorderly, disrespect, and 4-day AWOL; 2 SPCMs for FTR and drunkenness at station; 151 days lost time; record of postservice rehabilitation).

FD 78-00436 (1950 UD for unfitness (habits or traits) upgraded to HD, in part because of "ample documentation that applicant was frequently intoxicated"; 5 Art. 15s for off limits, AWOL, insolence, off limits in drinking establishment, failure to obey standing order, and 17-hour AWOL; 3 SCMs for failure to pay debt, possession of unauthorized pass, and 1-day AWOL; 16 incident reports; postservice medical reports documented acute and chronic alcohol abuse).

FD 78-00490 (1949 UD for unfitness (chronic alcoholism) upgraded to HD under current standards and overall record; 6 SCMs for wrongfully in private Japanese home, FTR, and two 3-day AWOLS).

FD 78-00596 (1970 GD for unfitness (frequent involvement) upgraded to HD because "offenses were alcohol related and overwhelming evidence that [applicant] was an alcohol abuser"; 3 Art. 15s for drunk and disorderly).

FD 78-00601 (1953 UD for unfitness (alcoholism) upgraded to HD under current standards).

FD 78-00848 (1958 UD for unfitness (repeated offenses) upgraded to HD; 2 SCMs for drunk and disorderly).

FD 78-00897 (1972 GD for GOS (122-, 40-, and 1-day AWOLs) upgraded to HD; psychiatric diagnosis of chronic alcoholism; failed rehabilitation efforts; 3 AWOLs and desertion totaling 163 days lost time).

FD 78-01007 (1954 UD for unfitness (repeated offenses) upgraded to HD under current standards; diagnosis of chronic abuser of alcohol "possibly related to his pre-service environment," an Indian reservation; 2 Art. 15s for drunk and disorderly and FTR; 2 SCMs for 8-day AWOL and disorderliness at station; 2 SPCMs for striking with fist and drunkenness at station; 265 days lost time).

FD 78-01255 (1956 UD for civil conviction (drunken driving) upgraded to HD; 1 Art. 15 for drunkenness; 1 SCM for 9-day AWOL; 155 days lost time; postservice membership in AA).

FD 78-01595 (1958 UD for unfitness (repeated offenses) upgraded to HD; 2 Art. 15s for drunk and disorderly and FTR; numerous statements of supervisors documented episodes of drunkenness).

FD 78-01765 (1956 UD for GOS (financial irresponsibility) upgraded to HD; evidence of in-service alcoholism consisted of 5 bounced checks made out to liquor store and investigatory report that noted "odor of alcohol on his breath" during interview).

FD 78-02027 (1967 BCD/SPCM (in part, drunk and disorderly) upgraded to HD, given "retrospective application of current policy"; 1 Art. 15 for leaving appointed place of duty; 1 SPCM for assault and drunk and disorderly).

FD 79-00011 (1951 UD for unfitness (traits of character) upgraded to HD because of applicant's "total inability to control his actions" due to drinking; most records missing but sworn testimony to 2 SCMs for 11- and 20-day AWOLs caused by applicant's returning to hometown to drink).

CHAPTER 14
HOMOSEXUALITY

14.1 INTRODUCTION

Discharges for homosexuality are relatively easy to have upgraded by Discharge Review Boards (DRBs) or Boards for Correction of Military Records (BCMRs). Recent federal court cases[1] support the argument that a servicemember separated for homosexuality must receive an Honorable Discharge (HD) unless the homosexuality has directly affected performance of military duties. A less than honorable discharge may legally be imposed, of course, if other parts of the service record (for example, performance marks) warrant it under the regulatory standards for grading discharges of servicemembers separated at expiration of normal terms of service.

The DRBs and BCMRs have followed the rule of law above in most cases. It is as yet unclear how they will apply a January 1981 revision of military regulations[2] that categorizes instances in which an Under Other Than Honorable Conditions Discharge (UD) may be issued to a servicemember for homosexuality. Most of the categories require that the homosexual conduct directly affect performance of military duties.

The revised directive is vague regarding the authority to issue a General Discharge (GD). The DRBs and BCMRs could conceivably abandon their current practice of upgrading to HD when no impact on the servicemember's military performance has occurred and his/her marks authorize it. Although the revised directive appears to be a step backward, it should still provide relief for many veterans.

The military's right to separate a servicemember for homosexual *acts*, albeit with an HD, has been upheld by the courts,[3] although the military's right to separate on the basis of homosexual *tendencies* is less clear. A federal court has recently held that separation for homosexual tendencies violates the first amendment.[4]

[1] *See* Roelofs v. Secretary of the Air Force, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980); Wood v. Secretary of Defense, 496 F. Supp. 192, 8 MIL. L. REP. 2454 (D.D.C. 1980).

[2] DoD Dir. 1332.14 (C2), 16 Jan. 1981, 46 Fed. Reg. 9,571 (to be codified in 32 C.F.R. Part 41).

[3] *See* Beller v. Middendorf, 632 F.2d 788, 8 MIL. L. REP. 2632 (9th Cir. 1980) (Naval regulations mandating discharge of homosexuals were reasonable and not unconstitutional). *But see* Matlovich v. Secretary of the Air Force, 591 F.2d 852, 6 MIL. L. REP. 2569 (D.C. Cir. 1978) (court held that it had jurisdiction to consider whether a homosexual servicemember's discharge was arbitrary and capricious).

[4] benShalom v. Secretary of the Army, 489 F. Supp. 964, 8 MIL. L. REP. 2338 (E.D. Wis. 1980). *See* § 14.3.1 *infra*.

There are two basic types of cases involving homosexuality:

- Cases in which acts occurred or are alleged; and
- Cases in which tendencies are alleged or preferences are admitted but no acts were performed.

Historically, the services used a more detailed classification system than this.[5] Although only the Navy and Marine Corps continued to use the more detailed system through 1980, it appears in many older cases from all of the services. The classification system for homosexuality formerly used by the services consisted of four classes:

- Class I: included persons who had engaged in one or more homosexual acts accompanied by force, fraud, or intimidation, or involving a child under the age of 16, whether the child cooperated or not;
- Class II: included persons who had engaged in one or more homosexual acts while in the military or had proposed or attempted to do so under circumstances not involving force, fraud, intimidation, or a child (active or passive roles were irrelevant);
- Class III: included persons who exhibited, professed, or admitted homosexual tendencies, or habitually associated with persons known to be homosexuals;
- Class IV: included persons who failed at the time of their enlistment to reveal the fact that they had engaged in one or more homosexual acts prior to service; thereby perpetrating a fraudulent entry into the service.

The January 1981 revision of the basic DoD directive discards the old classification system[6] and the pre-1981 division between homosexual acts (basis for a misconduct discharge) and homosexual tendencies (basis for an unsuitability discharge). "Homosexuality" is now a category of discharge distinct from "misconduct" or "unsuitability." The term "homosexual tendencies" has also been deleted from the directive, but the distinction between acts and tendencies remains significant in discharge upgrading.

Sexual perversion as a basis for a misconduct discharge is treated elsewhere in this manual.[7]

14.2 PREPARATION OF CASES INVOLVING HOMOSEXUAL ACTS

Homosexual acts may lead to either an administrative or a punitive discharge. An administrative discharge will most likely cite "homosexuality" as its grounds.[8] A punitive discharge will involve either a General or a Special Court-Martial and may result in a Dishonorable Discharge (DD) or Bad Conduct Discharge (BCD). Such courts-martial are rare today, although they were quite common in the 1940s.[9] Homosexual acts may also result in resignation for the good of the service in lieu of trial by court-martial, or discharge by reason of a civilian court conviction.

When the underlying cause of a discharge involves homosexual acts, a DRB or BCMR reviews the case under an essentially constant standard, regardless of whether the discharge resulted from resignation in lieu of court-martial, a civilian court conviction, a court-martial conviction, or a misconduct discharge.

The definition of homosexual acts has varied from service to service and from year to year,[10] but at present each service has adopted the following language:

> 1. Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.
>
> 2. Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.
>
> 3. A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.[11]

Homosexual acts can be subdivided according to whether or not aggravating circumstances are involved. If aggravating circumstances are found by an administrative discharge board to exist, the servicemember may be issued a UD. Under current regulations, a UD may be issued if a servicemember attempted, solicited, or committed a homosexual act:

- By using force, coercion, or intimidation;
- With a person under 16 years of age;
- With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- Openly in public view;
- For compensation;
- Aboard a military vessel or aircraft; or
- In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on disci-

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[5] OSD Personnel Policy Board Memo, Discharge of Homosexuals from the Armed Services (M-46) (Oct. 11, 1949) included three classes of cases. In 1974, the Navy added a fourth. The DoD classification system was eliminated by the 1959 DoD Dir. 1332.14, which referred only to tendencies as a basis for unsuitability discharges and acts as a basis for unfitness discharges.

[6] By March 1981, each service had promulgated the DoD directive. *See* App. 14A *infra*.

[7] *See* § 17.8 *infra*.

[8] Before 1976, homosexual acts fell under the "unfitness" category of reasons for discharge in DoD Dir. 1332.14. Between 1976 and 1980, acts came under the "misconduct" category.

[9] The charge generally involved in a court-martial today is a violation of Art. 125 of the Uniform Code of Military Justice (U.C.M.J.) regarding sodomy. 10 U.S.C. § 925. In the Navy, before the U.C.M.J. became law, Articles for the Government of the Navy (AGN) governed court-martial offenses. At least one early case (NC 77-05859) involved a charge of "scandalous conduct tending to the destruction of good morals (oral coition)." *See* AGN B-10, art. 8. *See generally* Ch. 20 *infra* (punitive discharges).

[10] *See* App. 14A *infra* (citations to each service's discharge regulations).

[11] 46 Fed. Reg. 9,577 (Jan. 29, 1981) (to be codified in 32 C.F.R. § 41.13(b)).

pline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.[12]

Although most of the aggravating circumstances are fairly straightforward and were adopted verbatim by each service, the language describing acts committed in "another location subject to military control" might be taken to mean that all, most, or only a small proportion of homosexual acts committed on a base or post qualify as aggravated. The Army's regulation, however, makes clear that committing an act on base is not necessarily an aggravating circumstance.[13] Acts committed in a servicemember's own room, in an empty building, in an isolated part of the base, or in any other situation where the servicemember reasonably expected privacy are thus not aggravating and do not bar an upgrade.

The presence of any of the aggravating circumstances does not automatically bar an upgrade under current standards. The DoD directive says that a UD *may* be issued. The implementing service regulations vary somewhat,[14] but none absolutely bars the issuance of a GD or HD if the "particular circumstances in a given case warrant."[15]

Ten years ago, most servicemembers separated due to homosexual acts received UDs. By 1980, UDs were rarely awarded.[16] Upgrades are now so routine in homosexual discharge cases that a personal appearance hearing may not be necessary to assure an upgrade to HD.[17]

There are three basic theories involved in upgrading cases involving homosexual acts.

First, as interpreted by the federal courts,[18] a less than honorable discharge cannot legally be based upon conduct that does not have a direct and adverse impact on the performance of military duties. Therefore, if a DRB denies an upgrade to HD in such a case, judicial review in federal court can be obtained.

Second, the requirement that an agency such as a DRB be consistent in its decisions when presented with similar situations is a basic principle of administrative law. Thus, Review Board decisions can be cited as precedent. Copies of such decisions are available free from DoD.[19]

Third, the Review Boards are required by their regulations to apply current standards retroactively when such standards enhance the rights of an applicant.[20] Although the current DoD standard is not identical to the standard employed by the courts, it is considerably better in many respects than standards applied over the past 40 years. This is particularly true with respect to veterans whose homosexual acts were not accompanied by aggravating circumstances. For such veterans, the fact of homosexuality is ignored by the Review Boards and their discharges are made consistent with their evaluation marks.

In order to obtain an HD, it is irrelevant whether the veteran actually committed the homosexual acts for which (s)he was discharged. There is consequently no reason for an applicant to contest that homosexual acts were actually committed unless (s)he also wants to have the reason for discharge changed from homosexuality to some other reason.[21]

14.3 PREPARATION OF CASES INVOLVING HOMOSEXUAL TENDENCIES

Through 1980, a discharge for homosexual tendencies usually meant that the military suspected the individual so discharged of being a homosexual but could not prove that (s)he had committed homosexual acts. Exhibiting, professing, or admitting homosexual tendencies or associating with homosexuals

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[12] *See* 32 C.F.R. § 41.13(d)(1).

[13]

> In another location subject to military control pursuant to a finding that the conduct had, or was likely to have had, an adverse impact on discipline, good order, or morale due to the close proximity of other members of the Armed Forces under circumstances in which privacy cannot reasonably be expected.

AR 635-200, para. 15-5a(7) (10 Mar. 1981).

[14] Army: AR 635-200, 105, para. 15-5a (10 Mar. 1981) ("may"). Navy/Marine Corps: SECNAVINST 1900.9D, para. 8a (12 Mar. 1981) ("shall normally be issued"). Air Force: AFM 39-12, IMC 81-2, para. 2-105A (12 Mar. 1981) ("normally . . . will be issued").

[15] 32 C.F.R. § 41.7(i).

"A Discharge Under Other Than Honorable Conditions may be issued in accordance with the guidance on Misconduct found in § 41.7(i). . . ." 32 C.F.R. § 41.13(d)(1). The DoD guidance on characterization of service provides:

> (1) In any case in which a Discharge Under Other Than Honorable Conditions certificate is authorized under this Part, a member may receive a more favorable characterization if, during his/her current enlistment or period of obligated service, or any voluntary or involuntary extension thereof, or period of prior service, he/she has been awarded a personal decoration as defined by his/her Service, or if warranted by the particular circumstances of a specific case.

32 C.F.R. § 41.9(b)(1).

[16] Fiscal Year 1970 marked a major change in the percentage of servicemembers receiving UDs. In FY 1969, the percentage of UDs for homosexual acts and sexual perversion was 54%; in FY 1970, 41%; and in FY 1979, 4.8% (52 of 1,085). 60% were HDs in FY 1979. *See* Army Times, June 25, 1975. *See also* "Discharge/separation of enlisted members by character of service and reason for separation," DMDC-3436, Office of the Assistant Secretary of Defense (Manpower Reserve Affairs and Logistics) (Military Personnel Policy) (April 1980).

[17] A veteran whose records document unblemished service and a homosexual act that did not involve any aggravating circumstances probably does not need to ask for a hearing. In fact, Navy and Marine veterans may be requested by the DRB to give up a hearing. *See* § 14.6.2 *infra*. Personal appearance hearings are very important for all veterans, especially Air Force veterans, if service records are missing. If there is any question about the consensual, nonaggravating nature of the act, or if there is a disciplinary record or poor evaluation marks that could only be explained by the veteran in person, every effort should be made to arrange for a hearing. If a veteran feels that a hearing would be too traumatic to endure, counsel should consider appearing alone. In such a case, the written brief must be complete. *See* Ch. 8 *supra* (details on hearing strategies and options). If there is no hurry, reconsideration criteria (32 C.F.R. § 70.5(b)(8)) may permit a veteran to request a documentary review first and, if full relief is not granted, then to seek a personal appearance hearing.

[18] *See* Harmon v. Brucker, 355 U.S. 519 (1958); *Roelofs*, 628 F.2d 594; Kennedy v. Secretary of the Navy, 401 F.2d 990 (D.C. Cir. 1968); *Wood*, 496 F. Supp. 192; Stapp v. Resor, 314 F. Supp. 475 (S.D.N.Y. 1970).

[19] *See* App. 14B *infra* (digests of selected cases on homosexuality-related discharges). *See also* Discharge Index (additional cases discoverable); § 14.8 *infra*; Ch. 10 *supra*.

[20] *See* 32 C.F.R. § 70.6(c)(1).

[21] *See* § 14.5.1 *infra*.

could, prior to 1981, result in a GD or HD by reason of unsuitability. Before 1959, servicemembers could receive a discharge by reason of unfitness "given evidence of habits or traits of character manifested by . . . homosexuality. . . ."[22] The character of the pre-1959 unfitness discharge was normally a UD.

In 1959, DoD revised its separation regulation, making "homosexual tendencies" a category of unsuitability discharge.[23] The character of discharge for homosexual tendencies was restricted to "an Honorable or General Discharge as warranted by the individual's military record."[24]

In 1981, the discharge for unsuitability by reason of homosexual tendencies was abandoned. The current basis for separation comparable to the old homosexual tendencies discharge is a discharge due to homosexuality accompanied by a finding that "the member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not. . . ."[25] The definition of a homosexual includes a person who desires to engage in homosexual acts.[26] The character of discharge is either a GD or HD depending on the individual's service record.

The DRBs and BCMRs upgrade to HDs in homosexual tendencies cases even more frequently than they do in homosexual acts cases. Therefore, a personal appearance before a DRB is generally not necessary, unless the service record contains a disciplinary record or includes lost time or evaluation marks that would not have supported an HD if the servicemember had completed a normal term of service.[27]

A homosexual tendencies case can be presented under the same general theories as a homosexual acts case.[28] There are two additional arguments available, involving pre-1959 discharges and the legality of the separation.

Veterans discharged before 1959 with UDs for unfitness due to homosexual tendencies, are assured of upgrades to at least GDs under the current standards argument, regardless of their disciplinary records.[29]

It is highly questionable whether the military can, consistent with the Constitution, discharge a servicemember for desiring to engage in homosexual acts. One federal court has already held that such a discharge violates "the First Amendment rights of every soldier to free association, expression, and speech" and the right to personal privacy.[30]

Three potential advantages are available to a veteran who challenges the military's right to separate him/her for homosexual tendencies:

- Such a challenge can provide grounds for a lawsuit in federal court (if the veteran was discharged recently enough to avoid statute of limitations and laches problems) for reinstatement and back pay;[31]
- Such a challenge can support a request to a Board to change the reason for discharge (to a reason like convenience of the government); and
- Such a challenge can increase the chance for an upgrade to HD, especially in cases in which the applicant's marks are low.

In evaluating the service record of a prematurely discharged servicemember, a Board must assume that (s)he would have received exemplary performance marks from the date of discharge until the normal expiration of the term of service.[32] A veteran with relatively low performance ratings during the period of completed service can force a Review Board to find that his/her overall performance ratings exceed the minimum required for an HD by taking the assumed high marks for the period following premature discharge into account in computing a ratings average.

14.4 SAMPLE CONTENTIONS

These sample contentions are to be used by applicants to DRBs for upgrades of discharges for homosexual tendencies or for homosexual acts.

Applicants discharged for homosexual tendencies should use the sample contentions in Contentions A, B, and C below.[33]

Applicants discharged for attempting, soliciting, or committing homosexual acts under clearly aggravating circumstances should use *only* the contentions in Contention B below.[34] Applicants discharged for homosexual acts under circumstances not clearly aggravating should use the contentions in both Contention B and Contention C.[35] In borderline situations, where a DRB or BCMR might consider the circumstances aggravating, contentions should be added to demonstrate otherwise.

14.4.1 CONTENTION A (FOR ALL DISCHARGES FOR HOMOSEXUAL TENDENCIES)

1. The applicant's discharge for homosexual tendencies or admitting to being a homosexual was improper because it violated the First Amendment. *See benShalom v. Secretary of the Army*, 489 F. Supp. 964, 8 MIL. L. REP. 2338 (E.D. Wis. 1980).

2. Because the applicant's discharge was

[22] Secretary of Defense Memorandum, Recommended Standards for Discharge Under the Selective Service Act of 1948 (Aug. 2, 1948), at para. 7(a)(1).
[23] DoD Dir. 1332.14, para. VII.G.6 (1959).
[24] DoD Dir. 1332.14, para. VII.G (1959).
[25] 32 C.F.R. § 41.13(c)(2).
[26] 32 C.F.R. § 41.13(b)(2).
[27] *See* note 37 *infra*.
[28] *See* § 14.2.1 *supra*.
[29] *See, e.g.*, AD 77-07959 (pre-1959 UD upgraded to HD following DRB determination that the Army equity standard, 32 C.F.R. § 581.2, app. C.3, applied and that the sole cause of the original UD was applicant's homosexual tendencies). *See* Ch. 21 *infra*.
[30] benShalom v. Secretary of the Army, 489 F. Supp. 964, 8 MIL. L. REP. 2338 (E.D. Wis. 1980).
[31] *See* Ch. 24 *infra*.
[32] *See* Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977); AD 77-00348; AD 77-07130.
[33] *See* §§ 14.4.1, 14.4.2, 14.4.3 *infra*.
[34] *See* § 14.4.2 *infra*. If such applicants received personal decorations for service or if other particular positive circumstances are present, they should add contentions pointing these things out. *See* note 20 *supra*.
[35] *See* §§ 14.4.2, 14.4.4 *infra*.

improper, the DRB must recharacterize the applicant's discharge to Honorable. *See Giles v. Secretary of the Army*, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980); *Dilley v. Alexander*, 627 F.2d 407, 8 MIL. L. REP. 2324 (D.C. Cir. 1980).

3. In the alternative, if the DRB rejects Contention 2, the DRB should recharacterize the applicant's discharge to Honorable because it must determine the character of the applicant's discharge by applying the same standard used for assessing the service records of those discharged at expiration of term of service to the applicant's service record, and must assume that (s)he would have received exemplary performance ratings from the date the prejudicial error occurred until ETS. *See Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980); *Carter v. United States*, 213 Ct. Cl. 727 (1977); AD 77-00348; AD 77-07130.

14.4.2 CONTENTION B (FOR ALL DISCHARGES FOR HOMOSEXUAL TENDENCIES OR FOR HOMOSEXUAL ACTS)

The following eight contentions may be used to support upgrades of discharges for either homosexual tendencies or homosexual acts. Where specification of one or the other reason is provided for in a contention, the alternatives are enclosed in brackets.

1. Federal courts have held the discharges of a servicemember with a less than Honorable Discharge for conduct that (1) does not result in deficiency in performance of the servicemember's military duty and (2) does not have a direct impact upon military service, exceeds the military's statutory authority and violates due process. *See Harmon v. Brucker*, 355 U.S. 519 (1958); *Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980); *Kennedy v. Secretary of the Navy*, 401 F.2d 990 (D.C. Cir. 1968); *Wood v. Secretary of Defense*, 496 F. Supp. 192, 8 MIL. L. REP. 2454 (D.D.C. 1980); *Stapp v. Resor*, 314 F. Supp. 475 (S.D.N.Y. 1970).

2. The [tendencies/conduct] for which the applicant was discharged consisted of [here state the facts leading to the discharge].[36]

3. The [tendencies/conduct] for which the applicant was discharged (1) did not result in deficiency in performance of duty and (2) did not have a direct impact upon military service within the meaning of the cases cited in Contention 1.

4. In characterizing the applicant's discharge, the discharge authority considered the [tendencies/conduct] for which the applicant was discharged.

5. The applicant's discharge is improper and inequitable because, in characterizing the applicant's discharge, the discharge authority exceeded the military's statutory authority and violated due process by considering the conduct for which the applicant was discharged — conduct which did not result in deficiency in performance of duty and did not have a direct impact upon military service.

6. In view of the validity of Contention 5, the applicant's discharge should be recharacterized to Honorable. *See Giles v. Secretary of the Army*, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980); *Dilley v. Alexander*, 627 F.2d 407, 8 MIL. L. REP. 2324 (D.C. Cir. 1980).

7. Further, the applicant's discharge should be recharacterized to Honorable because if the standards for grading the discharges of those separated at expiration of the normal term of service were applied to the applicant's overall record of service — excluding consideration of the conduct for which the applicant was discharged — an Honorable Discharge would be warranted.[37]

8. Failure to recharacterize the applicant's discharge to Honorable would violate due process and fundamental principles of administrative law. It would be inconsistent with DRB decisions to upgrade to Honorable in the following cases in which (1) the [tendencies/conduct] for which the applicants were discharged affected their military service and the performance of military duties to no lesser degree than did this applicant's, and (2) the quality of their service was inferior to the quality of the service of this applicant: [here state the pertinent case numbers[38]].

14.4.3 CONTENTION C (FOR DISCHARGES FOR HOMOSEXUAL TENDENCIES)

Contention 1 below should be used by all applicants for upgrades of discharges for homosexual tendencies. Contention 2 below should only be used

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[36] The conduct should be described in terms of who, what, and where the homosexual acts occurred according to the military's version of the events, or, if this version is to be contested, according to the evidence to be submitted.

[37] Current regulations for grading discharges of servicemembers at expiration of term of service are:

- Army: AR 635-200, ch. 1 (21 Nov. 1977);
- Navy: BUPERSMAN Art. 3850120 (C 1/80);
- Marine Corps: MCO 1900.16B (C 1, 9 Jul. 1979); and
- Air Force: AFM 39-10, para. 2-5 (IMC 80-1, 20 Jun. 1980).

But see Ch. 5 *supra* (locating regulations in effect at date of a veteran's discharge). The more favorable standard should be used. Although current Army requirements for an HD are not as specific as Navy, Marine, and Air Force requirements, older Army requirements were more specific. *See, e.g.*, AR 635-200, para. 1-9(d)(2) (in effect between Dec. 6, 1955, and May 19, 1975) (a member's service was to be characterized as Honorable under the following standards: "(a) has conduct ratings of at least 'Good'; (b) has efficiency ratings of at least 'Fair'; (c) has not been convicted by a general court-martial; and (d) has not been convicted more than once by a special court-martial"). As of July 7, 1980, only an HD could be issued to Air Force personnel being discharged at ETS for the convenience of the government.

[38] *See* App. 14B *infra* (list and digests of relevant cases). The actual decisional documents may have to be obtained in order to make an accurate comparison. *See also* § 14.8 *infra* (DRB Index categories). If no cases are found in which applicants with service records inferior to the present applicant's were granted upgrades, this contention should be deleted.

by applicants discharged with UDs for unfitness under pre-1959 regulations.

1. The applicant's discharge is inequitable and should be recharacterized to Honorable pursuant to 32 C.F.R. § 70.6(c)(1) because: (1) 32 C.F.R. § 41 differs in material respects from the policies and procedures under which the applicant was discharged; (2) 32 C.F.R. § 41 represents a substantial enhancement of the rights afforded a respondent in such proceedings; and (3) there is substantial doubt that the applicant would have received a less than Honorable Discharge if 32 C.F.R. § 41 had been in effect at the time of the applicant's discharge.

2. As a result of 32 C.F.R. § 70.6(c)(1), the applicant's discharge is inequitable. It should be recharacterized to reflect the grade of discharge that would be issued under the present regulations applicable to servicemembers discharged for homosexuality because (1) current regulations differ in material respects from the policies and procedures under which the applicant was discharged in that an Honorable Discharge is now presumed for and an Undesirable Discharge may not be issued to a servicemember discharged for stating (s)he is a homosexual; (2) current regulations represent a substantial enhancement of the rights afforded a respondent in such proceedings; and (3) there is substantial doubt that the applicant would have received a less than Honorable Discharge if the current regulations had been in effect at the time of the applicant's discharge.

14.4.4 CONTENTION D (FOR DISCHARGES FOR HOMOSEXUAL ACTS NOT INVOLVING AGGRAVATING CIRCUMSTANCES)

1. The current Department of Defense policy on grading discharges of persons separated for homosexuality follows:

> (1) A Discharge Under Other Than Honorable Conditions may be issued . . . if there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act: (a) by using force, coercion, or intimidation; (b) with a person under 16 years of age; (c) with a subordinate in circumstances that violate customary military superior-subordinate relationships; (d) openly in public view; (e) for compensation; (f) aboard a military vessel or aircraft; or (g) in another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.
>
> (2) In all other cases, the character of discharge of a member separated under this provision shall reflect the character of the member's service.

DoD Dir. 1332.14, encl. 8, 46 Fed. Reg. 9,577 (1981) (to be codified in 32 C.F.R. § 41.13 (d)).

2. The regulations cited in Contention 1 (1) differ in material respects from the policies and procedures under which the applicant was discharged; and (2) represent a substantial enhancement of the rights afforded a respondent in such proceedings.

3. Applicant was discharged for homosexuality within the meaning of 32 C.F.R. § 41.13(c).

4. The conduct for which the applicant was discharged involved none of the circumstances listed in 32 C.F.R. § 41.13(c) which would warrant a Discharge Under Other Than Honorable Conditions.[39]

5. The applicant's discharge is inequitable and should be recharacterized to Honorable pursuant to 32 C.F.R. § 70.6(c)(1) because there is substantial doubt that the applicant would have received a less than Honorable Discharge if 32 C.F.R. § 41.13(c) had been in effect at the time of the applicant's discharge.

14.5 SPECIAL ISSUES

14.5.1 CHANGE OF REASON FOR DISCHARGE

When a Board upgrades the character of a discharge, it is occasionally necessary to change the official reason or basis for discharge in order for the two to be legally consistent. For example, a UD for unfitness for homosexual tendencies was possible under pre-1959 regulations. Under current regulations, homosexual tendencies may lead to a discharge for homosexuality — neither unsuitability, nor unfitness. When a veteran with this type of discharge receives an upgrade in character of discharge as dictated by current standards, (s)he should also receive a change in reason for discharge.[40]

In some instances, a Board may change the reason for discharge in order to form the basis for *denying* an upgrade in character of discharge. This occurred at the Naval DRB in a homosexual case in which the reason for discharge was changed from

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[39] If there is any possibility that the conduct for which the applicant was discharged could be considered aggravated, additional contentions will help ensure that the Board cannot find aggravating circumstances. *See* § 14.2.1 *supra* (explanation of aggravating circumstances). A few suggested contentions are:

- Applicant's conduct did not involve assault;
- Applicant's conduct did not involve coercion;
- Applicant's acts were committed under circumstances in which privacy was reasonably expected [add details about the location].

[40] Another example of the necessity of changing the reason for discharge is when a veteran argues that there is insufficient evidence of homosexual acts to warrant discharge on those grounds. If the Board agrees, it must not only upgrade the character of discharge but also change the reason for discharge to "convenience of the government" (COG). *See, e.g.*, FD 78-01699; FD 78-01921; FD 78-02003; FD 79-00043.

"unfitness/homosexual acts" to "misconduct/shirking."[41] There have been allegations of other Boards in homosexual cases voiding veterans' service on grounds of fraudulent enlistment. Either practice may be unlawful.[42]

14.5.2 VETERAN DENIES BEING A HOMOSEXUAL

Some veterans discharged for homosexual acts or tendencies deny that they are homosexual. Veterans in this category may include those who:

- Have consistently denied committing any homosexual act;
- Admitted to participating in such an act but deny being homosexual at present;
- Confessed to doubts about their sexual orientation and were labeled as having homosexual tendencies; or
- Fabricated a confession to get out of the military.

In most cases, HDs will result regardless of whether or not the applicants prove that no acts were committed or that they are (were) not homosexual. Veterans who deny all charges of homosexuality are often vulnerable on factual and procedural grounds. Service records contain allegations that are generally unrebutted.

In order to convince a Board that a discharge was improper, a veteran usually must do more than testify at a DRB hearing that the charges were false. One method is to challenge the sufficiency of the evidence that formed the basis for the discharge. If the veteran never admitted to homosexual activity or to any of the allegations, and if the only evidence presented was a written accusation, a strong argument can be made that there was no competent evidence.[43]

If a servicemember waived his/her right to an administrative discharge board hearing or failed to submit a rebuttal to the allegations, a Review Board may well rely on this as evidence of guilt. In fact, however, servicemembers often waived their rights out of fear of court-martial, embarrassment, or lack of understanding of their rights.

Both individuals who admitted participating in homosexual acts and individuals who admitted homosexual tendencies may find psychiatric reports useful.[44] Ideally, a psychiatric report would indicate that the individual profiled was not homosexual and that the incident or confession that lead to discharge was a typical example of immaturity, curiosity, or normal sexual confusion. A psychiatrist, counsel, and applicant should review current regulations in preparing testimony.[44a]

A servicemember who solicited, attempted, or committed a homosexual act cannot, under current regulations, be separated for homosexuality if one of the following findings is made by an administrative discharge board:

> (i) Such conduct is a departure from the member's usual and customary behavior;
>
> (ii) Such conduct under all the circumstances is unlikely to recur;
>
> * * *
>
> (iv) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and
>
> (v) The member does not desire to engage in or intend to engage in homosexual acts.[45]

The Army has added the following phrase to the second provision above: "because it is shown, for example, that the act occurred solely as a result of immaturity, intoxication, coercion, or a desire to avoid military service."[46]

Submitting a copy of a marriage certificate, birth certificates of children, and testimony of a spouse to the Review Board may also be useful in rebutting a finding of homosexuality.

Occasionally, veterans reveal that they fabricated confessions to get out of the service or committed acts deliberately to secure a discharge, but now want to set the record straight. Board reaction to such testimony varies.[47] The danger is that a Board may change the reason for discharge to shirking and deny an upgrade in discharge.[48] If a veteran insists on presenting such testimony, the compelling reasons for the fabrication should be stressed.[49]

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[41] MD 79-001187.

[42] *See* Mulvaney v. Secretary of the Air Force, 493 F. Supp. 1218, 1225 (N.D. Ill. 1980) ("The Army cannot now contend that a discharge based on improper grounds should not be corrected because it could have been based on proper grounds."); Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980) ("The Army is thus prohibited from searching the files of any veterans in the affected class to determine whether they could have been charged with other misconduct at the time when they were initially separated.").

[43] *See, e.g.*, FD 78-01952 (none of the evidence concerning the acts was corroborated by a third party); FD 78-02003 ("much of the evidence was hearsay and could not be corroborated"); FD 79-00006 (basis for categorization as Class II "tenuous and insufficient"); FD 78-01565 (information received from OSI that airman participated in homosexual act and psychiatric evaluation that "available evidence points to homosexual orientation" considered evidence to support discharge for tendencies, not acts); AD 78-00620 (allegations constituted "at the worst case a homosexual advance; at the best case homosexual tendencies").

[44] The psychiatrist in such a case should be given a copy of any military psychiatric reports or witness statements. Failure to prepare a psychiatric report before discharge, if one is required by regulation, constitutes prejudicial error. *See* § 12.5.4 *supra*.

[44a] *See* App. 14A *infra*.

[45] 32 C.F.R. § 41.13(c)(1).

[46] AR 635-200, para. 15-4a(2) (10 Mar. 1981).

[47] *See, e.g.*, ND 78-00247 (NDRB ignored statement and upgraded discharge under current discharge policy for homosexuals); MD 78-01861 (NDRB upgraded discharge to GD "without making a finding relative to the validity of the original basis for discharge"); ND 7X-01786 (testimony rejected as "lacking substantiation"); ND 78-00959 (testimony rejected due to "no creditable evidence in testimony refuting his admitted statements"); MD 79-01187 (upgrade denied after testimony accepted as truthful and reason for discharge changed to misconduct/shirking); NC 76-2423I (BCNR upgraded discharge to HD after applicant testified that he had deliberately committed homosexual acts in an attempt to be discharged).

[48] *See* MD 79-01187.

[49] Weir v. United States, 474 F.2d 617, 1 MIL. L. REP. 2016 (Ct. Cl. 1973); Steuer v. United States, 207 Ct. Cl. 282, 3 MIL. L. REP. 2401 (1975).

14.5.3 PRESERVICE CONDUCT

In 1958, the Supreme Court held that the military could consider only "military service" in determining the character of discharge to issue.[50] Since consideration of preservice homosexual acts or tendencies is contrary to that holding, a less than honorable discharge based in whole or in part on such conduct cannot stand.[51]

14.5.4 COERCED RESIGNATIONS

In the past, the Navy sometimes encouraged servicemembers to resign (with UDs) for the good of the service in lieu of court-martial for sodomy in cases where procedural prerequisites to court-martial, established by law or regulation, had not been fully complied with.[52] The Navy has also been said to draw up court-martial charges listing specific acts but not naming partners, places, or dates, and to draw up charges listing violations of U.C.M.J. Articles which in fact have nothing to do with sodomy.[53] Any time such tactics can be proved, the discharge resulting from them must be found void and the character of discharge must be re-evaluated based on the rest of the service record.[54]

14.5.5 CONFRONTATION WITH ACCUSER

When an examination of administrative discharge board proceedings reveals that a servicemember's accuser was not at the hearing, it can be argued that the servicemember's right to due process was violated. Failure to produce the accuser denies the servicemember an opportunity to confront and cross-examine that person.[55]

14.5.6 RETENTION AND REINSTATEMENT

In the past, service regulations have contained provisions for retaining servicemembers who have engaged in *one* homosexual act. These provisions are highly qualified, however; there are no reported cases in which retention was approved for a "confirmed" homosexual. Regulations adopted in 1981 continue to permit the retention of certain servicemembers when specified findings are present.[56]

While BCMRs have the power to order reinstatement,[57] there are no reported homosexuality discharge cases in which they have used it. Recently, however, a federal court ordered reinstatement of a veteran discharged for homosexuality.[58]

14.5.7 CONSTITUTIONAL VALIDITY OF A DISCHARGE FOR HOMOSEXUAL ACTS

Litigation on the constitutionality of discharging persons solely on the basis of homosexual acts has focused on the nexus between the homosexual acts and the quality of an individual's service. In only one decision, however, has litigation been even partly successful for a veteran.[59]

14.5.8 REGULATORY ARGUMENTS

A failure to comply with regulations applicable to the processing of a servicemember for discharge for homosexual tendencies or acts can provide good grounds for upgrading. For example, an administrative discharge board's failure to make specific findings regarding homosexuality creates an effective argument that the veterans should not have received a bad discharge. If regulations require that court-martial charges be brought in aggravating acts cases, failure to convene a court-martial supports an argument that there were, in fact, no aggravating circumstances.[60]

In any case that does not appear easily upgraded, regulatory issues may make the difference.

14.6 SPECIAL REVIEW BOARD PROCEDURES

14.6.1 INVESTIGATIVE FILES

In most homosexual cases, an investigative file will have been compiled by the service's law enforcement division. The file may contain the original accusation of homosexuality, statements of coworkers, and the veteran's confession. Access to an investigative file will permit the veteran to address any hint of "aggravating circumstances" or attack the sufficiency of evidence that formed the basis for the allegation of homosexuality.

These investigative files are not kept with the personnel file at the St. Louis Records Center. A spe-

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[50] Harmon v. Brucker, 355 U.S. 579 (1958).

[51] *See generally* § 12.5.7.8 *supra* (evidence). Old Navy homosexuality cases (1950s and 1960s) frequently contain evidence, often in the form of a notation in the Navy administrative discharge board proceedings of "preservice acts," that preservice homosexuality was considered in characterizing the discharge. *See* FD 78-01965 (DRB acknowledged that character of service may not be based on preservice activity).

[52] In Middleton v. United States, 170 Ct. Cl. 30 (1965), a servicemember was confronted with the same sodomy charges of which he had been acquitted in civilian court and offered the choice of resigning in lieu of trial with a UD or being court-martialed. Navy regulations, however, prohibited such a court-martial without the approval of the Secretary of the Navy, which had not been obtained. The Court of Claims granted relief on the grounds that he was denied due process and fair treatment.

[53] A hypothetical example is a servicemember charged with violating Art. 82, U.C.M.J., and told that the article prohibits solicitation for sodomy. In fact, Art. 82 prohibits solicitation only of desertion, sedition, mutiny, or misbehavior before the enemy.

[54] *See generally* § 12.5.1.3 *supra*.

[55] *See* § 12.5.7.8.2 *supra*.

[56] *See* § 14.5.2 *supra*.

[57] *See* § 9.4.2 *supra*.

[58] benShalom v. Secretary of the Army, 489 F. Supp. 964, 8 MIL. L. REP. 2338 (E.D. Wis. 1980).

[59] Matlovich v. Secretary of the Air Force, 591 F.2d 852, 6 MIL. L. REP. 2569 (D.C. Cir. 1978).

[60] *See, e.g.*, AD 78-00620 (regulation required preferral of court-martial charges if there was aggravation; lack of preferral accepted by DRB as indicating no aggravation; regulation also required hospitalization of an "offender who is deemed reclaimable and whose misconduct is not aggravated by independent offenses" [W.D. Cir. 3, para. 2b]; DRB accepted counsel's argument that fact of hospitalization supported lack of aggravation).

cial request under the Privacy Act must be directed to the particular law enforcement agency involved.[61] Review Boards do not consistently obtain these files; applicants should confirm whether the Boards have obtained them.

14.6.2 TENDER LETTERS

The practice of offering (or tendering) an upgrade without a personal appearance hearing — even though the applicant requested a hearing — is employed by the Naval DRB as a cost-cutting measure. If, when the Naval DRB begins to process an application, a "prima facie basis"[62] for an upgrade arises, the DRB will inform the applicant (and counsel) in writing that an upgrade is likely and suggest that (s)he withdraw the request for a hearing. If the applicant agrees to this procedure, the DRB conducts a review based on the record and issues a decision. If an HD does not result, the veteran can then request and obtain a hearing. Although this practice is used almost exclusively in homosexual discharge cases, it is not confined to them.[63]

14.7 VA POLICY TOWARDS SERVICEMEMBERS DISCHARGED FOR HOMOSEXUAL ACTS

Through 1979, the VA considered veterans with UDs based on homosexual acts to have been discharged under "dishonorable conditions" and so barred from receiving any benefits.[64] Since December 31, 1979, VA regulations have barred benefits only if the homosexual acts involved "aggravating circumstances."[65] Veterans with bad discharges due to homosexuality who are interested in obtaining VA benefits should apply simultaneously for those benefits and for upgrades.[66]

14.8 RELEVANT DRB INDEX CATEGORIES

Research for this chapter utilized Discharge Index Supplements through No. 9. Entries are expected to change in 1981 to incorporate the changes in the DoD directive on discharging servicemembers for homosexuality.[67] Relevant categories from the Subject/Category Listing (1978 rev.) follow.

Homosexual Tendencies: A46.00 (Homosexual tendencies); A46.01/02 (No verified record of homosexual acts prior to or during service); A46.03/04 (Did not exhibit, profess or admit to homosexual tendencies); A46.05/06 (Psychiatric/Psychological evaluation (when required) not performed).

Homosexual Acts: A57.00 (Homosexual acts); A57.01/02 (No confirmed proposal, solicitation, attempt or performance of homosexual acts); A57.03/04 (Isolated incident stemmed from immaturity, curiosity or intoxication); A57.05/06 (Psychiatric/Psychological evaluation (when required) not conducted); A65.00 (Homosexual acts); A94.21/22 (Homosexual interest self-admitted); A94.23/24 (Homosexual act(s) committed with express/implied consent of an adult(s)); A94.25/26 (Homosexual act(s) off military installation); A94.27/28 (Homosexual act(s) resulted from duress).

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[61] *See* Ch. 6 *supra*.

[62] *See* NDRB Admin. Bull. #21 (28 May 1980).

[63] A Navy or Marine Corps veteran (or Army or Air Force veteran) may want to suggest in a cover letter accompanying the application form that a prima facie basis for an upgrade appears to exist in the case, and to request expedited review. It may be useful to indicate directly on the application form that the veteran "will forego hearing if your preliminary review indicates that a prima facie basis for an upgrade exists."

[64] 38 C.F.R. § 3.12(d)(5) (1979).

[65] 38 C.F.R. § 3.12(d)(5), as amended by 45 Fed. Reg. 2,318 (Jan. 11, 1980), reads:

> § 3.12 Character of discharge.
>
> . . . .
>
> (d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.
>
> . . . .
>
> (5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

[66] *See* § 26.3.4.6 *infra*.

[67] *See* Ch. 10 *supra* (details on obtaining a free copy of the Discharge Index).

APPENDIX 14A
REGULATIONS

These regulations have governed enlistment separations from active duty of persons involved in homosexuality.

Department of Defense:

- DoD Dir. 1332.14, encl. 8 (C 2, 16 Jan. 1981), 46 Fed. Reg. 9,571 (Jan. 29, 1981) (to be codified in 32 C.F.R. § 41.13).

Army:

- AR 635-200, ch. 15 (IC 5, 10 Mar. 1981).
- AR 635-200, ch. 13 (tendencies) and ch. 14 (acts) (1 Feb. 1978).
- AR 635-200, ch. 13 (C 39, 15 Jan. 1973).
- AR 635-212, 15 Jul. 1966 (tendencies; with C 8 (1 Mar. 1970) acts included).
- AR 635-209, 14 Apr. 1959 (tendencies).
- AR 635-89, 15 Jul. 1966.
- AR 635-89, 8 Sep. 1958.
- AR 635-89, 21 Jan. 1955.
- AR 600-443, 10 Apr. 1953.
- AR 600-443, 12 Jan. 1950.
- AR 615-368, 27 Oct. 1948.
- AR 615-368, 14 May 1948.
- AR 615-368, 7 Mar. 1945.
- WD Cir. 179, 10 Jul. 1947.
- WD Cir. 3.

Navy/Marine Corps:

- SECNAVINST 1900.9D, 12 Mar. 1981.
- SECNAVINST 1900.9C, 20 Jan. 1978 and SECNAV Memo, 20 Jan. 1978.
- SECNAVINST 1900.9A, 31 Jul. 1972.
- SECNAVINST 1900.9, 20 Apr. 1964.
- SECNAVINST 1620.1, 5 Jun. 1953.
- SECNAV ltr 49-882, P13-7, 10 Dec. 1949.
- SECNAV ltr C-15-43, P13-7, 83443, 1 Jan. 1943.

Navy only:

- BUPERSMAN 3420189 (advance change, effective 12 Apr. 1981).
- BUPERSMAN 3420180, 1 Jul. 1969 (tendencies).
  BUPERSMAN 3420220, 1 Jul. 1969 (acts).
- BUPERSMAN C-10310, 14 Apr. 1959 (tendencies).
  BUPERSMAN C-10311, 14 Apr. 1959 (acts).
- BUPERSMAN C-10312, 11 Jun. 1948.
- BUPERSMAN D-9112, 1 Oct. 1942.

Marine Corps only:

- MCO 1900.16B, para. 6013 (C 4, 13 Mar. 1981).
- MCO 1900.16B, 23 Mar. 1978.
- MCO 1900.16A, 28 Jun. 1972.
- MCO 1900.16, 9 Sep. 1968.
- MCO 5000.3, 13 Mar. 1961.
- MCM, 11 Apr. 1949.
- MCM, 3 Jun. 1940.

Air Force:

- AFM 39-12, para. 2-103 (IMC 81-2, 12 Mar. 1981).
- AFM 39-12, 1 Sep. 1966.
- AFR 35-66, 14 Apr. 1959.
- AFR 35-66, 23 Jul. 1956.
- AFR 35-66, 31 May 1954.
- AFR 35-66, 12 Jan. 1951.
- AFR 35-66, 20 Feb. 1950.

APPENDIX 14B
DRB/BCMR DECISIONS

A. CASE LISTS

These lists include all cases used in this chapter. Copies of cases cited in supporting briefs should accompany the briefs. Copies are free from the following address: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington D.C. 20310.

1. ARMY BCMR

AC 77-01099; AC 75-04773A; AC 73-01528B; AC 71-02673B; AC 69-00605J.

2. ARMY DRB

AD 80-01230; AD 79-09604; AD 79-08421; AD 79-01094; AD 78-03596; AD 78-02943A; AD 78-01854; AD 78-01109; AD 78-00924; AD 78-00827; AD 78-00620; AD 78-00528; AD 78-00051; AD 77-12540; AD 77-12152; AD 77-10398; AD 77-09660; AD 77-07959; AD 77-07722; AD 77-07199; AD 77-07182; AD 77-06843.

3. AIR FORCE DRB

FD 79-00043; FD 79-00006; FD 78-02041; FD 78-02003; FD 78-01965; FD 78-01952; FD 78-01937; FD 78-01929; FD 78-01921; FD 78-01912; FD 78-01821; FD 78-01752; FD 78-01699; FD 78-01565; FD 78-01401; FD 78-01379; FD 78-01213.

4. MARINE DRB

MD 79-01223; MD 79-01187; MD 79-00535; MD 78-03323; MD 78-01861.

5. NAVY BCNR

NC 77-05859; NC 76-02479A; NC 76-02423I; NC 76-019721; NC 75-00078; NC 68-00464.

6. NAVY DRB

ND 79-00352; ND 79-00338; ND 79-00207; ND 78-02812; ND 78-02321; ND 78-02191; ND 78-02023; ND 78-01378; ND 78-01091; ND 78-01085; ND 78-01064; ND 78-01063; ND 78-00978; ND 78-00959; ND 78-00250; ND 78-00247; ND 78-00010; ND 7X-01786.

B. DIGESTS OF CASES RELIED UPON

1. ARMY

AC 69-00605J (1963 UD for voluntary admission of homosexual acts with consenting adults upgraded to GD; 1 Art. 15 for disrespect; 18-day AWOL).

AC 71-02673B (1960 UD for numerous, nonviolent homosexual acts upgraded to GD; 2 Art. 15s for missing bed check).

AC 73-01528B (1962 UD for homosexual acts with approximately 10 people upgraded to GD).

AC 75-04773A (1963 UD based on admission of active participation in approximately 25 homosexual acts upgraded to GD; records contained no competent evidence to substantiate Class II discharge).

AC 77-01099 (1952 UD for allegedly fondling another WAC and soliciting her to commit sodomy upgraded to HD because current departmental regulations require character of separation to be determined solely by member's military record).

AD 77-06843 (1962 UD for one homosexual act and admission to others upgraded to HD because "consistent with today's standards, a separation for homosexuality, absent grave acts of indiscipline, would have been . . . under honorable conditions"; unsatisfactory rating in last period disregarded in assessing overall record because such rating "is normally accomplished by the command when there is a separation with a UD for unfitness").

AD 77-07182 (1967 GD for 3 homosexual acts between consenting adults upgraded to HD despite applicant's being considerably senior to other participants.)

AD 77-07199 (1967 GD for homosexual acts between consenting adults upgraded to HD).

AD 77-07722 (1976 GD for self-admitted homosexual tendencies upgraded to HD; 16 days bad time due to 2 AWOLs).

AD 77-07959 (1958 UD for homosexual tendencies upgraded to HD under current standards).

AD 77-09660 (1961 UD for homosexual acts between consenting adults, some on post, upgraded to HD).

AD 77-10398 (1963 UD for homosexual acts held improper and upgraded to HD; SM admitted tendencies and acts but statements of witnesses confirmed only solicitation).

AD 77-12152 (1943 UD for GOS upgraded to HD after investigation of officer revealed 4 homosexual acts, some with enlisted personnel, but "in an apparently discreet manner" found "not prejudicial to good order and discipline").

AD 77-12540 (1966 UD for "mutual embracing, caressing, and kissing" upgraded to HD because incidents were isolated and related to youth [18], immaturity and intemperate use of alcohol; psychiatric evaluation that acts occurred from combination of immaturity, impulsivity, and alcohol; 1 Art. 15 dereliction of duty; evaluation marks uniformly excellent until last period when conduct was rated unsatisfactory "obviously for the reason of his separation").

AD 78-00051 (1944 UD for homosexual tendencies upgraded to HD because SM achieved grade of Sergeant).

AD 78-00924 (1956 UD for preservice homosexual acts upgraded to HD).

AD 78-00528 (1961 UD for admitting one homosexual act, possible involvement in two others, upgraded to HD; postservice conduct exemplary (involvement with American Legion, DAV, VFW, Masons, Shriners)).

AD 78-00620 (1944 UD for GOS upgraded to HD; most records were missing; DRB considered "acts" that led to discharge "at the worst case a homosexual advance," "at best case . . . homosexual tendencies"; applicant denied advance and nonpreferral of CM charges and hospitalization indicated no aggravation; upgrade based on current standards and overall quality of service).

AD 78-00827 (1943 UD, apparently for homosexual tendencies, upgraded to HD).

AD 78-01109 (1958 UD for unstated number of homosexual acts upgraded to HD; SM had been implicated in a CID report by partner).

AD 78-01854 (1942 UD for overt homosexuality upgraded to HD based on current policies because only homosexual tendencies had been established; psychiatrist stated SM was "definitely a homosexual"; testimony at separation board about SM's "feminine mannerisms and nocturnal activities"; most records lost and applicant elected not to testify at the hearing).

AD 78-02943A (UD for one homosexual act as a passive partner with 14-year-old dependent son of an officer upgraded to HD because act was considered an isolated incident).

AD 78-03596 (1963 UD for 4 homosexual acts within one month on base upgraded to HD because acts were isolated and reflected immaturity; 3 Art. 15s for absence from place of duty, leaving guard post, and missing bed check).

AD 79-01094 (1969 UD for accusations of homosexual activity upgraded to HD because separation both improper and inequitable since NP evaluation does not support separation for homosexuality; 1 Art. 15 for being late to work).

AD 79-08421 (1979 UD for implication in two homosexual acts upgraded to HD under current standards; mental status evaluation reported no homosexual tendencies).

AD 79-09604 (1962 GD (previously upgraded from UD) for numerous homosexual acts involving civilian and military personnel off base upgraded to HD; 1 Art. 15 for FTR).

AD 80-01230 (1962 GD for unsuitability (homosexual tendencies) upgraded to HD under "current standards in cases of this nature" and absence of disciplinary record; confessed homosexual feelings to chaplain shortly after arrival at boot camp).

2. NAVY

NC 68-00464 (1947 UD for 3 consensual homosexual acts upgraded to GD; 1 DC for 4-hour delay; 1 GCM for 13-day AWOL).

NC 75-00078 (UD for officer (GOS for homosexual acts with enlisted member) upgraded to GD despite disparity in rank because enlisted member "know what was up").

NC 76-019721 (1961 UD for admitting one act of mutual masturbation with another officer upgraded to HD based on current Naval policy and excellent evaluations (3.2 conduct, 3.25 overall)).

NC 76-24231 (1952 UD for engaging in passive homosexual acts upgraded to HD under current standards despite statement that acts were committed "in an attempt to be discharged").

NC 76-02479A (1945 UD for homosexual act presumed to be with "consenting participant and not a victim because other party was also offered UD in lieu of court-martial" upgraded to GD; 3 NJPs for drinking, 3 ¼-hour AWOL, incapacitation for duty).

NC 77-05859 (1942 DD for scandalous conduct (oral coition) upgraded to GD; 5 "extremely minor" NJPs for violation of a lawful shipboard order, failure to make bed, 57-minute absence, creating disturbance, and 3-hour absence; 1 SCM for 8-day absence).

ND 7X-01786 (1968 UD for admission (to NIS) of active and passive homosexual acts with civilians upgraded to HD; DRB rejected applicant's retraction of that admission; 1 SCM for 3-day UA from combat zone).

ND 78-00010 (1964 UD for one homosexual act while drunk upgraded to HD under current standards; 1 SCM for 2-day UA).

ND 78-00247 (1967 UD for admission in NP consultation to 4 homosexual acts despite attempt to retract confession in later consultation upgraded to HD under current standards; DRB ignored applicant's statement that he was not then or now a homosexual).

ND 78-00250 (1968 for UD for admission to homosexual acts with consenting adult off base upgraded to HD; 1 NJP for use and possession of marijuana).

ND 78-00959 (1967 UD for admission to preservice and in-service homosexual acts with civilian off base upgraded to HD under current policy despite applicant's testimony that he lied about his homosexual activity; 4 NJPs for 23-hour UA, 1-day UA, disrepect in language, and 15-day UA; marks of 3.1 in performance, 3.4 in behavior, 3.4 overall).

ND 78-00978 (1964 UD for officer GOS — after release from active duty with HD following NIS report indicating homosexual acts — upgraded to HD).

ND 78-01063 (1943 UD for homosexual acts with a consenting civilian adult ashore upgraded to HD; final average marks 4.0, 3.5).

ND 78-01064 (1959 UD for two homosexual acts with consenting partners upgraded to HD; 2 NJPs for 5 ¼-hour UA, missing movement, unlawful possession of alcohol), 3.47 military behavior and proficiency marks, 3.5 overall).

ND 78-01085 (1961 UD for admitting to preservice, and in-service homosexual acts with civilians upgraded to HD; SM had agreed to accept UD for GOS for sodomy).

ND 78-01091 (1962 UD for Chief Petty Officer who admitted performing homosexual act with E-4, paying E-3 to perform homosexual acts on him, attempted solicitation of E-2, receiving money from civilians for letting them perform acts on him upgraded to HD in Secretarial Review despite DRB holding that solicitation on junior members is considered aggravation since "there was in fact no aggravation surrounding [applicant's] homosexual activity").

ND 78-01378 (1967 UD after seeking assistance from chaplain and doctor and admitting to NIS preservice and in-service homosexual acts off base with consenting partners upgraded to HD; 1 NJP for disrespectful language; 3.2 military behavior mark, 3.3 proficiency mark, 3.4 overall).

ND 78-02023 (1952 UD for single homosexual act with consenting partner upgraded to HD because there "is doubt that the applicant would have received the same discharge" today; 4.0 military behavior mark, overall trait average of 3.89).

ND 78-02191 (1956 UD after admitting to homosexual acts with another sailor off base upgraded to HD; SM was charged with 2 counts of sodomy and accepted UD for GOS but CNP directed unfitness discharge instead, marks of 3.5 performance, 3.8 behavior, 3.5 overall).

ND 78-02321 (1974 GD after admitting to homosexual acts with consenting civilian upgraded to HD).

ND 78-02812 (1968 UD for "having fondled the private parts of a sleeping shipmate" and admitting to act with civilian upgraded only to GD because non-consenting fondling considered aggravating).

ND 79-00207 (1960 UD for officer GOS following accusation by enlisted member of homosexual overture upgraded to HD; officer denied accusation; psychiatric testimony that applicant not homosexual and alleged overture seemed unlikely to be true; DRB found overture but not aggravation).

ND 79-00338 (1966 UD for civil conviction for oral copulation upgraded to GD in Secretarial Review in face of DRB recommendation to deny relief because "conviction for a crime of moral turpitude evidences misconduct"; 3 NJPs for liquor aboard ship, 2-hour UA, and gambling in barracks).

ND 79-00352 (1957 UD for civil conviction, in part, for oral copulation upgraded to GD in Secretarial Review in face of DRB recommendation to deny relief because applicant agreed to accept money; 3 NJPs for 6 ½-hour UA, possession of another's raincoat, and false statement); overall trait average of 2.75).

3. MARINE CORPS

MD 78-01861 (1962 UD for admitting to homosexuality upgraded to GD because "overall circumstances do not constitute sufficient aggravation to warrant" UD; applicant's testimony he lied to get out ignored; 2 UAs (5, 2-day)).

MD 79-00535 (1973 GD (previously upgraded from UD) for homosexual tendencies upgraded to HD; originally received UD for fraudulent entry after admitting to preservice acts to NIS).

MD 79-01187 (1952 UD for admitting to extensive preservice and in-service homosexual acts, and diagnosis as "sexual deviate (homosexual)," not upgraded following testimony to DRB that admission was total fabrication; DRB chose to believe applicant's testimony and changed reason for discharge from unfitness to misconduct/shirking).

MD 79-01223 (1976 GD for admission of homosexual tendencies upgraded to HD under current standards; conduct/proficiency marks of 4.3).

4. AIR FORCE

FD 78-01213 (1956 UD for homosexual acts with older homosexual while intoxicated upgraded to HD because they were considered a "momentary indiscretion, brought about by immaturity and intoxication").

FD 78-01379 (1959 UD for one homosexual act with another airman upgraded to HD because act was considered isolated incident, "an aberration of his normal behavior pattern [that] does not reflect his true character").

FD 78-01401 (1952 UD for homosexual acts upgraded to HD because acts were considered mitigated by drinking and "perception of being enticed into the acts" by older, more senior airman).

FD 78-01565 (1964 GD for homosexual acts based on information received from OSI and psychiatric diagnosis of "sexual deviation, homosexual type" upgraded to HD because evidence substantiated only tendencies, not acts; reason for discharge changed from unfitness to unsuitability).

FD 78-01699 (UD for admitting to one homosexual act as passive partner upgraded to HD because DRB concluded applicant was not homosexual because "his guilt and disgust in participating in the act led him to report the incident"; reason for discharge changed from unfitness to COG).

FD 78-01752 (1956 UD for homosexual acts committed by "confirmed and habitual homosexual" upgraded to HD under current policy).

FD 78-01821 (1962 UD for admitting to one homosexual act with civilian upgraded to HD because DRB considered record to substantiate unsuitability discharge for association with known homosexuals; act considered "aberration of his normal lifestyle" in light of postservice conduct (obtained GED, employed, no criminal record)).

FD 78-01912 (1946 UD for homosexual acts upgraded to HD because DRB "unable to determine the extent, if any, of the applicant's involvement in homosexual acts").

FD 78-01921 (1956 UD for one homosexual act as passive partner upgraded to HD because act committed "out of curiosity, and while severely intoxicated"; reason for discharge changed from unfitness to COG).

FD 78-01929 (1967 UD for homosexual acts with civilian upgraded to HD under current standards).

FD 78-01937 (1968 UD for 3 perservice homosexual acts, 1 in-service act with civilian upgraded to HD; sought medical treatment for "serious psychological problem").

FD 78-01952 (1965 GD for homosexual acts despite denials upgraded to HD because DRB found none of the evidence concerning the acts to be corroborated by a third party).

FD 78-01965 (1951 UD for confessing one preservice homosexual act to psychiatrist upgraded to HD; DRB acknowledged character of service may not be based on preservice activity; reason for discharge changed from unfitness to unsuitability).

FD 78-02203 (1964 UD following accusations of homosexual proposals upgraded to HD because DRB concluded that "much of the evidence was hearsay and could not be corroborated").

FD 78-02041 (1963 UD for admitting to preservice homosexual acts and 6 in-service homosexual acts upgraded to HD under current standards in absence of evidence of coercion or violence).

FD 79-00006 (1956 UD for homosexual acts upgraded to HD because consideration of adverse polygraph results was inappropriate under current directives, only association with know homosexuals was established, and basis for categorization as Class II was "tenuous and insufficient"; reason for discharge changed from unfitness to unsuitability).

FD 79-00043 (1960 UD for one homosexual act with passive partner upgraded to HD; testimony that applicant participated out of fear; reason for discharge changed from unfitness to COG).

CHAPTER 15
DRUG ABUSE

15.1 INTRODUCTION

Traditionally, the military has considered the illegal use of drugs to be a disciplinary problem. Before 1971, court-martial and punitive discharge for possession of drugs was not unusual. At best, an Undesirable Discharge (UD) for unfitness was issued.[1] No rehabilitation programs were required, and no

[1] In the 1940s, a finding of drug use often led to confinement at hard labor and a Dishonorable Discharge (DD). As recently as the mid-1960s, servicemembers were court-martialed for simple possession

distinction was made between possession of drugs for personal use and possession for sale. Major changes in these policies began in 1970; understanding them is important in successfully upgrading a drug-related discharge.

The increased use of drugs by the civilian population in the 1960s and the ready availability of drugs in Vietnam created a military crisis.[2] In 1970, the Department of Defense (DoD) issued its first directive on drugs.[3] It reiterated that use of drugs would result in criminal prosecution and a DD or UD. It also encouraged, but did not mandate, the use of rehabilitation programs.

By 1971, news reports from Vietnam were stating that heroin use by American troops had reached epidemic proportions and also noting the lack of meaningful rehabilitation programs.[4] In June 1971, President Nixon directed the Secretary of Defense to "commence identification of drug addicted servicemembers departing from Vietnam" and to require detoxification.[5] The Army's Commanding General in Vietnam immediately ordered that all personnel leaving Vietnam be given urinalyses to detect drug use. The order stated that the "individual user identified by the urinalysis" would be protected from punitive action.[6]

On July 7, 1971, DoD established a service-wide Drug Identification and Treatment Program and prohibited imposing disciplinary actions or UDs against servicemembers whose drug use was detected through urinalysis.[7] In August 1971, a memorandum from Secretary of Defense Melvin Laird directed the Discharge Review Boards (DRBs) and Boards for Correction of Military Records (BCMRs) to apply this new policy retroactively to veterans who had received bad discharges.[7a] The Laird Memo and the Drug Identification and Treatment Program are prominent landmarks in the field of discharge upgrading. Most veterans discharged before July 1971 for drug use now routinely receive upgrades.

It was still possible after 1971, however, to receive a stigmatizing General Discharge (GD) for personal use of illegal drugs, whether detected through urinalysis or through volunteering for treatment. A UD for unfitness due to drug abuse was still possible for "use, possession, sale, transfer or introduction on a military installation of any narcotic substance, marijuana, or dangerous drugs" if sufficient evidence existed independent of a urinalysis or a servicemember's volunteering for treatment.[8]

In 1974, the United States Court of Military Appeals decided the case of a soldier who refused to participate in the Army's drug detection program. The court held that an order to produce a urine specimen which, if positive, could lead administratively to a GD was a violation of Article 31 of the U.C.M.J., the military's version of the fifth amendment prohibition against self-incrimination.[9] That decision led to a 1975 DoD change in administrative separation regulations to permit only a fully Honorable Discharge (HD) when proof of drug use is based directly or indirectly on a urinalysis or on the servicemember's volunteering for treatment.[10] This policy is currently in effect in each service.

Until 1979, the DRBs refused to apply the above decision retroactively. In late 1979, however, the Army was ordered by a federal court to search its records for names and addresses of veterans who had received less than honorable discharges due to compelled urinalyses and to upgrade the discharges to HDs.[11] Approximately 6,500 Army discharges were recharacterized pursuant to the order, which was affirmed on appeal.

In November 1979, a DoD policy directed at servicemembers who use marijuana and hashish was instituted.[12] It recognized the lack of uniform identification efforts, addressed disciplinary actions among the services, and offered the following guidance: "Normally, for a cannabis offender who uses or possesses a minor amount and who otherwise has a good record, the use of Article 15 of the . . . [U.C.M.J.], as opposed to trial by court-martial, is appropriate."[13] This policy statement formalized prac-

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[1] (continued)

of marijuana and received the maximum punishment of five years confinement and a DD. If a servicemember was not discharged as part of the sentence of a court-martial, or if conviction at a court-martial was precluded by legal defects, separation with a UD for unfitness due to drug abuse was still possible.

[2] *See generally Drug Abuse and Alcoholism in the Armed Forces: Examination Before the Special Subcomm. on Alcoholism and Narcotics of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 2d Sess. (1970).

[3] DoD Dir. 1300.11, 23 Oct. 1970, 32 C.F.R. Part 62.

[4] *See, e.g.,* N.Y. Times, May 16, 1971, at 1, col. 6.

[5] Memorandum from President Nixon to Secretary of Defense Laird (June 11, 1971).

[6] Message P 181100Z (Drug Abuse) from CG USARV LBN RVN to All Army Commands (June 1971).

[7] Memorandum (Rehabilitation of Drug Abusers) from Deputy Secretary of Defense David Packard to Secretaries of the Military Departments (July 7, 1971) [hereinafter cited as Packard Memo]. *See* App. 15A *infra* (reproduction of Packard Memo); § 15.2 *infra* (detailed explanation of the significance of the Packard Memo and how it affects servicemembers discharged before July, 1971).

[7a] Memorandum (Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users) from Secretary of Defense Laird to the Secretaries of the Military Departments and the Chairman of the Joint Chiefs of Staff (Aug. 13, 1971) [hereinafter cited as Laird Memo]. *See* App. 15A *infra* (reproduction of Laird Memo).

[8] DoD Dir. 1332.14, 23 Dec. 1976, paras. H.8, I.

[9] United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797, 2 MIL. L. REP. 2063 (1974).

[10] The unsuitability category for discharge was eliminated and a new category created: Personal Abuse of Drugs Other Than Alcoholic Beverages. DoD Dir. 1332.14, 30 Sep. 1975, encl. 2, para. F. The unfitness category, with its possibility of a UD, remained the same.

[11] Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980). *See* § 15.3 *infra* (detailed explanation of the *Giles* decision and its implications for Navy, Marine, and Air Force veterans).

[12] Memorandum (DoD Policy Regarding Cannabis Use) from Deputy Secretary of Defense W. Graham Claytor, Jr., to Secretaries of the Army, Navy and Air Force (5 Nov. 1979) [hereinafter cited as Claytor Memo]. *See also Drug Abuse in the Armed Forces of the United States: Oversight Update: Hearing Before the House Select Comm. on Narcotics Abuse and Control,* 96th Cong., 1st Sess. (1979) (SCNAC-96-13); *Drug Abuse in the Armed Forces of the United States: Oversight Update: Hearing Before the House Select Comm. on Narcotics Abuse and Control,* 96th Cong., 1st Sess. (1980) (SCNAC-96-2-9).

[13] *See* Claytor Memo, *supra* note 12, at 3. The memo does not define "minor amount" or "good record." There is no information on how the services have implemented this policy nor how the DRBs have applied it.

tices already reported in many commands.

A recent change in DoD regulations prohibits servicemembers from possessing drug-use paraphernalia.[14]

15.1.1 SUMMARY OF CURRENT POLICY

The military's current policy towards drug use emphasizes rehabilitation rather than punishment. This change in emphasis has led to a high success rate in upgrading drug-related discharges.[15] The level of drug use among lower-ranking enlisted members is high, but most drug users are now able to return to full duty after a rehabilitation program or to obtain HDs.[16]

A court-martial is less likely for personal use of marijuana than for such use of hard drugs. Courts-martial,[17] or administrative separations for misconduct, leading to bad discharges generally occur only if trafficking is involved.

15.1.2 TYPES OF CASES

A major division of drug discharge cases can be made at July 7, 1971, the date on which the DoD drug program went into effect and to which the Laird Memo retroactively applies. A third important category of cases is that in which compelled urinalyses are involved; litigation in this area has forced major changes in Army (and, potentially, Navy and Air Force) discharge review procedures.

The report of separation or discharge orders of a servicemember officially discharged for drug use will probably contain one of the following reasons:

- Sentence of a general or special court-martial (specification includes drug use, sale, transfer, etc.);
- Habits and traits/drug addiction;
- Unfitness/drug addiction;
- Unfitness or misconduct/drug abuse;
- Unsuitability/personal abuse of drugs;
- Good of the service in lieu of trial by court-martial/drugs; or
- Unfitness or misconduct/civil conviction (charge includes drugs).

Drug use often contributes to a servicemember's separation or discharge without appearing on records as an official reason for discharge. Evidence of such drug use can be a significant factor in obtaining an upgrade.[18] Any of the following official reasons for a discharge may mask the real reason (drug use):

- Sentence of a general or special court-martial (specification includes multiple charges);[19]
- Good of the service in lieu of trial by court-martial (for multiple charges, AWOL, etc., but not solely for drug use);
- Unfitness or misconduct/frequent involvement;
- Unsuitability/apathy, defective attitude;[20] or
- Unfitness or misconduct/civil conviction (not specifically drug possession).

Achieving upgrades in cases in which drug use was not the official reason for discharge requires special attention and planning. A personal appearance hearing with the applicant present is particularly important. If it can be proved that disciplinary offenses were manifestations of a drug abuse problem, an upgrade is very likely.

15.2 DISCHARGES BEFORE JULY 1971

DoD's 1971 Drug Identification and Treatment Program[21] was intended to encourage drug users to seek rehabilitation voluntarily, by eliminating the possibility of a UD or disciplinary action under the U.C.M.J. in a case in which evidence of drug use was developed through urinalysis.[22] The program did not,

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[14] The impetus for prohibiting paraphernalia comes from the Drug Enforcement Administration's Model Drug Paraphernalia Act, DoD Dir. 1010.4, Alcohol and Drug Abuse by DoD Personnel (25 Aug. 1980), 45 Fed. Reg. 61,615 (1980) (to be codified in 32 C.F.R. Part 62). This directive cancels DoD Dir. 1300.11 (*see* note 3 *supra*). *See also* DoD Inst. 1010.5, Education and Training Alcohol and Drug Abuse Prevention (5 Dec. 1980), 45 Fed. Reg. 84,995 (1980) (to be codified in 32 C.F.R. Part 62a).

[15] An alternative to applying to either a DRB or a BCMR (if the discharge resulted from the sentence of a court-martial begun before July 7, 1971) is to use Art. 74(b) of the U.C.M.J. *See* § 20:4.4 *infra* (Art. 74(b) procedures).

[16] The latest DoD survey of drug use reveals that among E-1 to E-5s, 53% of Army, 59% of Navy, 61% of Marines, and 33% of Air Force personnel had used illegal drugs in the year prior to the survey. Of E-6 to E-9s, and low-ranking officers (0-1 to 0-3s), only an average of 9% had used drugs illegally. *See* DoD, WORLDWIDE SURVEY OF NON-MEDICAL DRUG USE AND ALCOHOL USE AMONG MILITARY PERSONNEL: 1980 (Contract No. MDA903-79-C-0667).

In 1978, 4,739 of the administrative discharges for drug abuse were HDs, 1,039 were GDs, and only 112 were Discharges Under Other Than Honorable Conditions (formerly called UDs). Inexplicably, the Navy issued 42 HDs, 846 GDs, and 72 UDs, while the Army issued 4,204 HDs, 3 GDs, and 7 UDs. Administrative Discharges for Drug Abuse, RCS DD-M(SA) 1060 Report (obtained from OASD (M&RA) MPP).

[17] The military's jurisdiction to court-martial servicemembers who commit drug offenses off base was narrowed in 1976 to those cases in which arrangements for drug sale were made on base, or in which drugs sold off base were specifically earmarked for distribution on base. In the fall of 1980, however, the Court of Military Appeals held that "almost every involvement of service personnel with the commerce in drugs is 'service connected.'" United States v. Trottier, 9 M.J. 337, 8 MIL. L. REP. 2508 (C.M.A. 1980). *See also Jurisdiction Over Drug Offenses Clarified and Strengthened,* 8 MIL. L. REP. 1063 (Nov.-Dec. 1980).

[18] For example, it may be argued that drug use impaired an applicant's ability to perform satisfactorily, or that the reason for the applicant's discharge should be changed officially to drug abuse. *See* § 15.5.1 *infra* (preparing these and other arguments); § 15.2.1 *infra* (discussion of pre-1971 discharges, not officially for drug use, which may qualify for virtually automatic upgrading under the Laird Memo).

[19] *See* Ch. 20 *infra* (upgrading court-martial discharges). In a letter to Staff Judge Advocates, it was hinted that the use of "multiplicious charges" would circumvent the upgrading of punitive discharges required by the Secretary of Defense. Letter from Brigadier General Lawrence H. Williams, Assistant JAG for Military Law to all Staff Judge Advocates (July 3, 1972). When possible, it should be emphasized that, despite multiple charges, the primary reason for court-martial was the drug charge.

[20] Despite the express preference for rehabilitation or an HD in current DoD directives, some commanders persist in ignoring that emphasis. A military defense counsel in the Air Force reported in 1980 that it was the Strategic Air Command's policy to process drug offenders for unsuitability discharges for "apathy, defective attitude, and inability to expend effort constructively" rather than to provide rehabilitation. The defense counsel also complained that the commander of the 8th Air Force was attempting to make known to all subordinates his view that drug abusers should receive GDs.

[21] *See* App. 15A *infra*.

[22] A GD was still possible following urinalysis or volunteering for treatment. Disciplinary action, a UD, or punitive discharge was not

however, help veterans who had, prior to July 1971, acquired drug habits in Vietnam and received bad discharges which barred them from medical care at VA facilities.

Recognizing this shortcoming, DoD designed a policy enabling veterans who had previously applied for DRB review of their UDs to obtain retroactive application of the provisions of the drug treatment program.[23] On August 13, 1971, Secretary of Defense Laird directed the Secretary of each service to implement this policy at each DRB.[24]

Following the Army's lead,[25] Secretary Laird later expanded the policy to include "punitive discharges and dismissals resulting from approved sentences of courts-martial issued solely for conviction of personal use of drugs or possession of drugs for the purpose of such use."[26] Despite efforts by DoD to contact veterans affected by this change in policy, thousands of veterans may remain unaware of their chance for an almost automatic upgrade.[27]

The Laird Memo of August 13, 1971 (and the follow-up memo of April 28, 1972) established that UDs, BCDs, and DDs must be upgraded to (at least) GDs if they were issued or in process before July 7, 1971, and were based on personal use of drugs or possession of drugs for personal use.

15.2.1 TIME FRAME COVERED BY THE LAIRD MEMO

The August 13, 1971 Laird Memo addressed administrative discharges, while the April 28, 1972 memo addressed punitive discharges. Both apply to discharges that were issued or in process by July 7, 1971.

"In process" means that July 7, 1971, is not an absolute cut-off. The entire discharge correspondence may have to be studied to determine whether a servicemember discharged in September 1971, for example, had appeared before an administrative discharge board, or had been recommended for discharge before July 7, 1971.[28] An arrest or investigation for drug use that occurred before July 7, 1971, even if no discharge proceedings began until after July 7th, may bring the case under the Laird Memo. Boards have accepted the explanation that a unit operating in the field in Vietnam probably would be unaware of the drug treatment program and have therefore extended the time frame.[29]

When a servicemember's discharge occurred after July 7, 1971, but may have been in process before that date, a contention to that effect should be submitted.[30]

Although the DoD drug program was a response to drug problems in Vietnam in the 1960s, the Laird Memo is retroactive to all pre-1971 discharges, and does not bar veterans of earlier eras from benefiting from its provisions.

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[22] (continued)

ruled out so long as the action was "supported by evidence not attributed to a urinalysis administered for identification of drug abuses and not attributed solely to their volunteering for treatment." *See* Packard Memo, *supra* note 7 (reproduced at App. 15A *infra*).

[23] Department of Defense Policy Regarding Disciplinary and Administrative Actions Related to Drug Use and the Review of Discharges Under Other Than Honorable Conditions Issued for Drug Use, OASD (M&RA) MPP (12 Aug. 1979).

[24] *See* Laird Memo, *supra* note 7a (reproduced at App. 15A *infra*).

[25] The rationale for extending the policy to punitive discharges was:

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

Memorandum (Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users) from Under Secretary of the Army Kenneth E. Belieu to the Deputy Secretary of Defense (Sept. 24, 1971) (reproduced at 44 Fed. Reg. 25,111 (April 27, 1979)).

[26] Memorandum (Review of Punitive Discharges Issued to Drug Users) from Secretary of Defense Melvin R. Laird to Secretaries of the Military Departments, Chairman, Joint Chiefs of Staff (April 28, 1972) (reproduced at 44 Fed. Reg. 25,111 (April 27, 1979)). *See* App. 15A *infra* (reproduction of this memo).

[27] DoD was sued in 1972 to force notification of all veterans affected by the Laird Memo. As a result, all veterans with drug abuse SPN 384 were sent notice at their home of record. *See* American Veterans Comm. v. Secretary of Defense, 2 MIL. L. REP. 2239 (D.D.C. 1973). *See also* GOV'T ACCOUNTING OFF., IMPROVING OUTREACH AND EFFECTIVENESS OF DOD REVIEWS OF DISCHARGES GIVEN SERVICEMEMBERS BECAUSE OF DRUG INVOLVEMENT (B-173688, Nov. 30, 1973) (GAO

[27] (continued)

criticism of DoD efforts). In 1980, as part of the court-ordered review of Army records in *Giles* (*see* § 15.3 *infra*), the Army DRB discovered approximately 600 veterans who were eligible for upgrading under the provisions of the Laird Memo.

[28] *See* MD 78-01427 (recommended for discharge in June 1971 after voluntarily admitting to drug use and seeking assistance; before final discharge orders were issued, drug exemption program began (on July 19, 1971) and SJA recommended giving servicemember the option of selecting exemption; however, servicemember was UA at the time and was discharged in absentia July 30th).

[29] *See* AD 77-07588 (incident leading to discharge occurred in August 1971 and discharge was accomplished in November; Board applied the "philosophy of the Laird Memo since the date of the incidents which led to separation were so close to the date of issuance of the Laird Memorandum").

[30] As a general rule, applicability of the Laird Memo should be claimed if there is any chance that it applies. The contention should detail all pertinent dates and clearly state that the Laird Memo applies. A sample contention follows:

> Applicant received notice dated June 15, 1971, of the convening of an administrative discharge board to consider separation for unfitness due to frequent involvement. On July 10, 1971, that board recommended separation; on August 15, 1971, Gen. M.J. Poppy approved the board's recommendation. Applicant's case was thus "in process on or before July 7, 1971," and comes within the time frame covered by the Laird Memo of August 13, 1971.

See also §§ 15.3, 15.4, 15.5 *infra* (alternatives for an upgrade).

15.2.2 TYPES OF DRUGS AND DRUG USE COVERED BY THE LAIRD MEMO

Before 1971, use or possession of the following types of drugs could result in an unfitness discharge: narcotics, hypnotics, sedatives, tranquilizers, stimulants, hallucinogens, and other harmful or habit-forming drugs.[31] In 1971, drug use was defined as "use of those controlled substances as defined by 21 U.S.C. § 812 and applicable regulations."[32]

The Laird Memo defines drug use to include: simple possession, intoxication, addiction, and experimental and casual use. Indeed, virtually any use that does not include selling, introducing, transferring, or distributing is covered by the Memo. Even when the servicemember was allegedly involved in a sale, (s)he may nevertheless qualify for consideration under the Memo.[33]

15.2.3 DISCHARGES COVERED BY THE LAIRD MEMO

The Laird Memo authorizes upgrades in discharges issued for a number of official reasons, including unfitness (or misconduct) due to "drug addiction, habituation, or the unauthorized use or possession [of drugs],"[34] and the good of the service when drug abuse was involved (the two most common reasons given).[34a]

In order for the Laird Memo to apply, drug use must have been the "sole" reason for the discharge, and must have been personal, *i.e.*, the "possession [was] without the intent to sell."[35] The Review Boards construe the term "sole" very broadly, finding the "sole reason" requirement to be met even when some of the conduct leading to the discharge was not drug-related.[36]

The Laird Memo also has been applied to discharges not officially for drug use when drug use is established as the real reason,[37] and to discharges for civilian drug convictions.[38]

Evidence that drug use was the real basis for a discharge may be obtained from medical records of treatment for drug abuse or for drug-related diseases, such as hepatitis. Post-discharge rehabilitation, history of pre-service drug use, induction waiver for drug abuse, or ongoing drug problems may also support a contention that drug use was the true basis for a discharge. Some acts of indiscipline are considered "typical of those afflicted with drug addiction"; for example, AWOLs to procure drugs or to recover from the effects of drug intoxication.[39]

15.2.4 DRUG SALES

The July 7, 1971 DoD drug program does not bar punishment or issuance of UDs for violations of "those laws and regulations relating to the sale of drugs or the possession of significant quantities of drugs for sale to others."[40] If the reason for a discharge included sales, or if sales could possibly be inferred, that element (or inference) must be rebutted

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[31] DoD Dir. 1332.14, 20 Dec. 1965, para. 8.1.

[32] *See* note 35 *infra*. Reference to 21 U.S.C. § 812 was added in the September 30, 1975 revision of DoD Dir. 1332.14.

[33] *See* § 15.2.4 *infra*.

[34] DoD Dir. 1332.14, 20 Dec. 1965, para. 8.1 (unfitness: drug addiction, habituation, or the unauthorized use or possession of narcotics, hypnotics, sedatives, tranquilizers, stimulants, hallucinogens, and similar known harmful or habit forming drugs and/or chemicals).

[34a] *See* AD 80-0959; AD 80-09466; AD 80-09448; AD 80-09393; AD 79-05885; AD 79-04457; AD 77-08804; AD 77-04776; FD 78-01670; FD 78-00595; MD 80-01604; MD 80-00198; MD 78-01427; MD 78-01367; MD 7X-06398; ND 80-01020; ND 80-00256; ND 79-02174; ND 79-01802; ND 79-00335; ND 78-02578. *See* App. 15C *infra* (details of these cases).

[35] A September 1971 memorandum directed to the Army DRB includes the following:

> Drug possession for personal use implies the possession of a quantity of one or more of the drugs [*i.e.*, controlled substances defined 21 U.S.C. § 812 and applicable regulations] without the intent to sell, introduce, transfer, or distribute such drugs to another person or persons. No specific amount of drugs will be used in making a determination that the possession of drugs was for personal use. The determination is dependent upon the circumstances of each case taken in their totality. Such factors include the number of drugs, the amount of drugs, the frequency with which drugs could be obtained, the likely intake of a user given the particular drug and its potency and the degree of his prior use, the individual's previous history of drug use or association with drugs, the possession, if any, of drug packaging or related equipment, and any other relevant factors which may establish or disprove his intent to possess drugs for his own use.

Memorandum (Review of the Discharges Under Other Than Honorable Conditions Issued to Drug Users) from Under Secretary of the Army Thaddeus R. Beal to the Director, Army Council of Review Boards (Sept. 17, 1971) [hereinafter cited as Beal Memo] (reproduced at 44 Fed. Reg. 25,111 (April 27, 1979)).

[36] "The term 'solely' should not be construed to bar the favorable recharacterization of a discharge where only minor offenses, especially those related to or caused by drug abuse, may have been a contributing factor in the granting of an Undesirable Discharge." *Id.* Army DRB panel members are given explicit directions on this issue. "[I]t is incumbent upon the panel to attempt to determine whether or not the involvement of drugs was the proximate cause or effect of other disciplinary problems which contributed toward discharge." 44 Fed. Reg. 25,071 (April 27, 1979) (ADRB SOP).

See AC 78-02948 ("it is unlikely that his conviction of the AWOL's for a total of 10 days alone would have resulted in a punitive discharge; and that his discharge was apparently based solely on the possession and use of marijuana"); AC 75-00610A (although BCD not issued solely on the basis of applicant's conviction for possession of drugs, the minor offenses included should not preclude recharacterization).

See also AD 77-07588 (possession of cocaine and heroin, and striking an NCO); AD 78-01650 (possession of marijuana and giving military payment certificates to Vietnamese national); AD 80-09401 (malingering, failure to perform duties, physical incapability to perform duties due to use of drugs); AC 58-01715B (AWOLs and possession of heroin); AC 75-00610A (introduction of marijuana, wearing unauthorized insignia, disrespect to NCO); AC 78-02948 (AWOLs and possession and use of marijuana).

[37] *See, e.g.*, AD 78-00049.

[38] "If the civilian case for which the offender was convicted or confined is of a nature that had it been a military offense and 'Laird' should have applied, then board members may apply Laird policy and grant relief." 44 Fed. Reg. 25,072 (April 27, 1979) (ADRB SOP). *See, e.g.*, AD 80-01466 (possession of dangerous drugs); FD 78-00792 (possession of marijuana); ND 79-01843 (drug intoxication involving moral turpitude). Just as a discharge not officially due to drug use can be shown to be drug related, a civil conviction for larceny, for example, can be shown to be drug related.

[39] *See* AD 78-00049.

[40] This is the case, provided that the evidence that led to disciplinary action was not attributable to a urinalysis or to the servicemember volunteering for treatment. *See* App. 15A *infra*.

if an upgrade is to be achieved.[41] Servicemembers discharged for selling drugs can successfully overcome the problem at the Review Boards in at least two common situations:

- Where the applicant was arrested while in possession of a large quantity of drugs; and
- Where the applicant was arrested while transferring drugs to a friend or to an informer.

In the first situation, the quantity of drugs probably led to the inference of intent to sell; but since "no specific amount of drugs will be used in making a determination that the possession was for personal use,"[42] no specific amount can irrebuttably imply an intent to sell. The applicant's rebuttal of such an implication should be guided by the same factors that guide a Review Board in determining whether the drugs were for personal use:

- Number of different kinds of drugs;
- Quantity of each drug;
- Frequency or ease with which drugs could be obtained;
- Level of physical or psychological addiction;
- Possession of drug packaging equipment;
- Proximity to pay day;
- Cost; and
- Whether drugs were acquired through barter, as was common in Vietnam.

If the applicant sold or transferred drugs to a friend as a favor and made no profit on the transaction, or if the applicant was acting on behalf of a group that pooled its money to purchase the drugs, a Board will often find that the Laird Memo applies, either because the "sale" was not substantiated or because the applicant was acting merely as a conduit.[43]

If the sale was made to an informer, *i.e.,* if the applicant was acting as procuring agent for the buyer, the defense of agency can be raised. Some of the factors that support an applicant's use of this defense include:

- Applicant made no profit on the transaction;[44]
- Applicant acted at informer's request;
- Applicant used informer's money;
- Applicant merely passed the drugs and money from one party to the other;
- Applicant did not set the price, merely quoted the going rate;
- Informer was a friend of the applicant;
- Supplier was a casual acquaintance of the applicant;
- Applicant was a conduit of information between informer and seller; and
- Informer was aware of the identity of the supplier but insisted that the applicant make the deal.

If any of these factors are present in the applicant's case, they should be discussed in his/her contentions.[45]

15.2.5 EXTENT OF RELIEF AVAILABLE UNDER THE LAIRD MEMO

The Laird Memo and its 1972 supplement require review of UDs, BCDs, and DDs issued for personal abuse of drugs and authorize GDs. HDs are permitted by the Laird Memo, and as a general rule are granted when the service records would have led to HDs except for the drug involvement. The best way to argue that a drug-related discharge should be upgraded to an HD (rather than only to a GD) is to argue that any disciplinary offenses or deterioration in the servicemember's performance was the direct consequence of the drug abuse.

Although the Laird Memo does not specifically address veterans who received GDs because of drug use, applicants in this situation may find that two additional arguments can help produce upgrades to HDs. One involves the standard for an HD for a person discharged at expiration of the normal term of service;[46] the other involves the current standard for character of service for a person discharged for personal abuse of drugs.[47]

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[41] For example, it may be argued that, given the applicant's severe addiction, the large quantity of drugs was necessary to supply the habit, and that the facts do not support an inference of trafficking.

[42] *See* Beal Memo, *supra* note 35.

[43] *See* MD 7X-06398 (applicant discharged for use and sale of dangerous drugs; denied sales, denied making profit, but admitted "acting as a go-between"). *See also* AD 78-01650 (testimony that "several of us had pooled our money to make purchase of marijuana for our own use but not for sale"; two sandbags full of rolled marijuana cigarettes); AD 77-08804 (three pounds of marijuana, 108 allobarbital capsules). There is a specific Discharge Index category for this issue. *See* A85.06 (discharge based on sale, but mere conduit theory applies).

[44] Making a profit does not necessarily overcome this defense; *e.g.,* applicant is not seller when profit resulted from scheme devised by informer. United States v. Pacheco, 46 C.M.R. 555 (A.C.M.R. 1972).

[45] A starting point for research is provided by the following cases: United States v. Martinez, 3 M.J. 600, 5 MIL. L. REP. 2377 (1977); United States v. Simmons, 2 M.J. 758, 5 MIL. L. REP. 2250 (1977); United States v. Young, 2 M.J. 472, 4 MIL. L. REP. 2261 (1975); United States v. Lewis, 49 C.M.R. 734, 2 MIL. L. REP. 2118 (1974); United States v. Foster, 49 C.M.R. 421, 2 MILL. REP. 2507 (1974); United States v. Scott, 49 C.M.R. 213, 2 MIL. L. REP. 2165 (1974); United States v. Hodge, 48 C.M.R. 576, 2 MIL. L. REP. 2103 (1974); United States v. Henry, 23 C.M.A. 70, 48 C.M.R. 541, 2 MIL. L. REP. 2022 (1974); United States v. Benavidez, 48 C.M.R. 354, 1 MIL. L. REP. 2647 (1973); United States v. Whitehead, 48 C.M.R. 344, 1 MIL. L. REP. 2646 (1973); United States v. Richards, 47 C.M.R. 675, 1 MIL. L. REp. 2468 (1973); United States v. Calhoun, 47 C.M.R. 113, 1 MIL. L. REP. 2211 (1973); United States v. Holladay, 47 C.M.R. 22, 1 MIL. L. REP. 2249 (1973); United States v. Noble, 46 C.M.R. 1211, 1 MIL. L. REP. 2021 (1973); United States v. Pacheco, 46 C.M.R. 555 (A.C.M.R. 1972); United States v. People, 45 C.M.R. 872 (1972); United States v. Durant, 45 C.M.R. 672 (A.C.M.R. 1972): United States v. Suter, 21 C.M.A. 510, 45 C.M.R. 284 (1972): United States v. Francis, 44 C.M.R. 781 (1971); United States v. Wampler, 44 C.M.R. 638 (1971), *pet. denied,* 44 C.M.R. 940 (1972); United States v. Fruscella, 21 C.M.A. 26, 44 C.M.R. 80 (1971); United States v. Stewart, 20 C.M.A. 300, 43 C.M.R. 140 (1971); United States v. Munoz, 40 C.M.R. 478, *pet. denied,* 40 C.M.R. 327 (A.C.M.R. 1969); United States v. Sierra, 38 C.M.R. 869, *pet. denied,* 38 C.M.R. 441 (1968); United States v. Maginley, 32 C.M.R. 843, *aff'd,* 13 C.M.A. 445, 32 C.M.R. 445 (1963); United States v. Horne, 9 C.M.A. 601, 26 C.M.R. 381 (1958).

[46] *See* § 15.4.3, 15.4.4 *infra*.

[47] The normal character of discharge in a case involving personal abuse of drug is an HD. The Boards are aware of this. *See, e.g.* AD 79-05885 (a 1962 UD for use and possession of marijuana upgraded under the Laird Memo because "under today's standards there is substantial doubt that this discharge would have been the same"); ND 78-00237 (a 1966 UD previously upgraded to a GD because "under today's standards, the applicant could not be discharged by reason of misconduct (drugs) because he voluntarily turned himself in as a drug abuser"). Although the argument for an upgrade to an HD under the DRB equity standard is not as certain as the Laird Memo's requirement for an upgrade to a GD it should be made. The

An upgrade to at least a GD is certain enough in a case covered by the Laird Memo that a personal appearance hearing is probably not necessary if the applicant would be satisfied with a GD.[48]

15.2.6 SAMPLE CONTENTIONS[49]

1. A Discharge Review Board or Board for the Correction of Military Records is required to recharacterize the Undesirable, Bad Conduct, or Dishonorable Discharge of any former servicemember separated, or in the process of being separated, on or before July 7, 1971, solely on the basis of personal use of drugs or possession of drugs for the purpose of such use. *See* Laird Memoranda (Aug. 13, 1971, and Apr. 28, 1972).

2. Applicant was separated or in the process of being separated on or before July 7, 1971.[50]

3. Applicant was discharged solely for personal use of drugs or possession of drugs for personal use.[51]

4. The Laird Memo requires recharacterization to at least a General Discharge.

5. For the DRB to conclude that the applicant's discharge should not be recharacterized to fully Honorable would violate due process and fundamental principles of administrative law because it would be inconsistent with the DRB's decision to upgrade to Honorable in each of the following cases in which (1) the Laird Memo was applied, and (2) the quality of the servicemembers' service was equal or inferior to the quality of the service of the applicant here: [here cite cases in which upgrades were granted on records equal or inferior to the applicant's].[52]

6. The applicant's discharge is inequitable[53] and should be recharacterized to fully Honorable pursuant to 32 C.F.R. § 70.6(c)(1) because (1) DoD Dir. 1332.14, encl. 2, para. F (30 Sep. 1975) differs in material respects from the policies and procedures under which this applicant was discharged; an Honorable Discharge is now required when servicemembers are discharged for personal abuse of drugs other than alcohol and the evidence of the abuse was gathered as a direct or indirect result of a urinalysis test administered for identification of drug abusers, or as a result of a servicemember's volunteering for treatment for a drug problem, and:

- Member's record indicates lack of potential for continued service; or
- Long-term rehabilitation is determined necessary and member is transferred to a Veterans Administration or civilian medical facility for rehabilitation; or
- Member has failed, through inability or refusal, to participate in, cooperate in, or complete a drug abuse treatment and rehabilitation program.

(2) DoD Dir. 1332.14, encl. 2, para. F represents a substantial enhancement of the rights afforded a respondent in such proceedings, and (3) there is substantial doubt that this applicant would have received less than a fully Honorable Discharge if DoD Dir. 1332.14, encl. 2, para. F had been in effect at the time of his/her discharge.

15.3 DISCHARGES RESULTING FROM URINALYSES

Nearly 3,000 Army veterans who believe they have bad discharges do not. As of December 1980, the Army has been unable to deliver 2,944 HDs issued as a result of a court order.[54] Any Army veteran who believes his/her drug use was detected by urine testing should obtain a copy of his/her personnel records from the National Personnel Records Center in St. Louis using SF 180[55] or call the Army DRB at (202) 697-3518 and ask the Project Officer, Court Ordered Discharge Review Project, to confirm whether his/her name is on file. The veteran may find that an HD certificate has been placed in his/her records.

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[47] (continued)
advantage of the Laird Memo to former servicemembers is that it was made specifically retroactive. *See* § 15.4.2 *infra*.

[48] If the applicant's record is spotless except for the one incident that led to discharge, an upgrade to an HD can be expected from a documentary review alone. If service records are missing, however, a personal appearance hearing is very important — especially for Air Force veterans. If there is any question that the drug use might have involved sales or if the drug-related nature of disciplinary offenses could only be explained adequately by the veteran in person, every effort should be made to arrange for a hearing before the Review Board in Washington or at a regional hearing site. *See* Ch. 8 *supra* (hearing strategies and options). Reconsideration criteria may permit a veteran to request a documentary review first and then, if full relief is not granted, to seek a personal appearance hearing. This method may take longer to accomplish an upgrade.

[49] These contentions are intended to insure DRB or BCMR recognition that the Laird Memo applies to the applicant and to accomplish an upgrade to HD. Contentions should be tailored to the applicant's particular circumstances; special arguments are available for certain official reasons for discharge. *See, e.g.,* Ch. 17 *infra* (discharges for unfitness); Ch. 19 *infra* (discharges for good of the service in lieu of court-martial); Ch. 20 *infra* (discharges following courts-martial). *See also* Ch. 11 *supra* (how to prepare contentions).

[50] Details explaining that a discharge was in process should be provided if the date of discharge was not July 7, 1971, or before. *See* § 15.2.1 *supra*.

[51] If the official reason for discharge does not specify drugs, contentions establishing personal use as the true reason for discharge should be added. *See* § 15.2.3 *supra*. If there is any possibility that a Board member might believe a sale of drugs was involved, contentions rebuting that notion should be added. *See* § 15.2.4 *supra*.

[52] *See* App. 15C *infra* (cases in which upgrades were granted in accordance with the Laird Memo). Actual decisional documents may have to be obtained in order to make accurate comparisons. Additional research may be necessary. *See* App. 15B *infra* (Research Key). If no cases are found in which applicants with service records inferior to the present applicant's received upgrades, this contention should be deleted.

[53] *See* § 15.4.4.1 *infra*.

[54] Giles v. Secretary of the Army, 475 F. Supp. 595, 7 MIL. L. REP. 2524 (D.D.C. 1979), *aff'd*, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980).

15.3.1 INTRODUCTION

The DoD drug program that went into effect July 7, 1971, used urinalyses as its principal means of drug detection. Everyone under age 26 was subject to testing without forewarning. Every person leaving Vietnam after June 18, 1971, had to submit a urine specimen before (s)he could leave the country. More than four million tests were conducted in the first 14 months of the program.

As of July 7, 1971, any evidence of drug use "developed by, or as a direct or indirect result of urinalysis" could not be used in any disciplinary action under the U.C.M.J., or to support, "in whole or part" a UD.[56] A stigmatizing GD was still permitted, however; between 1971 and 1974, 18,518 GDs were issued for drug abuse.[57] DoD separation regulations incorporated the restriction on UDs by creating a subcategory of unsuitability discharges entitled "personal abuse of drugs."[58]

In 1974, the Court of Military Appeals (C.M.A.) ruled that an order to produce a urine specimen was a violation of Article 31 of the U.C.M.J. when it could lead to less than an HD.[59] That ruling prompted a six-month suspension of all urine testing. Testing has resumed, but as of January 7, 1975, an HD has been required when a discharge for drug abuse ensues.[60]

Despite the ruling, DRBs refused to apply the decision to veterans seeking an upgrade. DRBs also considered it proper to speculate if servicemember could have been discharged for some other reason (thereby justifying a denial or relief). Litigation (*Giles v. Secretary of the Army*) filed in 1977 against the Army produced an order declaring that the Army's refusal to upgrade unlawfully violated Article 31 of the U.C.M.J.[61] For the first time in history, the court ordered upgrades for an entire class of veterans.

The issue of awarding a less than honorable discharge as a result of compelled urinalysis is not closed. Not all Army veterans in the class have been contacted, and the Navy and Air Force DRBs do not believe they are required to upgrade discharges automatically, as was the Army DRB. Litigation may be forthcoming against both services.[61a]

15.3.2 *GILES* CLASS DEFINED

The class in *Giles* comprised all Army veterans with less than honorable discharges whose cases contained the following elements:

- The characterization of discharge was issued in an administrative proceeding;
- The Army introduced evidence at the administrative proceeding developed by or as a direct or indirect result of compelled urinalysis; and
- The urinalysis was administered for the purpose of identifying drug abusers (either for purposes of entry into a treatment program or to monitor progress during rehabilitation or follow-up).

There are two ways to identify *Giles* class members. A quick but somewhat unreliable method is to examine the official reason for discharge, the date of discharge, and the code assigned at discharge. The slower, more reliable method is to analyze each element in the definition of the class.

Most Army veterans who are members of the *Giles* class were discharged for unfitness or unsuitability for drug abuse[62] between July 1971 and April 1976.[63] Before 1971, urinalyses for drug abuse were uncommon; however, some persons, particularly those hospitalized as a result of drug overdoses, may have been required to submit to testing.

Classmembers' separation papers (DD 214s) probably carry one of the following Separation Program Numbers (SPNs): 384; 385; JPB; JMM; JLF; and JKK. The absence of one of these codes does not necessarily mean that the person is not a class member. These SPN codes indicate discharges for drugs; they are not exhaustive of all cases in which urinalyses were conducted. The Army used these SPNs to search its computerized files to locate persons likely to be class members. Army veterans with other SPN codes and other reasons for discharge may also be class members but their records were not located in the computers.

In summary, to establish that an applicant is a member of the *Giles* class, the following must be shown:

- A compelled urinalysis was conducted;[64]

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[55] The correct address for former servicemembers of a particular rank and status is included on the SF 180.

[56] *See* Packard Memo, *supra* note 7 (reproduced at App. 15A *infra*).

[57] RCS DD-M (SA) 1060 Report, Administrative Discharges for Drug Abuse (obtained from OASD (M&RA) MPP). Some of these GDs may have been due to persons volunteering for treatment rather than to positive results from urinalyses.

[58] DoD Dir. 1332.14, 26 Oct. 1973, para. H.8.

[59] United States v. Ruiz, 22 C.M.A. 181, 48 C.M.R. 797, 2 MIL. L. REP. 2063 (1974). *But see* United States v. Lloyd, 10 M.J. 172, 9 MIL. L. REP. 2152 (C.M.A. 1981) and United States v. Armstrong, 9 M.J. 374, 8 MIL. L. REP. 2523 (C.M.A. 1980).

[60] *Ruiz*, 22 C.M.A. 181, 48 C.M.R. 797 (1974), was decided on July 5, 1974. On July 13, 1974, the Office of the Secretary of Defense stopped "all urine testing in support of service alcohol and drug programs." On January 7, 1975, that office directed the services to resume testing in a manner that would not violate the *Ruiz* decision. DoD did not formally change its administrative discharge regulations until September 1975. *See* DoD Dir. 1332.14, 30 Sep. 1975 (effective 90 days later).

[61] *Giles*, 475 F. Supp. 595 (D.D.C. 1979). The judge ordered the Army, among other things, to: (1) compile a list of all those separated with a less than honorable discharge by reason of drug abuse; (2) issue a press release to include, among other things, the address and telephone number of organizations associated with the National Military Discharge Review Project from which individuals can obtain information; (3) publish information in the *Federal Register* and change Army DRB and BCMR regulations; (4) review the personnel and medical records of the veterans on the list; (5) determine the last known address of each of these veterans; and (6) upgrade, by September 1, 1980, the discharges of all members of the class to HDs and send a certificate of this upgrade by certified mail to each classmember.

[61a] *See* Walters v. Secretary of Defense, No. 81-0962 (D.D.C. filed April 22, 1981), 1 VRN 1.

[62] If LSD, marijuana, cocaine, or a methaqualone was the only drug leading to the servicemember's discharge, compelled urinalysis may not be an issue. The test used between 1971 and 1974 (the FRAT test) was not designed to detect the above drugs.

[63] Effective April 1, 1976, an interim message change to AR 635-200 required HDs for personal abuse of drugs. DA Message 30 222 6Z.

[64] The Army considers any of the following to constitute prima facie evidence that a compelled urinalysis was conducted:

- A urinalysis lab report showing a FRAT test administered;
- Any narrative report indicating a urinalysis was administered to determine if an individual was using drugs;

- The evidence that led to discharge was developed by the urinalysis or was a direct or indirect result of the urinalysis;[65] and
- The Army introduced the evidence in an administrative proceeding.[66]

If these elements can be documented, expedited review may be pursued.[67]

15.3.3 EXPEDITED REVIEW PROCEDURES UNDER *GILES*

Any Army veteran who has been through the court-ordered review (there are approximately 10,000 such veterans) and has been found not to be a class member should pursue an upgrade in the usual manner.

If any Army veteran believes (s)he is affected by the *Giles* court order, only an abbreviated application form (DD 293) need be filed. The applicant should fill out the DD 293, insert the code "Category G" in Block 8, and mail it to the address indicated on the form for Army applicants. "Such applications shall be reviewed expeditiously by a designated official who will either send the individual an Honorable Discharge certificate . . . or forward the application to the Discharge Review Board."[68]

15.3.4 NAVY, MARINE CORPS, AND AIR FORCE DISCHARGES

Although the *Giles* suit was against the Army, the Navy, Marine Corps, and Air Force made the same illegal use of urinalyses. Litigation may be filed if these services' Review Boards do not voluntarily change their regulations to conform to those of the Army DRB. Until that litigation is resolved,[68a] however, applicants to these Boards should argue that compelled urinalyses violate Article 31 of the U.C.M.J., in addition to the other arguments available.[69]

If the Army decides that the applicant is not a member of the *Giles* class, the application is processed like any other. The applicant may withdraw the application for later submission, supplement it with additional contentions, or contest the decision about classmember status. The mode of hearing (documentary review or personal appearance) should be designated as soon as possible after notice is received that the applicant is not a class member.

15.3.5 SAMPLE CONTENTIONS FOR NAVY, MARINE CORPS, AND AIR FORCE VETERANS

1. The applicant's discharge was characterized as less than honorable in an administrative proceeding in which the military introduced evidence developed by or as a direct or indirect result of compelled urinalysis administered for the purpose of identifying drug abusers (either for purposes of entry into a treatment program or to monitor progress during rehabilitation or follow-up).

2. To characterize a discharge as less than Honorable under the circumstances set forth in Contention #1 violates Article 31 of the U.C.M.J. *Giles v. Secretary of the Army,* 475 F. Supp. 595, 7 MIL. L. REP. 2524 (D.D.C. 1979).

3. Because of the validity of Contentions #1 and #2, applicant's discharge must be upgraded to Honorable. *Giles.*

4. The Court Order in *Giles*, combined with the uniformity requirements of Pub. L. No. 95-126, mandate that the applicant receive an Honorable Discharge.

5. The applicant's discharge is inequitable and should be recharacterized to Honorable

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[64] (continued)
- Any clinical cover sheet reflecting a diagnosis of drug dependency, addiction, abuse, or use of a specific drug;
- Entry into the Army or re-entry following a break in service after June 30, 1972;
- Participation in a drug rehabilitation program or detoxification program after June 30, 1972;
- Departure from Vietnam or Thailand for reassignment to another location after September 1, 1971; or
- Participation in a drug follow-up program after June 30, 1972.

SFRB Admin. Memo #24-80, 1 Apr. 1980, encl. 1.

[65] Evidence of refusal or failure (before January 7, 1975) to participate in a urinalysis counts as evidence developed as a direct result of compelled urinalysis. SFRB Memo, Information Bulletin #5, 5 May 1980. *See* AD 77-05280 (servicemember discharged for refusing to submit to urinalysis).

[66] The Army DRB views references in the record of an administrative proceeding to the following items as indications that the Army introduced evidence:
- Participation in a drug rehabilitation or detoxification program;
- Hospitalization for drug abuse; and
- Drug experience which would have made the individual liable to compelled urinalysis.

A reference to these matters is considered a direct reference to urinalysis results. SFRB Admin. Memo #24-80, 1 Apr. 1980, encl. 1. The worksheet used by the Army DRB suggests the following ways in which reference to a urinalysis in documents in the Official Military Personnel File may demonstrate introduction of evidence of compelled urinalysis:
- Commanding Officer (CO) mentioned urinalysis in narrative of document recommending separation;
- CO referred to urinalysis as evidence in enclosures to recommendation for separation;
- Intervening commander mentioned urinalysis in narrative of forwarding indorsement/comment;
- Intervening commander referred to urinalysis as evidence in enclosure to correspondent in forwarding indorsement;
- Urinalysis mentioned or introduced as evidence by government at the Board proceedings (recorder, Board member, or government witness);
- Urinalysis mentioned in approval action by appropriate approval authority;
- Urinalysis referenced as enclosure in approval action by appropriate approval authority.

There is also space on the worksheet for the Army DRB reviewing officer to explain why (s)he believes "urinalysis appears to have been considered by command although not mentioned/referred to specifically in administrative discharge paperwork." OSA Form 175, Worksheet — Court Ordered Discharge Review Project.

[67] *See* § 15.3.3 *infra* (special application procedures). If the urinalysis may not have been considered, the applicant should still file under the expedited procedures. The expedited review does not affect an applicant's opportunity to present his/her case to the Board under the regular procedures if (s)he is found not to be a member of the *Giles* class.

[68] 45 Fed. Reg. 17,991 (1980) (to be codified in 32 C.F.R. Part 581, app. C.4). The Army's view is that the designated official's action is not a decision by the DRB, although DRB panel members process these cases.

[68a] *See* note 61a *supra*.

[69] *See* § 15.4 *infra*.

pursuant to 32 C.F.R. § 70.6(c)(1) because (1) current standards contained in DoD Dir. 1332.14 (1977) differ in material respects from the policies and procedures under which the applicant was discharged in that they mandate an Honorable Discharge for a servicemember discharged for personal abuse of drugs when evidence developed as a direct or indirect result of a urinalysis was considered in the discharge processing; (2) DoD Dir. 1332.14 represents a substantial enhancement of the rights afforded a respondent in such proceedings; and (3) there is substantial doubt that the applicant would have received the same discharge if DoD Dir. 1332.14 (1977) had been in effect at the time of the applicant's discharge.

15.4 DISCHARGES AFTER JULY 1971

Applicants discharged after July 7, 1971, who were being considered for discharge by their command before that date, may be able to argue that the mandatory upgrade policy of the Laird Memo applies to them.[70]

15.4.1 INTRODUCTION

There are several ways to upgrade discharges issued (either officially or arguably for drug use) after the DoD drug program went into effect in July 1971.[71] There are two reasons for the great number of arguments available for upgrading these discharges.

First, implementation of the DoD drug program was very uneven; commands were confused about the original details of the program's restrictions on character of discharge. Then, in 1974, a court imposed further restrictions on character of discharge.[72] Almost ten years after drug treatment programs began, confusion remains as to who may enter such programs and what disciplinary actions may be taken against persons who seek treatment. This confusion has meant that many commanders and military lawyers have misapplied certain provisions of the drug program regulations.[73] Such misapplications, when presented at discharge review, often mandate upgrades under the DRB propriety standard.[74]

Second, regulations governing character of discharge and decisions to discharge for certain kinds of drug abuse improved throughout the 1970s. Under the DRB equity standard,[75] which mandates an examination of an applicant's case in light of current discharge policy, upgrades in post-1971 cases are very likely.

Despite favorable changes in policy, drug abuse still appears to play a significant role in the issuance of bad discharges. Although the official numbers of less than honorable discharges issued for drug abuse have declined, drug use may well contribute to more bad discharges than the discharge statistics reveal. Perhaps commands purposely divert servicemembers from drug treatment programs, or provide only nominal treatment and then issue less than honorable discharges for other reasons. What is clear is that a high rate of bad discharges continues and that among lower-ranking servicemembers (who receive most of the bad discharges) drug use is very common.[76] Drug use may have been a factor in discharging any veteran, regardless of the official reason given.

Arguments for upgrades in post-1971 drug-related discharges should follow, for the most part, the DRB standards:

- Propriety, *i.e.*, the regulations were not followed in separating the applicant; and/or
- Equity, *i.e.*, under today's more liberal policies, a bad discharge would not be issued.

Recent litigation has demonstrated the viability of arguing that Article 31 of the U.C.M.J. is violated when a compelled urinalysis is the evidentiary basis for a less than honorable discharge.[77]

A personal appearance hearing is generally advisable in a drug-related discharge. If propriety arguments alone are being made in support of an upgrade, a personal appearance hearing is not so important.[78]

15.4.2 TYPES OF CASES

Drug-related discharges issued after the July 1971 DoD drug program began may be distinguished according to whether or not they were officially for drug use. The discharge papers of a person discharged officially for drug use after 1971 will show one of the following reasons for separation:

- Unfitness/drug abuse;
- Misconduct/drug abuse;
- Unsuitability/personal abuse of drugs;
- Personal abuse of drugs other than alcohol;
- Good of the service in lieu of court-martial/drugs; or
- Sentence of a court-martial.

The discharge papers of a person using drugs but not officially discharged for that reason may show any other reason. The most common reason used is unfitness or misconduct due to "frequent involvement" or civilian court conviction.

15.4.3 ARGUING THAT THE DISCHARGE WAS IMPROPER

In addition to general regulatory issues,[79] drug-related discharges raise issues relating to participation in rehabilitation programs and use of evidence of drug abuse. Not every violation of regulations will be

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[70] *See* § 15.2.1 *supra*.
[71] *See* Packard Memo, *supra* note 7 (reproduced at App. 15A *infra*).
[72] *Ruiz*, 22 C.M.A. 181, 48 C.M.R. 797 (1974).
[73] *See* Alvarey, The Scope of the Alcohol and Drug Abuse Prevention and Control Program Exemption Policy, DA Pam 27-50-92 (1980).
[74] *See* 32 C.F.R. § 70.6(b).
[75] *See* 32 C.F.R. § 70.6(c).
[76] *See* note 16 *supra*.
[77] *See* Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980). *See also* § 15.3 *supra*.
[78] *See* §§ 8.3, 9.2.7 *supra* (other considerations involving hearing strategies).
[79] *See* § 12.5 *supra*.

grounds for upgrading a bad discharge;[80] however, simply raising doubts about the propriety of the discharge can sometimes lead to an upgrade.[81]

The July 1971 DoD drug program[82] was implemented by each service. Rehabilitation programs were established to treat drug abusers who either voluntarily sought care or were directed to the program when identified by random urinalyses.[83]

To encourage servicemembers to seek treatment, the program guaranteed that drug use for which they voluntarily sought treatment would not be used as the basis for disciplinary actions or UDs. Before 1975, members who failed to complete a rehabilitation program usually received GDs. When the C.M.A. ruled that the possibility of receiving a GD as a result of compelled urinalysis was a violation of the Article 31 right against self-incrimination, DoD changed its regulations to prohibit anything less than an HD.[84]

Drug program regulations in each service are quite lengthy.[85] Generally, the critical aspect of these regulations in discharge upgrading work is the restriction placed on using evidence of personal drug use or possession in disciplinary actions or in issuing discharges below HDs. Although the names and details of the drug programs vary, each offers immunity from prosecution to certain drug abusers.

15.4.3.1 Errors Related to Participation in Drug Rehabilitation Programs

The Army defines its exemption policy as:

> (a) An immunity from disciplinary action under the UCMJ, or administrative separation with less than an Honorable Discharge, as a result of certain occurrences of . . . drug use or possession of drugs incident to personal use.
>
> (b) An immunity from use of evidence obtained directly or indirectly from the member having been involved in the [drug program]. . . .[86]

This immunity from prosecution applies automatically to any servicemember who:

- Volunteers for drug treatment;
- Receives emergency medical treatment for a drug overdose;
- Undergoes a positive urinalysis;
- Is referred to the drug program by a doctor who has diagnosed drug abuse at a sick call or routine medical exam; or
- Is referred to the drug program by his/her commander.

Veterans who participated in a drug program either succeeded or failed: if they succeeded but later were discharged for drug offenses, their drug treatment records should be examined very carefully to determine whether the rehabilitation really was successful;[87] if they failed, UDs were improper.[88]

Evidence to support a contention that the applicant should have been granted immunity may be

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[80] The DRBs' propriety standard states that:

> A discharge shall be deemed to be proper unless, in the course of discharge review, it is determined that there exists an error of fact, law, procedures, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby. Such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made. . . .

32 C.F.R. § 70.6(b)(1). It is especially critical that any propriety issue be presented to the DRB if judicial review of a denial of relief may later be sought. *See generally* Ch. 24 *infra*.

[81] The DRB will give the benefit of the doubt to an applicant. *See, e.g.,* AD 77-11366.

[82] *See* Packard Memo, *supra* note 7 (reproduced at App. 15A *infra*).

[83] *See* § 15.2 *supra* (procedures for dealing with compelled urinalyses).

[84] *See* United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797, 2 MIL. L. REP. 2063 (1974). DoD Dir. 1323.14, 30 Sep. 1975, added the following note regarding the *Ruiz* decision:

> It is essential to assure compliance with both the letter and spirit of the rule of law announced in *United States* v. *Ruiz* (23 USCMA 181, 48 CMR 797 (1974)). Extreme care should be exercised to assure that a member identified for separation under this provision is not separated with less than an honorable discharge, based on some separate and distinct reason for discharge, unless it can be clearly demonstrated that evidence of drug use obtained through the identification process described herein was not directly or indirectly utilized in establishing such separate and distinct reason. It may be desirable for field commanders to consult with legal personnel concerning implementation of this note.

See notes 60 and 62 *supra*.

[85] *See, e.g.,* AR 600-85 (May 1, 1976) (the Army's Alcohol and Drug Abuse Prevention and Control Program). This contains chapters on prevention, identification, referral, exemption, detoxification, rehabilitation, client management, civilian employee participation, program reports, and evaluation.

[86] *Id.*

[87] Evidence of drug use subsequent to a rehabilitation program indicates that the servicemember was not completely rehabilitated. This issue goes more to the equity of the discharge than to its propriety. *See* § 15.5 *infra*. A propriety argument may exist, however, if the clinical records (or the applicant's statement) do not support a finding that the applicant successfully completed rehabilitation. *See, e.g.,* AR 600-85, para 5-8 (criteria for success and failure). A rehabilitation program is particularly suspicious if no one ever failed it. *See* § 15.6.1 *infra* (discussion of how to obtain drug abuse records).

[88] Between 1971 and 1975, GDs were required; after 1975, HDs were required. *See* App. 15A *infra*. A veteran discharged with the proper character of service, but less than an HD, should present the current standards argument. *See* § 15.4.4.1 *infra*. A veteran discharged for drug abuse as a rehabilitation failure, who received a UD when a GD was required or a GD when an HD was required, can argue that the discharge was improper. A sample contention follows:

> 1. Applicant's discharge is improper and should be recharacterized pursuant to 32 C.F.R. § 70.6 (b)(1) because (a) there exists an error of procedures associated with the discharge at the time of issuance in that a [name of discharge issued] was not permitted for a respondent separated for personal abuse of drugs due to failure to complete rehabilitation; and (b) there is substantial doubt that the discharge would have remained the same if the error had not been made.

Some veterans may have been discharged as rehabilitation failures who in fact were not. If an applicant thinks that (s)he was doing well in a program and was surprised to be labelled a failure, the records (*e.g.,* the commander's recommendation for elimination, which is required to contain a nonconclusory history of the veteran's drug abuse and a summary of rehabilitative efforts) should be examined carefully. Any determination of rehabilitation failure should have been made in consultation with the drug program staff and after the program staff had made its recommendation. In an advisory opinion prepared for the Judge Advocate General of the Army, the proceedings in the case of a soldier discharged for failing rehabilitative efforts due to continued abuse of alcohol included "improprieties" in the above respects; the proceedings were found "insufficient to support his elimination from the service" and "prejudiced his substantial rights." DAJA-AL 1978/3482, 22 Sep. 1978.

found either in medical records[89] or in statements from the applicant that (s)he sought help but was denied assistance.[90]

Immunity from prosecution or from receiving a less than honorable discharge does not apply to all incidents of drug use or possession that occurred before the immunity was granted.[91] For example, the Army's exemption policy does not apply if, at the time (s)he volunteered, the servicemember:

- Was being investigated for a drug offense;
- Was officially warned that (s)he was suspected of the offense;
- Had been apprehended or charged under the U.C.M.J. for the offense; or
- Had received emergency medical treatment for drug overdose and the treatment resulted from apprehension by law enforcement officials.[92]

The exact date an investigation began is critical if the applicant contends that (s)he had volunteered for treatment before that date. Any doubt about dates of entry into a program or dates of investigations should be resolved in favor of an applicant.[93]

15.4.3.2 Errors Related to Discharge of Servicemembers Who Participated in a Rehabilitation Program

Participation in a drug rehabilitation program may not be used, directly or indirectly, as evidence at any stage of a discharge proceeding; any such use, regardless of the official reason for discharge or the member's performance record, necessitates an HD.[94]

Each service uses many forms to record a servicemember's involvement in a drug program. Mere reference to a form as an enclosure in a recommendation for discharge can be enough to necessitate an upgrade. The drug abuse information contained in these forms is confidential and is inadmissible in a court-martial in certain circumstances.[95]

15.4.3.3 Miscellaneous Propriety Issues

A charge of possession of a large quantity of drugs or of sale of drugs that was handled only at a special court-martial or by separation in lieu of court-martial, rather than at a general court-martial, may indicate that the government's case was weak or defective. Weak cases include those in which:

- Evidence of drug possession was obtained by an illegal search;
- The drugs used were not illegal or controlled substances;
- The defense of agency to the charge of sales was available;
- The military had no jurisdiction over the offense.

DRBs will upgrade a discharge for drug possession based on evidence secured by an illegal search. Occasionally, a servicemember will have been discharged for possessing drugs that were not, in fact, prohibited by the regulations. DoD did not incorporate all-encompassing language prohibiting possession of "controlled substances" until 1975. At irregular intervals prior to 1975, various classes of drugs were added to a list of banned substances as DoD recognized their abuse.[96]

Sometimes, in cases in which a charge of sale resulted in either a court-martial conviction or a good of the service discharge in lieu of court-martial, the agency defense, or what the Army DRB calls the "mere conduit theory," can be successfully raised.[97]

15.4.4 ARGUING THAT THE DISCHARGE IS INEQUITABLE

Most arguments concerning the equity of bad discharges issued for drug use are applicable to all recipients, regardless of when discharged. Equity arguments can be used alone or to supplement arguments disputing the propriety of a discharge.

Useful equity arguments include:

- Current standards are more liberal than those under which the applicant was discharged;
- The character of discharge was too harsh at the time it was issued;
- The quality of service outweighs the drug use; and/or
- Drug use impaired the applicant's ability to serve.

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[89] Sick call records may contain an entry for treatment of an overdose or diagnosis of drug abuse. *See* § 15.6.1 *infra* (how to obtain complete medical records in these cases).

[90] For example, if a servicemember spoke with the unit commander about a drug problem but the commander refused to refer him/her to the drug treatment program, the following contention may be used:

> 1. Applicant's discharge is improper and should be recharacterized pursuant to 32 C.F.R. § 70.6 (b)(1) because: (a) there exists an error of discretion associated with the discharge at the time of issuance, in that applicant's unit commander on [give date] refused to refer applicant to the drug treatment program for assistance; and (b) there is substantial doubt that the discharge would have remained the same if the error had not been made because, had the applicant failed the treatment program (s)he could not have received an Undesirable Discharge.

A servicemember may have known about a drug program but failed to seek treatment because (s)he felt — accurately or not — that her/his drug use was under control. *See* § 15.4 *infra*. On the other hand, a drug abuser who sincerely wanted help may have avoided rehabilitation centers since they were notorious for easy availability of drugs.

[91] The immunity also does not apply to incidents of drug abuse committed after a member is declared to have successfully completed rehabilitation or anytime after immunity is granted.

[92] *See* AR 600-85, para. 3-17 (May 1, 1976).

[93] *See, e.g.*, AD 77-11366. Commanders were not always pleased to learn that they had to issue HDs to drug abusers and sometimes went so far as to alter the dates of proceedings in order to prevent such discharges. *See, e.g.*, DAJA-AL 1978/3482, 22 Sep. 1978. If dates in the applicant's record are inconsistent with those in other parts of the record or with the applicant's memory, careful examination of the dates is justified.

[94] *See, e.g.*, AR 635-200, para. 1-14a (Nov. 21, 1977).

[95] *See, e.g.*, United States v. Cruzado-Rodriguez, 9 M.J. 908, 8 MIL. L. REP. 2579 (A.F.C.M.R. 1980) (AF Form 1612, Notification of Drug-Abuse Information, included in an airman's "unfavorable information file," held inadmissible at court-martial as evidence of past conduct).

[96] In 1948, the reference in the DoD discharge regulations was simply to drug addiction. In 1959, habit forming narcotics and marijuana were added; in 1965, hypnotics, sedatives, tranquilizers, stimulants, hallucinogens, and similar harmful or habit-forming drugs and/or chemicals were added. In 1973, the reference was consolidated to read narcotic substance, marijuana or dangerous drugs; and in 1975, it was made to include intoxicating inhaled substance or controlled substance as evidenced by 21 U.S.C. § 812.

[97] *See* § 15.2 *supra* (discussion of the agency defense).

15.4.4.1 Theory of Current Standards

Two major changes in DoD policy will support an upgrade based on current standards.[98]

The first change was DoD's revision in 1975 of its administrative separation regulation regarding compelled urinalyses and voluntary enrollment in a drug treatment program.[99] This change is especially useful for veterans separated with:

- GDs for unsuitability due to personal abuse of drugs;
- UDs for unfitness due to drug abuse, if based on entry into, but failure to complete, a treatment program;[100] or
- UDs for unfitness due to drug addiction, issued before 1971.[101]

Anyone who entered but failed to complete a drug treatment program, or who can argue persuasively that (s)he would have volunteered for a drug treatment program if one had been available, should get an HD by using the current standards argument.

The second change was DoD's 1979 policy decision to treat small-quantity cannabis users as minor offenders.[102] This change is especially useful for veterans discharged:

- For good of the service in lieu of trial by court-martial for use or possession of a minor amount of marijuana or hashish;
- For unfitness or misconduct due to drug abuse, if the drug specified was marijuana or hashish;
- By sentence of a court-martial for marijuana or hashish use or possession; or
- For unfitness or misconduct due to frequent involvement when the "involvement" included a court-martial for use or possession of a minor amount of marijuana or hashish.

15.4.4.2 Sample Contentions

In drug abuse cases, the following sample contention may be useful:[103]

> 1. The applicant's discharge is inequitable and should be recharacterized to fully Honorable pursuant to 32 C.F.R. § 70.6(c)(1) because (1) DoD Dir. 1332.14, 30 Sep. 1975, encl. 2, para. F differs in material respects from the policies and procedures under which the applicant was discharged in that under current standards an Honorable Discharge is required for a servicemember discharged for personal abuse of drugs other than alcoholic beverages [here insert one or more of the following phrases:
>
> - When based on evidence developed as a direct or indirect result of urinalysis;[104]
> - When based on evidence developed as a direct or indirect result of volunteering for treatment, and
>
> (a) The servicemember's record indicates lack of potential for continued military service; or
>
> (b) Long-term rehabilitation is deemed necessary and the servicemember is transferred to the Veterans Administration or a civilian medical facility for rehabilitation; or
>
> (c) Failure of the servicemember, through inability or refusal, to participate in, cooperate in, or complete a drug abuse treatment and rehabilitation program];[105]
>
> (2) DoD Dir. 1332.14, 30 Sep. 1975, encl. 2, para. F represents a substantial enhancement of the rights afforded a respondent in such proceedings; and (3) there is substantial doubt that applicant would have received a less than Honorable Discharge if DoD Dir. 1332.14, 30 Sep. 1975, encl. 2, para. F had been in effect at the time of the applicant's discharge.

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[98] The current standards argument is based on the DoD discharge review equity standard:

> A discharge shall be deemed to be equitable unless;
> (1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that:
> (i) Current politics or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and
> (ii) There 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. . . .

32 C.F.R. § 70.6 (c)(1) (i), (ii).

[99] *See* DoD Dir. 1332.14, 30 Sep. 1975, encl. 2, para. F:

> Personal Abuse of Drugs Other Than Alcoholic Beverages; Discharge with an Honorable discharge, when based on evidence developed as a direct or indirect result of a urinalysis test administered for identification of drug abusers, or by a member's volunteering for treatment for a drug problem under the Drug Identification and Treatment Program administered by his particular Armed Force, and:
>
> 1. Member's record indicates lack of potential for continued military service; or
> 2. Long term rehabilitation is determined necessary and member is transferred to a Veterans' Administration or civilian medical facility for rehabilitation; or
> 3. Member has failed, through inability or refusal, to participate in, cooperate in, or complete a drug abuse treatment and rehabilitation program.

See § 15.1 *supra* (discussion of United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797, 2 MIL. L. REP. 2063 (1974)). A UD was still permitted if the evidence of drug abuse was not due to urinalysis or volunteering for treatment. *See* DoD Dir. 1332.14, 30 Sep. 1975, encl. 2, para. I.6.

[100] *See* FD 78-01411.

[101] *See* FD 78-00780.

[102] *See* § 15.1, notes 12, 13 *supra*. *See also* United States v. Miller, 8 MIL. L. REP. 2017 (A.C.M.R. 1979) (lack of instruction on uncharged misconduct held not prejudicial error because "use and possession of marijuana, unfortunately, are not uncommon and are offenses generally considered to be minor").

[103] These contentions are appropriate for applicants discharged for unsuitability due to personal abuse of drugs, for failing a drug treatment program after voluntarily entering it, or for drug abuse when no treatment program was available. *But see* proposed revision to DoD Dir. 1332.14 at 46 Fed. Reg. 31,663 (June 17, 1981).

[104] *See* § 15.3 *supra*.

[105] In a case in which treatment programs were not available, a contention may be added asserting that the applicant would have volunteered for treatment had it been available and would not, therefore, have received less than an HD. When possible, the contention should be supported with evidence that the applicant had voluntarily admitted drug use to a doctor or had sought treatment after discharge.

In drug abuse cases involving marijuana or hashish, these sample contentions may be useful:[106]

1. Applicant was discharged for [here give an explanation of how cannabis use contributed to the applicant's discharge; *e.g.*,
   - Unfitness/drugs for possessing a small amount of marijuana; or
   - Good of the service in lieu of court-martial for possessing a small amount of hashish].[107]

2. Applicant's discharge is inequitable and should be recharacterized to fully Honorable pursuant to 32 C.F.R. § 70.6(c)(1) because (1) the Claytor Memo (Nov. 5, 1979) differs in material respects from the policies and procedures under which the applicant was discharged in that under present standards "for a cannabis offender who uses or possesses a minor amount and who otherwise has a good record, the use of Article 15 . . . , as opposed to trial by courts-martial, is appropriate"; (2) the Claytor Memo represents a substantial enhancement of the rights afforded a respondent in such proceedings; and (3) there is substantial doubt that applicant would have received a less than honorable discharge if the Claytor Memo had been in effect at the time of the applicant's discharge.

15.4.4.3 Theory That Discharge Was Too Harsh

When a DRB finds that a less than honorable discharge was too harsh even under the standards existing at the time it was issued, it will upgrade the discharge.[108] For example, a UD for a civil conviction for possession of five grams of marijuana was considered "too severe for the nature of the civil conviction."[109] A BCD for simple possession of drugs in 1973 was also considered "too harsh."[110]

15.4.4.4 Sample Contention

1. Applicant's discharge is inequitable and should be recharacterized to fully Honorable pursuant to 32 C.F.R. § 70.6(c)(2) because, at the time it was issued, it was inconsistent with the standards of discipline in the military service of which the applicant was a member. [Here cite cases in which a similar finding has been made,[111] or introduce other evidence — *e.g.*, a statement from the applicant that three other servicemembers involved in similar incidents were not separated at all.][112]

15.4.4.5 Theory That Quality of Service Outweighs the Offense

The second most common equitable reason for upgrading drug-related discharges, after application of current standards, appears to be that the overall record of service outweighs the drug use. If the quality of service is satisfactory, the DRB considers the possession, use, and even sale of drugs as an isolated incident, "not characteristic of [applicant's] overall quality of service."[113]

In considering the applicant's quality of service, the DRB examines several factors listed in the DoD equity standard.[114] The applicant may argue that each of these factors separately warrants relief, or that the standards for grading discharges of persons separated at expiration of the normal term of service

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[106] These contentions are appropriate for applicants whose use of marijuana or hashish contributed to discharge.

[107] An additional contention may also be appropriate:
- Applicant has an otherwise good record as substantiated by evaluation marks of exc/exc.

[108] A discharge is considered equitable unless, at the time of issuance, the discharge was inconsistent with standards of discipline in the service of which the applicant was a member. 32 C.F.R. § 70.6(c)(2).

[109] MD 79-00333. Additional research in this area can be done using the Discharge Index and Subject/Category Listing A94.06 (too harsh: discharge inconsistent with standards of discipline existing at time of discharge).

[110] *See* AD 77-12802.

[111] *See* note 109 *supra*.

[112] Occasionally, if a group was apprehended using drugs, there will be references in the applicant's records to the disposition of the other members.

[113] *See, e.g.*, AD 79-03112 (UD for good of the service, for sale of one ounce of heroin; no other disciplinary offenses).

[114] A discharge shall be deemed to be equitable unless:

> (3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's Service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this subparagraph and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:
>
> (i) Quality of service, as evidenced by factors such as:
>
> Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative).
>
> Awards and decorations.
>
> Letters of commendation or reprimand.
>
> Combat service.
>
> Wounds received in action.
>
> Records of promotions and demotions.
>
> Level of responsibility at which the applicant served.
>
> Other acts of merit that may not have resulted in a formal recognition through an award or commendation.
>
> Length of service during the service period which is the subject of the discharge review.
>
> Prior military service and type of discharge received or outstanding post-service conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review.
>
> Convictions by court-martial.
>
> Records of nonjudicial punishment.
>
> Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in Military Service records.
>
> Records of periods of unauthorized absence.
>
> Records relating to a discharge in lieu of court-martial.

32 C.F.R. § 70.6(c)(3)(i). Research in this area can be done using Part F of the Subject/Category Listing (*see* App. 15B *infra*) and the Discharge Index or by reviewing the cases digested at App. 15C *infra* to locate cases in which applicants with service records inferior to the applicant's obtained discharge upgrades. *See also* Ch. 22 *infra*.

(ETS) should be applied.[115] Another way to emphasize the applicant's quality of service is to show that the applicant's service was as good as or superior to that of others who received upgrades.

15.4.4.6 Sample Contentions

1. Applicant's discharge is inequitable and should be recharacterized to fully Honorable pursuant to 32 C.F.R. § 70.6(c)(3)(i) because, when viewed in conjunction with the factors listed below, the offense that led to discharge was an isolated offense not characteristic of the applicant's overall quality of service. The following factors evidence a quality of service that outweighs the offense that led to discharge: [here insert pertinent details of the applicant's service; for example:
   - Applicant enlisted on Dec. 8, 1941, during a time of national crisis;
   - Applicant performed in an outstanding manner for 18 months, receiving C&E ratings of exc/exc;
   - Applicant received X, Y, Z awards and decorations; or
   - Applicant received a promotion to E-3 subsequent to a demotion].[116]

2. Applicant's discharge should be recharacterized to Honorable because, if the standards for grading the discharges of those separated at expiration of the normal term of service were applied, excluding consideration of the conduct for which the applicant was discharged, an Honorable Discharge would be warranted.[117]

3. For the DRB to conclude that the applicant's discharge should not be recharacterized to Honorable would violate due process and fundamental principles of administrative law because it would be inconsistent with the DRB's decision to upgrade to Honorable in each of the following cases in which (1) the discharge was related to drug use, and (2) the quality of those applicants' service was inferior to the quality of the service of the applicant here: [here cite cases that satisfy the above criteria].[118]

15.4.4.7 Theory That Drug Use Impaired Capabilities

When an applicant's record of service is not as good as the records of other servicemembers, another equity argument is available: That drug use impaired the applicant's ability to serve.[119] Increasingly, in these cases, a DRB finds that an applicant's "capability to serve [was] strongly influenced by drug abuse,"[120] or that the drug abuse should be "considered sufficient mitigation" to offset a substandard service record.[121] Another recurring element in these cases is the presence of a personality disorder.[122]

The argument that an upgrade is warranted, given the limited capability to serve, may become

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[115] If consideration of the conduct that led to discharge is excluded, and if the standard for grading discharges of persons separated at ETS is applied, a veteran's worthiness of an HD can be effectively demonstrated. This argument and the one contained in the DoD equity standard at 32 C.F.R. § 70.6(c)(3)(i) are not very different. The advantage of arguing the ETS standard is that a greater degree of specificity is possible. There is no guidance in the DoD discharge review standards as to how a DRB should weigh the factors listed in the equity standard.

Current regulations for grading discharges of servicemembers at expiration of term of service are: AR 635-200, ch. 1 (21 Nov. 1977) (Army); BUPERSMAN 3850120 (C 1/80) (Navy); MCO 1900.16B (C1, 9 Jul. 1979) (Marine Corps); and ARM 39-10, para. 2-5c (C1, 12 Sep. 1977) (Air Force). *See* Ch. 5 *supra* (how to locate regulations in effect at date of veteran's discharge); Ch. 12 *supra* (how to determine whether evaluation marks were properly calculated and supported).

Although current Army and Air Force regulatory requirements for an HD are not as specific as requirements in the Navy (overall final trait average of not less than 2.7 and an average of not less than 3.0 in military behavior) and Marine Corps (average conduct mark of 4.0 or higher and average proficiency mark of 3.0 or higher), the older Army and Air Force requirements were more specific. *See, e.g.*, AR 635-200, para. 1-9(d)(2),(3), in effect between Dec. 6, 1955, and May 19, 1975 ("a member's service will be characterized as honorable . . . under the following standards: (a) has conduct ratings of at least 'Good;' (b) has efficiency ratings of at least 'Fair;' (c) has not been convicted by a general court-martial; (3) has not been convicted more than once by a special court-martial").

Of course, if review of the standard for an HD at ETS reveals that the applicant falls a bit short of that mark, (s)he should develop the factors listed in the DoD equity standard. One factor may be especially pertinent to drug-related discharges: "outstanding post-service conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review." This factor should be stressed when, *e.g.*, the applicant has obtained drug treatment since discharge or has assumed a role as a productive member of the community.

[116] *See* note 114 *supra*.

[117] *See* note 115 *supra*.

[118] *See* App. 15C *infra* (cases in which upgrades were granted). Actual decisional documents may have to be obtained in order to make accurate comparisons. Additional research may be necessary. *See* App. 15B *infra* (Research Key). If no cases are found in which applicants with service records inferior to the present applicant's received upgrades, this contention should be deleted.

[119] A discharge is deemed equitable unless:

> (3) In the course of *a* discharge review, it is determined that relief is warranted based upon consideration of the applicant's Service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this subparagraph and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:
>
> . . . .
>
> (ii) Capability to serve, as evidenced by factors such as:
>
> Total Capabilities. This includes an evaluation of matters such as age, educational level, and aptitude scores. Consideration may also be given to whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to the military service.

32 C.F.R. § 70.6(c)(3)(ii)(A). *See* Discharge Index category A93.18 (factors which could impair ability to serve: drugs).

[120] *See* AD 79-01060. *See also* AD 77-12802 (BCD upgraded to GD based on "mitigating influence of drugs").

[121] *See* AD 77-08106.

[122] *See* AD 79-01060 (NPE diagnosis of schizophrenia); FD 79-00013 (NPE diagnosis of C&B disorder with antisocial personality). The involvement of a personality disorder in the servicemember's resort to drugs may warrant an upgrade. *See* § 16.7.2 *infra* (discussion of Lipsman v. Brown, C.A. No. 76-1175, 6 MIL. L. REP. 2061 (D.D.C. 1978)).

even more important for servicemembers discharged recently. As the adequacy of the services' rehabilitation efforts continues to be questioned, DRBs can use this argument to correct the stigma of a bad discharge, *(e.g.,* for drug use) issued subsequent to participation in a rehabilitation program. DRBs may recognize that drug use following "rehabilitation" may be more reflective of the poor quality of the rehabilitation program than of a flagrant violation of the regulations.

15.4.4.8 Sample Contention

1. Applicant's discharge is inequitable and should be recharacterized to Honorable pursuant to 32 C.F.R. § 70.6(c)(3)(ii)(A) because, when viewed in conjunction with his/her impaired capability to serve due to use of drugs, applicant served to the best of his/her ability.[123]

15.4.4.9 Miscellaneous Equity Issues

DRBs and BCMRs index their decisions in drug-related cases under five other equitable considerations:

- Simple possession (A94.30);[124]
- Use off duty (A94.32);
- Use off military reservation (A94.34);
- No use after exemption granted (A94.36);
- No sale-trafficking (A94.38).[125]

15.5 SPECIAL ISSUES

15.5.1 ARGUING THAT THE VETERAN SHOULD HAVE BEEN DISCHARGED FOR DRUG ABUSE

Some veterans may have been involved with drugs, even though nothing in the record reflects that involvement. It often can be argued that, despite the lack of official, in-service documentation,[126] other evidence of drug abuse[127] establishes that an in-service problem existed and contributed to the less than honorable discharge.

For veterans discharged before July 1971 who successfully make this argument, application of the Laird Memo[128] may result in an upgrade. For all veterans who successfully make this argument, application of current standards may result in an upgrade. The argument can be made in three steps: (1) X,Y,Z evidence establishes that drug abuse contributed to applicant's discharge; (2) the reason for discharge should be changed to Personal Abuse of Drugs Other Than Alcoholic Beverages; (3) A,B,C other relevant arguments [drawn from this chapter].

Veterans discharged after the advent of in-service rehabilitation programs can expect a DRB panel member to ask why the applicant never sought assistance for the drug abuse. Perhaps the servicemember was using drugs too heavily to recognize the need for treatment, or perhaps the existing treatment programs were known to be useless and to lead only to additional difficulties. It is reasonable, too, that only after discharge did the applicant understand how debilitating drug use was.

A personal appearance hearing in these cases is important.[129] Extensive documentation of the drug involvement is also essential.

15.5.2 ARGUING THAT A LESS THAN HONORABLE DISCHARGE IS UNLAWFUL

If an applicant's drug use did not cause poor performance, as measured by unsatisfactory evaluations or disciplinary actions, an additional argument may be presented: distinguishing poor evaluations or disciplinary actions based on possession of drugs or other conduct which did not demonstrably impair the member's ability to serve from those based on drug use that did cause inability to perform duties.

Several federal court decisions indicate that discharging a servicemember for conduct that does not result in deficiency in conduct and does not have a direct impact on the military exceeds the military's statutory authority and violates due process. One of the most recent of these decisions involved an airman convicted of possession of heroin with intent to distribute.[130] The court held that such possession did not impair the servicemember's ability to serve.

15.5.3 SAMPLE CONTENTIONS

1. As interpreted by the federal courts, discharging a servicemember with a less than honorable discharge for conduct that (1) does not result in deficiency in performance of the servicemember's military duty, and (2) does not have a direct impact upon military service ex-

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[123] This contention may be elaborated by separately stating, *e.g.,* that:

- Applicant's use of drugs mitigates the offense that led to discharge [add details about the extent of use, relationship to offense, etc.];
- Applicant's abuse of drugs following participation in a drug rehabilitation program indicates that (s)he was unable to overcome his/her dependence on drugs;
- Applicant's abuse of drugs following participation in a rehabilitation program indicates that the program was not well conducted; or
- Applicant's ability to participate in rehabilitation program was impaired by the greater availability of drugs in the quarters housing rehabilitation participants than anywhere else.

[124] *See* AD 77-2808 (BCD upgraded to GD based, in part, on the fact that the servicemember was found guilty only of simple possession of a controlled substance).

[125] *See* § 15.2.4 *supra* (discussion of the issue of sales and possible defenses).

[126] If, for example, no entry in the record states explicitly that the individual sought treatment for drug use, or no disciplinary offense charged drug possession.

[127] *E.g.,* high school record of being expelled for drugs, juvenile arrest records, and medical treatment records can establish pre-service drug use; post-service use can be confirmed by rehabilitation

[127] (continued)

program records, convictions for drug offenses, or testimony that an offense was committed to support drug use. A pre-sentence report following a civilian conviction may contain references to drug use or a habit "that was picked up while in service."

[128] *See generally* § 15.2 *supra*.

[129] This is especially true when the official service records are missing. *See* §§ 8.6 and 9.2.11 *supra* (details on hearings).

[130] Roelofs v. Secretary of the Air Force, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980).

ceeds the military's statutory authority and violates due process. *See Harmon v. Brucker*, 355 U.S. 519 (1958); *Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980); *Wood v. Secretary of Defense*, 496 F. Supp. 192, 8 MIL. L. REP. 2454 (D.D.C. 1980); *Kennedy v. Secretary of the Navy*, 401 F.2d 990 (D.C. Cir. 1968); *Stapp v. Resor*, 314 F. Supp. 475 (S.D.N.Y. 1970).

2. The conduct for which the applicant was discharged consisted of: [here describe (in terms of quantity, type, location, etc.) the drug use for which the applicant was discharged. Use the military's version of events unless it is to be contested, in which case the version which the applicant intends to support with evidence should be used].

3. The conduct for which the applicant was discharged (1) did not result in deficiency in performance of duty and (2) did not have a direct impact upon military service, except insofar as the applicant was separated prior to the expiration of the normal term of service.

4. In characterizing the applicant's discharge, the discharge authority considered the conduct for which the applicant was discharged.

5. The applicant's discharge is improper and inequitable because, in characterizing the applicant's discharge, the discharge authority considered the conduct for which the applicant was discharged, thereby exceeding the military's statutory authority and violating due process.

6. In view of the validity of Contention #5, the applicant's discharge should be recharacterized to Honorable. *See Giles v. Secretary of the Army*, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980); *Dilley v. Alexander*, 627 F.2d 407, 8 MIL. L. REP. 2324 (D.C. Cir. 1980).

15.6 SPECIAL REVIEW BOARD PROCEDURES

15.6.1 OBTAINING DRUG REHABILITATION RECORDS

Drug rehabilitation records are confidential and are protected by statute.[131] They are maintained in filing systems separate from other medical or service records. A request for records on SF 180 should ask specifically for the drug abuse treatment records.[132] These records are routinely released to the individual veteran; however, his/her counsel may be asked to submit a special release authorization form.[133]

15.6.2 OBTAINING INVESTIGATIVE RECORDS

DRBs may obtain records from military police or investigative units. The applicant should also obtain those records, as well as any FBI arrest records.[134] The DRB must make such information available if it is requested.[135]

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[131] 21 U.S.C. § 1175.

[132] If the veteran was treated in a medical facility for an overdose, for example, the facility and date of treatment should be identified in order to obtain specific records of the treatment. *See* § 6.6.2 *supra*.

[133] The National Personnel Records Center in St. Louis will provide this form if it is necessary. A sample copy can be found at App. 6E *supra*.

[134] Reports of drug-related investigations have had fairly wide distribution outside the military. 101st Airborne Division Daily Bulletin #195 (July 14, 1971), carried the following note:

> 5. *DRUG ABUSE*: The Military Police Criminal Investigation Section is requested to furnish the US Army Investigative Records Repository (USAIRR) in CONUS the name of all personnel within 24 hours after they are identified as suspects or offenders in a criminal investigation. In the case of drug, marijuana, narcotics, or those involved in illicit currency transactions, the USAIRR furnished printouts to the Federal Bureau of Drugs and Narcotics and the Internal Revenue Service of the US Treasury Department. The files of the USAIRR are permanent and information therein is available to any agency or department of the Federal Government. (AVDG-PM)

[135] The DRB need not, however, tell the applicant that these records have been obtained. See 32 C.F.R. § 70.5(b)(9)(iv), (v).

APPENDIX 15A
REGULATIONS

1. PACKARD MEMO (July 7, 1971)

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

MEMORANDUM FOR Secretaries of the Military Departments
Chairman, Joint Chiefs of Staff

SUBJECT: Rehabilitation of Drug Abusers

Consistent with guidance from the President of the United States, it is the policy of the Department of Defense to encourage military members to submit themselves voluntarily for treatment and rehabilitation under the Drug Identification and Treatment Program of the Department of Defense.

Accordingly, evidence developed by, or as a direct or indirect result of urinalyses administered for the purpose of identifying drug users may not be used in any disciplinary action under the Uniform Code of Military Justice or as a basis for supporting, in whole or part, an administrative discharge under other than honorable conditions. Similarly, a military member may not be subject to disciplinary action under the Uniform Code of Military Justice or to administrative action leading to a discharge under other than honorable conditions for drug use solely because he has volunteered for treatment under the Drug Identification and Treatment Program of the Department of Defense.

This policy does not exempt military members from disciplinary or other legal consequences resulting from violations of other applicable laws and regulations, including those laws and regulations relating to the sale of drugs or the possession of significant quantities of drugs for sale to others, if the disciplinary action is supported by evidence not attributed to a urinalysis administered for identification of drug abusers and not attributable solely to their volunteering for treatment under the Drug Identification and Treatment Program of the Department of Defense.

This policy is effective immediately and steps should be taken to insure its complete understanding and immediate compliance within the Armed Forces.

/s/David Packard

2. LAIRD MEMO (August 13, 1971)

MEMORANDUM FOR The Secretaries of the Military Departments
The Chairman, Joint Chiefs of Staff

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

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

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

The statute of limitations for review of discharge within the scope of this policy will be in accor-

dance with 10 United States Code 1553.

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

/s/Melvin Laird

3. LAIRD MEMO (April 28, 1972)

MEMORANDUM FOR Secretaries of the Military Departments
Chairman, Joint Chiefs of Staff

SUBJECT: Review of Punitive Discharges Issued to Drug Users

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

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

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

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

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

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

/s/Melvin Laird

4. DRUG REGULATIONS

Current DoD drug program/discharge regulations:

- DoD Dir. 1010.4, Alcohol and Drug Abuse by DoD Personnel, 25 Aug. 1980, 45 Fed. Reg. 61,615 (1980) (to be codified in 32 C.F.R. Part 62);
- Claytor Memo, DoD Policy Regarding Cannabis Use (Nov. 5, 1979);
- DoD Dir. 1332.14, Enlisted Administrative Separations, 29 Dec. 1976, 32 C.F.R. Part 41 (excerpts below).

F. **Personal Abuse of Drugs Other Than Alcoholic Beverages.** Discharge with an honorable discharge, when based on evidence developed as a direct or indirect result of a urinalysis test administered for identification of drug abusers, or by a member's volunteering for treatment for a drug problem under the Drug Identification and Treatment Program administered by his/her particular Armed Force, and:

1. Member's record indicates lack of potential for continued military service; or
2. Long-term rehabilitation is determined necessary and member is transferred to a Veterans' Administration or civilian medical facility for rehabilitation; or
3. Member has failed, through inability or refusal, to participate in, cooperate in, or complete a drug abuse treatment and rehabilitation program.

Note: It is essential to assure compliance with both the letter and spirit of the rule of law announced in *United States* v. *Ruiz* (23 USCMA 181, 48 CMR 797 (1974)). Extreme care should be exercised to assure that a member identified for separation under this provision is not

separated with less than an honorable discharge, based on some separate and distinct reason for discharge, unless it can be clearly demonstrated that evidence of drug use obtained through the identification process described herein was not directly or indirectly utilized in establishing such separate and distinct reason. It may be desirable for Field Commanders to consult with legal personnel concerning implementation of this note.

I. **Misconduct.** Separation under other than honorable conditions, unless the particular circumstances in a given case warrant a general or an honorable discharge, when it has been determined that an individual is unqualified for further military service because the member's military record in the current enlistment of period of obligated service evidences one or more of the following patterns of conduct, acts or conditions:

6. Drug abuse, which is the illegal, wrongful, or improper use, possession, sale, transfer or introduction on a military installation of any narcotic substance, intoxicating inhaled substance, marijuana, or controlled substance, as established by 21 USC 812 (reference (d)), when supported by evidence not attributed to a urinalysis administered for identification of drug abusers or to a member's volunteering for treatment under the Drug Identification and Treatment Program administered by his/her particular Armed Force.

DoD Dir. 1332.14, 29 Dec. 1976, encl. 2, paras. F, I.

Current Army drug program, discharge, and discharge review regulations:

- AR 600-85, Alcohol and Drug Abuse Prevention and Control Program (May 1, 1976) (*see* excerpt *infra*);
- AR 635-200, Personnel Separations: Enlisted Personnel, Ch. 9, Alcohol or Other Drug Abuse (Exemption Policy) (May 1, 1980);
- AR 635-200, para. 14-33a(2), Separation for Misconduct, Alcohol or other drug offenses (May 1, 1980);
- Army DRB memos:
  - — SOP, Annex F-1, paras. 3f, 3p, President's Guidance: Drugs, Pre-Laird Civilian Drug Abuse, 44 Fed. Reg. 25,071 (1979);
  - — SOP, Annex H-2-1, para. 6, Checklist for Reviewing Discharge Propriety, Chapter 9 — Alcohol/Drug Abuse, 44 Fed. Reg. 25,077 (1979);
  - — SOP, Annex O-1, para. 20, Analysis of New AR 600-85, 44 Fed. Reg. 25,085 (1979);
  - — SOP, Laird Memos, Beal and Belieu Memos, 44 Fed. Reg. 25,111 (1979);
  - — SFRB Memo 3-80, Alcohol/Drug Exemption Policy (May 7, 1980);
  - — SFRB Admin. Memo 24-80, Review of Cases Under *Giles* (Apr. 11, 1980);
  - — SFRB Memo, *Giles*, Information Bulletin #1 (Apr. 8, 1980); #2 (Apr. 11, 1980); #3 (Apr. 14, 1980); #4 (Apr. 15, 1980); #5 (May 5, 1980).

Current Navy drug regulations:

- SECNAVINST 5355.1A, Drug Abuse (March 5, 1975);
- BUPERSMAN 3420175, Administrative Procedures for Disposition Recommendation of Enlisted Personnel Identified as Drug Abusers (Use, Possession, Transfer or Sale) (Jul. 1980);
- BUPERSMAN 3420183, Procedures for Processing Enlisted Personnel for Discharge by Reason of Personal Abuse of Drugs Other Than Alcoholic Beverages (Apr. 1980);
- BUPERSMAN 3420180, para. 3.b, Administrative Discharges (Jul. 1980);
- BUPERSMAN 3420185, paras. 1.a, d, e, Procedures for Processing Enlisted Personnel for Discharge by Reason of Misconduct (Jul. 1980).

Current Marine Corps drug regulations:

- MCO 5355.3, Drug Exemption Program (Oct. 30, 1978);
- MCO 1900.16B, para. 6016.1.g, Unsuitability: Personal Abuse of Drugs Other Than Alcoholic Beverages (Mar. 23, 1978);
- MCO 1900.16B, para. 6017.1.d, Misconduct: Drug Abuse (Mar. 23, 1978).

Current Air Force drug regulations:

- AFR 30-2, Social Actions, Ch. 4: Drug Abuse Control Program (C 2, Jan. 31, 1979);
- AFM 39-12, § I, Discharge for Personal Abuse of Drugs (C 11, July 20, 1976);
- AFM 39-12, para. 2-15c, Acts or Patterns of Misconduct: Drug Abuse (C 15, Aug. 10, 1979).

Table 3–1. HQDA Exemption Policy
(Subject to Exceptions Outlined in Paragraphs 3–17*b* and 3–17*c*)

LINE	A	B	C	D
	If a member is identified as an abuser of alcohol or other drugs by the method indicated below—	—the member will not be subject to disciplinary action under the UCMJ, or to administrative separation with less than an honorable discharge, based in whole or in part on alcohol abuse, or drug use or drug possession incidental to personal use, which occurred prior to the effective time of exemption as indicated below:	Additionally, the member will not be subject to disciplinary action under the UCMJ, or to administrative separation with less than an honorable discharge, based in whole or in part on an occurrence of alcohol abuse, or drug use or drug possession incidental to personal use, which is revealed to a physician or ADAPCP counselor at a scheduled interview or evaluation, or by a positive urinalysis administered during active or follow-up rehabilitation. This exemption is effective at the time such occurrences are revealed, or the urine test is laboratory confirmed as positive.	Further, information, or evidence developed by or as a direct or indirect result of such information, that is revealed to a physician or ADAPCP counselor at a scheduled interview or evaluation, or by a positive urinalysis administered either to identify drug abusers for entry into the ADAPCP or to monitor progress during the active or follow-up rehabilitation phases of the ADAPCP, will not be used in any disciplinary action under the UCMJ, or in any administrative separation proceeding in which the servicemember is subject to less than an honorable discharge. (See paragraph 3–18*d*.)
1	Member voluntarily seeks help for an alcohol or other drug problem. (See para 3–3.)	At the time of volunteering.		
2	Member receiving emergency medical treatment for an actual or possible alcohol or other drug overdose.	At the time the member receives the emergency treatment. See paragraph 3–18*b* for special procedures to be followed when treatment is obtained from a civilian medical facility.		
3	Urine test administered to identify drug abusers for entry into the ADAPCP.	At the time the urine test is laboratory confirmed as positive.		
4	Medical referral to the ADAPCP by a physician who has diagnosed alcohol or other drug abuse incident to a sick call or other routine medical examination.	At the time of the diagnosis.		
5	Commander referral to the ADAPCP based on deteriorating job performance, conduct, or other behavior in a manner frequently associated with alcohol or other drug abuse; or based on apprehension by other than civilian or military law enforcement officials; or based on discovery of use or possession of drugs or drug paraphernalia during a routine inspection.	At the time of the initial interview by ADAPCP counselor. (See paragraph 3–11*a*.)		
6	Apprehension/investigation referrals (through the member's unit commander) by civilian or military law enforcement officials.	At the time of the initial interview by ADAPCP counselor. (See paragraph 3–11*a*.)		

APPENDIX 15B
RESEARCH KEY

See Ch. 10 *supra* (details on obtaining a free copy of the Discharge Index).

The Subject/Category Listing (1978 rev.) contains the following entries relevant for researching drug-related issues:

(A01.21/22) Evidence Obtained in Violation of Art. 31, U.C.M.J., (Self-incrimination) Improperly Considered
(A01.29/30) Exempt Evidence (Alcohol/Drug Rehabilitation Program) Improperly Considered
(A53.00) Drug Use, Sale, or Possession
(A66.00) Drug Abuse
(A69.00) Discharge for Alcohol/Drug Rehabilitation Failure
(A69.01/02) SM Was Not Rehabilitative Failure
(A69.03/04) SM Was Discharged Prior to Minimal Treatment
(69.05/06) Discharge Not Properly Characterized as Honorable
(A69.07/08) Improper Counsel for Consultation
(74.00) Conduct Triable by CM: Drugs
(A85.00) Drug Use/Possession (LAIRD Memorandum)
(A85.01/02) Discharge Based Solely on Drug-Related Conduct
(A85.03/04) Discharge Based Solely on Drug Use/Possession
(A85.05/06) Discharge Based on Sale but Mere Conduit Theory Applies
(A85.07/08) Service Record Otherwise Satisfactory
(A91.01/02) Character of Discharge Received by SM Is Not Now Authorized or Required When a SM Is Discharged for the Same Reason or Conduct
(A91.03/04) Conduct for Which SM Was Discharged No Longer Provides an Authorized Basis for Separation
(A93.17/18) Drugs
(A94.01/02) Severity of Punishment (Civil or Military): Current Standards
(A94.05/06) Too Harsh: At Issuance, Discharge Inconsistent with Standards of Discipline
(94.07/08) Discharge in Lieu of Court Martial: Although a Punitive Discharge Was Authorized, an Other Than Honorable Discharge Was Too Harsh Under the Circumstances
(A94.29/30) Drugs: Simple Possession (Small Amount)
(A94.31/32) Drugs: Use Off-Duty
(A94.33/34) Drugs: Use Off Military Reservation
(A94.35/36) Drugs: No Use After Exemption Granted
(A94.37/38) Drugs: No Sale-Trafficking

APPENDIX 15C
DRB/BCMR DECISIONS

A. CASE LISTS

The lists below include all cases cited in Chapter 15. Copies of cases cited in supporting briefs should accompany the briefs. Copies may be obtained free from DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310.

1. PRE-JULY 1971 DISCHARGES

AC 58-01715B; AC 75-00610A; AC 78-02948; AD 77-04776; AD 77-07588; AD 77-08804; AD 78-00049; AD 78-01650; AD 79-04457; AD 79-05885; AD 80-01466; AD 80-09393; AD 80-09401; AD 80-09448; AD 80-09466; AD 80-09509; FD 78-00595; FD 78-00792; FD 78-01670; MD 7X-06398; MD 78-01367; MD 78-01427; MD 80-00198; MD 80-01604; ND 78-00237; ND 78-02578; ND 79-00335; ND 79-01802; ND 79-01843; ND 79-02174; ND 80-00256; ND 80-01020.

2. POST-JULY 1971 DISCHARGES

AD 77-05280; AD 77-08106; AD 77-08493; AD 77-10054; AD 77-11366; AD 77-12808; AD 79-01060; AD 79-03112; AD 80-00490; FD 78-00780; FD 78-01411; FD 78-01731; FD 79-00013; MD 79-00333; MD 80-00224.

B. DIGESTS OF CASES RELIED UPON

1. ARMY

AC 58-0175B (DD for multiple offenses in 1951, CM for 16- and 48-day AWOLs during state of emergency and possession of heroin; upgraded to GD because "contemporary policies relative to absences of such short duration" permit relief under the Laird Memo and because disciplinary record consisted of 1 Art. 15 in 2½ years service).

AC 75-00610A (BCD for multiple offenses in 1970, GCM for use and introduction of marijuana, wearing unauthorized insignia, disrespect to NCO; marijuana conviction set aside by BCMR because offenses minor "in the absence of evidence showing intent to sell or transfer" and Laird Memo should be applied).

AC 78-02948 (BCD for multiple offenses in 1967, GCM for 2- and 8-day AWOLs and possession and use of .08 grams of marijuana; disciplinary record of 1 SPCM for 19-day AWOL, breaking restriction, and carrying concealed knife; upgraded to GD because BCMR concluded the BCD "was apparently based solely on the possession and use of marijuana").

AD 77-04776 (UD for unfitness/drugs in 1963, apprehended for possession of drug paraphernalia and diagnosed as narcotics addict; disciplinary record of 1 Art. 15 for disobeying order and 1 SCM for 2-day AWOL; upgraded to HD because Laird Memo applied).

AD 77-05280 (GD for unfitness/drug abuse in 1974, refusing to submit to urinalysis after counseling, a rehabilitative transfer, failure in a drug rehab program, and 1 positive urinalysis for morphine abuse; disciplinary record of 1 Art. 15 for marijuana possession; upgraded to HD because DRB found that applicant met criteria of AR 635-200, Ch. 9 for retroactive application of current standards).

AD 77-07588 (UD for good of the service/multiple charges in 1971, possession of 42 capsules of cocaine and 40 vials of heroin, striking NCO; disciplinary record of 2 Art. 15s for absence from duty and violation of regulations; upgraded to GD because testimony that applicant smoked 20 capsules per day indicated that large quantity of drugs alone did not establish trafficking; "philosophy of the Laird Memorandum" applied "since the date of the incidents [August] which led to separation were so close to the date of issuance of the [memo]"; full relief denied because "direct relationship between all of the offenses of record and the applicant's drug addiction" not established).

AD 77-08106 (UD for good of the service/AWOL in 1972, 6-month AWOL; disciplinary record including 1 Art. 15 for 34-day AWOL, total of 8 periods of AWOL, 284 days lost time, civilian record of arrest for possession and sale of marijuana and possession of syringe and needles, conviction for possession of drugs; upgraded to GD because drug use (including marijuana, LSD, amphetamines, and barbiturates, according to applicant) partially off-set service record).

AD 77-08493 (UD for good of the service/drugs in 1976, possession of a controlled substance and 1 gram of heroin; upgraded to HD because DRB had doubts about propriety of actions prompting the drug seizure and considered discharge too harsh).

AD 77-08804 (UD for good of the service/drugs in 1969, 5 counts of possession and planning illegal shipment of drugs, 3 pounds of marijuana, 108 allobarbital capsules; disciplinary record of 1 Art. 15 for altering document; upgraded to GD because DRB believed applicant's testimony that he did not intend to sell drugs and applied Laird Memo to possession counts).

AD 78-01650 (UD for good of the service/multiple charges in 1970, possessing 1,958 grams of marijuana and giving military payment certificates to Vietnamese national; disciplinary record of 1 Art. 15 (disrespectful to NCO) and 1 SPCM (stealing $10); upgraded to GD on application of Laird Memo, since drug possession was "one of the charges").

AD 79-01060 (UD for the good of the service/multiple charges in 1974, unlawful entry and intent to commit larceny, stealing TV, 5-day AWOL; disciplinary record of 3 Art. 15s (FTG twice, 12-day, 1-day, and 6-day AWOLs); testimony of 4½ years drug abuse, NP evaluation diagnosed schizophrenia; upgraded to GD because Board found capability to serve strongly influenced by drug abuse and/or possible character and behavior disorder).

AD 79-03112 (UD for good of the service in 1972, drug sale (1 ounce of heroin); no other disciplinary infractions and no indication of pre-service drug use; upgraded to GD because of good overall record and Board finding that the drug sale "could be treated as isolated and not characteristic of his overall quality of service").

AD 79-04457 (UD for unfitness/drugs in 1950, use and possession of philopon, a central nervous system stimulant, apprehended with a prostitute and charged with possession of a dangerous drug; disciplinary record of 1 SCM (breaking restriction and absent from bed-check); upgraded to HD because of overall record and application of Laird Memo).

AD 79-05885 (UD for unfitness/drugs in 1962, use and possession of marijuana, disciplinary record of 2 Art. 15s (FTR) and 1 SCM (FTG); admitted using heroin; NP evaluation of "antisocial reaction with use of habit forming drugs"; CO said "applicant was less than an average soldier and was not reliable"; upgraded to HD upon application of Laird Memo and current standards).

AD 77-10054 (UD for misconduct/frequent involvement in 1975; disciplinary record of 6 Art. 15s (3 FTR, 1 absent from duty, and 2 failure to obey), record of heavy alcohol and drug use, drug rehabilitation program failure; upgraded to HD because of good post-service conduct, because disciplinary record no bar to it, and because separation "should have been under honorable conditions by virtue of drug abuse").

AD 77-11366 (UD for misconduct/frequent incidents in 1976; disciplinary record of 3 Art. 15s for marijuana possession, 2 Art. 15s for FTG, 1 SCM for 27-day AWOL; upgraded to HD because of benefit of doubt concerning drug rehab failure, minor nature of offenses, and only 27 days lost time in 18 months service).

AD 77-12808 (BCD for possession of controlled substance in 1973, possession of amphetamines; disciplinary record of 4 Art. 15s (4 FTG, FOLO, DOLO), 2 SPCMs (attempted larceny of cigarettes and offense noted above), received C & Es of exc/exc, fair/exc, gd/gd, uns/uns over 20-month period; upgraded to GD because of "mitigating influence of drugs," post-service rehabilitation efforts, and because crime was simple possession).

AD 78-00049 (UD for unfitness/frequent incidents in 1970; upgraded to HD; lost records case; successful completion of BCT/AIT based on assignment to combat unit; combat achievement substantiated by submission of citation and newspaper clipping; testified to RVN combat, drug addiction, and personal problems; no record of drug offenses; Laird Memo applied since disciplinary record of frequent AWOLs found to be "typical of those afflicted with drug addiction"; record of at least 100 days lost time).

AD 80-00490 (UD for misconduct/civil conviction in 1974, guilty plea to charges of marijuana possession, with distribution charge dropped, sentenced to 1 year imprisonment, suspended, and

served 1 year probation; disciplinary record of 1 Art. 15 (DOLO), efficiency ratings "below average"; upgraded to GD because of overall record).

AD 80-01466 (UD for misconduct/civil conviction in 1970, possession of dangerous drugs (quantity and type unspecified), sentenced to one year confinement; disciplinary record of 8 Art. 15s (8 spec. of FTG, 1 improper uniform, 1 AWOL, and 1 violation of company SOP) and 1 SCM (sleeping on a sentinel post), RVN duty and 505 days lost time, 177 in 3 periods of AWOL and remainder in civil confinement, no evidence of drug abuse in military record; upgraded to GD because Laird Memo found to apply).

AD 80-09393 (UD for misconduct/drugs in 1971; classified as drug addict but no details of addiction given, NP evaluation diagnosed "inadequate personality" with "resentment of authority" and "low frustration tolerance," disciplinary record of 2 Art. 15s (FTG and DOLO); upgraded to HD because of overall service record and application of Laird Memo).

AD 80-09401 (UD for unfitness/frequent incidents in 1970, "continuous malingering, failure to perform duties and [being] physically incapable of performing duties in his MOS due to continuous use of narcotics and drugs" (heroin, opium, barbiturates, and marijuana); disciplinary record of 1 Art. 15 (possession of 21 binoctal tablets, 2 ration cards, concealed weapon), no lost time, C & Es of exc/exc and uns/uns, service in Vietnam, NPE diagnosis of inadequate personality; upgraded to HD because Laird Memo applied).

AD 80-09448 (UD for unfitness/drug abuse in 1968; inducted with moral waiver for drug abuse; consistent use of LSD and marijuana while in-service, NP evaluation found "(P)ersonality, immature, manifested by excessive use of LSD," disciplinary record of 1 Art. 15 (FTG); upgraded to HD because Laird Memo applied).

AD 80-09466 (UD for unfitness/drugs in 1968, repeated abuse of a variety of drugs in large quantities; disciplinary record of 1 SPCM (29-day AWOL), C & Es of exc and uns, record included 2 NPEs whilch diagnosed "psychosis associated with drug intoxication"; upgraded to HD because of record, NPEs, and application of Laird Memo).

AD 80-09509 (UD for unfitness/drug abuse in 1971; recommended for elimination while civil charges for possession of marijuana pending, convicted and sentenced to 8 years, sentence reduced to 8 years probation; 18 months creditable service, 1 Art. 15 (F & G), 1 set of C & E (exc), no lost time; upgraded to GD because of application of Laird Memo).

2. AIR FORCE

FD 78-00595 (UD for unfitness/drug abuse in 1959, possession of narcotics paraphernalia, trace of marijuana, and admission of drug use; investigation revealed applicant was a member of a group trafficking in marijuana and at one time had as many as 100 marijuana cigarettes in his possession; disciplinary record of several incident reports and 2 Art. 15s (failure to meet scheduled formation and drunk in public place), DR noted immaturity (17½ at enlistment; discharge upgraded to GD, despite evidence of trafficking, and Laird Memo applied).

FD 78-00780 (UD for unfitness/drug addiction in 1951; applicant was addicted to heroin; disciplinary record included SCM (6-day AWOL) and 1 AW 104 (leaving place of duty), served 2½ of 3 year tour; upgraded to HD because DRB applied current standards).

FD 78-00792 (UD for misconduct/civil conviction in 1968, possession of marijuana, sentenced to 90 days in jail and 3 years probation, legal review of recommendations for discharge noted that airman sold marijuana to both military and civilian personnel; disciplinary record of 1 Art. 15 (stealing 29¢ packet of tobacco); upgraded to GD because DRB applied "intent of the Laird Memorandum").

FD 78-01411 (UD for unfitness/drug abuse in 1971; applicant admitted drug use, including occasional use of heroin, entered drug rehabilitation program but failed; upgraded to HD because current policy applied).

FD 78-01670 (UD for unfitness/drug abuse in 1968; applicant admitted smoking marijuana on 2 or 3 occasions; no disciplinary record, record of service reflected consistent high ratings (no lower than highest 30%), served 4 years, 1 year overseas; upgraded to HD because of Laird Memo and overall record).

FD 78-01731 (UD for misconduct/civil conviction in 1974, possession of more than 1 ounce of marijuana; disciplinary record of "minor offenses" (letter of reprimand for failure to get haricut, and

failure to repair on 2 occasions), performance for first 22 months excellent; voluntarily entered drug rehabilitation program prior to civil conviction, but following conviction refused to continue in the program; upgraded to GD because of evidence that civil conviction was a "one time incident").

FD 79-00013 (UD for unfitness/frequent involvement in 1974; history of drug abuse inferred from 1 incident of possession of marijuana paraphernalia; disciplinary record of 3 Art. 15s (AWOLs) and 1 SPCM (AWOL), NP evaluation diagnosed C & B disorder with antisocial personality; upgraded to GD because of diminished capability to serve evidenced by C & B disorder exacerbated by drug abuse).

3. MARINE CORPS/NAVY

MD 7X-06398 (UD for unfitness/drugs in 1970, "use and sale of dangerous drugs"; applicant admitted using marijuana and "acting as a go-between," but denied sales or making a profit from any transaction; disciplinary record included 7 NJPs (3 unspecified violations of Art. 134; DOLO, 1-day UA, DIL, FOGO), served 3 years 11 months of 4-year tour, 1 year in Vietnam, military behavior marks: 3.9; proficiency: 4.0; upgraded to GD because DRB found sales unsubstantiated and applied Laird Memo).

MD 78-01367 (UD for unfitness/drug use in 1971, possession of dangerous drug (Obesitol); disciplinary record of 1 NJP (drinking as a minor) and 1 SCM (sleeping on post in combat zone), military behavior average of 3.7, proficiency of 4.0; upgraded to GD because Laird Memo applied).

MD 78-01427 (UD for unfitness/drug use in 1971; voluntarily sought help for use of large quantities of LSD, mescaline, and speed, was told could be discharged and seek help from civil authorities; recommended for discharge in June 1971, and before processing completed drug exemption program began (July 19, 1971) and SJA recommended returning proceedings pending election of exemption, but applicant was UA then and discharge was executed; disciplinary record of 3 NJPs (sleeping on post, 16-day UA, falsify ID card) and 1 SCM (57-day UA), final conduct average of 3.6, post-service record of 2 civil convictions for drug offenses; upgraded to GD because Laird Memo applied).

MD 79-00333 (UD for misconduct/civil conviction in 1973, possession of 5 grams of marijuana; sentenced to 6 months probation, $50.00 fine, received improper NJP for same offense; disciplinary record also included 1 SCM (1 day UA, FOLO, AAPD), and 2 NJPs (12-hour and 18-day UAs); upgraded to GD because UD was "too severe for the nature of the civil conviction").

MD 80-00198 (UD for unfitness/drugs in 1967; applicant admitted use of marijuana, benzedrine, and seconal, and was found in possession of librium and fiorinal; NP evaluation found no evidence of addiction, disciplinary record 1 SCM (27-day UA) and 1 NJP (35-day UA), average conduct rating for 15 months creditable service was 3.6(5); upgrade to GD because Laird Memo applied).

MD 80-00224 (UD for misconduct/drug abuse in 1972; applicant was dependent on marijuana, amphetamines, and hallucinogens, failed to complete drug rehabilitation program; upgraded to HD because of current standards).

MD 80-01604 (UD for unfitness/drug abuse in 1969; applicant admitted use of marijuana and LSD; disciplinary record of 2 Art. 15s (FOLR and feigning injury, possession of marijuana); upgraded to HD because Laird Memo applied).

ND 78-00237 (GD for unfitness/drugs in 1966; original UD for admitting use of marijuana and LSD upgraded in 1974 to GD; GD upgraded to HD because "current policies and procedures governing discharges for use of drugs" applied).

ND 78-02578 (UD for unfitness/drug use in 1970; voluntarily admitted drug use; record of minor offenses included civil conviction for trespass on private property and 1 NJP (2-day UA), final military behavior mark of 1.0; upgraded to GD because Laird Memo applied).

ND 79-00335 (UD for unfitness/drug abuse in 1968, possession and use of LSD; disciplinary record of 2 SCMs (missing movement and aggravated assault); admitted to pre-service and in-service use of marijuana; upgraded to GD because Laird Memo applied, but disciplinary offenses cited as precluding upgrade to HD).

ND 79-01802 (UD for unfitness/drug abuse in 1969; informant alleged he purchased marijuana from applicant while aboard ship; applicant admitted drug use; no disciplinary infractions and final conduct average of 3.5, efficiency average of 3.4; upgraded to GD, despite evidence of drug sale,

because Board applied Laird Memo).

ND 79-01843 (UD for misconduct/civil conviction in 1966, "drug intoxication, involving moral turpitude," which would have been punishable by confinement under the U.C.M.J. for over a year; nature of offense and sentence unspecified; disciplinary record of 2 NJPs (4-day UA and disrespect toward an officer/drunk on duty); upgraded to GD because Laird Memo applied).

ND 79-02174 (UD for unfitness/drug use in 1969; applicant voluntarily admitted smoking marijuana while on duty; no disciplinary infractions, final average behavior rating of 3.4, overall trait average 3.4, upgraded to HD because Laird Memo applied).

ND 80-00256 (UD for unfitness/drug abuse in 1960; applicant admitted use of marijuana and benzedrine while on duty, and pre-service drug abuse; disciplinary record of 1 SPCM (12-day UA), 1 SCM (DOLO), and 1 NJP (2-day UA); upgraded to GD because Laird Memo applied).

ND 80-01020 (UD for unfitness/drug abuse in 1969; applicant admitted to frequent use of marijuana and LSD; disciplinary record of 3 NJPs (absence from appointed place of duty and 6-day UA), final average behavior mark of 2.6; upgraded to GD because offenses not "flagrant," hence Laird Memo could be applied).

CHAPTER 16
DISCHARGES FOR UNSUITABILITY, MARGINAL PERFORMANCE, AND TRAINING FAILURE

16.1 INTRODUCTION AND OVERVIEW

"Unsuitability" is not a type of discharge but a general category of a wide variety of personal traits and characteristics, any of which, if administratively found to exist in a particular servicemember, provides a basis for issuing an involuntary discharge. Discharges based upon unsuitability may be either General (GD) or Honorable (HD), with HDs growing more frequent as procedural rights in unsuitability cases have increased. Unsuitability is the most common reason for involuntary discharge and for issuing GDs.

Unsuitability is used to discharge service-

members who are unsuitable for the military because of patterns of behavior beyond their control and which make adjustment to military life difficult if not impossible. Types of unsuitability include or have included: personality disorders (formerly called "character and behavior disorders" — the most common form of unsuitability used to support a discharge), inability to expend efforts constructively, bed-wetting, alcohol abuse, homosexual and "aberrant" sexual tendencies, financial irresponsibility, drug abuse (as detected by urinalysis), or failure in a drug or alcohol rehabilitation program. In practice, a finding of unsuitability provides an expeditious means of eliminating unwanted servicemembers because (except since 1966 in the Army) discharge procedures in this area have lacked substantial safeguards. The recently adopted Trainee Discharge Program (TDP) and Marginal Performer or Expeditious Discharge Programs (EDP) have presented commanders with even simpler alternatives to eliminate unproductive servicemembers.

It is frequently difficult to distinguish whether unsuitability or "unfitness" should have been the appropriate ground for discharge, even though the latter usually results in the issuance of a worse type of discharge. For example, intentional "shirking" is a basis for a finding of unfitness while "inability to expend efforts constructively" will support a finding of unsuitability. The two appear to differ only in the subjective judgment of a commander as to the degree of willfulness involved in the servicemember's conduct. In this regard, an analogy of the administrative process to the criminal process suggests that unsuitability should generally be viewed as a lesser included offense of unfitness.

There are several reasons why GDs for unsuitability have been so numerous despite the dischargees' lack of intentional misconduct:

- Lax procedures permitted quick elimination of troublesome servicemembers, particularly late in the Vietnam War, and led to the issuance of discharges that might not have resulted under the stricter standard of proof at a court-martial or unfitness proceeding;
- Informal "plea-bargaining" often resulted in acceptance of a GD for unsuitability in exchange for an agreement to drop a contested unfitness proceeding;
- Vague standards for determining the character of discharge in unsuitability cases have led to GDs not justified by servicemembers' records of service; and
- A psychiatric diagnosis of a character and behavior disorder was extremely easy to obtain during the Vietnam War and was commonly used to secure early release.

Since 1966, the Navy and Marines have graded discharges for unsuitability solely on the servicemembers' numerical final conduct and efficiency ratings ("trait averages" or "marks" or "ratings"), and the Air Force specifically presumes an HD in unsuitability cases. The lack of guidance in the Army on what type of discharge to award after a finding of unsuitability helps explain the disproportionately high incidence of GDs in that service for persons found unsuitable. This past tendency to undergrade leaves Army Boards more likely than those of other services to upgrade a GD for unsuitability now.

16.2 HISTORY OF PROCEDURES AND TYPES OF DISCHARGES AUTHORIZED

Major changes in regulations governing bases for discharge occurred in 1948, 1956, 1959, 1966, and are anticipated in 1981. Procedural rights have expanded over the years, and HDs have become more probable.[1] There were few if any meaningful procedural rights in most unsuitability cases prior to 1966. After that date, procedures improved, providing more detailed requirements for notice, counsel, and opportunity to respond. In the Army, a hearing could be requested.

From the 1940s to 1956, and 1959 in the Air Force, a GD was mandatory in an unsuitability case. From that time until 1966, an HD or GD was permitted, depending on the quality of the servicemember's service.

Since 1966, a majority of dischargees for unsuitability have received HDs from the Air Force, Navy, and Marines. The Army regulation referenced the standards governing discharge characterization at expiration of a normal term of service (ETS); however, ignoring the clear preference for an HD in these standards, the Army continued to award a GD in the vast majority of cases.[1a]

In the mid-1970s, the new Expeditious Discharge and Trainee Discharge Programs in all services resulted in use of summary procedures for early separation for those who appeared unlikely to fit in. The majority of those discharged under these programs received HDs.

Regulatory standards governing each basis for a finding of unsuitability are individually discussed later in this chapter. First, however, general approaches to upgrading GDs based upon unsuitability are discussed.

16.3 CURRENT STANDARDS APPROACH, WITH SAMPLE CONTENTIONS

Examination of the DRB equity standard[1b] — requiring retroactive application of current standards to see if a different result would likely have occurred — is the first step in dealing with a discharge upgrading case. It is particularly important in cases where unsuitability was found because of the gradual trend in the past 30 years toward awarding HDs to most

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[1] *See* Ch. 5 *supra* (selected digest of each service's procedural requirements for establishing each reason for discharge). Reference to Ch. 5 will show, for example, that an airman under the rank of E-3 with less than eight years of service is entitled to an "individual evaluation," as opposed to counsel and a hearing in an unsuitability case. *See also* § 12.5 *supra* (effects of procedural errors).

[1a] *See* REPORT OF THE JOINT SERVICE ADMINISTRATION DISCHARGE GROUP at 3-23 (1978) (1977 statistics on discharges issued for unsuitability are reproduced in App. 16B *infra*). *But see* § 16.7.2 *infra* (*Lipsman* discussion).

[1b] *See* Ch. 21 *infra* (discussion of this DRB equity standard).

individuals discharged for this reason. Changes in the regulations[2] generally fall into two categories:

- Some reasons for unsuitability have been eliminated.[3] If the basis for a servicemember's discharge no longer exists, (s)he would probably serve until ETS under current standards and receive an HD.
- A GD formerly was mandatory for unsuitability.[4] In contrast, under current standards, an HD is presumed for many categories of unsuitability.[5]

These two changes clearly meet the regulatory criterion that past and present policies "materially" differ. Present policies represent a "substantial enhancement" of rights, creating a "substantial doubt" that discharges accomplished under past policies would be the same today. The strongest argument in all unsuitability cases is thus that current policies do not permit a GD, and that retroactive application of these policies must result in an upgraded discharge.

Contentions must be tailored to the exact policy and procedural changes that have occurred in regulations pursuant to which the applicant was discharged. A sample contention for a servicemember discharged under a category of unsuitability for which a GD was mandatory and for which an HD now is presumed would be as follows:

> 1. The applicant's discharge is inequitable and should be recharacterized to Honorable, pursuant to 32 C.F.R. § 70.6(c)(1) because:
>
> (a) current policies and procedures contained in [cite the current regulations] differ in material respects from the policies and procedures under which the applicant was discharged in that today (i) a General Discharge is not mandatory for the reason for which the applicant was discharged and (ii) an Honorable Discharge is, by regulation, presumed to be the appropriate character of discharge;
>
> (b) [cite to current regulations] represents a substantial enhancement of the rights afforded a respondent in such a proceeding; and
>
> (c) there is substantial doubt that the applicant would have received the same character of discharge if [cite the current regulation] had been in effect at the time of the applicant's discharge since his/her service record was good and an Honorable Discharge would have been presumed.
>
> 2. For the DRB to conclude that contention #1 is not grounds for recharacterizing the applicant's discharge to Honorable would violate due process and fundamental principles of administrative law because it would be inconsistent with each of the following cases in which the Discharge Review Board, pursuant to 32 C.F.R. § 70.6(c)(1) recharacterized to Honorable the discharge of a servicemember who was separated under the same regulation as the applicant here: [cite relevant cases].

16.4 OTHER GENERAL APPROACHES, WITH SAMPLE CONTENTIONS

If the current standards approach is insufficient or if the case is before the BCMR,[6] other approaches can be used. One argument is that, since the servicemember being discharged for unsuitability is not volitionally at fault, an HD should be presumed. This is especially true if the discharge is for psychiatric reasons — it is unjust to punish someone for being ill. A corollary to this argument is that the servicemember should not have been in the service in the first place.

The type of discharge issued should be based on the quality of the servicemember's service, without regard to the fact that the discharge was for cause.[7] If the veteran had several disciplinary actions that might support a GD, it can be argued that these were minor incidents manifesting the nonvolitional trait on which the discharge was based.

The following general framework should be used for this type of contention; however, remember to relate the specifics of your case to each argument.

> 1. Applicant's discharge is inequitable and warrants recharacterization to Honorable because his/her [unsuitability trait] impaired his/her ability to serve;
>
> 2. Applicant's discharge is inequitable and warrants recharacterization to Honorable because (s)he tried to be a good servicemember but failed due to [unsuitability trait]; and
>
> 3. Applicant's discharge is inequitable and warrants recharacterization to Honorable because his/her disciplinary actions were directly related to, and were caused by, his/her [unsuitability trait].

16.5 IMPROPERLY RECORDED REASON FOR DISCHARGE

Sometimes, the actual unsuitability reason is not given in the separation document (DD 214). For example, the DD 214 may reflect discharge for a "character and behavior disorder" when all the steps

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[2] *See* App. 16C *infra* (chronological development of standards for unsuitability discharges).

[3] *See, e.g.*, AR 635-359, para. 2(1) (1948) (permitting separation for lack of physical stamina).

[4] *See, e.g.*, AR 635-209, para. 8 (1955).

[5] *See* § 16.7 *infra* (discussion of personality disorders).

[6] Regulations do not bind the BCMR to apply current standards. However, the BCMR considers current standards very important, and often upgrades discharges for this reason.

[7] *See, e.g.*, NC 77-2122 (BCNR upgraded applicant's unsuitability discharge without consideration of the fact that the discharge was for cause; applicant completed 1 month and 21 days of his enlistment without a mark on his record; Board considered his overall record, his apparent psychiatric problem, his short period of active duty, and the absence of any disciplinary problems; concluded that under current standards he would have received an HD).

leading up to the discharge indicate that discharge was contemplated for "apathy." Where such a discrepancy between the DD 214 and military record exists, the applicant should not assume that the DRB will look only at the DD 214 for the discharge's basis. The DRB may find the reason for discharge to be an error, but leave the GD intact, ordering issuance of a DD 215 to reflect the proper reason for discharge.

If there is any reason to believe that the Board will not follow the DD 214 reason for the discharge, applicants should make contentions to prove that the reason for discharge most favorable to them is the one supported by the record.

Relying on the DD 214 reason for discharge can have disastrous results. Normally, an individual discharged for a character and behavior disorder is afforded various rights, such as the right to a valid psychiatric diagnosis establishing the existence of the disorder. If no diagnosis was performed, the individual is entitled to an upgrade. However, if the reason for discharge on the DD 214 is inconsistent with the rest of the individual's military record, the Board may not treat the case as a character and behavior disorder case, thus denying the upgrade for nondiagnosis.[8]

16.6 SPECIFIC REASONS FOR UNSUITABILITY DISCHARGES

The following sections deal with equity and propriety issues pertinent to each reason for unsuitability discharge. General propriety issues, such as adequate notice, that go to the legality of the discharge are discussed in Chapter 12, and general equity issues are discussed in Chapter 22. Because the Boards do not neatly compartmentalize their reasoning, review of these chapters is necessary. Boards often consider certain propriety issues to be equitable issues.

16.7 CHARACTER AND BEHAVIOR DISORDER (PERSONALITY DISORDER) DISCHARGES

16.7.1 MEDICAL NATURE OF PERSONALITY DISORDERS

The services' medical fitness standards for appointment, enlistment, and induction state that personality disorders, as well as psychoses and psychoneuroses, are medical causes to reject appointment, enlistment, or induction.[9] In contrast, the medical fitness standards for retention, promotion and separation distinguish between psychoses and psychoneuroses on one hand and personality disorders on the other. The former are treated as medical reasons for separation, while personality disorders "are considered to render an individual administratively unfit rather than unfit because of physical disability."[10]

This distinction is inconsistent with both authoritative medical standards and the DoD's own medical diagnoses of persons who were given GDs by reason of character and behavior, or personality disorders. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* defines three categories of mental illness which are identical to the categories established in the services' medical fitness standards, namely, psychoses, neuroses (psychoneuroses), and personality (character and behavior) disorders.[11] The *Diagnostic and Statistical Manual of Mental Disorders* states that personality disorders are characterized by "deeply ingrained maladaptive patterns of behavior. . . . Generally, these are life-long patterns, often recognizable by the time of adolescence or earlier."[12]

Among the types of personality disorders the *Manual* lists are the paranoid personality, the schizoid personality, the passive-aggressive personality, and the inadequate personality.[13] Similarly, medical diagnoses given by military physicians to persons who were afterward recommended for administrative separation and given GDs, have included "passive-dependent personality disorder," "schizoid personality with paranoid features," and "character behavior disorder, inadequate type." Thus the services have been issuing GDs to individuals in whom they have diagnosed mental disorders.[14]

Like those suffering from psychotic or psychoneurotic disorders, persons suffering from character and behavior disorders have no reliable, conscious control over their behavior patterns.[15] Character dis-

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[8] The Board's rationale in this situation is that the DD 214 reason for discharge was administrative error. *See* AD 78-01548; AD 79-11289; ADRB SOP, Annex H-3, para. g., 44 Fed. Reg. 25,079 (1979).

However, if the command erred by convening an administrative board hearing for which character and behavior disorder was the basis, this reason for discharge is conclusive, even had the commander meant to process the servicemember for apathy.

In AD 77-09115, the applicant had a "series of numerous acts of misconduct both on and off duty." Even though the command had wanted to separate him for apathy, his discharge for character and behavior disorder was approved. The psychiatric diagnosis upon which the discharge was based was improper because it was signed by a person whose qualifications were unknown, and the Board granted relief.

[9] *See, e.g.*, AR 40-501, ch. 2, § XVI.

[10] AR 40-501, ch. 3, § XV.

[11] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968) [hereinafter cited as MANUAL OF MENTAL DISORDERS]. Indeed, in a 1965 publication of the Army's Office of the Surgeon General, it was suggested that the American Psychiatric Association's official classifications were modeled after the three categories developed by the Army. *See* 1 OFFICE OF THE SURGEON GENERAL, DEP'T OF THE ARMY, NEUROPSYCHIATRY IN WORLD WAR II at 756 (1966).

[12] MANUAL OF MENTAL DISORDERS, *supra* note 11, at 41.

[13] *Id.* at 42-44.

[14] Prior to the adoption of the "character and behavior disorder" classification, "psychoneurosis" was used indiscriminately by DoD psychiatrists to categorize individuals with problems ranging from true psychoneurosis, to character disorders, to simple malingering or insubordination. W. MENNINGER, PSYCHIATRY IN A TROUBLED WORLD 32-37 (1958). Eventually recognizing the problem, the War Department created the "character and behavior disorder" classification to provide its psychiatrists with a more realistic diagnostic alternative. WD TB MED. 203 (Oct. 1943).

[15] The fundamental causes of psychoses, psychoneuroses, and character disorders are somewhat different. Psychoses stem from early developmental defects and may produce more severe or disruptive manifestations than psychoneuroses and character disorders, which stem from intrapsychic conflicts. The behavior traits of persons suffering from psychoneuroses and character disorders may not be as severe or as disruptive as the manifestations of psychotic disorders, but they are no more controllable.

orders have been described as a "heterogeneous group of pathological character disturbances which exhibit in common an [sic] habitual inflexibility of behavior patterns . . ."[16] While it may appear that the behavior of an individual suffering from such a disorder is consciously determined, in reality, a "rigid character formation" imposes the observed behavior patterns.[17] Character formation involves the resolution of conflict between instinctual drives or wishes and inhibitions rooted in the unconscious. In a psychoneurotic individual,[18] the resolution of conflict is manifested in a neurotic symptom. Thus personality disorders, like psychoses and psychoneuroses, can be said to be unconsciously determined, or mental disorders over which a person has no reliable, conscious control.[19]

Because of the lawsuit discussed below and a change in the DRBs' statute, there have been recent significant changes in the way in which the majority of GDs for C & B are treated by the service that gave most of them — the Army.

16.7.2 *LIPSMAN* SETTLEMENT AND ARMY CASES, WITH SAMPLE CONTENTIONS

Lipsman v. Brown[20] was a class action lawsuit brought against the Army to remedy two fundamental illegalities in the way the Army separated servicemembers for a character and behavior (C & B) disorder:

- The Army often separated servicemembers for this psychological disorder without support of a diagnosis by a psychiatrist; and
- The practice of the Army was to consider a C & B disorder as support for a GD despite the quality of a servicemember's military record.

The 1978 settlement of the *Lipsman* case[20a] expressly recognized the illegal existence of these practices. To remedy the illegalities, the Army agreed that:

- Army regulations would be amended to require that, henceforth, any servicemember separated for a C & B disorder must be diagnosed as having one by a physician trained in psychiatry;
- The Army DRB would automatically upgrade to an HD the discharge of any servicemember separated for a C & B without being diagnosed by a physician trained in psychiatry and psychiatric diagnoses, regardless of the overall record of service;[21]
- Army regulations would be amended to prohibit consideration of any C & B diagnosis in determining the character of discharge for anyone separated in the future;
- The Army DRB would be directed to review the application of a veteran properly discharged for a C & B disorder with "compassion" and to consider the presence of a C & B diagnosis as a mitigating factor supporting an upgrade to HD except in a case in which there are "clear and demonstrable reasons why a fully Honorable Discharge should not be given"; and
- Army regulations would be amended to require that an HD be issued to each individual separated for unsuitability by reason of a C & B disorder if (s)he had no convictions by general court-martial and not more than one conviction by special court-martial in the relevant period of obligated service.

As noted earlier, the uniform discharge review standard regarding application of current standards (promulgated after the *Lipsman* settlement) requires the Army DRB to apply retroactively all these changes in Army regulations.

As a result of *Lipsman*, Army GDs for C & B disorders are among the easiest to have upgraded. The only cases that fail to produce upgrades are those in which there was a proper psychiatric diagnosis and the Army DRB misapplies the terms of the *Lipsman* settlement, as for example by viewing a few AWOLs or a few Art. 15s for minor offenses as "clear and demonstrable reasons for not granting a fully Honorable Discharge."

The tendency of a few panels to ignore the *Lipsman* settlement should not deter applicants from rquesting a review without a hearing. Submitting a careful set of contentions that indicates full awareness of *Lipsman* and that cites other DRB decisions granting an upgrade to HD should assure an HD in almost every C & B case.

The following contentions should be used, eliminating Contentions #2 and #3 in a case in which there is a diagnosis by a physician trained in psychiatry:

> 1. The applicant was discharged for a character and behavior disorder (or personality disorder).
>
> 2. The applicant's character and behavior (or personality) disorder was not established by the diagnosis of a physician trained in psychiatry and psychiatric diagnoses.
>
> 3. Because of the validity of Contentions #1 and #2, the settlement in *Lipsman v. Brown*, C.A. No. 76-1175 (D.D.C. 1978), and ADRB SOP, Annex H-3 and SFRB, Memo #3-78, 44 Fed. Reg. 25,079, 25,093-94 (April 27, 1979), mandates an upgrade to Honorable.
>
> 4. The applicant was not convicted by a general court-martial or by more than one special court-martial during his/her last term of enlistment or any extension thereof.
>
> 5. Current policy and procedures applicable on an Army-wide basis require that "when the reason for separation is unsuitability due to personality disorder. . . the individual will be

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[16] AMERICAN PSYCHOANALYTIC ASSOCIATION, A GLOSSARY OF PSYCHOANALYTIC TERMS AND CONCEPTS at 25 (2d ed. 1968).

[17] *Id.*

[18] *Compare id.* at 26-27 *with id.* at 79.

[19] *Id.* at 26-27.

[20] 6 MIL. L. REP. 2064 (1978). *See* App. 16A *infra*.(reproduction of settlement). *See also* ADRB SOP, Annex H-3, 44 Fed. Reg. 25,079 (Apr. 27, 1979); DRB Index category A86.08.

[20a] *See* App. 16A *infra*.

[21] The Army DRB's SOP explains the provision as "essential because there is no way to determine today the extent to which more serious mental disorders might have affected the applicant's behavior while in service." SFRB, Memo # 3-78, 44 Fed. Reg. 25,093-94 (Apr. 27, 1979). *See also* ADRB SOP, Annex H-3, 44 Fed. Reg. 25,079 (Apr. 27, 1979).

furnished an Honorable Discharge certificate unless (s)he has been convicted of an offense by general court-martial or has been convicted by more than one special court-martial in the current enlistment period of obligated service or any extension thereof, in which case (s)he may be furnished a General Discharge certificate" (DA Message 151800Z Feb. 1978, amending AR 635-200, para. 13-15 (21 Nov. 1977)).

6. The policy and procedures identified in Contention #5 differ in material respects from the policy and procedures under which the applicant was discharged and represent a substantial enhancement of the rights afforded a servicemember recommended for discharge for character and behavior (or personality) disorder.

7. Because of the validity of Contentions #4-6, there is substantial doubt that the applicant would have received less than a fully Honorable Discharge if the new Army policy and procedures for discharges for personality disorders had been available to the applicant at the time (s)he was processed for discharge.

8. Because of the validity of Contentions #4-7, the applicant's discharge is inequitable pursuant to 32 C.F.R. § 70.6(c)(1) and must be upgraded to fully Honorable.

9. The settlement in *Lipsman v. Brown*, C.A. No. 76-1175 (D.D.C. 1978) requires the Board to consider the presence of a personality disorder diagnosis as a mitigating factor that justifies relief except in cases where there are clear and demonstrable reasons why a fully Honorable Discharge should not be given.

10. There are no clear and demonstrable reasons why a fully Honorable Discharge should not be given to the applicant within the meaning of the requirement described in Contention #9.

11. To conclude that the applicant's discharge should not be recharacterized to Honorable would be to violate *Lipsman v. Brown* and due process because it would be inconsistent with the decisions of the Board applying the *Lipsman* settlement in upgrading the discharge to Honorable in each of the following cases: [Here insert applicable cases].[22]

[22] There are scores of cases that an applicant could cite here. Cases which can be cited by all applicants include AD 77-07511; AD 78-01392; AD 77-08013; AD 77-12048; AD 79-01537; AD 78-01456.

For cases in which there is no diagnosis by the required physician, see AD 78-01206 (applicant's disciplinary record included 6 NJPs and one SPCM); AD 78-00612 (5 NJPs); AD 77-08621 (4 NJPs); AD 78-03036 (no recorded offenses or time lost).

See also AC 79-04025 (no time lost or acts of indiscipline: Board upgraded applicant's discharge despite his low conduct and efficiency ratings, holding that it was "evident" that these ratings were due to his inability to adapt successfully to military service because of his C & B, and that a doubtful characterization must be resolved in favor of veteran); AD 7X-019376 (applicant had one NJP for AWOL and an AWOL for 4⅓ months, for total lost time of 171 days); AD 78-00692 (applicant first discharged with a UD for frequent involvement, after which his discharge was upgraded to GD and reason for discharge changed to C & B: on second review, Board determined that applicant's C & B impaired his capability to serve and voted to

16.7.3 *LIPSMAN* SETTLEMENT AND NAVY, MARINE, AND AIR FORCE CASES, WITH SAMPLE CONTENTIONS

The Air Force, Navy, and Marines were not parties to the *Lipsman* settlement, and the Air Force and Naval DRBs do not follow the *Lipsman* rules.[23] Nonetheless, it is arguable that *Lipsman's* underpinnings in fundamental fairness should be applicable. There is, additionally, a statute requiring all DRBs to have uniform rules which might justify application of the Army's *Lipsman* rules to the other service Boards.[24]

The contentions below exemplify the type of general approach that may be appropriately used before all non-Army Boards. This approach should not, however, be relied upon to the exclusion of other arguments to which the Boards are more receptive.

1. Due process, as well as Pub. L. No. 95-126, 91 Stat. 1106 (1977), require the Board to apply the following discharge review standards established by *Lipsman v. Brown*, C.A. No. 76-1175 (D.D.C. 1978), and 32 C.F.R. § 70.6(c)(1) and applied by the Army to all servicemembers discharged for a character and behavior (or personality) disorder:

- Automatically upgrade to Honorable the discharge of any servicemember separated by reason of a character and behavior disorder without being diagnosed by a physician trained in psychiatry and psychiatric diagnosis regardless of the overall record of service;
- Review applications from veterans properly discharged for a character and behavior disorder with "compassion" and consider the presence of a character and behavior diagnosis as a mitigating factor justifying an upgrade to Honorable except in cases where there are "clear and demonstrable reasons why a fully Honorable Discharge should not be given";
- Upgrade to Honorable the discharge of any servicemember discharged for a character and behavior disorder who had no convictions by general court-martial and not more than one conviction by

[22] (continued)

grant full relief); AD 77-07806 (upgraded despite record of one NJP, one SCM, and one SPCM).

See AD 79-02402 (applicant's disciplinary record included one NJP and two SCMs: Board upgraded his discharge to an HD because "[b]ased on today's standards, the applicant's rights would have been substantially increased and there is substantial doubt that he would have received the same characterization of discharge in view of his disciplinary record"). *See also* AD 77-11290; AD 77-12552.

[23] In the years before *Lipsman*, the Navy, Air Force, and Marines issued HDs to servicemembers discharged for C & B disorders at a significantly higher rate than the Army did. *See* note 1a *supra*.

[24] Pub. L. No. 95-126, 91 Stat. 1106 (codified at 38 U.S.C. § 3103(e)(1)), requires the DRBs to review discharges under "published uniform standards." *See* § 9.1.3.3 *supra* (further discussion of Pub. L. No. 95-126).

In all Navy, Marine Corps, and Air Force cases, and in Army cases in which applicants do not have good disciplinary records, there are theories besides the *Lipsman* case upon which C & B discharges can claim upgrading.

special court-martial in the last period of obligated service.

2. The applicant was discharged for a character and behavior (or personality) disorder.

3. The applicant's character and behavior (or personality) disorder was not established by a physician trained in psychiatry and psychiatric diagnoses.

4. Because of the validity of Contentions #1-3, the applicant's discharge should be upgraded to Honorable.

5. The applicant was not convicted by a general court-martial or by more than one special court-martial during the last term of enlistment or any extension thereof.

6. Because of the validity of Contentions #1, 2 and 5, the applicant's discharge should be upgraded to Honorable.

7. There are no clear and demonstrable reasons why a fully Honorable Discharge should not be given to the applicant, and, therefore, because of the validity of Contentions #1 and 2, the applicant's discharge should be upgraded to Honorable.

16.7.4 PROPRIETY APPROACHES

16.7.4.1 General Strategy

The best attack on a C & B is that the psychiatrist's evaluation was inadequate or inaccurate. In most cases, the psychiatrist merely fills out a form or recites a standard narrative. In other cases, (s)he merely signs a work-up done by a non-doctor. Sometimes the doctor is not a qualified psychiatrist. In any of these situations, the veteran's recollection of what the interview was like and who conducted it is important. Because a veteran with a GD has access to the VA, often the VA will give him/her a complete psychiatric examination, and may conclude that no C & B disorder exists or existed.

If a C & B discharge is found to be improper, another reason for discharge must be substituted. In *Carter v. United States*,[25] the Court indicated that, where a discharge for C & B was improper, it is usually appropriate to assume that the servicemember would have completed his/her enlistment without being discharged for cause for any other reason. The DRB had, in *Carter*, assigned the neutral classification of "Secretarial Authority" when it reviewed the case on its own motion during the course of litigation.

16.7.4.2 There Was No Disorder, With Sample Contentions

If the military psychiatric evaluation failed to reveal a mental disease or defect as required by regulation, discharge for a C & B is improper and constitutes grounds for an upgrade.[26] In addition, the applicant may offer a recent psychiatric evaluation (performed by the VA, for example) to rebut the military psychiatrist's finding that a C & B disorder existed. In this situation, the applicant should demonstrate why the recent evaluation is more reliable than that previously performed by the military, *e.g.*, because not enough tests were performed, or qualifications of the examiner were dubious. If found improper, the discharge should be upgraded to an HD.[27]

Sample contentions are as follows:

1. Applicant's discharge for a character and behavior disorder was improper and should be recharacterized to Honorable, because the psychiatric evaluation upon which the discharge was based failed to reveal (or to reveal conclusively) the existence of a mental disease or defect as required by [cite the regulation] in effect at the time of discharge. *See Carter v. United States*, 213 Ct. Cl. 727 (1977); AD 77-11932; AD 77-10901; AD 78-02062; AD 77-10208.

2. Because of Contention 1 the reason for applicant's discharge should be changed to expiration of term of service or Secretarial Authority.

16.7.4.3 There Was No Psychiatric Examination, With Sample Contention

If a psychiatric examination required by regulations[28] was not performed, the discharge was improper at the time of its issuance.[29] A sample contention:

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[25] 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977). *See also* ADRB SOP, Annex 0-1, SFRB Memo # 24, March 10, 1977, 44 Fed. Reg. 25,087 (Apr. 27, 1979) (discussion of *Carter*); SFRB Memo # 16, Nov. 11, 1976, 44 Fed. Reg. 25,084 (Apr. 27, 1979).

[26] *Id.*; DRB Index category A86.02; SFRB Memo # 18, Jan. 21, 1977, 44 Fed. Reg. 25,085 (1979). *See also* AD 77-11932 (Board determined that, despite a record of four NJPs and one SPCM for disobeying an order from and striking an NCO, "[applicant] was not properly separated as the psychiatrist diagnos[is] found no psychiatric disease" and granted relief); AD 77-10901 (since neuropsychiatric evaluation did not state that applicant had a personality disorder, "[m]ajority of Board felt that his initial discharge was improper and upgraded discharge"); AD 78-02062 (Board granted relief because despite record of 3 NJPs "for drunk, improperly possessing a weapon, disrespect to an NCO and loitering while on guard duty," applicant "had a psychiatric examination which did not diagnose him as having a character and behavior disorder"); AD 77-10208 (Board granted applicant full relief and changed reason for discharge to "Secretarial Authority" because original basis for discharge was not supported by a proper psychiatric evaluation).

[27] *See* note 25 *supra*; AD 77-07130. This rule applies to *all* discharges subsequently held improper by a Board or court. *See* § 12.5.1.3 *supra*.

[28] *See, e.g.*, AR 635-212, para. 6(2).

[29] *See* DRB Index categories A52.02, A40.06, A86.02; AD 77-08021 (despite applicant's record of three NJPs, one SCM, and one SPCM, DRB upgraded because there was no evidence in his file that neuropsychiatric evaluation was performed or that he was ever referred to medical authorities); AD 77-12179 (same result on record with two SCMs and three NJPs for repeated AWOLs in 15½ years of service); AD 77-07663 (same result on record with three NJPs and once SCM); AD 78-01258 (applicant's record included three NJPs, but C & B discharge not supported by psychiatric record: Board declined to apply the presumption of regularity, found the discharge improper because of the missing psychiatric diagnosis, and upgraded despite legal prehearing comments stating "[the psychiatric] report was with paperwork apparently withdrawn. Without more administrative regularity should be presumed"); AD 77-07517 (same result citing ADRB SOP, Annex 0-1, SFRB Memo # 16, 44 Fed. Reg. 25,084 (Apr. 27, 1979)).

#. Applicant's discharge was improper and warrants recharacterization to Honorable because a psychiatric evaluation was not performed prior to discharge, contrary to [cite the regulation].

16.7.4.4 The Examination Was Improper, With Sample Contention

An inadequate,[30] improper,[31] or untimely[32] psychiatric examination supporting discharge for a C & B disorder constitutes automatic (*per se*) prejudicial error, thereby entitling the applicant to an upgrade regardless of his/her military record. A sample contention:

#. Applicant's discharge is improper and warrants recharacterization to Honorable because his/her psychiatric examination was conducted in violation of [cite the regulation] in that the examination was [*e.g.*, not signed by a physician] [add details].

16.7.4.5 The Psychiatric Diagnosis Was an Illegally Obtained Statement, With Sample Contention

In *United States v. Ruiz*,[33] the U.S.C.M.A. held that Article 31, U.C.M.J. warnings must be given before taking a urine sample when evidence from that sample can lead to a GD. While the DoD strictly interprets the case as controlling only on identical facts, it can be argued that a military psychiatrist usually knows when examination has been ordered for purposes of an involuntary GD, and that therefore the *Ruiz* warnings are required.[34] A sample contention:

#. Applicant's discharge is improper and should be recharacterized to Honorable because it was based on evidence obtained in violation of applicant's right against self-incrimination as embodied in Article 31 of the Uniform Code of Military Justice. That evidence consisted of the statements obtained by the examining psychiatrist who concluded that the applicant had a C & B disorder. *See United States v. Ruiz*, 23 C.M.A. 181, 38 C.M.R. 797 (1974); *Giles v. Secretary of the Army*, 627 F.2d 554 (D.C. Cir. 1980). [Add Details].

16.7.4.6 Other Propriety Approaches

Another possible contention is that a discharge was improper because the servicemember's performance ratings were sufficiently high to merit characterization as Honorable. This is relatively simple in the case of Navy and Marine veterans whose services employ an objective numbering scale to determine whether one receives an HD or a GD. A challenge to low ratings received can lead to a finding that they were calculated improperly or given inappropriately.[35]

Recent Navy and Marine Corps regulations provide that a diagnosed personality disorder alone is insufficient reason for discharge unless the disorder renders the member incapable of adequate service.[36] Thus, where a neuropsychiatric evaluation upon which an applicant's C & B was based stated that his "personality disorder was not incapacitating and did not warrant administrative separation," the Board found the discharge improper.[37]

A history of disciplinary infractions does not necessarily overcome the Air Force's presumption that an HD is appropriate in cases of unsuitability, particularly if those infractions are largely attributable to the cause of the servicemember's unsuitability.[38]

16.7.5 EQUITY APPROACHES

The primary equity approach is that the servicemember was ill and that the illness led to poor performance and disciplinary problems.[39] The factors to be stressed as a matter of equity parallel the fairness factors underlying the *Lipsman* rules.

16.8 INAPTITUDE

"Inaptitude" is another basis for discharge. The 1979 BUPERSMAN describes inapt servicemembers as "lacking general adaptability, wanting readiness or skill, unhandy or unable to learn."[40] This at-

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[30] *See* DRB Index category A42.02; ADRB SOP, Annex H-3, 44 Fed. Reg. 25,079 (Apr. 27, 1979) (medical officers, assigned full time to Mental Health Service or to an NP clinic, signing as a psychiatrist). *See also* AD 77-08841 (upgrade where psychiatric evaluation did not support a discharge for a character and behavior disorder; "No indication of Branch or qualifications of examiner and nothing written other than 'check the boxes' in a form."); AD 78-02062 (upgrade where psychiatric evaluation in file was pre-printed form without any revealing information); AD 77-12205 (upgrade where mental status evaluation did not include applicant's name, medical officer's signature, rank, or branch).

[31] *See* DRB Index category A42.02; AD 79-00809 (discharge improper because psychiatric evaluation was done by physician's assistant in violation of existing regulations); AD 78-03960 (upgrade where evaluation was signed by nonphysician MSC officer in violation of regulations); AD 77-06781 (discharge improper because evaluation was signed by MSC social worker and medical specialist).

[32] *See* DRB Index category A42.02; ADRB SOP, Annex H-3, para. a., 44 Fed. Reg. 25,079 (Apr. 27, 1979); § 12.5.4 *supra*.

[33] 23 C.M.A. 181, 38 C.M.R. 797, 2 MIL. L. REP. 2063 (1974). *Ruiz* involved urine samples that were held to be "statements" within the meaning of Art. 31, U.C.M.J., which provides the equivalent of the fifth amendment privilege against self-incrimination. A recent decision casts doubt on the continued validity of *Ruiz*. United States v. Armstrong, 9 M.J. 374, 8 MIL. L. REP. 2523 (C.M.A. 1980).

[34] *See* Giles v. Secretary of the Army, 627 F2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980). *See* Ch. 15 *supra*.

[35] *See, e.g.*, ND 78-01135 (marks warranted HD); ND 78-00844 (same). *See* § 12.8 *supra* (strategies for attacking improper ratings).

[36] BUPERSMAN art. 3420184 (1979); MARCORSEPMAN, para. 6016(3) (1) (1978).

[37] ND 78-01010 (applicant had one NJP and one SPCM). In the absence of a psychiatric diagnosis, independent psychiatric evidence may be offered to support applicant's claim that (s)he should have been retained despite a C & B disorder.

[38] AFM 39-12, para. 2-3, para. 1-24(c) (in effect since 1966). *See* FD 79-00394 (AFDRB upgraded applicant's C & B discharge because his "inability to cope with military life [was] due primarily to his personality disorder" and because of the Air Force presumption that individuals discharged for unsuitability should receive an HD).

[39] ADRB SOP, Annex F-1, paras. 3.h., 3.v.(3), 44 Fed. Reg. 25,071, 25,073 (Apr. 27, 1979).

[40] BUPERSMAN 3420184 (1)(f). *See also* AR 635-200, para. 13-4 a.

tempted definition still lacks precision and distinguishes the inapt from the apathetic[41] or from the nonproductive or marginal performers subject to the Expeditious Discharge and Trainee Discharge Programs (EDP and TDP).[42]

The only difference between discharges under EDP and TDP and discharges for inaptitude is that the former two programs were instituted in 1974 and require separation within the first 36 months of service. An applicant who was discharged prior to institution of these programs may successfully contend that under current standards (s)he would have been issued an HD under EDP or TDP.

Other arguments include invoking equity considerations common to all unsuitability cases and challenging poor performance ratings. The inapt servicemember is one who "would but couldn't" due to an inability to learn.[43]

16.9 APATHY

The upgrading of discharges for "apathy, defective attitude, or inability to expend efforts constructively" may be difficult because these reasons evade precise definition. Prior to 1975, DoD Directive 1332.14 stated that this behavior is "apparently beyond the control of the individual," thus rendering the servicemember incapable of serving adequately. (After 1975, 1332.14 deleted that language and added "As a significant observable defect elsewhere not readily describable.") This nonvolitional element distinguishes apathy from "shirking," an unfitness or misconduct reason for discharge.

16.9.1 ARMY AND AIR FORCE APATHY CASES

Successfully upgrading a discharge for apathy before the Army and Air Force Boards requires proof of an inability to serve,[44] or of some other extenuating factor(s) such as drug abuse,[45] a diagnosed mental disorder,[46] a relatively good service record,[47] personal decorations, prior honorable enlistment,[48] good post-service conduct,[49] or the isolated nature of any disciplinary problems.[50]

Applicants should attempt to dispel any impression of willfulness. Failure to do so may result in denial of relief on grounds that the applicant should have received a UD for shirking, rather than a GD for apathy, in the first place. The applicant's contentions should therefore emphasize the nonvolitional aspect of his/her behavior and underscore the favorable aspects of his/her military career.

16.9.2 NAVY AND MARINE APATHY CASES

In reviewing unsuitability cases, the NDRB looks to the applicant's numerical performance marks as the primary factor in determining whether to grant relief. A decision to grant relief is seemingly based on the impropriety of the discharge as issued rather than on any articulated equitable considerations.[51]

It is not likely that the NDRB will remain impervious to logical equitable arguments. However, they must be clearly presented.[52] An applicant's first claim should be that the ratings require an HD; second, that the bad ratings were improperly calculated;[53] third, that the conduct was beyond the applicant's control.

16.10 ENURESIS (BED-WETTING)

The 1976 DoD administrative discharge directive dropped enuresis as a category of unsuitability; the Army had eliminated it in 1972. The military's recognition of enuresis as a nonvolitional medical problem

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[41] *See* § 16.9 *infra*.

[42] *See* § 16.15 *infra*.

[43] *See* 32 C.F.R. § 70.6(c)(3)(ii) (A) ("capability to serve" rule); ADRB SOP, Annex F-1, paras. 3.i., 3.t., 44 Fed. Reg. 25,071, 25,072-73 (Apr. 27, 1979). For cases in which the ADRB upgraded GDs for inaptitude based on this principle, see AD 77-07618 (principal reason for discharge was servicemember's inability to perform his duties because of his inability to speak or learn to speak English); AD 78-04557 (servicemember's capability to serve affected by inability to learn stemming from nervousness). No Navy, Air Force, or Marine cases discussing this issue were located in the DRB Index through Supplement 8.

See § 22.5.2 *infra* (discussion of substandard enlistees or draftees (Project 100,000)).

[44] *See* AD 78-0249 (applicant's disciplinary record included two NJPs for minor offenses and a previous HD; Board granted upgrade, reasoning that numerous personal problems may have contributed to his poor performance). *See generally* ADRB SOP, Annex F-1, para. 2.b., 44 Fed. Reg. 25,069-71 (Apr. 27, 1979).

[45] *See* AD 79-00500. In this case, the applicant had two NJPs for minor offenses. During his first 15 months, ratings were excellent and then spiraled downward. Drug abuse appeared to be involved. The Board upgraded because "drugs were a mitigating factor in his capability to serve."

See also AD 78-04427. The applicant here had one SCM for a 19-day AWOL. He was discharged from drug rehabilitation as a failure for lack of cooperation. The Board considered his entire record, which included an RVN tour and a personal decoration.

[46] In at least one case, AD 78-03657, a Board awarded relief upon evidence of psychiatric problems. Applicant had one NJP for a seven-day AWOL; detailed psychiatric diagnosis concluded that he suffered "schizoid personality"; Board considered his overall record, which included two previous Honorable Discharges.

[47] *See* AD 77-012061 (applicant's disciplinary record included two NJPs, but Board found "applicant's service was at least good during his tenure," and, on that basis, granted relief). *See also* notes 45, 46 *supra*.

[48] *See* AD 77-02317. The applicant's disciplinary record was clean prior to discharge. He had allegedly committed several serious offenses but no charges had been brought. He had two HDs, ten years overall service, six years in Vietnam, and several personal decorations. Based on his overall record, the Board voted to grant relief. *See also* notes 44, 46 *supra*.

[49] *See* FD 78-00173 (applicant had one NJP; testimony and other evidence at hearing persuaded Board that his attitude and behavior had improved substantially since his discharge and that "at the time of his entry into the Air Force his youth and immaturity were most likely strong contributing factors that involved him in minor difficulties with his supervisors").

[50] *See* AD 77-10862 (applicant had three NJPs, two for violent offenses, including assault on a staff sergeant; although the primary reason for the Board's decision to upgrade was that the applicant's attempt to withdraw a waiver of his rights was denied, the decision also indicated that the isolated nature of the applicant's disciplinary problems was a mitigating factor).

[51] *See* ND 78-01764 (appellant's original discharge was held unwarranted by his service record; his military behavior average of 3.4 and overall trait average of 3.33 were held sufficient to merit an HD).

[52] *See* MD 79-00618; MD 78-03195; MD 78-00403 (relief denied following applicant's failure to make detailed contentions). *See generally* DRB Index categories A44.00, A28.00.

[53] *See* § 12.8 *supra* (challenges to low ratings).

came even later than its enlightened attitudes toward alcoholism and drug use. In the meantime, thousands of servicemembers had been given GDs for enuresis.

While reference to the DRBs' application of the current standards rule[54] would seem to resolve these cases, the DRBs often try to avoid simple application of this rule when the veteran has a poor service record, or (in the case of the NDRB) low performance marks. Also, while the BCMRs usually apply current standards, no written directive mandates this. In these situations, additional claims may be needed, such as:

- The service's failure to support discharge with the type of medical examination required by regulation;[55]
- Its failure to support discharge with a finding of interference of enuresis with job performance;[56]
- The relation of disciplinary or adjustmental problems to the nonvolitional medical problem.

If a veteran discharged for enuresis has a good record, little is gained in requesting a personal appearance hearing. Refusing one might even speed results in the case.

16.11 FINANCIAL IRRESPONSIBILITY

Financial irresponsibility is currently used by the Navy, Marines, and Air Force to discharge servicemembers as unsuitable. This reason for discharge appears to be a lesser offense of the unfitness/misconduct category of "an established pattern showing a dishonorable failure to pay just debts." Veterans discharged for this reason with a GD can use the following strategies to support their applications for upgrades:

- Since financial irresponsibility rarely affects directly the military or the performance of one's duties, basing a bad discharge on it goes beyond the statutory authority of the military services;[57]
- If the debts alleged were not owed or could not be avoided, the applicant should present evidence of this;
- If the debts were owed, the applicant should present evidence, such as cancelled checks or letters from former creditors attesting to payment, that they have been fully satisfied;
- The applicant should present evidence, such as a favorable credit rating or a letter from a bank stating that (s)he has been on time with loan or mortgage payments, to demonstrate that (s)he is no longer "financially irresponsible";
- Application of the current standards rule,[58] in the case of Army veterans, can support a request for an HD; and
- At the NDRB, any low performance ratings preventing an HD should be challenged.[59]

16.12 UNSANITARY HABITS

"Unsanitary habits" has been used most often to discharge individuals who repeatedly contract venereal disease. Until a 1975 change in the DoD administrative discharge directive, unsanitary habits was an unfitness reason for discharge. The most recent proposed change to the directive appears to eliminate unsanitary habits as a specific reason for discharge.[60]

Two arguments available to applicants discharged for this reason are that:

- Application of the current standards rule[61] warrants an HD or at least a discharge consistent with the veteran's record of service, if the discharge was for unfitness; and
- Since unsanitary habits rarely affect the military or the performance of one's duties, basing a bad discharge on them goes beyond the statutory authority of the military services.[62]

16.13 HOMOSEXUAL TENDENCIES

This reason for discharge was eliminated in January, 1981.[62a]

16.14 ALCOHOLISM OR TREATMENT PROGRAM FAILURE

Military regulations governing alcoholism and rehabilitation program failure have developed into an extensive body of rules. The area is sufficiently complex to warrant separate treatment.[62b]

16.15 EXPEDITIOUS DISCHARGE OF MARGINAL PERFORMERS

Since 1974, all services have had regulations that streamline procedures for separating nonproductive

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[54] *See* 32 C.F.R. § 70.6(c)(1); Ch. 21 *infra*.

[55] The Army regulation in effect between 1948 and 1972 stated that enuresis was symptomatic of other physical or mental conditions, and that individuals who manifested this symptom required thorough examination by a doctor and a psychiatrist to ascertain its cause. AR 615-369 (1948); AR 635-209 (1959). Marine Corps regulations contained the same requirement. *See, e.g.*, MARCORSEPMAN, para. 6016(1)(b) (1972).

[56] Navy regulations still permit a COG discharge, which can result in a GD if performance marks are low, for enuresis. Article 385022(m) of the 1979 BUPERSMAN permits discharge of servicemembers suffering from enuresis, upon the recommendation of the Chief of the Bureau of Medicine and Surgery, if the condition interferes with job performance. A veteran discharged under this section may attack the propriety of the discharge by showing that the condition failed to interfere with job performance. Another propriety attack may be to show that the commander discharged the applicant without the recommendation of the Chief of the Bureau of Medicine and Surgery. The Board, however, may vote not to upgrade if the applicant's marks are low. *See* § 12.8 *supra* (challenges to low ratings).

[57] *See* § 12.4 *supra*.

[58] *See* 32 C.F.R. § 70.6(c)(1); Ch. 21 *infra*.

[59] *See* § 12.8 *supra* (challenges to low ratings).

[60] *See* § 21.4 *infra*. The new proposed directive is expected to be published in late 1981. Developments will be reported in the *Veterans Rights Newsletter*.

[61] *See* 32 C.F.R. § 70.6(c)(1); Ch. 21 *infra*. *Cf.* FD80-02102; ND 80-0116; ND 80-01613; ND 80-00854 (UDs upgraded to HDs).

[62] *See* § 12.4 *supra*.

[62a] *See* Ch. 14 *supra*; DRB Index category A46.00.

[62b] *See* Ch. 13 *supra*; DRB Index category A45.00.

or marginal performers. These procedures are intended to benefit both the servicemember (by providing a discharge before (s)he gets into serious trouble) and the service (by separating individuals who would reduce overall efficiency and morale by their behavior or attitude). The Navy, Army, and Marine Corps issue GDs or HDs under these programs, while the Air Force has issued only HDs.

While these programs undoubtedly allow many people unable to adjust to military life a quick exit, some aspects of the programs warrant criticism:

- There is no reason to stigmatize dischargees under these programs with a GD;
- Despite regulations[63] prohibiting use of these programs to bypass the regular administrative discharge system, the programs' vague criteria and speedy procedures have permitted commanders and servicemembers to use them in inappropriate situations.[64]

16.15.1 ARMY PROGRAMS

The Army's Trainee Discharge Program (TDP) provides discharges for servicemembers in their first 179 days of active duty;[65] its Expeditious Discharge Program (EDP) provides discharges for servicemembers in their sixth to thirty-sixth month of active duty (first term of enlistment only). Both programs were initiated in 1974.[66]

Under the EDP, servicemembers must demonstrate that they cannot or will not meet acceptable standards due to:

- Poor attitude;
- Lack of motivation;
- Lack of self-discipline;
- Inability to adapt socially or emotionally; or
- Failure to demonstrate promotion potential.[67]

Qualified servicemembers are further defined as possessing the following characteristics:

- "Quitter";
- Hostility toward the Army;
- Inability to accept instructions or directions;
- Clearly substandard performance;
- Evidence of social/emotional maladjustment;
- Lack of cooperation with peers and superiors;[68]
- Inability to adjust to the Army environment;
- Incapacity to adjust permanently, after responding initially; or
- Doubtful potential for service following completion of BCT and AIT.[69]

[63] *See, e.g.*, AR 635-200, para. 5-31d.(1).

[64] In fiscal year 1977 alone there were 46,252 marginal performer discharges, of which 13,735 were GDs. *See generally* REPORT OF JOINT SERVICE ADMINISTRATIVE DISCHARGE STUDY GROUP (1977-78) (August 1978).

[65] The TDP provides for discharge of members "who lack the necessary motivation, discipline, ability or aptitude to become productive soldiers." AR 635-200, para. 5-33 (1979). A TDP discharge must be effected within the first 179 days of active duty in the first term of enlistment. Members discharged under this section receive an HD.

[66] In 1973, under AR 635-200, para. 5-37, personnel not demonstrating potential for promotion could be discharged with an HD or GD.

[67] AR 635-200, para. 5-31 a. (1980).

[68] AR 635-200, para. 5-31 e.(1)(a)-(f) (1980).

[69] AR 635-200, para. 5-31 e.(2)(a)-(c) (1980).

16.15.1.1 Propriety Approaches

An EDP discharge is improper if the program's standards were not met, its process was misused, or its regulatory procedures were violated. Some common errors are:

- The servicemember's failure to meet the EDP's criteria for unsuitability[70] or time of service;[71]
- The commander's violation of restrictions on the use of the EDP;[72]

[70] *See, e.g.*, AD 77-07186 (DRB found that the applicant, an E-4 with an excellent record and Army potential, was improperly discharged for failure to demonstrate promotion potential); AD 77-09209 (DRB found discharge, which was based on incidents of AWOL and an Art. 15 along with poor motivation and failure to respond to counseling, not supported by applicant's written record, which failed to reflect any lost time or NJPs).

In situations similar to those discussed above, Boards tend to shy away from finding discharges improper and prefer to upgrade based on inequity. *See* AD 79-03730 (Board found discharge inequitable and upgraded because applicant completed BCT and AIT so successfully that he was promoted to E-3 after three months).

[71] *See* AD 77-11542; AD 79-00415 (applicant had 2 years, 1 month prior service and under the current re-enlistment served 1 year, 5 months; there was a short gap between applicant's first term of service and re-enlistment; Board held "a break in service of not more than 90 days does not interrupt the continuity of active duty" and found that applicant served more than 36 months of active duty and granted relief based on this impropriety).

[72] AR 635-200, para. 5-31 d. (1980) limits the use of the EDP as follows:

> Limitations. It is contrary to the intent of this policy for commanders to do the following:
>
> (1) To use this policy as a substitute for appropriate administrative action under paragraph 5-32, chapters 9, 13 or 14 of this regulation; processing through medical channels because of physical or mental defects; or appropriate disciplinary action.
>
> (2) To make arbitrary or capricious use of this authority.
>
> (3) To force the separation of members who:
>
> (a) Possess a potential for rehabilitation.
>
> (b) Decline discharge under this policy.
>
> (4) To effect discharge of members who have not been evaluated for a period of at least 60 days in their current unit of assignment.

No cases interpreting 5-31 d.(1) have been located under A24.00 or A25.00 of DRB Index Supplement 8. An applicant contesting an EDP discharge may cite this provision when alleging that the EDP action was improperly substituted for appropriate administrative, medical, or disciplinary action where more procedural rights would have been available.

No cases interpreting 5-31 d.(2) have been located. Violation of it would occur, for example, in a situation where a servicemember who had a good record received one NJP, after which EDP proceedings were initiated. Some overlap exists between the terms of 5-31 d.(2) and those of 5-31 d.(3)(a).

Implicit in 5-31 d.(3)(a) is the requirement that a commander grant a servicemember sufficient time to overcome his/her deficiencies after counseling. Failure to provide time to demonstrate improvement may render the discharge improper. *See* AD 77-07186 (discussed in § 16.15.1.2 *infra*); AD 77-07275; AD 79-03281. In addition, failure to transfer the servicemember for rehabilitation may constitute prejudicial error, rendering the discharge improper. *See* AD 79-05009. *See also* § 12.5.2 *supra*.

A servicemember must consent to being processed under the EDP according to 5-31 d(3)(b). *See* § 12.5.5 *supra* (discussion of coercion and duress). *See also* AR 635-200, para. 5-31 f.(1).

Failure to satisfy the strict time requirement of 5-31 d.(4) should be automatic (*per se*) error. *See* AD 79-01327; AD 78-00928. This provision should be applied retroactively under the current standards equity rule. *See* AD 78-03817 (one reason cited for upgrade was inequity, since "applicant's rights would have been enhanced under today's regulation in that he would have had to serve a minimum of 60 days in the unit").

- A failure to give the servicemember the opportunity to consult with counsel (*per se* error); [73]
- Failure of the discharge authority to have proper rank (*per se* error);[74]
- Approval of a GD when the commander initiating the action does not recommend one;[75]
- Consideration of conduct occurring three days after approval of discharge but prior to actual discharge;[76] and
- Failure to provide adequate documentation to support discharge or to demonstrate attempts at counseling.[77]

16.15.1.2 Equity Approaches

As with other reasons for discharge, upgrades based on equity are often hard to distinguish from those based on propriety. It appears, however, that an upgrade is warranted on equity grounds where:

- The servicemember's overall record is good, apart from mere allegations of disciplinary problems;[78]
- Traditional mitigating factors (such as youth, good faith effort) are present;[79]
- Current standards and procedures represent a substantial enhancement of rights.[80]

16.15.2 NAVY PROGRAMS

Since 1966, the Navy has authorized the separation of personnel who manifest "repeated below average or unsatisfactory markings or unfavorable or less than favorable remarks on non-commissioned officer fitness or petty officer fitness or enlisted performance evaluation reports."[81] Since October 1974, the Navy has had a "marginal performer" program similar to that of the Army;[82] and since 1974, recruits with under six months service receive HDs if eliminated as marginal performers.[83]

Most challenges to GDs under the first two programs are similar to those described for the Army programs, but additional approaches are possible, based on challenging final conduct averages and performance ratings.[84] Although procedural errors

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[73] AR 635-200, para. 5-31 f.(3) (1980) provides that "no member will be awarded a general discharge under this provision unless given the opportunity to consult with an appointed counsel for consultation. . . ." *See* AD 77-08486 (automatic error); AD 77-08356 (same); AD 77-09854 (same).

[74] AR 635-200, para. 5-31 h. (1980) provides that the authorities empowered to order an EDP discharge are "[l]ieutenant colonels [or higher and] who are commanders of battalions and battalion-size units. . . . This authority may not be delegated." *See* AD 78-0075; AD 78-04609; §§ 12.5.7.2, 12.5.9 *supra*.

[75] Under AR 635-200, para. 5-31 f.(4) (1980), a discharge authority who disagrees with the initiating commander's recommendation for an HD may not overrule the commander's decision. Rather, the case must be returned to the initiating commander, who then may institute new EDP proceedings or "take other appropriate action." Failure to comply with this requirement renders the discharge improper. *See* AD 77-08486 (applicant had 4 NJPs and 6 days AWOL but had discharge upgraded to an HD based on "improper action taken by command in issuing a General Discharge without returning it to the initiating commander who had recommended a fully Honorable Discharge"). *See also* AD 77-08486.

[76] AR 635-200, para. 5-31 f.(7) (1980) provides that "[d]ischarge *will* be accomplished within 3 duty days following approval by discharge authority when the member is stationed in [the continental United States (CONUS)] and as soon as possible when overseas." (Emphasis added.) This represents a change in the 1975 regulation which drew no distinction between CONUS and overseas duty and provided that "[d]ischarge *should* be accomplished within 3 duty days following approval by discharge authority." (Emphasis added.) The change in language from "should" to "will" requires an even clearer showing of necessity to justify delay in separation for members stationed in CONUS.

The purpose of 5-31 f.(7) seems to be to separate EDP dischargees before they commit acts against discipline while awaiting discharge. If separation is delayed more than 3 days and the servicemember receives an NJP while awaiting discharge, a GD based on that NJP is improper. This result is mandated under both 1975 and 1977 regulations unless the record reveals some reasonable justification for delay, such as a medical problem which delayed processing. *See* AD 77-11035 (upgrade of applicant's discharge, which was not effected until 52 days after it was first approved, during which time he received 1 NJP); AD 78-02260 (delay of 20 days found "excessive" according to 1975 regulation where no justification for delay found in record); AD 78-00261 (delay of 12 days between approval and discharge held "excessive" because record did not indicate any reason (*e.g.*, medical) for delay).

[77] AR 635-200, para. 5-31 g. (1980) requires the affected servicemember's immediate commander to notify him/her in writing of the reasons for discharge, including specific facts and incidents. If the SM voluntarily consents to the discharge, the immediate commander must forward his/her letter and acknowledgment through command channels to the commander exercising discharge authority. The endorsement must include "pertinent information" such as the number of Art. 15s, number of courts-martial, and number of times counseled. *See* AD 78-03817.

[78] *See, e.g.*, AD 79-03326 (no acts of indiscipline or lost time); AD 78-02794 (same); AD 78-01985 (10 counseling sessions, decline in performance, hepatitis from drug use, and allegations of disciplinary problems, but discharge upgraded because there was no official record of offenses or lost time); AD 77-07457 (applicant who had served 9 months with 1 NJP for failure to go, and was recommended for discharge because of "poor attitude, lack of self-discipline, and inability to accept instructions," had discharge upgraded because record was not so bad as to merit less than an HD); AD 77-08854 (upgraded on record of 2 NJPs for failure to repair in almost 2 years of service, 1 of which was spent in Germany); AD 78-01587 (upgrade to HD on record of 2 NJPs for failure to obey a lawful order in 1 year, 1 month of service); AD 77-01488A (applicant's service found honorable on record of 3 NJPs in 1 year, 1 month).

[79] AD 78-01531 (3 NJPs, AWOL, drugs, and extensive counseling, but NJPs found offenses minor and possibly "attributable to immaturity"); AD 77-07403 (where applicant had 1 NJP for unclean rifle on guard and "disrespect in language," had no C/E ratings in 9 months of service, was in lowest mental group, and had commander who stated "applicant demonstrated complete lack of ability to adapt to military, had substandard appearance and inefficiency." Board found that "description of his service describes an individual who tried but could not perform satisfactorily").

[80] *See, e.g.*, AD 78-03817; Ch. 21 *infra*.

[81] BUPERSMAN art. 385220(j) (1979) (first appeared in 1966 as art. C-10306).

[82] *See* § 16.15.1 *supra* (description of the Army program); BUPERSMAN art. 385220.4a (1979). Art. 385220.4a permits separation of servicemembers for failure to maintain required proficiency in rate, for creating an administrative burden due to minor infractions, or for not contributing to unit readiness or mission — all evidenced by below average performance ratings or demonstrated incapacity to meet effectiveness standards. Servicemembers may be discharged under this section only if they are in pay grade E-3 or below, are in their first term of service, and have completed less than 36 months active duty. The regulation requires proof that all procedural rights were provided.

This provision and art. 385220 both permit separations for below average ratings, but 385220.4a affords discharged servicemembers a wider variety of rights. Applicants discharged under the 1966 regulation should carefully check the new regulation before claiming application of the current standards rule under 32 C.F.R. § 70.6(c)(1). *See also* Ch. 21 *infra*.

[83] *See* BUPERSINST 1910.28.

[84] *See* § 12.8 *supra*; ND 78-00816 (although assigned grade of 1.0 was attributed in record to applicant's indifferent attitude and unwillingness to accept orders, applicant's personal appearance rebutted this, and Board eliminated mark as too low in view of fact that no charges were pending at time of its receipt, subsequently finding

should provide a basis for an upgrade for impropriety, the NDRB continues to rely on the assigned marks to see if an upgrade is warranted.[85]

Discharges under the 1966 program might be upgraded by arguing that the new procedures provide a substantial enhancement of rights and that the current rule warrants an upgrade.[86]

16.15.3 MARINE PROGRAMS

Like the Army, the Marines have trainee[87] and first term (between 6 and 36 months) Expeditious Discharge Programs (EDP).[88] The Marine EDP is very similar to those of the other services; however, the slight modifications provide additional procedural rights:

- Commanders must personally observe the dischargee;
- The Service Record Book must contain ratings from at least two conduct and proficiency rating periods, each at least two months long; and
- The potential dischargee must be advised that "it will be to his/her advantage to confer with counsel prior to making a statement or indicating his/her desire not to make a statement."

Like the Navy, the Marines look to final rating averages as the most important factor in upgrade proceedings.

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[84] (continued)
applicant's ratings average high enough to warrant HD); ND 78-726 780110 (where applicant had 1 NJP for 9 day AWOL, 1 SPCM for disrespect to a commissioned officer, disobedience of a lawful order, and resisting apprehension, and 1 military behavior grade of 2.6 which was unsubstantiated by either a page 15 SRB entry or existence of disciplinary actions during that period, Board eliminated the behavior grade, recomputed ratings average, and upgraded.)

[85] No NDRB cases on procedural errors have been located through Supplement 9 of the DRB Index. *See* § 12.5.1.3 *supra* (effect of finding a procedural error); § 12.5 *supra* (procedural errors generally).

[86] *See* Ch. 21 *infra*.

[87] MARCORSEPMAN para. 6012.2.b. (an HD is automatic).

[88] The Marine Corps' EDP provides for separation of personnel who "have clearly demonstrated that they cannot or will not meet acceptable standards because of poor attitude, lack of motivation, lack of self-discipline, inability to adapt socially or emotionally to service requirements, or have failed to demonstrate promotion potential." MARCORSEPMAN para. 6012.5.

APPENDIX 16A
LIPSMAN: SETTLEMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL J. LIPSMAN, et al.,

Plaintiffs,

Civil Action No. 76-1175

v.

HAROLD BROWN, Secretary of Defense, et al.,

Defendants.

JOINT MOTION AND STIPULATION OF SETTLEMENT

The parties hereto, through their respective undersigned counsel, have reached agreement on a proposed settlement of this action and hereby jointly move the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for an Order approving that agreement.

I. Statement of the Case

The plaintiffs herein are Daniel J. Lipsman and Wayne Reeves, former service members discharged from the Army with general discharges for unsuitability by reason of character and behavior disorders (now called "personality disorders"), and the National Association of Concerned Veterans, a non-profit organization whose members include former service members discharged from the Army with general discharges for unsuitability by reason of personality disorders. Plaintiffs brought the action on behalf of themselves and on behalf of all persons who have been issued general discharges by the Army for unsuitability by reason of personality disorders.

The defendants are Harold Brown, Secretary of Defense, Clifford L. Alexander, Jr., Secretary of the Army, Raymond J. Williams, Executive Secretary of the Army Board for Correction of Military Records and William E. Weber, President of the Army Discharge Review Board. The Army Board for Correction of Military Records and the Army Discharge Review Board are boards of civilians of the Department of the Army authorized by statute and regulation to change discharges or to issue new discharges upon application or upon their own motions.

Plaintiffs challenge the constitutionality and lawfulness under 10 U.S.C. § 1169 and applicable Army regulations of the defendants' policies and practices of discharging service members with diagnosed personality disorders. The class action was brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, seeking declaratory and injunctive relief only.

II. The Agreement

The parties hereto, through their respective undersigned counsel, agree to the following proposed terms of settlement of this action:

A. Analysis of the Problem by Defendants. The defendants have undertaken an analysis of the problems and issues raised by the complaint herein, the findings and conclusions of which are contained in a Memorandum For Record dated February 7, 1977. (Attachment 1.)

B. Revision of Regulations. The defendants will amend Army Regulation 635-200, Personnel Separations: Enlisted Personnel (July, 1966): (1) to prohibit the consideration of any psychiatric diagnosis of personality disorder in the determination of the type and character of separation to be issued a service member; (2) to require that every personality disorder diagnosis be established by a physician trained in psychiatry and psychiatric diagnosis; and (3) to require that each individual dis-

charged for unsuitability due to personality disorder be furnished an honorable discharge certificate unless he or she has been convicted of an offense by general court-martial or has been convicted by more than one special court-martial in the current enlistment period of obligated service or any extension thereof. Reference is made to the change order (Attachment 2) and proposed change (Attachment 3) for the precise language of these regulatory changes.

C. Retroactive Application. Defendants will retroactively apply above-described regulatory changes (1) and (2) in considering applications for relief made to the Army Discharge Review Board. Change (3) is prospective only. However, the Army Discharge Review Board will be directed to review all such applications with "compassion," and will consider the presence of a personality disorder diagnosis as a mitigating factor justifying relief except in cases where there are "clear and demonstrable reasons why a fully honorable discharge should not be given." Under the retroactively applied regulations, applicants for relief who were not diagnosed by a medical doctor trained in psychiatry shall be entitled to have their discharges upgraded to honorable. (Attachment 4.)

D. Notice to Class. Defendants will send individual notice of the regulatory changes, the reasons for those changes, and the opportunity to reapply for relief under the new regulations to former service members discharged for unsuitability due to personality disorders, who have applied to and been denied relief by the Army Discharge Review Board in the past. (Attachment 5.)

Defendants will also issue notice to all other class members by means of a press release, describing the regulatory changes and the reasons for them, and advising that applications for relief under the new regulations can be made by letter. (Attachment 6.)

E. Dismissal. Plaintiffs agree to the dismissal of this action with prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, effective upon this Court's approval of this Stipulation of Settlement.

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THE HONORABLE AUBREY E. ROBINSON, JR.
United States District Court for the
District of Columbia

DATE: February 6, 1978

ATTACHMENT 1

7 February 1977

MEMORANDUM FOR RECORD

SUBJECT: Personality Disorder Regulation Changes

This memorandum outlines the changes made to the regulations governing the discharge of persons with personality disorders (formerly called character and behavior disorders) who are considered unsuitable for continued military service. It also examines the purposes and expected effects of these changes, and sets forth the efforts being made to deal with persons discharged in past years who suffer from personality disorders.

One regulation change states that discharge authorities who characterize a servicemember's record to determine the type of discharge he should receive must ignore the fact that the servicemember has been diagnosed as suffering from a personality disorder. Prior to this change discharge authorities could justify a general discharge in part on the basis of a personality disorder diagnosis. With this change they must characterize a person's military service by looking solely to the person's overall conduct and efficiency during his period of service. A second change in the regulations ensures that individuals with suspected personality discharges whose performance is inadequate will be diagnosed by a psychiatrist to determine whether they have more severe mental problems that account for their poor performance. In the past this determination has not always been made by a psychiatrist.

During fiscal years 1968 through 1975, the Army discharged 56,560 persons for unsuitability by reason of personality disorders. Of these, 84% received general discharges. Because these numbers are so significant it is manifest that the discharge policies affecting these persons must be fair and accurate. Cases from past years have revealed that persons have in effect, in particular cases, been penalized for their personality disorders by receiving general discharges because of the disorders. While this practice was never authorized by regulation, the Army decided to prohibit it explicitly in the discharge regulations. The first regulation change is thus expected to eliminate in the future any cases where persons with clean service records receive general discharges. A second perceived inequity in the discharge system was the diagnosis of soldiers for mental problems by persons who were not licensed psychiatrists. Persons diagnosed as suffering from psychoses or severe neuroses are discharged through medical channels and, in almost all cases, receive honorable discharges. Persons with personality disorders, however, are usually discharged through administrative channels, and, as noted in the statistics above, usually receive general discharges. In order to ensure that servicemembers are processed through the appropriate channel, mental status diagnoses will now be made by psychiatrists rather than, as in the past, by persons with other types of medical training. Both of the changes are expected to cause more servicemembers to receive honorable, rather than general, discharges.

Because both of these regulation changes are designed to eliminate perceived inequities in the discharge system, efforts are being made to render relief to persons discharged in past years who were harmed as a result of the inequities. To this end, the Army discharge review authorities will apply the changes when considering future applications for relief. Thus, former servicemembers who were discharged since World War II because of personality disorders, and who received a less-than-honorable discharge, may have their discharges upgraded upon application to the review authorities if they had a clean service record or if they were discharged without being diagnosed by a psychiatrist. The number of such persons eligible for relief is unknown, but is thought to be at least several thousand. Those eligible for relief will receive upgrades in their discharges only if they apply for relief to the Army Discharge Review Board.

As a second remedial effort the Army Discharge Review Board is attempting to contact by mail all persons who might be affected by these changes who have applied to the Board in past years and been denied relief. The Board expects to mail out approximately ten to twelve thousand notifications. These persons will be informed of the changes and urged to fill out applications to reapply for relief. Because of administrative costs no effort is being made to contact individually all other persons who were discharged with a general discharge for unsuitability by reason of personality disorders. However, such persons are urged to apply to the Army Discharge Review Board to have their discharges reconsidered.

[Signature]

Eric T. Freyfogle
Assistant to the General Counsel

ATTACHMENT 2
FROM: HQDA/DAPE-MPE-PS/WASH DC/*
TO: ALL HOLDERS OF AR 635-200

SUBJECT: Interim Change to AR 635-200

1. This interim change is being distributed through publications pinpoint distribution system to all holders of AR 635-200, in accordance with DA Form 12-9A block. . . . The primary purpose is to make changes and clarify procedure regarding discharge for unsuitability by reason of personality disorder and the characterization of service for such discharges. This change is effective 22 February 1977.

2. Change Para 1-7, AR 635-200 to read:

"General Considerations. The type of discharge and character of service are of great significance to the soldier and must accurately reflect the nature of service performed. Eligibility for veterans benefits provided by law, eligibility for reentry into service, and acceptability for employment in the civilian community may be affected by these determinations. The type of discharge and character of service will be determined solely by the military record during the current enlistment or period of service, plus any extensions thereof, from which the soldier is being separated. It is of paramount importance that the soldier's performance of duty and conduct be accurately evaluated and be based on the overall period of service and not on any isolated actions or entries on the Enlisted Qualification record."

3. Change Para 1-9a, AR 635-200 to delete:

"Preservice and prior service activities."

4. Add to Para 1-9a "(3) Mental Status evaluation or other similar medical evaluation given during the period of service which is being characterized."

5. Change Para 13-5b(2) to read:

"Personality Disorder: As determined by medical authority (*i.e.*, the diagnosis will have been established by a physician trained in psychiatry and psychiatric diagnosis) and described in the Diagnostic and Statistical Manual (DSM II) of Mental Disorders (section on mental disorders, International Classification of Diseases and Injuries-8, Diagnostic and Statistical Manual (DSM II) of Mental Disorders, 2nd Edition, Committee on Nomenclature and Statistics, American Psychiatric Association, Washington, DC 1968) this condition is a deeply ingrained, maladaptive pattern of behavior of long duration which interferes with the member's ability to perform duty. Exception: Combat exhaustion

and other acute situational maladjustments. No individual may be discharged pursuant to this paragraph unless he or she meets Army medical standards for retention."

6. Add to Para 13-10a: "(f) Individual is being considered for discharge under provisions of Para 13-5b(2)."

[Signature]

*Document retyped; originally on DD Form 173.

ATTACHMENT 3

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20310

add to ¶ 13-31b:

When the reason for separation is unsuitability due to personality disorder (para. 13-5b(2)), the individual will be furnished an honorable discharge certificate unless he has been convicted of an offense by general court-martial or has been convicted by more than one special court-martial in the current enlistment period of obligated service or any extension thereof, in which case he may be furnished a general discharge certificate.

ATTACHMENT 4

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

MEMORANDUM FOR: PRESIDENT, ARMY DISCHARGE REVIEW BOARD

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

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

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

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

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

1Encl
As stated

ATTACHMENT 5

Dear former soldier:

In the event that you did not receive or fully understand my previous letter, this letter is to inform you again of a recently initiated project undertaken by the Army Discharge Review Board, under which *you may be eligible for an Honorable Discharge*. Please disregard this letter if you already have a current application pending with the Board for reconsideration of your discharge, or you have had your discharge already upgraded to honorable.

For your information, this project has been initiated because of certain policy changes in the separation of individuals with diagnosed character and behavior disorders (now termed "personality" disorders). These changes are intended to ensure that such individuals have a full and fair opportunity for an honorable discharge. Certain of these policy changes will be applied retroactively to the benefit of former applicants to the Board who requested relief or a change in their discharge, if their discharge was by reason of unsuitability due to personality disorder. In particular, a diagnosis of such a disorder will be considered by the Board as a factor justifying an upgrade of the discharge except in cases where there are clear and demonstrable reasons why a fully honorable discharge should not be given.

Review of our records reveals that you were previously considered by the Board, and denied relief. *You are hereby informed that your case will be reconsidered under the new policy, if you so desire*.

You may apply for reconsideration simply by completing and mailing the enclosed application form (DD Form 293) to the Discharge Review Board, identifying the "retroactive change to AR 635-200" as the reason for your application. Your case will be finalized no later than six months *after the Board receives your application*.

Sincerely yours,

1 Encl
As stated

WILLIAM E. WEBER
Colonel, IN
President

ATTACHMENT 6

MEMORANDUM FOR CORRESPONDENTS

Department of the Army today announced that former service members separated with general discharges because of unsuitability due to personality (formerly known as "character and behavior") disorders may, upon application to the Army Discharge Review Board, be qualified for honorable discharges.

This new policy is separate and distinct from the Special Discharge Review Program recently conducted for former Vietnam Era service members, and is available to all qualifying service members separated since 1958, whether or not they are Vietnam Era service members.

Discharge authorities in the past may have based the award of a general discharge, in part, on an individual's personality disorder diagnosis. Under revised discharge procedures recently implemented, the type of discharge certificate a soldier is issued must be based solely on conduct and efficiency ratings received during his or her period of service, without regard to any personality disorder diagnosis. This change is designed to ensure that persons are not stigmatized simply because of a medical evaluation.

The revised procedures also require that persons being discharged because of personality disorders be diagnosed by medical doctors properly trained in psychiatry, rather than by other medical or non-medical personnel. This change should ensure that persons with severe personality disorders, psychoses or neuroses will be examined by professionally trained personnel to determine whether separation through medical, rather than administrative, channels is appropriate.

In reviewing applications for relief, the Army Discharge Review Board will apply these new discharge procedures retroactively. The Board will also consider the presence of a personality disorder diagnosis as a mitigating factor that may justify relief except in cases where there are clear and demonstrable reasons why a fully honorable discharge should not be given.

A further change requires that in the future service members discharged because of personality disorders be given honorable discharges unless they have been convicted by general court-martial or more than one special court-martial.

The number of former service members who will thus be eligible for honorable discharges is unknown, but is likely to include at least several thousand of the over 56,000 persons separated from the Army since 1958 with general discharges for unsuitability due to personality disorders. As a remedial effort, the Army Discharge Review Board is attempting to contact by mail all persons who might be affected by these changes who applied for upgrades since 1958 and were denied relief. The Board has initially mailed out approximately ten to twelve thousand notifications, and is undertaking a second mailing.

Former service members who think they may be affected by these changes may apply for relief to the Army Discharge Review Board, Department of the Army, Washington, D.C. 20310, identifying the "retroactive change to AR 635-200" as the reason for the application.

Qs and As for Use by PAOs

Q. How is this new policy different from the Special Discharge Review Program recently conducted for certain former Vietnam Era service members?

A. This new policy is not limited to service members who served between August 4, 1964, and March 28, 1973, and is not applicable to deserters. Any service member who was separated with a general discharge for unsuitability by reason of character and/or behavior disorder since 1958 is eligible under the new policy.

Q. What is a personality disorder?

A. Personality disorder is the modern term for what was previously called a character and/or behavior disorder. It is an involuntary mental disorder, just as psychosis and neurosis are types of mental disorder. Persons suffering from personality disorders may not be able to fully control their actions at all times.

Q. What criteria will the Army Discharge Review Board apply to applications for review of past general discharges for unsuitability by reason of personality disorders?

A. Eligible applicants may qualify for upgrading if:

(a) they were not diagnosed by a medical doctor properly trained in psychiatry; or

(b) they were issued a general discharge on the basis of their personality disorder diagnosis, rather than their service record; or

(c) the Board considers the presence of a personality disorder diagnosis as a mitigating factor that justifies relief, and there are no clear and demonstrable reasons why a fully honorable discharge shall not be given.

Q. How will the Army Discharge Review Board determine whether a service member received a general discharge because of a personality disorder, or because of poor conduct?

A. Not all service members who receive general discharges for unsuitability due to personality disorders have records of poor conduct. If their conduct and efficiency ratings generally meet established Army criteria for honorable discharges, they would be eligible for an honorable discharge. The Board will review all applications with compassion and consider the personality disorder diagnosis as a mitigating factor that justifies relief except in cases where there are clear and demonstrable reasons why a fully honorable discharge should not be given.

Q. What effect will the recent regulatory changes have on the number of service members who receive general discharges versus the number who receive honorable discharges?

A. It is anticipated that the number of service members who receive honorable discharges will increase.

APPENDIX 16B

TYPES OF DISCHARGES ISSUED IN FY 1977 FOR SELECTED REASONS OF UNSUITABILITY

Reason for/ Type of Discharge	Army		Navy		Marine Corps		Air Force		DoD	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Personality Disorders										
Honorable	330	43%	6,379	81%	1,859	81%	1,059	90%	9,627	80%
General	432	57	1,502	19	426	19	117	10	2,477	20
	762	100%	7,881	100%	2,285	100%	1,176	100%	12,104	100%
Apathy										
Honorable	412	15%	649	15%	1,410	72%	1,672	63%	4,143	36%
General	2,313	85	3,614	85	539	28	984	37	7,450	64
	2,725	100%	4,263	100%	1,949	100%	2,656	100%	11,593	100%
Inaptitude										
Honorable	39	32%	5,156	100%	332	88%	28	88%	5,555	97%
General	84	68	25	>.5	45	12	4	12	158	3
	123	100%	5,181	100%	377	100%	32	100%	5,713	100%
Other										
Honorable	1	>.5 %	336	31%	0	NA	8	NA	345	19%
General	729	100	731	69	1	NA	1	NA	1,462	81
	730	100%	1,067	100%	1	NA	9	NA	1,807	100%

APPENDIX 16C
CHRONOLOGICAL DEVELOPMENT OF CURRENT STANDARDS FOR UNSUITABILITY DISCHARGES

1. ARMY

DATE OF CHANGE OF STANDARDS	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	GENERALLY:	
Pre-1956	GD is mandatory for discharge based upon unsuitability.	§ 16.2
1956	Mandatory GD is dropped; GD or HD may be issued for unsuitability discharge. Grading of discharge is to be based upon the SM's overall quality of service.	§ 16.2
1972	Discharge for unsuitability by reason of enuresis (bed wetting) is dropped.	§ 16.10
1974	Special discharge programs are available as alternatives to unsuitability discharges for trainees with less than 6 months AD (TDP), and for other SMs (EDP) who have demonstrated that they cannot or will not meet acceptable standards required of SMs. Matters to be considered include: A] Poor attitude. B] Lack of motivation. C] Lack of self discipline. D] Inability to adapt socially or emotionally. E] No promotion potential. F] Inability to meet standards to complete training. These programs exist to permit discharge *before* punitive measures become necessary. SMs discharged under these programs are issued discharges for COG. For the TDP, HDs are issued; for the EDP, GDs or HDs are issued.	§ 16.15
1979	Eligibility criteria for EDP alternative to unsuitability discharge are clarified: EDP applies to SMs with more than 6 months AD, but less than 36 months AD.	§ 16.15
	Counseling and rehabilitation are required for all SMs considered for discharge as unsuitable. Discharge is authorized only upon finding that rehabilitation failed.	Ch. 16
	Discharge for unsuitability by reason of unsanitary habits (venereal disease) is dropped.	
1980	Court decision requires discharge to be based only on conduct which has a direct effect on the performance of the SM's military duties.	§ 12.4
1981	Discharge for unsuitability by reason of homosexual tendencies is dropped.	Ch. 14
	CHARACTER AND BEHAVIOR DISORDERS:	
1978	Decision to discharge cannot be based on "status" of having a C&B disorder. There must be a causal connection between the disorder and the SM's ability to perform satisfactorily.	§ 16.7.2

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	Discharges for C&B disorders must be supported by a specific diagnosis by a psychiatrist. If no such diagnosis is present, discharges for C&B disorders are improper. In addition, if the diagnosis was not made by a psychiatrist, if the findings were not described sufficiently, if no specific C&B disorder diagnosis was made, if it was not timely in relation to the discharge decision, or if no warning was given that the exam was to be used in a discharge proceeding, then the discharge for the C&B disorder was improper.	§ 16.7.2
	C&B disorder may be used in the decision whether to discharge, but may not be used in the grading of that discharge.	§ 16.7.2
	Court settlement requires that pre-1978 GDs for unsuitability by reason of C&B disorders must be upgraded to HDs if proper psychiatric exams were not performed prior to discharges.	§ 16.7.2
	HDs required for SMs discharged by reason of C&B unless convicted by a GCM or more than one SPCM.	§ 16.7.2
	INAPTITUDE:	
1973	Discharge for unsuitability is authorized for SMs who fail to demonstrate potential for promotion.	§ 16.8
1978	Definition of conduct for which a discharge for unsuitability by reason of inaptitude is authorized is clarified: An unsuitability discharge for inaptitude may be issued to SMs who are inept due to lack of general adaptability, want of readiness or skill, unhandiness, or ability to learn.	§ 16.8
	ENURESIS (BED WETTING):	
1948	Enuresis is considered a symptom of another mental or physical disorder. Full medical and psychiatric examinations are required prior to discharge.	§ 16.10
	HOMOSEXUAL TENDENCIES:	
1978	Unsuitability discharge is authorized for SMs who demonstrate homosexual tendencies. Homosexual tendencies are demonstrated by verified preservice homosexual acts, but no in-service acts. If evidence of in-service homosexual acts exists, discharge for misconduct will be considered.	Ch. 14
1980	Counseling and rehabilitation requirements are waivable for SMs being considered for discharge by reason of homosexual tendencies.	Ch. 14
	APATHY:	
1975	Definition of conduct for which a discharge for unsuitability by reason of apathy is authorized is clarified: An unsuitability discharge for apathy may be issued to SMs who have problems beyond their control and who are incapable of performing satisfactorily. Unlike the conduct underlying a misconduct discharge for shirking, apathy is not considered to be volitional conduct.	§ 16.9
1978	Definition of conduct for which a discharge for unsuitability by reason of apathy is authorized is clarified: An unsuitability discharge for apathy may be issued to SMs who demonstrate a lack of appropriate interest, have defective attitudes, or are unable to expend their efforts constructively.	§ 16.9

2. NAVY

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	GENERALLY:	
Pre-1956	GD is mandatory for discharges based upon unsuitability.	§ 16.2
1956	Mandatory GD is dropped; GD or HD may be issued for unsuitability discharge. Grading of discharge is to be based on SM's conduct and proficiency ratings.	§ 16.2
1974	Special discharge programs are available for trainees and SMs with less than 36 months AD who demonstrate inability to adjust to military life. Dischargees under this program (Expeditious Discharge Program (EDP) or Trainee Discharge Program (TDP)) demonstrate an "incapability to serve"; a majority obtain HDs.	§ 16.15
1976	Discharges for unsuitability are authorized for the following reasons: A] Character and behavior disorders. B] Inaptitude. C] Apathy. D] Alcohol abuse. E] Financial irresponsibility. F] Unsanitary habits. G] Homosexual tendencies.	Ch. 16
	Discharge for unsuitability by reason of enuresis (bed wetting) is dropped.	Ch. 16
	Rehabilitation period is required prior to discharge except for character and behavior disorders, and for homosexual tendencies. Waiver and retention is possible.	Ch. 16
1978	Definition of conduct for which unsuitability discharge may be issued is clarified: G] Homosexual tendencies are reclassified as Class III Homosexuality and include aberrant sexual tendencies.	Ch. 14
1979	Definitions of conduct for which unsuitability discharge may be issued are clarified: D] Alcohol abuse includes any irresponsible use of alcohol which leads to misconduct, unacceptable social behavior, impairment of performance of duty or physical or mental health, or failure of rehabilitation. E] Financial irresponsibility includes circumstances where expenses are greater than income and debt continues to increase. If there is more than negligence on the part of the SM, and if there is a failure to pay debts, discharge for misconduct may be considered. F] Unsanitary habits are dropped as a reason supporting the issuance of a discharge for unsuitability.	Ch. 16
1980	Court decision requires discharge to be based only on conduct that has a direct effect on the performance of the SM's military duties.	§ 12.4
1981	Definition of conduct for which unsuitability discharge may be issued is clarified: G] Homosexual tendencies is dropped as a reason supporting the issuance of a discharge for unsuitability.	Ch. 14
	CHARACTER AND BEHAVIOR DISORDERS:	
Pre-1976	Diagnosis of C&B disorder is insufficient basis for the issuance of a discharge for unsuitability.	§ 16.7

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	Period of rehabilitation is required to permit SM to adjust to service.	§ 16.7
1978	Court decision significantly revises Army C&B disorder discharge procedures. Application of "uniform standards" should make these revised procedures applicable to all services.	§ 16.7.3
	INAPTITUDE:	
Pre-1976	Discharge for unsuitability is authorized for SMs who have a lack of general adaptability, readiness, or skill, or who are "unhandy" or demonstrate an inability to learn.	§ 16.8
	APATHY:	
Pre-1975	Discharge for unsuitability is authorized for SMs who have attitudinal problems beyond their control and who are incapable of performing satisfactorily. Apathy should be distinguished from "shirking" where the failure to perform was volitional.	§ 16.9
	ENURESIS (BED WETTING):	
1979	Decision to discharge for enuresis is authorized, if the condition interferes with the SM's job performance and is supported by findings of the Chief, BUMED.	§ 16.10
	Decision to discharge for enuresis may be GD or HD, depending on the SM's marks. The reason for discharge is COG.	§ 16.10
	FINANCIAL IRRESPONSIBILITY:	
1979	Definition of conduct for which discharge for financial irresponsibility may be issued is clarified: A discharge for unsuitability may be based on the SM's financial irresponsibility where the SM's debts and expenses continue to increase. If there is more than negligence on the part of the SM, and if there is a failure to pay debts, a discharge for misconduct may be considered.	§ 16.11
	UNSANITARY HABITS:	
1979	Unsanitary habits is dropped as a reason supporting the issuance of a discharge for unsuitability.	§ 16.12

3. MARINE CORPS

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	GENERALLY:	
Pre-1956	GD is mandatory for unsuitability discharges.	§ 16.2
1956	Mandatory GD is dropped; GD or HD is authorized based on the SM's record. Grading of discharge is to be based on the SM's conduct and proficiency ratings.	§ 16.2

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
1959	Discharge for unsuitability is authorized for the following conditions: A] Inaptitude, as shown by lack of general adaptability, want of readiness or skill, unhandiness, or inability to learn. B] Enuresis. C] Character and behavior disorder; prior UD for unfitness is dropped. D] Apathy, defective attitude, failure to expend efforts constructively (matters beyond the SM's control). E] Alcoholism as shown by chronic use or addiction to alcohol; prior UD for unfitness is dropped. F] Homosexual tendencies; distinction is made between homosexual tendencies and acts. For homosexual acts, a UD for unfitness is authorized.	Ch. 16
1965	Criteria for issuance of an unsuitability discharge are clarified: C] C&B disorder requires more than a medical diagnosis of the condition; the SM clearly must be unqualified for retention. H] Financial irresponsibility, as shown by conduct that clearly demonstrates the SM is unqualified for retention, but does not meet standards for discharge for misconduct by reason of bad debts.	Ch. 16
	Period of rehabilitation before discharge is required except for enuresis, C&B disorders, and homosexual tendencies.	Ch. 16
1969	Criteria for issuance of unsuitability discharge are clarified: E] Alcoholism: a medical diagnosis as an alcoholic is not required; it is sufficient for the SM to overindulge in alcohol. In addition, discharge for COG (GD/HD) is authorized. F] Homosexual or aberrant sexual tendencies.	Ch. 16
1972	Criteria for issuance of unsuitability discharge are clarified: G] Fraudulent enlistment: SMs who conceal a juvenile record may be eligible for a discharge for COG rather than misconduct or unsuitability.	Ch. 18
1973	Criteria for issuance of unsuitability discharge are clarified: E] Alcohol abuse, as shown by failure or refusal to complete successfully a rehabilitation program. I] Drug abuse: if based solely on discovery through urinalysis or voluntary disclosure in order to enter rehabilitation, and the SM's failure or refusal to complete successfully a rehabilitation program. Prior UD for unfitness or misconduct is dropped.	Ch. 13 Ch. 15
1974	Special discharge programs are initiated for trainees (TDP) or SMs who have less than 36 months AD (EDP), and who demonstrate an inability to adjust to military life.	§ 16.15
1976	Criteria for issuance of unsuitability discharge are clarified: B] Enuresis is dropped as a specific reason for discharge. I] Drug abuse: HD is required if discovery is through urinalysis or voluntary disclosure in order to enter rehabilitation. J] Unsanitary habits: prior UD for unfitness is dropped.	Ch. 16
1980	Court decision requires discharge to be based only on conduct that has a direct effect on the performance of the SM's military duties.	§ 12.4
1981	Homosexual tendencies is dropped as a reason for discharge.	Ch. 14

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	INAPTITUDE:	
1968	Period of rehabilitation before discharge is required.	§ 16.8
	CHARACTER AND BEHAVIOR DISORDERS:	
Pre-1959	Discharge is authorized for unfitness (UD) for SMs who have personality disorders.	§ 17.3
1959	UD for unfitness is dropped; discharge is authorized for unsuitability by reason of a character and behavior disorder.	
1969	Diagnosis of a C&B disorder is insufficient; discharge requires a finding that SM clearly is unqualified for retention.	
	FINANCIAL IRRESPONSIBILITY:	
1969	Period of rehabilitation before discharge is required.	
	DRUG ABUSE:	
Pre-1971	Discharge is authorized for unfitness for drug abuse.	Ch. 15
1970	Criteria for discharges for drug abuse or for other drug abuse-related reasons are clarified: Misconduct that involves use or possession of a small amount of marijuana may be dealt with through the use of Art. 15, as compared to discharge.	Ch. 15
1971	UD for unfitness or misconduct is prohibited for drug abuse disclosed through urinalysis or voluntary disclosure in order to enter rehabilitation.	Ch. 15

4. AIR FORCE

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	GENERALLY:	
Pre-1959	GD is mandatory for unsuitability discharges.	§ 16.2
1959	Mandatory GD is dropped; GD or HD may be issued, based on the SM's record.	§ 16.2
Pre-1966	Discharge is authorized for unsuitability by reason of the following conditions: A] Inaptitude, as shown by a lack of general adaptability, want of readiness or skill, unhandiness, or inability to learn. B] Character and behavior disorders. C] Apathy, defective attitude, inability to expend efforts constructively. D] Enuresis. E] Alcoholism or intemperate use of alcohol. F] Homosexuality in Class III; or other aberrant sexual tendencies (discharge is mandatory). G] Financial irresponsibility.	Ch. 16
	HD is presumed for unsuitability discharge. GD issued only if warranted.	Ch. 16
	Rehabilitation before discharge is required whenever the SM demonstrates motivation for service and capacity for rehabilitation, and is morally fit for retention.	Ch. 16

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
1969	Conditions for which rehabilitation is to be undertaken are clarified, to include: A] Inadaptability. B] Character and behavior disorders. C] Apathy. G] Financial irresponsibility.	Ch. 16
	Rehabilitation before discharge is not required for: D] Enuresis. E] Alcoholism. F] Homosexual tendencies.	Ch. 16
1970	Criteria for issuance of an unsuitability discharge are clarified: F] Homosexual tendencies or habitual association with persons known to the SM to be homosexuals, with no evidence of homosexual acts, or pre- or prior service homosexual tendencies. Mandatory discharge processing is dropped, but retention will occur only in exceptional circumstances.	
1972	Criteria for issuance of unsuitability discharge are clarified: H] "Multiple reasons" is added.	
	Period of rehabilitation is required before discharge for all unsuitability conditions.	
1974	Special discharge programs are initiated for trainees (Trainee Discharge Program (TDP)), and SMs who have less than 36 months AD (Expeditious Discharge Program (EDP)), who demonstrate that they are incapable of adjusting to military life.	§ 16.15
	Criteria for issuance of unsuitability discharges are clarified: B] C&B disorders: a medical diagnosis is not alone sufficient for discharge; a finding that the SM demonstrates an inability to adjust is also required. E] Alcohol abuse, as shown by a failure or refusal to participate in or successfully complete rehabilitation. I] Drug abuse, as shown by urinalysis or voluntary disclosure in order to enter rehabilitation requires the issuance of an HD. Discharge is to be based on the need for long term rehabilitation or the failure or refusal to participate in or successfully complete rehabilitation.	Ch. 16
1976	Criteria for issuance of unsuitability discharges are clarified: C] Apathy, as shown by: (i) a failure to discharge properly assignments commensurate with grade and experience; (ii) a progressive downward trend in performance of duties; (iii) a failure to demonstrate leadership qualities required for grade; and (iv) a failure to maintain standards for duress personal appearance or military deportment.	Ch. 16
	Discharge for unsuitability is more appropriate for substandard performance by an SM than is a discharge for unfitness by reasons of shirking. D] Enuresis is dropped as a specific reason for unsuitability discharge. H] Multiple reasons is dropped as a specific reason for unsuitability discharge. J] Unsanitary habits, as shown by (i) repeated venereal disease infections, (ii) refusal to bathe, and (iii) refusal to maintain personal hygiene, is added as a specific reason for unsuitability discharge; prior UD for unfitness by reason of unsanitary habits is dropped.	Ch. 16

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
1980	Court decision requires discharge to be based only on conduct that has a direct effect on the performance of the SM's military duties.	§ 12.4
1981	Homosexual tendencies as reason for discharge is dropped.	Ch. 14
	ALCOHOLISM:	
1959	Discharge is authorized for unsuitability for SMs who suffer from alcoholism or who engage in intemperate use of alcohol.	
	CHARACTER AND BEHAVIOR DISORDERS:	
	Discharge is authorized for unsuitability for SMs who are diagnosed as suffering from C&B disorders and who demonstrate inability to adjust to military life. Period of rehabilitation before discharge is required.	Ch. 16
1978	Court decision significantly revises Army C&B disorder discharge procedures. Application of "uniform standards" should make these revised procedures applicable to all services.	§ 16.7.2
	HOMOSEXUALITY:	
Pre-1970	Discharge processing is mandatory.	Ch. 14
1970	Definition of homosexuality is clarified to eliminate classes of homosexuals; however, the same conditions apply for the issuance of an unsuitability discharge.	Ch. 14
	Discharge processing is not mandatory, although retention will occur only in the most exceptional circumstances.	Ch. 14
	DRUG ABUSE:	
Pre-1974	Drug abuse is a specific reason for issuance of a discharge for unfitness or misconduct (UD).	Ch. 15
1971	UD for drug abuse is prohibited if discovered through urinalysis or voluntary disclosure in order to enter rehabilitation.	Ch. 15
1974	Criteria for award of discharges by reason of drug abuse are clarified: Discharge for unsuitability by reason of drug abuse, to include the use, possession, sale, transfer or introduction onto a military facility of narcotics, marijuana or other drugs, will be issued: (i) if the drug abuse is discovered through urinalysis or voluntary disclosure in order to enter rehabilitation; and (ii) if the SM needs long term rehabilitation and lacks the potential for continued service.	Ch. 15
1974	Special discharge programs are initiated for SMs who are trainees (TDP), or who have less than 36 months AD (EDP), and who demonstrate an inability to adjust to military life.	§ 16.15
1975	HD is required for SMs whose drug abuse is discovered through urinalysis or voluntary disclosure in order to enter rehabilitation.	Ch. 15
1980	Court decision requires discharge to be based only on conduct that has a direct effect on the performance of the SM's military duties.	§ 12.4

CHAPTER 17
DISCHARGES FOR UNFITNESS OR MISCONDUCT

17.1 INTRODUCTION AND OVERVIEW

Until 1977, unfitness and misconduct were considered to be separate reasons to discharge for cause. Separation of these general categories had little practical effect other than confusion because of the different regulations used. Since 1977, the term "misconduct" has included "unfitness" and is the sole general category for these types of cases. The two terms are used interchangeably in this chapter.

Misconduct discharges have traditionally been aimed at servicemembers who intentionally commit "bad acts." An Undesirable Discharge (UD) has been the result in almost every one of these cases until recent years. The most common reason for this type of discharge has been "frequent involvement of a discreditable nature with civilian and military authorities," formerly called "habits and traits of character manifested by antisocial or amoral trends."[1] This has been used to eliminate servicemembers who repeatedly commit minor offenses not serious enough to warrant a court-martial. Closely related to this reason is "shirking." Other reasons for discharge for misconduct are based on more specifically defined offenses:

- Homosexual acts;[1a]
- Drug use;[1b]
- Fraudulent enlistment;[1c]
- Psychopathic or other antisocial personality disorder manifested by repeated acts of misconduct;
- Sexual perversions;
- Conviction of certain offenses by an American or foreign civilian court;
- Unsanitary habits (venereal disease);
- Prolonged absence without leave (AWOL);
- Dishonorable failure to pay just debts or support dependents; and
- Discharge as a security risk.

This last reason is extremely rare. Procedures are essentially the same as in a misconduct discharge; however, when the articulated factual basis for the discharge merely involves associations and political beliefs as opposed to specific disloyal acts, then characterization of the discharge as anything other than honorable is highly suspect.[1d]

Unfitness discharges are most easily understood as the other side of the coin from unsuitability dis-

[1] *See* § 17.4 *infra*.

[1a] *See* Ch. 14 *supra*.
[1b] *See* Ch. 15 *supra*.
[1c] *See* Ch. 18 *infra*.
[1d] Stapp v. Resor, 314 F. Supp. 475 (S.D.N.Y. 1970). *See* § 12.4 *supra*.

charges. The unsuitable servicemember is one who is not in control of his/her misconduct and/or inefficiency. An unfit servicemember, however, can control his/her conduct and is, consequently, held accountable for it. The UD, which is normally presumed in unfitness cases, serves as punishment of the servicemember who commits an unfitness offense. It is frequently difficult to distinguish unsuitability from unfitness, *e.g.*, the distinction between "shirking" and the "inability to expend efforts constructively." In the 1940s and 1950s the regulations included psychiatric reasons for discharge under both unfitness and unsuitability, blurring the "would but couldn't/could but wouldn't" rule of thumb for these cases.

Another difficulty in these cases is that the unfitness category is frequently used to avoid the more cumbersome procedures required to process a servicemember for discharge by a court-martial. In some cases, the servicemember is given a break in that the harsher sanctions of the U.C.M.J. are not invoked; however, in other cases, the servicemember's inability to perform or conform is not perceived and the unfitness route is clearly too harsh.

It is the standard of "too harsh" that the review boards primarily use. Boards generally inquire into:

- The seriousness of the offense weighed against the servicemember's record;
- Whether the servicemember could fairly be held responsible for his/her acts; and
- Whether the servicemember was given an adequate opportunity to "prove" himself/herself.

17.2 HISTORICAL SUMMARY OF PROCEDURES AND TYPES OF DISCHARGES AUTHORIZED

Major regulatory changes affecting all reasons for discharge occurred in 1948, 1956, 1959, and 1966, and are anticipated in early 1981. In general, procedural rights have expanded over the years, and General Discharges (GDs) for unfitness have become more common.

When a UD for unfitness or misconduct was possible, there was always an opportunity for some form of hearing with counsel. From the 1940s to around 1966, the hearings were relatively pro forma, notice and confrontation rights were minimal, and counsel was normally not an attorney. In 1959 and again in 1966, procedural rights improved significantly.

Over the years the type of discharge likely to result from an unfitness/misconduct discharge proceeding has changed. From the 1940s to the early or mid-1950s, a UD was mandatory in some services. From that time forward an Honorable Discharge (HD) or GD was occasionally permitted, depending on the circumstances of the case, but a UD continued to be presumed. In practice, almost all unfitness/misconduct cases resulted in UDs until the late 1960s. The press of the caseload during the Vietnam War and other factors resulted in a great deal of plea bargaining in which servicemembers frequently received GDs in exchange for waivers of administrative discharge board hearings. In the 1970s, servicemembers separated for unfitness received significant numbers of HDs and GDs, even though the regulations (except in the Navy) continued to presume UDs for unfitness or misconduct discharges.[2] This anomalous result has caused observers of the administrative discharge system to question whether it should continue to function in its present state at all.[3]

Over the years, some of the bases for unfitness discharges have been removed, changed to reasons for discharge for unsuitability, or singled out for better than a presumed UD. These are:

- Alcoholism or alcohol-related acts;
- Drug abuse when the person was detected through random urinalysis testing or entered a drug treatment program for assistance;
- Unsanitary habits (venereal disease); and
- Homosexuality (DoD relaxed its discharge characterization policy in 1981).

In all of these cases, the boards look to the current regulations to determine whether, had they been in effect at the time the applicant was discharged, there exists a substantial likelihood that the result would have been different ("the current standards approach").[4]

17.3 GENERAL CASE APPROACHES

The main issue in an unfitness case is why was the servicemember processed for unfitness rather than for unsuitability. The rule of thumb is that a servicemember who "would but couldn't" is unsuitable, whereas the servicemember who "could but wouldn't" is unfit. The applicant must demonstrate that (s)he was not responsible for his/her actions as a servicemember, or simply did not have the capacity to conform to or perform military service. The distinctions can be quite subtle, particularly since the services assume that someone with a character and behavior disorder (a common ground for discharge for unsuitability) can make choices in his/her conduct.

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[2] On August 22, 1974, the Chief of Naval Operations issued an important change to BUPERSMAN Art. 3420180, which, among other things, sets out Navy policy for the issuance of UDs. UDs are given only in the most flagrant cases. In general, persons in the following categories of cases should be considered candidates for UDs:

> A) Drug sale/trafficking; B) Drug abuse subsequent to having been retained and warned or punished under U.C.M.J. for drug abuse, or subsequent to exemption and rehabilitation; C) Fraudulent enlistment premised on a prior discharge under other than honorable conditions; D) Civil conviction for offenses against minors and other heinous type offenses; E) Homosexual acts with minors or acts consummated through coercion and all other sex deviate offenses involving minors [In 1978, this provision was further refined. *See* App. 14A *supra*]; F) Record of nonjudicial punishment (NJP) along with offenses serious enough to warrant courts-martial.

It is generally inappropriate, however, to award a UD if the last U.C.M.J. action was a court-martial which could have resulted in a punitive discharge but did not.

[3] *See* COMPTROLLER GENERAL'S REPORT NO. B-197168, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED (Jan. 15, 1980); REPORT OF JOINT SERVICE ADMINISTRATIVE DISCHARGE STUDY GROUP (1977-78) (Aug. 1978).

[3a] *See* Ch. 13 *supra*.

[4] *See* Ch. 21 *infra* (discussion of the current standards rule, 32 C.F.R. § 70.6 (c)(1)).

Thus, to use this argument successfully, one must demonstrate that:

- The person was seriously hampered by some form of unsuitability; or
- Factors such as medical problems, family hardship, immaturity, low IQ, or other mitigating factors were combined with relatively minor offenses or lengthy good service.

While it can be argued that the servicemember's commander abused his/her discretion in initiating an unfitness/misconduct proceeding, this is generally not the best approach. Although a finding of abuse of discretion might be implicit in a board conclusion that the servicemember was unsuitable rather than unfit, nothing is to be gained in the average case by explicitly asking the board to condemn the servicemember's commanding officer's decision. In reality, many boards view the cases in retrospect by applying the standards that an omniscient commander would have used in making a determination.

Another approach is to suggest that the discharge received was too harsh under the circumstances, when viewed in hindsight. The following are general circumstances that alone or in combination seem to trigger such an explicit or implicit conclusion:

- The servicemember's overall service record warranted a better discharge than that awarded.
- Mitigating factors tended to make the award of an unfavorable discharge unfair. Some of these factors are psychological or medical problems,[5] family or personal problems, drug- or alcohol-related problems, immaturity, limited education, or limited innate abilities which tend to outweigh the misconduct in question.
- The servicemember was given an inadequate amount of time to prove his/her ability to conform. Sometimes this will involve a finding that rehabilitative measures, required by regulation, were taken inappropriately.
- Current standards would not, or might not, permit a misconduct discharge for such minor offenses; or such offenses would now be viewed as minor. The Naval Discharge Review Board (DRB) frequently refers to the 1974 guidance on issuing UDs when using this approach.

Finally, some procedural errors[5a] in processing a discharge may be grounds for an upgrade. For example, when the regulation under which the servicemember was discharged required that a mental status evaluation and/or psychiatric evaluation be conducted prior to separation, and the examination was not performed, or was performed by unqualified personnel or in a time frame (*e.g.*, basic training) too removed to be related to the separation proceeding, the UD should be upgraded to at least a GD.[6] Two other procedural requirements which are commonly not complied with are: (1) after 1966, any counsel at an administrative discharge board hearing had to be a lawyer unless not "reasonably available"; and (2) any waiver of the Board hearing occurring after January 1, 1974, had to be with attorney assistance.

17.4 DISCHARGES FOR FREQUENT INVOLVEMENT OR HABITS AND TRAITS

The most common reason for discharge for unfitness/misconduct has been for patterns of misconduct or "frequent involvement" in repeated specific acts of misbehavior. This category of unfitness/misconduct is designed to eliminate the servicemember who intentionally commits a series of offenses. Because of the ease of the use of the administrative process and because of the general lack of standards over the years, this reason for discharge has been used in a wide variety of situations, including:

- A service record permeated with repeated acts of misconduct resulting in a series of nonjudicial punishments and courts-martial;
- A service record with repeated acts of misconduct occurring near the end of the person's service;
- A service record with as few as three relatively minor acts of misconduct;
- A service record covering relatively lengthy service with several isolated acts of misconduct occurring within different time frames; and
- A service record containing allegations of relatively serious acts of misconduct for which there was no court-martial.

The range of possible behavior patterns that can justify misconduct discharges gives an idea of how a misconduct discharge can be used in situations that differ greatly from those contemplated in the regulations.

17.4.1 EQUITABLE CONSIDERATIONS

No definition exists for the most common reason for an unfitness/misconduct discharge: "frequent involvement of a discreditable nature with civilian or military authorities." For this reason, Review Boards must struggle with general concepts rather than a quantitative weighing of numbers and types of offenses. Some commanders view a few incidents of any rule-breaking as being enough to support a charge of "frequent involvement." Sometimes traffic tickets and minor civilian offenses are considered, as

[5] Service regulations have usually provided that where a disabling medical condition is a direct or substantial contributing cause of the misconduct, discharge for unfitness is not appropriate. *See e.g.*, AR 635-212, para. 3a(3). It has been held that medical testimony of a severe character and behavior disorder that caused the misconduct is not conclusive, however, and an ADB may reach a different conclusion. DAJA-AL 1972/4968, 11 Oct. 1972.

[5a] *See* § 12.5 *supra* (general discussion of procedural errors that can affect most types of administrative discharges).

[6] ADRB SOP, Annex 0-1, SFRB Memo #16, 11 Nov. 1976, 44 Fed. Reg. 25,084 (1979) (MSE required); Annex H-3, 44 Fed. Reg. 25,079 (1979) (MSE must be signed by psychiatrist or a medical officer assigned full time to mental health services or a neuropsychiatric clinic). The Air Force and Navy do not have policies as explicit as the Army's. *See* DRB Index category A50.06.

well as incidents that did not result in any official disciplinary action. The following are various approaches to these cases:

- *Insufficient incidents.* The argument is simply that the record does not prove "frequent" involvement or does not justify a conclusion that there was a pattern ("habits and traits") of misbehavior.[7]
- *Isolated incidents.* Logic and some regulations dictate that incidents which occurred in an isolated time frame, such as during basic training, should not be considered when calculating whether incidents are frequent. Additionally, some incidents do not fit into the pattern of conduct which the discharge is meant to punish (*e.g.*, late rent payments causing a civilian landlord to complain to the servicemember's commander). Most regulations have prohibited the use of incidents that occurred in a prior enlistment when calculating the character of discharge.[8]
- *Series of incidents close in time (multiple minor offenses).* Often a servicemember develops a personality conflict with a superior in a new unit. The result can be a rash of disciplinary actions designed to create a case of frequent involvement. The Boards understand the potential for abuse in these situations.[9]
- *Avoidance of court-martial.* Sometimes specific criminal acts are cited to support frequent involvement, although no disciplinary action was taken. Often this was done to avoid the aggravation of a court-martial or because the offense could not be proven at a court-martial. Most regulations state a general policy that the administrative process is not to be used to avoid a trial by court-martial. The Boards are sensitive to cases where there is clear abuse.[10]
- *Court-martial failed to discharge.* If a servicemember is found guilty of certain offenses by a court-martial which chose not to impose a punitive discharge, the servicemember should not then be administratively discharged for the same offenses on the grounds of frequent involvement. Similarly, if evidence of Article 15s was before the court-martial at the sentencing phase, and no discharge was imposed, the servicemember should not be subject to administrative discharge for the same offenses. When an administrative discharge is issued in these situations, a good argument can be made that the U.C.M.J. was wrongfully circumvented, and the discharge is suspect and should be upgraded.[11]
- *Psychiatric difficulties.* If a Board finds that the applicant was suffering from serious psychological problems which may have contributed to his/her misconduct, it will upgrade the discharge. This is often similar to the argument that a character and behavior disorder warranted discharge for unsuitability.[12]
- *Immaturity, incapacity to serve, and family or other problems.* Frequently a Review Board will find that the servicemember's misconduct was mitigated by his/her immaturity, limited "capability to serve," or personal problems.[13]
- *Current standards.* Sometimes a Board will indicate that a UD was too harsh by referring to the fact that the servicemember would not have received a UD under current standards. This is particularly true at the Naval DRB.[14]
- *Lack of rehabilitation efforts.* If a Board finds that there were minor acts of indiscipline and that relatively little was done to assist the servicemember with his/her problems, it will conclude that inadequate rehabilitative efforts were made.[15]
- *Overall record.* Where the incidents were relatively minor and/or the servicemember had lengthy creditable service, the Board will conclude that the UD was either too harsh or, in light of the overall record, inappropriate.[16]

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[7] *See* DRB Index categories A92.24, A92.25, A92.30, A92.28. *See also* ND 78-01677.

[8] *Id. See also* FD 78-01532.

[9] *See* DRB Index category A94.10; ADRB SOP, Annex F-1, para. 3.M., 44 Fed. Reg. 25,072 (1979).

[10] *See* §§ 12.9.2, 12.9.3 *supra.*

[11] *Id. See* note 2 *supra;* ADRB SOP, Annex F-1, para. 3.O., 44 Fed. Reg. 25,072 (1979); AD 79-09462; AD 78-04786; AD 79-04547.

[12] *See* DRB Index category A94.04. *See also* FD 78-01834; AD 78-00178; AD 7X-07028B; AD 78-01370; AD 78-03266; AD 78-06628; AD 79-04459. *Cf.* AD 79-09462; AD 79-04836; AD 79-06542; AD 78-01980; AD 78-04386 (drugs or alcohol).

[13] *See* DRB Index categories under A93.00. *See also* FD 78-01532; FD 78-01291; AD 79-04437; AD 79-05425; AD 79-05208; FD 79-00115; AD 79-04459; AD 79-05253; AD 79-04350; AD 79-04354; FD 79-00784; AD 79-03659; AD 79-06749; AD 79-06877; FD 79-00823; AD 79-09106; AD 79-01884; FD 78-00787; AD 79-05627; AD 79-05958; AD 79-06276; AD 79-08079; AD 79-05086A; FD 79-00113; AD 79-05237; AD 79-04302; AD 79-04137; AD 79-04836; AD 79-0666; AD 79-03857; AD 79-05253; AD 78-04655; AD 79-04650; AD 79-04692; AD 78-01708; AD 79-04104; AD 79-06881; AD 79-0538; AD 79-05765; AD 79-09258; AD 79-05961; AD 79-05214; AD 79-05253; MD 79-00306; AD 79-04650; AD 79-03802; AD 79-03862; FD 78-01392; FD 78-01688; FD 78-01327; ND 78-02547; ND 78-01834; MD 79-01478; AD 79-02387; AD 79-02971; AD 79-03739; AD 79-05184; AD 79-08054; AD 79-04691; AD 79-09067; AD 79-05718; AD 78-03824; AD 79-04089; AD 78-02803; AD 79-04089; AD 79-03538; AD 78-03353; AD 79-06542; AD 78-01980; AD 79-04506; AD 79-09434; AD 79-04006; AD 79-00115; MD 78-04637; AD 79-04302; AD 79-05214; AD 79-06749; AD 79-01438; FD 78-01102; AD 79-05879; AD 79-05253; AD 79-06877.

[14] This is particularly true with regard to the 1974 change in Navy policy as to UDs described in note 2 *supra. See* ND 79-02249; ND 79-01885; ND 79-00242; MD 79-01752; ND 80-0002; ND 79-01805; MD 79-0891; FD 78-01486; ND 78-01486; ND 79-01298; ND 79-02310; ND 78-02579; MD 79-00115; ND 79-01126; ND 79-00143; MD 78-00360; AD 78-04009; FD 79-00115; AD 79-04459; AD 79-09369.

[15] *See* § 12.5.2 *supra* (propriety considerations). *See also* AD 79-03711; AD 79-06184; AD 78-01969; AD 79-03052.

[16] *See* DRB Index category A94.06. *See* FD 79-01267; AD 79-06628; AD 78-06628; AD 79-03990; AD 79-04105; AD 79-04487; AD 79-05723; AD 79-06143; AD 79-05879 (minor offenses).

See AD 79-05041; AD 79-05055; AD 79-03934; AD 79-00115; AD 78-01969; AD 78-03765A; AD 79-01438; ND 79-02249; FD 78-01102; ND 79-01885; ND 79-00242; ND 79-00368; AD 79-04934; MD 78-04175; AD 79-04362; AD 79-04337; AD 78-03755; AD 79-01126; AD 79-04934; AD 79-04386; AD 79-04337; AD 79-04362; ND 79-01399; AD 79-09605; FD 78-01402; MD 79-02636; ND 78-01677; AD 79-04281; ND 79-01544; FD 78-01532; FD 78-01834; AD 78-03120; FD 79-01267; MD 79-01752; MD 78-04036; FD 78-01291; AD 79-04437; AD 79-05425; AD 79-01823; AD 78-04587; AD 79-05332; AD 79-09462; AD 78-04786; AD 79-05554; MD 78-03762; MD 79-00473; AD 79-05208; AD 79-06628; AD 78-02693; MD 78-01381; MD 78-03041; MD 78-03073; MD 78-03221; MD 78-03927; MD 78-04452; MD 79-101022; MD 78-04637; AD 79-05222; AD 79-05717; AD 78-02693; AD 79-05919; MD 78-04637; AD

17.4.2 PROPRIETY CONSIDERATIONS

Boards are normally hesitant to base decisions to upgrade on findings of impropriety when they can utilize an equitable approach. However, in several clear instances the Boards will find that the proceedings were improper. Some of those are:

- Improper mental status evaluation;[17]
- Failure to provide the rehabilitative or counseling efforts required by regulations;[18] and
- Failure to provide the type of counsel, notice, hearing rights, or other essential procedural requirements of the regulations.[19]

17.5 SHIRKING

In some instances "shirking" might resemble "frequent involvement." Shirking, however, is a pattern of nonfeasance of duties while frequent involvement is the commission of specific acts of malfeasance. The discharge regulations do not define shirking specifically. However, it appears that the offense of shirking involves an established pattern of deliberate evasion of military duty.[20] Shirking is dealt with in a fashion similar to that of frequent involvement and is viewed as the volitional opposite of the unsuitability category of "apathy or inability to expend efforts constructively." Frequently successful arguments for upgrading in shirking cases include the following:

- The servicemember was incapable of performing adequately and under current standards (s)he would have been discharged as a marginal performer;[21]
- Where the servicemember was suffering from a psychiatric disability, the element of intentional evasion of duty is eliminated, and a discharge upgrade is warranted;[22]
- Family problems, immaturity, and low potential for success;[23]
- Lack of proper rehabilitative efforts by command and overall good record;[24] and
- Because of limited capacity to serve, the discharge should have been for unsuitability/apathy.

There are no propriety issues specifically related to shirking that are not related to other reasons for discharge, except perhaps an interpretation that a set of facts amounts to shirking "as a matter of law." A board would normally conclude, however, that there were insufficient incidents to form a pattern, that the incidents were a result of mitigating factors, that the servicemember was incapable of performing, or that the servicemember should have been discharged as unsuitable.

17.6 DISCHARGES BASED ON CIVILIAN COURT CONVICTIONS

The military services have traditionally treated the conviction of a servicemember by a United States or foreign civilian court of certain offenses as grounds for separation. While the standard has changed slightly over the years, the civilian conviction would be grounds for separation if:

- No matter what the sentence, the offense could potentially have resulted in confinement for more than one year under the U.C.M.J. (six months in the older regulations);[25]
- No matter what the offense could potentially be under the U.C.M.J., it resulted in a sentence to confinement of more than one year (six months in the older cases); or
- The offense was one of moral turpitude.

In general, the regulations have not been concerned about whether the adjudication was under a youthful offender statute, was sealed, or was some other form of adjudication that did not amount to a formal conviction. The regulatory intent has been to eliminate those persons whose civilian conduct has resulted in adverse consequences within a criminal context in a civilian court. Considerations, however, that affect the continued validity of the civilian action are often deemed relevant by the Boards.

Sometimes the services do not execute the discharge while the servicemember is in confinement, since the servicemember is technically AWOL. This hurts parole prospects and may create procedural problems in getting a discharge review.

17.6.1 EQUITABLE APPROACHES

The general considerations in civilian conviction cases are similar to those in other unfitness cases. Boards will most likely agree to upgrade when:

- The character of discharge was too harsh in light of the applicant's overall record or current standards;[26]
- The civilian offense was not serious and/or the applicant received a sentence that did not im-

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[16] (continued)
79-02879; AD 79-06893; AD 79-03185; AD 79-06502; AD 79-05719; AD 79-03711; AD 78-0178; AD 79-4547; AD 79-05038; ND 80-0002; ND 79-01805; AD 7X-07028B; AD 79-09149; AD 79-05919; AD 78-01370; AD 78-03266; AD 78-06628; AD 79-03990; AD 79-04105; AD 79-04487; AD 79-05723; AD 79-06143; AD 79-05879; AD 79-05208 (UD found "too harsh").

[17] *See* DRB Index categories A50.06; A50.08. *See also* AD 79-05838; AD 79-04150; AD 79-04205; AD 79-04223; AD 78-02834; AD 79-05967; AD 78-01301; AD 79-03285; AD 79-02532; AD 79-03156; AD 77-08620.

[18] *See* note 15 *supra*.

[19] *See generally* § 12.5 *supra*.

[20] DAJA-AL 1974/3846, 29 April 1974, *reported in* [July, 1974] ARMY LAW *and* DOD REPORT, *supra* note 3, at incl. 3, p. 10.

[21] *See* FD 78-01467.

[22] *See* AD 79-02751; AD 79-06498; AD 79-08079; AD 78-02949.

[23] *See* AD 78-01025; AD 79-08079.

[24] *See* AD 79-03052.

[25] These standards are contained in the Table of Maximum Punishments (TMP) in the MANUAL FOR COURTS-MARTIAL. *See* App. 17B *infra* (1951 and 1969 tables). Note that during the Korean War, the TMP was suspended for cases arising in the Far East. *See* ADRB SOP, Annex H-1, 44 Fed. Reg. 25,078 (1979) (after Dec. 2, 1976 "more than one year" changed to "one year or more").

[26] *See* AD 79-00952; AD 79-06852; AD 79-94333; FD 79-00779; FD 79-00766; FD 79-00487; AD 79-04961; AD 79-09252; AD 79-03384; AD 79-04491; FD 78-01994 (cases discussing the "too harsh" doctrine). *See* ND 79-01727; ND 78-02380; AD 78-03413; AD 79-07688 (cases discussing the current standards approach). *See also* ADRB SOP, Annex F-1, para. 3.Q., 44 Fed. Reg. 25,072 (would civilian offense justify UD in military).

pair his/her performance of military duties (*i.e.*, a fine);[27]

- The applicant has been permitted to withdraw the guilty plea after successful completion of probation and the offense was expunged, or the applicant has been pardoned for the offense that led to the discharge;[28]
- Other post-service factors such as lack of subsequent convictions and rehabilitation exist, especially if it can be shown that the causes of the conviction have been eliminated;[29]
- The conviction was for possession of drugs for personal use or was drug-related (the Laird drug policy might apply);[30]
- A civilian court judge structured sentencing so that it did not interfere with military duties or it was clear that the judge wished the servicemember to complete his/her military service (this argument can be helpful and often is bolstered by a letter by the sentencing judge.);
- Mitigating factors such as immaturity, alcohol, or drug abuse can be shown;[31] and
- Evidence exists that the applicant was not guilty of the offense.[32]

17.6.2 PROPRIETY CONSIDERATIONS

The service regulations which govern discharge for civilian convictions contain important procedural safeguards. If these safeguards and standards are not observed in a discharge proceeding, an upgrade will be awarded. Some of the most common situations where improprieties have been found are:

- When the civilian offense was not included as grounds for separation in the service regulations, the discharge was improper.[33]
- When the separation occurred prior to the civilian conviction (*e.g.*, upon arrest), the servicemember had not indicated that (s)he would not appeal, the appeal period had not run, or the appeal had not been denied, the separation was improper.[34]
- Army regulations require that the servicemember be notified by certified mail of the discharge proceeding; failure to permit assigned military counsel to travel to meet with the servicemember to prepare a defense while (s)he was incarcerated can be error.[35]
- Marine Corps regulations from 1966 until March 4, 1976 did not permit a waiver of an administrative discharge board hearing by a servicemember while in civilian confinement. Nevertheless, many commanders misinterpreted this regulation and permitted this improper waiver.[36]
- If the right to an administrative discharge hearing was waived after January 1, 1974, the servicemember must have been given access to a lawyer.
- In Army cases, there is a requirement for a mental status evaluation if the servicemember is under military control. Violation of this requirement is error.
- After February 1, 1978, the general court-martial convening authority had to be the approving authority even if the servicemember received a GD.[37]
- When the servicemember was an inactive reservist at the time of the conviction or when the conviction had no effect on the servicemember's military service, a less than honorable discharge can only rarely be issued based solely on the conviction.[38]
- The Air Force regulations provide that if the servicemember returns to duty and no action toward discharge is taken within a reasonable time, there is a constructive waiver on the part of the command. The same argument can be used in the other services simply by arguing the unfairness of returning a servicemember to active duty for a substantial period of time and then initiating a discharge action at a later date. This is consistent with the military tradition of officially forgiving misconduct after the command seemingly condones it through the return of the servicemember to normal duties.[39]
- Many of these discharges are issued after a hearing conducted without a servicemember's presence; questions have been raised whether this violates due process.[40] As a practical mat-

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[27] *Id. See also* note 2 *supra* (nonserious offenses defined).

[28] *See* Air Force instructions to DRB applicants; AD 79-06506.

[29] *See* AD 79-06852; MD 79-02240; AD 79-06506.

[30] *See* ADRB SOP, Annex F-1, para. 3.P., 44 Fed. Reg. 25,072 (1979); Ch. 15 *supra* (policy for cases in process pre-July 7, 1971).

[31] *Cf.* AD 79-09462; AD 79-04836; AD 78-03353; AD 79-06542; AD 79-06627.

[32] *See* AD 79-07688.

[33] *See* AD 79-06832. The discharge regulation should always be checked for subtle changes in wording. *See* note 25 *supra*; DRB Index category A61.02.

[34] *See* FD 78-00973; AD 7X-13342; DRB Index category A61.04; 59 OFF THE RECORD 40:

> 7. Misconduct Discharge for Conviction by Civilian Authorities
>
> The recommendation for discharge must contain affirmative evidence that the respondent does not desire to appeal his conviction, or that the appeal period has expired without appeal having been filed, or that he appealed and his appeal has been denied. [Ed. note: Navy policy is that command must notify BUPERS when a civilian conviction occurs, whether or not the servicemember is recommended for discharge. If the member is processed for discharge, the letter of transmittal must contain information as to the status of an appeal, if any. If the conviction is subsequently appealed, processing for an administrative discharge will be deferred pending the outcome. *See* BUPERSMAN 3420240.].

[35] *See* §§ 12.5.3, 12.5.7.3 *supra*. In the 1950s there was no requirement of notice or a hearing. In later years, the notice may have gone only to the warden and not to the servicemember.

[36] Prior to the promulgation of the DRB directive in 1978, the NDRB found this to be *per se* error (*see* MD 77-01690); however, since March 31, 1978, they determine whether the discharge would have been likely even without the waiver of an ADB. This practice is questionable.

[37] AR 635-200, para. 1-32 (1978 change).

[38] *See* § 12.4 *supra*.

[39] *See* DRB Index category A61.10; AFR 39-12, para. 2-28. *Cf.* MANUAL FOR COURTS-MARTIAL para. 68F (rev. ed. 1969) (constructive condonation of desertion).

[40] No court has ever held a violation of due process for this reason.

ter the boards are not likely to accept this argument without a showing that the outcome would have been different had the applicant been present at the administrative discharge board.

- The Naval DRB has ruled that, where the conviction upon which the discharge was based was subsequently expunged, it is improper to continue to base a bad discharge on the expunged conviction.[41]
- In some adjudications that are not traditional criminal convictions, military regulations require that permission be sought from a higher authority to discharge the servicemember.[42]
- When a conviction was by a foreign court, it is important to consider whether an equivalent U.C.M.J. offense was used to measure the seriousness of the offense; if the conviction was not based on fundamental due process, the propriety of the discharge should be challenged.[43]

17.7 DISHONORABLE FAILURE TO PAY JUST DEBTS OR SUPPORT DEPENDENTS

This reason for an adverse discharge has little to do with one's military service and is highly questionable in the absence of a specific showing of some effect on military service.[44] The basis for this reason is the idea that a servicemember is on active duty 24 hours a day and any failure to comply with societal norms reflecting adversely on the military is actionable. Thus, a purposeful failure to pay debts or a refusal to comply with a court order to support dependents is considered an offense that reflects adversely on the military service.[45] The "lesser offense" under unsuitability is "financial irresponsibility." Boards consider the following factors when reviewing such a case:

- The overall service record;[46]
- The intentionalness or flagrance[47] of the failure to pay and the absence of mitigating factors;
- Indications that the applicant could not manage his/her own affairs or was subject to some mitigating pressure that caused the debt, suggesting unsuitability rather than unfitness (one classic example is a low-ranking enlisted person with a nonworking spouse and several children who has been transferred from a warm climate to a cold climate and whose pay is insufficient to buy winter clothing for the entire family);
- Explanation of what led to the creation of the debts (*i.e.*, gambling, alcohol, drugs, failed business, family problems) and what has been done to resolve them — if it appears that the applicant merely used these circumstances to avoid payment of a legal debt, without seeking assistance from other family members or alternate means to satisfy the debt, the board will not look kindly on the individual;
- Repayment of the debts and elimination of the cause of the problem — if the applicant has not repaid the debts, (s)he must have a reason (for example, the debts were not owed as a matter of law); and
- Evidence of current good credit and documentation indicating a favorable change in circumstances.[48]

Additionally, one should always argue that it was beyond the service's statutory authority to base a bad discharge on an offense that does not affect the quality of the applicant's service.[49]

17.8 HOMOSEXUALITY AND SEXUAL PERVERSION

While sexual perversion remains undefined, it generally includes child molestation, indecent exposure, or even behavior that falls short of a homosexual act when such an act cannot be proven. While the services have recently taken a more lenient view of the character of discharge for homosexuality, the same considerations would not apply in many of these other cases.[50] The following arguments could be used:

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[40] (contined)

Cf. Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963). Perhaps the best approach is that the service should have delayed the ADB under the circumstances to permit the servicemember to be present, especially when the service records were not complete or release from jail was to occur within a short period of time.

[41] ND 78-01620 (original conviction set aside by civilian courts due to denial of right to counsel). It could also be argued that the expungement of a youthful offender conviction removes the basis for the discharge for the civil conviction and an upgrade is required.

[42] DAJA-AL 1980/1176, 25 Feb. 1980:

> The Judge Advocate General determined that paragraphs 14-12c and 14-19, AR 635-200, construed together, prohibit separation of an individual adjudicated a juvenile offender for an offense not involving moral turpitude absent the granting of an exception to policy by the Commander, MILPERCEN. The Judge Advocate General noted that factors distinguishing this case from DAJA-AL 1972/4559, 27 July 1972, and DAJA-AL 1971/5679, 30 December 1971, are that the servicemember was processed separately from the adult system and was required to give up his right to a jury trial, and that the Alabama Code specifically states that this is an adjudication, not a conviction. Therefore, absent the granting of the exception, the separation by the local discharge authority was improper. Since the discharge was invalid (*i.e.*, without authority), there was no basis for changing the discharge or upon which to base a constructive discharge, the servicemember having not acquiesed in any discharge status. Accordingly, the ABCMR could either reinstate the servicemember or recommend a convenience of the Government discharge.

[43] Most Status of Forces Agreements (SOFA) relinquishing criminal jurisdiction to the host country where U.S. troops are stationed require U.S. trial observers to make a report on the fairness of the proceedings. Often a veteran's mdre detailed analysis of the trial will support an argument that his/her guilt cannot be presumed because of the conviction.

[44] *See* § 12.4 *supra*.

[45] It is an offense under the general articles of Art. 134, U.C.M.J., 10 U.S.C. § 934.

[46] *See* AD 79-03961; AD 79-05770; AD 79-01563; AD 78-03022.

[47] *See* ND 79-02027; ND 79-00201; MD 79-01690.

[48] *See* Air Force guidance sent to DRB applicants.

[49] *See* § 12.4 *supra* (discussion of nonservice-related "offenses").

[50] *See* AD 79-3739. *See also* Ch. 14 *supra* (homosexuality).

- The overall service record warrants an upgrade;[51]
- There was successful completion of a treatment program;[52] or
- The act was an isolated incident.[53]

17.9 UNSANITARY HABITS

This reason was usually given for discharge when a servicemember repeatedly contracted cases of venereal disease, although other acts did constitute unsanitary habits (*e.g.*, infrequent bathing). Until 1975, this was a category of unfitness for which an Undesirable Discharge could be issued, although some services had, on their own, made it grounds for an unsuitability discharge. In 1975, DoD Directive 1332.14 was changed, making unsanitary habits a reason for an unsuitability discharge in all services. Using the current standards approach, almost all UDs or GDs issued to servicemembers whose records warranted HDs should be upgraded.[54]

17.10 DRUG ABUSE

Illegal use of drugs has always been a ground for discharge for unfitness. However, there are many specific considerations in drug cases.[55]

17.11 PROLONGED ABSENCES

While a lengthy absence without leave (AWOL) is a criminal offense under the U.C.M.J., and is a very serious offense in war time, the services resort to the administrative process in the following instances:

- When the absentee is an alien who has returned to his/her home country and is unlikely ever to return to face a court-martial, the regulations authorize a bad discharge for prolonged absence without the actual presence of the servicemember. A letter is sent to the servicemember's last known address with notice of the proposed discharge proceeding and the appointment of counsel.[56]
- When the statute of limitations has run on the prosecution for AWOL by courts-martial or where some defect in evidence will not permit a conviction.[57]

In all AWOL cases, boards are interested in the following factors:

- Whether there were any mitigating circumstances, such as family problems, immediate family illness, financial problems, drug and/or alcohol problems;
- The length of the AWOL;
- What the applicant did while AWOL;
- Whether the applicant was apprehended or returned voluntarily to military control;
- Whether the applicant went AWOL from a leave status, and, if so, whether (s)he was improperly denied an extension of leave;
- Whether the reason for going AWOL existed prior to enlistment or induction;
- Whether the applicant applied for a hardship discharge, medical discharge, or discharge as a conscientious objector; and
- Whether the applicant exhausted all remedies in the chain of command prior to going AWOL.

17.12 UNFITNESS/MISCONDUCT CHECKLIST

The following steps should be taken in all unfitness/misconduct cases:

- Conduct regulatory summary;[57a]
- Obtain relevant regulations and determine whether all procedures were complied with;[58]
- Determine whether the offense was "service-connected";[59]
- Determine whether under current standards the reason for discharge is no longer possible under misconduct regulations or whether more lenient discharge characterization policies currently exist;[60]
- Determine whether it can be argued that a discharge for unsuitability would have been more appropriate and whether the commander explained why unfitness was chosen;
- Determine whether mitigating factors, such as family, medical, psychological, or financial problems, contributed to the offense(s);
- Determine whether it can be argued that the servicemember's overall record outweighed the offense(s);
- Note special guidelines where alcoholism, homosexuality, drugs, or fraudulent enlistment are involved;[61]
- Determine whether the servicemember's record or offense met the regulatory requirements for discharge for the type of unfitness/misconduct involved; and
- Determine whether a psychiatric report was required, and, if so, whether it was performed by a psychiatrist or doctor assigned to a psychiatric service.

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[51] *See* FD 79-00331; AD 78-01636.

[52] *See* FD 79-00331.

[53] *See* AD 78-01636.

[54] *See* § 16.12 *supra*; § 21.4 *infra*; AD 78-04009; AD 79-09369; FD 80-02102; ND 80-01106; ND 80-01613.

[55] *See* Ch. 15 *supra*. In general, the following drug cases are easily upgraded: all cases in process on or before July 7, 1971, solely for use and/or possession of drugs for personal use; marijuana cases not involving sale; and bad discharges resulting from forced urine testing.

[56] Near the end of the Vietnam War this provision was used to eliminate alien absentees from the roles. *See* [July 18, 1973] ARMY TIMES at 32. These aliens are ineligible to return to the United States. 8 U.S.C. § 1182(a)(22). If the person was determined to be an alien because of the adoption of foreign citizenship while AWOL, a more complicated question arises. *See generally* 8 MIL. L. REP. 1008 (1980).

[57] DAJA-AL 1974/5069, 24 Sept. 1974, held that if the DA Form 20 shows an AWOL, the burden shifts to the servicemember to prove (s)he was not AWOL. Thus, the quantum of proof to prove an AWOL administratively is far less than at a court-martial.

[57a] *See* Ch. 5 *supra*.

[58] *See* Ch. 10 *supra*; § 12.5 *supra*.

[59] *See* § 12.4 *supra*.

[60] *See* Ch. 2 *supra* (checklist); Ch. 21 *infra* (current standards); note 2 *supra* (Navy cases).

[61] *See* Chs. 13, 14, 15 *supra*; Ch. 18 *infra*.

APPENDIX 17A
DRB/BCMR DECISIONS

These cases are arranged numerically by service. The volume of cases and the imprecise manner in which they are indexed requires counsel to pursue his/her own research to assure completeness. The authors would appreciate having any significant cases called to their attention.

A. CASE LISTS ARRANGED BY REASON FOR DISCHARGE AND PRIMARY REASON FOR UPGRADE

The case lists are provided for convenience if counsel wants to order all of the cases used in this chapter. Note that copies of cases cited in supporting briefs should accompany the briefs. Copies may be obtained without charge from: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310.

1. FREQUENT INVOLVEMENT/HABITS AND TRAITS

Overall Record Warrants Upgrade:

AD 78-01969; AD 78-02693; AD 78-03120; AD 78-03755; AD 78-03765A; AD 78-04587; AD 78-04786; AD 79-00115; AD 79-01126; AD 79-01438; AD 79-01823; AD 79-03934; AD 79-04281; AD 79-04337; AD 79-04362; AD 79-04386; AD 79-04437; AD 79-04934; AD 79-05041; AD 79-05055; AD 79-05222; AD 79-05332; AD 79-05425; AD 79-05554; AD 79-05717; AD 79-05919; AD 79-09462; AD 79-09605.

FD 78-01102; FD 78-01291; FD 78-01402; FD 78-01532; FD 78-01834; FD 79-01267.

MD 78-03041; MD 78-03073; MD 78-03221; MD 78-03927; MD 78-04036; MD 78-04175; MD 78-04452; MD 79-01752; MD 79-02636; MD 79-01022.

ND 78-01677; ND 79-00242; ND 79-00368; ND 79-01399; ND 79-01544; ND 79-01885; ND 79-02249.

Too Harsh/Minor Offenses Warrant Upgrade:

AD 7X-07028B; AD 78-00178; AD 78-01370; AD 78-02693; AD 78-03266; AD 78-06628; AD 79-02879; AD 79-03185; AD 79-03711; AD 79-03990; AD 79-04105; AD 79-04487; AD 79-04547; AD 79-05038; AD 79-05208; AD 79-05222; AD 79-05717; AD 79-05719; AD 79-05723; AD 79-05879; AD 79-05919; AD 79-06143; AD 79-06502; AD 79-06628; AD 79-06893; AD 79-09149.

MD 78-01381; MD 78-03041; MD 78-03073; MD 78-03221; MD 78-03762; MD 78-03927; MD 78-04452; MD 78-04637; MD 79-01022; MD 79-00473.

ND 79-01805; ND 80-00002.

Current Standards Warrant Upgrade:

AD 78-04009; AD 79-04459; AD 79-09369.

FD 78-01486; FD 79-00115.

MD 78-00360; MD 79-00115; MD 79-08911.

ND 78-01486; ND 78-02579; ND 79-00143; ND 79-01126; ND 79-01298; ND 79-02310.

Psychiatric Problems or Unsuitability Discharge More Proper:

AD 78-01708; AD 78-01980; AD 78-02803; AD 78-03353; AD 78-03824; AD 78-04655; AD 79-02387; AD 79-02971; AD 79-03739; AD 79-03802; AD 79-03857; AD 79-03862; AD 79-04006; AD 79-04089; AD 79-04104; AD 79-04137; AD 79-04302; AD 79-04506; AD 79-04650; AD 79-04691; AD 79-04692; AD 79-04836; AD 79-05086A; AD 79-05184; AD 79-05214; AD 79-05237; AD 79-05253; AD 79-0538; AD 79-05718; AD 79-05765; AD 79-05961; AD 79-06542; AD 79-06666; AD 79-06881; AD 79-08054; AD 79-09067; AD 79-09258; AD 79-09434.

FD 78-01327; FD 78-01392; FD 78-01688; FD 79-00113.

ND 78-01834; ND 78-02547.

MD 79-00306; MD 79-01478.

Immaturity/Lack of Capability to Serve:
AD 79-01884; AD 79-03659; AD 79-04350; AD 79-04354; AD 79-05627; AD 79-05958; AD 79-06276; AD 79-06749; AD 79-06877; AD 79-09106.
FD 78-00787; FD 79-00784; FD 79-00823.

Insufficient Rehabilitation Attempted:
AD 79-00948; AD 79-02901; AD 79-03711; AD 79-04253; AD 79-04636; AD 79-04688; AD 79-06627; AD 79-04092.

Miscellaneous/Mixed Reasons:
AD 78-02060; AD 78-02878; AD 79-01925; AD 79-05047; AD 79-05259; AD 79-05348.

Impropriety:
AD 77-08620; AD 78-01301; AD 78-01969; AD 78-02834; AD 78-02949; AD 79-02532; AD 79-03156; AD 79-03285; AD 79-04081; AD 79-04150; AD 79-04205; AD 79-04223; AD 79-05838; AD 79-05967; AD 79-06184.

2. SHIRKING

General:
AD 78-01025; AD 79-01638.
FD 78-01467.

Psychiatric:
AD 79-02751; AD 79-06498; AD 79-08079.

Overall Record Warrants Upgrade or UD Too Harsh:
AD 78-01961; AD 78-02398; AD 79-04682; AD 79-09275.

Insufficient Rehabilitation:
AD 79-03052.

3. CIVIL COURT CONVICTIONS

Immaturity:
AD 79-01750.
FD 79-00039.

Too Harsh/Overall Record:
AD 79-00697; AD 79-00952; AD 79-03384; AD 79-04333; AD 79-04491; AD 79-04961; AD 79-06852; AD 79-09252.
FD 78-01994; FD 79-00487; FD 79-00766; FD 79-00779.
MD 79-02240.

Current Standards:
AD 78-03413; AD 79-07688.
ND 78-02380; ND 79-01727.

General Equity:
AD 79-04872; AD 79-06506.

Impropriety:
AD 7X-13342; AD 79-06832.
FD 78-00973.
ND 79-01875.

4. FAILURE TO PAY DEBTS

Overall Record/UD Too Harsh:
AD 78-03022; AD 79-01552; AD 79-01563; AD 79-03961; AD 79-05770.
ND 79-00201; ND 79-02027.

Current Standards:
MD 79-01690.

5. SEXUAL PERVERSION

AD 78-01636.
FD 79-00331.
ND 78-01245.

B. DIGESTS OF CASES RELIED UPON

1. ARMY

AD 7X-07028B (UD for three Art. 15s upgraded to HD; Board noted diagnosed personality disorder and minor nature of offenses; in light of excellent service ratings, found type of discharge too harsh).

AD 7X-13342 (UD, civil conviction for robbery, upgraded to GD/secretarial authority because servicemember was discharged without indicating whether he would appeal civil conviction and conviction was set aside on appeal).

AD 77-08620 (UD upgraded to GD; servicemember's discharge improper because MSE signed by a physician's assistant rather than by a commissioned medical corps officer).

AD 78-01025 (UD for three SPCMs and 332 days total lost time, upgraded to GD; servicemember's family problems not sufficiently serious to excuse misconduct entirely).

AD 78-01301 (UD for one Art. 15 and one SPCM, AWOL 42 days, upgraded to GD; Board determined that discharge was improper because MSE not signed by the appropriate medical authorities; Board also determined that discharge was inequitable because of improper MSE, and the fact that command did not rule out the possibility of a discharge for unsuitability).

AD 78-01370 (UD for three Art. 15s and one CM upgraded to GD; MSE "indicated limited capability" and servicemember's discharge characterization was too harsh).

AD 78-01636 (UD with two SPCMs for misconduct upgraded to GD; Board noted servicemember's overall record of service in Vietnam and good post-service conduct; servicemember was "confused at the time as a result of a fever which led to acts of indecent exposure").

AD 78-01708 (UD for two Art. 15s and one SCM upgraded to GD because Board found that servicemember's good service outweighed the offenses and that he was suffering from a "character and behavior disorder" at the time of his discharge).

AD 78-01961 (UD upgraded to GD; servicemember had excellent overall conduct and efficiency ratings and characterization of the discharge was too harsh for his indiscipline).

AD 78-01969 (UD upgraded to GD; Board found discharge improper because servicemember not given a rehabilitative transfer and inequitable because, although SM was given six Art. 15s and counseling, his prior HD from service in Vietnam and his four year, nine month prior creditable service indicated a good overall record of service).

AD 78-01980 (UD for two SCMs and one SPCM upgraded to GD; partial mitigation in servicemember's severe psychiatric problem and in evidence of a drinking problem; servicemember's final four years of service rated no worse than satisfactory and, when he received his court-martial, his service ratings were "satisfactory" or better).

AD 78-02060 (UD for one SPCM, involving a 13-day AWOL, for which servicemember was confined 143 days, and disrespect to an NCO; applicant "by his length of confinement had paid for the offenses of AWOL and disrespect").

AD 78-02398 (UD for three Art. 15s and 15 days total lost time upgraded to GD; servicemember's acts of indiscipline were minor and discharge characterization was too harsh).

AD 78-02693 (UD for six Art. 15s upgraded to GD; Board found no mitigation, due to seriousness of the offenses, but found the discharge too harsh in light of prior 25 months of satisfactory service).

AD 78-02803 (UD for three Art. 15s and one SPCM upgraded to GD; Board noted that servic-

emember suffered from an "unstable emotional condition" and that he should have been given an unsuitability discharge because his emotional condition affected his ability to serve).

AD 78-02834 (UD for four Art. 15s and one SPCM, 96 days total lost time upgraded to GD; the offenses were not minor and not sufficiently mitigated by personal, family, and medical problems; based on upgrade MSE signed by a physician's assistant contrary to regulations).

AD 78-02878 (UD for four Art. 15s, one SCM, and one SPCM upgraded to GD; Board noted servicemember's satisfactory service after reenlistment and the minor nature of his offenses).

AD 78-02949 (UD upgraded to GD after finding of an "absolute lack of documentation to indicate the specific basis for discharge").

AD 78-03022 (UD upgraded to GD; servicemember had received three Art. 15s, had prior honorable service in RVN and 11 months of excellent service ratings).

AD 78-03120 (UD for one SPCM (sleeping on guard) upgraded to GD because of overall satisfactory service).

AD 78-03266 (UD for two SPCMs upgraded to GD; Board found that it was servicemember's "lack of motivation to return to duty rather than repetitive acts of misconduct" that caused command to recommend separation; the discharge characterization was too harsh).

AD 78-03353 (UD for one Art. 15 and one SPCM, 30 days lost in confinement, upgraded to HD because servicemember's discharge characterization was too harsh; Board stated "psychological factors and perhaps alcohol and drug abuse were contributing factors that severely affected his capability to serve"; a medical board had recommended that he be separated for unsuitability rather than unfitness).

AD 78-03413 (UD upgraded to GD; servicemember had prior HD; discharge too harsh under current standards).

AD 78-03755 (UD for one Art. 15 (two-day AWOL), two SPCMs (two AWOLs), 269 total days lost time, upgraded to GD; servicemember had served satisfactorily in Vietnam and had satisfactory efficiency ratings; overall record warranted partial relief).

AD 78-03765A (UD for two SPCMs and one Art. 15 upgraded to GD; Board noted servicemember's receipt of a combat infantry badge for service in Vietnam, servicemember's overall record for 32 months prior to his SPCMs had been good).

AD 78-03824 (UD for three Art. 15s, one SCM, and one SPCM upgraded to GD; Board found that servicemember suffered from a diagnosed "character disorder" as well as alcohol problems which affected his ability to serve).

AD 78-04009 (UD for two Art. 15s and one CM upgraded to HD; nature of misconduct was minor, cause of applicant's discharge was repeated instances of veneral infection; Board stated that "under current policies highly doubtful that such conduct would result in discharge").

AD 78-04587 (UD upgraded to GD because UD too harsh in light of overall service).

AD 78-04655 (UD for three Art. 15s and one SPCM (17 days lost) upgraded to GD; psychiatric diagnosis of a "personality disorder, chronic severe," mitigated indiscipline).

AD 78-04786 (UD for one SPCM upgraded to HD based on overall record; one HD for a prior four-year period of service; in two years current service, no Art. 15s and only one day lost; alcohol problem was partially responsible for acts of misconduct and good post-service record mitigated it).

AD 78-06628 (UD upgraded to HD; aplicant was discharged for "minor offenses"; considering "the applicant's mental condition," the discharge was too harsh).

AD 79-00115 (UD for one Art. 15 and four SCMs upgraded to HD; applicant had four and one-half years overall record of good service and exemplary post-service conduct; "command may have made life difficult for the applicant because of his medical profile").

AD 79-00697 (UD for civil conviction for vandalism, petty larceny, and disorderly conduct upgraded to GD; minor nature of offenses, even though they resulted in one year confinement, nonetheless outweighed by overall record of service).

AD 79-00948 (UD for four Art. 15s, one SPCM, and 37 days total lost time upgraded to GD; unit commander had responsibility to document efforts to guide applicant; lack of counseling likely to have adversely affected applicant's ability to perform).

AD 79-00952 (UD upgraded to GD; UD "too harsh" considering applicant's HD for a prior enlistment of one year, ten months and "clean overall record" except for one Art. 15).

AD 79-01126 (UD for two Art. 15s (16 days lost) and one pending SCM for an AWOL upgraded to

GD based on applicant's overall record, prior good service of 1 year, 6 months, current good service of 1 year, 4 months prior to acts of indiscipline, tour in Vietnam, and rank of E-4).

AD 79-01438 (UD for one Art. 15 and one SPCM upgraded to GD; marital problems partially mitigating; overall record of service good).

AD 79-01552 (UD for bad debts upgraded to GD because of prior HD and evidence of good service; servicemember had waived his right to appear before a board of officers and made no statement on his own behalf).

AD 79-01563 (UD for bad debts upgraded to GD; servicemember received seven Art. 15s and numerous counseling sessions for his debts; in three years and eight months of prior honorable service, he had received two good conduct medals and had attained the rank of E-5).

AD 79-01638 (UD for shirking upgraded to GD; three AWOLs and one DOLO while in Vietnam; seven months prior good service; discharge for shirking followed an AWOL but another unit had approved a GD for unsuitability; discharge inequitable).

AD 79-01750 (UD for possession of marijuana upgraded to GD; three Art. 15s; Board found that servicemember had a deprived background and was immature; this was "sufficiently significant to mitigate"; Board stated that it "considered the record of no courts-martial and the relative light sentence of the civil conviction").

AD 79-01823 (UD for five Art. 15s, one SCM, and one GCM for three AWOLs (involving 158 total lost days) upgraded to GD; four prior periods of honorable service and two good conduct medals; acts of indiscipline partly mitigated by some evidence of alcohol abuse, service in a combat zone, and overall service).

AD 79-01884 (UD for one Art. 15, four SCMs, one SPCM, and 96 days lost time upgraded to GD; applicant was mental category five and at induction was described as not testable and illiterate; Board found that language problem was contributing factor and that four of the offenses were minor).

AD 79-01925 (UD for twice returning late from passes and one AWOL (15 days) upgraded to GD; the Board "recognized the gravity of an AWOL offense during the time of war," but found the servicemember's acts of indiscipline mitigated).

AD 79-02387 (UD for two Art. 15s, one SCM (AWOL), and two SPCMs upgraded to GD; minor acts of indiscipline; psychiatric diagnosis of a personality disorder; a Korean Combat veteran with a Combat Infantry Badge and only three years of elementary school).

AD 79-02532 (UD for two Art. 15s and one SPCM (four AWOLs — 118 total lost days), upgraded to GD; one year successful term in Vietnam and no mental status evaluation at time of discharge).

AD 79-02751 (UD for two AWOLs, totalling 180 days lost time, and two SPCMs upgraded to GD; psychiatric evaluation indicated a "chronic emotional instability").

AD 79-02879 (UD for six Art. 15s upgraded to GD; Board found the Art. 15s to be of a minor nature and found the discharge too harsh).

AD 79-02901 (UD for one Art. 15 and one SCM given for two AWOLs upgraded to GD; minor acts of indiscipline; failure by command to attempt rehabilitation).

AD 79-02971 (UD for one Art. 15 for two-day AWOL upgraded to HD; psychiatric evaluation indicated "character and behavior disorder" and mental disability; servicemember had been unable to complete training during five months of military service).

AD 79-03052 (UD for three Art. 15s upgraded to GD; 18 counseling sessions; command failed to transfer the servicemember in order to rehabilitate him; UD too harsh, but full relief could not be granted because servicemember failed to respond to counseling).

AD 79-03156 (UD for five Art. 15s upgraded to GD; absence of a mental status evaluation was prejudicial; servicemember improperly and inequitably discharged).

AD 79-03185 (UD for six Art. 15s (but no lost time) over a three-year period upgraded to GD because UD too harsh for overall record).

AD 79-03285 (UD for four Art. 15s and three confinements by civil authorities upgraded to GD; absence of mental status evaluation improper; and servicemember given no opportunity for a rehabilitative transfer).

AD 79-03384 (UD for burglary of a vehicle upgraded to GD; one year and two months of otherwise creditable service).

AD 79-03538 (UD for one SPCM (larceny) upgraded to HD; servicemember's age (17), limited

education, immaturity, overall good service record, and emotional condition, as established by a psychiatric report, were "fully mitigating").

AD 79-03659 (UD for three Art. 15s upgraded to GD; acts of misconduct were minor; diagnosed personality disorder and youth were mitigating factors).

AD 79-03711 (UD for seven Art. 15s, 32 days lost due to civil confinement, upgraded to GD after Board finding that there had been no rehabilitative transfer and that UD was too harsh).

AD 79-03739 (UD upgraded to HD; "the servicemember suffered a constitutional psychopathic state," as well as a mental disability and was a "sexual psychopath"; acts of sodomy committed while intoxicated; "because of the medical diagnosis and the evidence of alcohol in the offense, the Board felt that this was sufficient basis to mitigate the acts of indiscipline").

AD 79-03802 (UD upgraded to GD; SM suffered from a severe "psychological maladjustment"; capability to serve was "seriously impaired," which partially mitigated offenses).

AD 79-03857 (UD for three Art. 15s upgraded to GD; discharge too harsh; servicemember had emotional problems during service; record mitigated by good post-service record).

AD 79-03862 (UD for two Art. 15s and one SPCM upgraded to GD; psychiatric diagnosis of "immature personality" and a "character and behavior disorder").

AD 79-03934 (UD for four Art. 15s and 36 days lost time upgraded to GD because of seven years of prior honorable service and overall record).

AD 79-03961 (UD for one Art. 15, one SCM, and two SPCMs upgraded to GD; excellent service ratings during most of service).

AD 79-03990 (UD for four Art. 15s upgraded to HD; offenses were of a minor nature; UD too harsh in light of fact that there was no lost time; excellent efficiency ratings maintained during period of service).

AD 79-04006 (UD for two Art. 15s, SPCM, and two DOLOs upgraded to GD; diagnosis of "aggressive reaction personality disorder"; overall good record).

AD 79-04081 (UD upgraded to HD; "the GCM authority disapproved the Board of Officers' recommendation that the applicant be discharged for Habits and Traits. Therefore, the applicant was improperly discharged;" Board also noted "the diagnosis of a psychopathic personality with the use of marijuana and drugs").

AD 79-04089 (UD for five Art. 15s, one SCM, and one SPCM upgraded to GD; diagnosed personality disorder; acts of indiscipline were all minor; servicemember was immature).

AD 79-04092 (UD for five AWOLs involving 54 days total lost time upgraded to GD; lack of rehabilitative attempts; applicant was a candidate for the expeditious discharge program).

AD 79-04104 (UD for three SPCMs for AWOL upgraded to GD, despite Board determination that during two and one-half years the servicemember was either AWOL or in confinement because of "very strong psychiatric evaluation which concluded that the applicant had deep-seated and long-standing psychiatric problems").

AD 79-04105 (UD upgraded to HD; acts of indiscipline were of a minor nature; UD therefore too harsh).

AD 79-04137 (UD upgraded to GD based on overall record of service and unstable emotional condition which affected capability to serve).

AD 79-04150 (UD for one SPCM (major offense) upgraded to GD based on the impropriety of MSE that was conducted by a social worker and not signed by a medical doctor).

AD 79-04205 (UD upgraded to GD; MSE was not conducted at time of discharge; command erred in permitting the applicant to waive his discharge physical and MSE, substantially prejudicing his rights).

AD 79-04223 (UD for six Art. 15s and one SCM upgraded to GD; received rehabilitation and counseling, but "applicant apparently did not desire to react positively to the command's efforts"; required MSE not conducted, which was an impropriety sufficient to "mitigate indisciplines").

AD 79-04253 (UD for four SCMs, one Art. 15, and 46 days total lost time upgraded to GD; mitigating factors of psychiatric evaluation, failure to make substantive attempts at rehabilitation, minor nature of acts).

AD 79-04281 (UD for six Art. 15s upgraded to GD; one year and five months of acceptable service and attainment of the rank of E-3 mitigated minor acts of misconduct).

AD 79-04302 (UD for "episodes of suicide gestures" upgraded to GD based upon diagnosed grand-mal epilepsy as a medical problem affecting capacity to serve).

AD 79-04333 (UD upgraded to GD; after suspended sentence, there had been no attempt to rehabilitate; UD too harsh).

AD 79-04337 (UD for six Art. 15s, seven days lost, and numerous "unsuccessful" counseling sessions upgraded to GD based on overall record of service).

AD 79-04350 (UD for three Art. 15s upgraded to GD; Board noted that the servicemember had two years and three months of creditable service and that his immaturity mitigated his minor offenses).

AD 79-04354 (UD for two SPCMs (AWOL) and 190 days total lost time upgraded to GD; immaturity "affected his capability to serve"; alcohol abuse mitigated conduct).

AD 79-04362 (UD for three Art. 15s upgraded to GD; acts of indiscipline were minor; overall quality of current and prior service warranted partial relief).

AD 79-04386 (UD upgraded to GD based on overall good service; UD was too harsh).

AD 79-04437 (UD upgraded to GD; overall quality of service outweighed acts of indiscipline; mental category five; 17 years old; Combat Infantry Badge received; prior 36 months of service were without acts of indiscipline).

AD 79-04459 (UD for one Art. 15 (2 AWOLs); servicemember hospitalized 101 days prior to separation and diagnosed as suffering from a "constitutional psychotic state unqualified," which was a contributing factor to incapability to serve; "based on current policies," the service warranted an HD).

AD 79-04487 (UD for one SCM and two SPCMs; disciplinary actions were too harsh in light of the minor nature of acts of indiscipline; no lost time).

A 79-04491 (UD for assault upgraded to GD; assault "resulted in serious bodily injury" and 18 months of confinement; Board was "greatly influenced by the commander's letter indicating outstanding quality of service" prior to the incident).

AD 79-04506 (UD upgraded to GD; psychiatric diagnosis of "situational maladjustment; chronic, severe" and "obsession for the care of his children" were sufficiently mitigating).

AD 79-04547 (UD for one SPCM upgraded to GD; no other acts of indiscipline and UD was too harsh).

AD 79-04636 (UD for one Art. 15 and one SCM (both for AWOLs) upgraded to GD; overall good service record and no rehabilitative transfer).

AD 79-04650 (UD for two Art. 15s, one SCM, and one SPCM upgraded to GD; psychiatric evaluation of an "emotional instability reaction chronic-severe," which mitigate acts of indiscipline by affecting capability to serve.)

AD 79-04682 (UD for three AWOLs (64 days total lost time) and four Art. 15s for possession of marijuana and absence from place of duty upgraded to GD; MSE improper and prejudicial; UD also inequitable in light of impaired capacity to serve).

AD 79-04688 (UD for five Art. 15s upgraded to GD; UD too harsh for minor offenses; numerous counseling sessions, as a result of which command should have attempted rehabilitative transfer).

AD 79-04691 (UD for one SCM and one SPCM for several AWOLs involving 307 total lost days upgraded to GD; acts of indiscipline were partially mitigated by psychiatric diagnosis of "anti-social personality with severely deprived background, and a total inability to adapt to military service or any other social environment").

AD 79-04692 (UD for one Art. 15 and one SPCM upgraded to HD; psychiatric diagnosis of "character and behavior disorder" mitigated offenses).

AD 79-04836 (UD for five Art. 15s and 12-day AWOL upgraded to GD; applicant had a "multiple personality disorder" and was an "abuser of multiple drugs" which affected capability to serve).

AD 79-04872 (UD for interstate transportation of a stolen vehicle upgraded to GD; two prior HDs and one year and eight months of current creditable service).

AD 79-04934 (UD for one SPCM upgraded to GD based on overall quality of service).

AD 79-04961 (UD for three Art. 15s and 157 days total lost time upgraded to GD; extenuating circumstances regarding the civil court conviction existed; good overall record of service).

AD 79-05038 (UD for one SCM, one SPCM (for two AWOLs of 52 days), and a total of 100 days in confinement upgraded to GD; UD too harsh in light of overall record of service).

AD 79-05041 (UD for three Art. 15s and two SPCMs upgraded to GD based on overall satisfactory service record).

AD 79-05047 (UD upgraded to GD; "granting relief as an act of compassionate relief" because applicant was now legally blind; during his period of service, he had an "improper understanding" of how to bring his personal problems to the attention of military authorities).

AD 79-05055 (UD for three Art. 15s upgraded to GD based on overall record of service).

AD 79-05086A (UD for three CMs, one Art. 15, and 103 days lost time upgraded to GD; discharge inequitable because psychiatric evaluation diagnosed a severe personality disorder not amenable to treatment).

AD 79-05184 (UD for seven Art. 15s, one SCM, and 11 total lost days (spent in confinement), upgraded to GD; deprived background, low aptitude scores, and limited education mitigated minor offenses).

AD 79-05208 (UD for two SCMs, one SPCM, and one GCM upgraded to HD; all offenses were minor; "confined 617 days as a result of only 17 days AWOL and . . . discharged without characterization of service"; fourth grade education and mental category five; discharge was "too harsh when considering whole man concept").

AD 79-05214 (UD for one SPCM for a three-month AWOL upgraded to HD; diagnosed personality disorder and epilepsy).

AD 79-05237 (UD for one Art. 15 and one SPCM (160 days lost time due to AWOL) upgraded to GD; psychological problems caused by a change of duty assignment and an apparent drug problem; "board took into consideration testimony during his court-martial indicating the drastic change in his performance of duty after re-enlistment").

AD 79-05253 (UD for six AWOLs, two Art. 15s, one SCM, and three SPCMs upgraded to GD; mitigating factors of youth, limited education, marital problems, and a diagnosed "character and behavior disorder").

AD 79-05259 (UD for two SPCMs and four AWOLs upgraded to GD; medical records indicated the "trauma of having to institutionalize his mother" and a "relatively chaotic marital situation"; UD inequitable in light of "capabilities to serve").

AD 79-05332 (UD for one SCM and two SPCMs upgraded to GD; UD too harsh based on overall record of service; acts of misconduct were minor; prior HD for two years of service and two years served in current enlistment).

AD 79-05348 (UD for two SPCMs (AWOLs) upgraded to GD; severe family problems, deprived background, and limited education).

AD 79-0538 (UD for four Art. 15s and unsatisfactory conduct and efficiency ratings, upgraded to GD; record included no courts-martial, no lost time, and diagnosis of a psychological disorder).

AD 79-05425 (UD for six Art. 15s, one SCM, and one SPCM upgraded to GD; UD too harsh in light of overall service, limited education, low aptitude, and deprived family background).

AD 79-05554 (UD for one Art. 15 (missing bedcheck) and two SCMs (unauthorized use of vehicle), upgraded to HD; minor nature of the acts of indiscipline and good overall record).

AD 79-05627 (UD for two Art. 15s, two SCMs, two SPCMs, and 165 days total lost time upgraded to GD; UD too harsh in light of immaturity and overall good service record).

AD 79-05718 (UD for one Art. 15, one SCM, and one SPCM upgraded to GD; capability to serve impaired by emotional and alcohol problems; 20 months of prior good service).

AD 79-05719 (UD for three Art. 15s upgraded to GD; acts of indiscipline minor and UD therefore too harsh).

AD 79-05723 (UD for one SPCM upgraded to HD; SPCM was for wrecking a military vehicle; UD too harsh).

AD 79-05765 (UD for five Art. 15s, four SCMs, and 50 days total lost time upgraded to GD; "a significant Neuropsychiatric Evaluation" indicating an "anti-social personality"; deprived background; rehabilitative transfers and counseling sessions were "unsuccessful").

AD 79-05770 (UD for four Art. 15s (no lost time) upgraded to GD; three years of overall good service).

AD 79-05838 (UD for one long AWOL upgraded to GD because of an improper MSE (signed by doctor's assistant rather than by doctor), overall record, and good current service).

AD 79-05879 (UD for two long AWOLs upgraded to GD; outstanding post-service record; in-

service marital problems mitigated AWOLs; UD too harsh in light of minor nature of acts of indiscipline).

AD 79-05919 (UD for four Art. 15s upgraded to GD; overall excellent service for prior four and one-half years; UD too harsh).

AD 79-05958 (UD for one SCM and one SPCM upgraded to GD; immaturity, low education, and mental category five were mitigating factors; "the record indicates that he was considered suitable for service overseas," but Board found servicemember had a diminished capability to serve).

AD 79-05961 (UD for two Art. 15s and two SPCMs upgraded to GD; MSE indicated a "Passive Dependency Reaction" and characterized servicemember as "borderline mentally defective"; one year and three months of otherwise creditable service, but "limited capability to serve").

AD 79-05967 (UD upgraded to GD based upon improperly signed MSE).

AD 79-06143 (UD for two SPCMs involving two AWOLs (total lost time 37 days) upgraded to HD; no trouble with civilian authorities since discharge; 29 months of prior satisfactory service; in light of minor nature of acts of indiscipline, UD too harsh).

AD 79-06184 (UD for frequent involvement (after SPCM sentence to BCD for larcency) upgraded to GD; discharge improper and inequitable because command improperly ignored counseling requirements and used administrative process rather than completing the CM process; no MSE; insufficient incidents to be "frequent").

AD 79-06276 (UD for one Art. 15 and three SCMs upgraded to HD; mitigating factors of age (17), educational level, and low aptitude; acts of indiscipline were minor; no lost time or rehabilitative transfer).

AD 79-06498 (UD for five Art. 15s and two SCMs upgraded to GD; acts of indiscipline were minor; capability to serve impaired by a medical problem cited as a "conversion reaction"; commander and the psychiatrist recommended discharge for unsuitability).

AD 79-06502 (UD for one Art. 15, three SCMs, and one SPCM upgraded to GD; good conduct and efficiency ratings; UD too harsh).

AD 79-06506 (UD upgraded to HD; civil conviction expunged after discharge; good post-service conduct).

AD 79-06542 (UD for one court-martial and an AWOL, for which servicemember was confined, upgraded to GD; psychiatric evaluation found a "constitutional psychopathic inadequate personality"; chronic alcoholism; good post-service conduct; "capability to serve was limited").

AD 79-06627 (UD upgraded to GD; post-service conduct mitigated acts of indiscipline; no rehabilitative transfer; overall good service).

AD 79-06628 (UD for four Art. 15s upgraded to GD; acts of indiscipline minor and UD too harsh).

AD 79-06666 (UD for four Art. 15s upgraded to GD; psychiatric diagnosis found that servicemember had an "emotionally unstable personality," diminishing capability to serve; offenses were minor).

AD 79-06749 (UD for one Art. 15, one SCM, one SPCM, and 133 lost days upgraded to GD; mitigating factors of immaturity (age 17), low level of education, mental category four, and a series of medical problems).

AD 79-06832 (UD upgraded to GD; separation was improper, as the conviction and resulting confinement did not comply with the maximum punishment criteria which would have authorized a separation for civil conviction).

AD 79-06852 (UD upgraded to GD; prior 15 years with an excellent service record; excellent post-service record; UD too harsh for an isolated incident; applicant had "paid his debt to society").

AD 79-06877 (UD for one SPCM for a 21-day AWOL (118 days total lost time) upgraded to HD; age, immaturity, and marital problems sufficiently mitigating to explain lost time).

AD 79-06881 (UD for seven Art. 15s upgraded to GD; three MSE diagnoses of "inadequate personality").

AD 79-06893 (UD for three Art. 15s upgraded to GD; overall record good (excellent service ratings); UD too harsh).

AD 79-07688 (UD for civil conviction upgraded to HD; gravity of the offense was not such as to justify UD; good post-service record; retroactive application of current standards; notarized statement supporting servicemember's allegation that he was innocent of the civil offense given great weight).

AD 79-08054 (UD for 711 lost days upgraded to GD; psychiatric evaluation found a serious mental deficiency (mental age of seven year old)).

AD 79-08079 (UD for five AWOLs totalling 140 days upgraded to HD; low aptitude test scores; family problems; a psychiatric evaluation indicated that servicemember did not understand a hardship discharge; capability to serve was so severely reduced that full relief was appropriate).

AD 79-09067 (UD for two SCMs and 42 days lost time upgraded to GD; psychiatric exam found neurosis).

AD 79-09106 (UD for two SCMs, two SPCMs, and 127 days lost time in civil and military confinement upgraded because of servicemember's low educational level).

AD 79-09149 (UD for four Art. 15s and 15 lost days upgraded to GD; UD too harsh).

AD 79-09252 (UD for four Art. 15s upgraded to GD; offenses minor; conduct and efficiency ratings were "satisfactory"; overall quality of service supported upgrade)..

AD 79-09258 (UD for seven Art. 15s and two SPCMs upgraded to GD; mitigating factors of deprived background, low aptitude, and a psychiatric evaluation indicating a "very limited capability" to adapt to military life).

AD 79-09275 (UD for six Art. 15s and two SPCMs upgraded to HD; successful tour in Vietnam; evacuated for shrapnel wounds; received an Army Commendation Medal and a Purple Heart; no rehabilitative transfer; UD was too harsh).

AD 79-09369 (UD for one SPCM (for which servicemember was sentenced to six months and served 148 days) and for repeated venereal infections upgraded to GD; "in view of current policies separation was inequitable").

AD 79-09434 (UD for one SCM, two SPCMs, and 139 days lost time upgraded to HD; neuropsychiatric evaluation of a "constitutional psychopathic state (schizoid personality)" created limited capability to serve).

AD 79-09462 (UD for SPCM or assault resulting in 24-day confinement upgraded to HD; circumstances of the assault mitigated the seriousness of the offense; overall record of service was good).

AD 79-09605 (UD for two Art. 15s, two SCMs, and 72 lost days upgraded to GD; acts of indiscipline were "mostly minor"; servicemember would not have received the SCMs in view of current standards; overall service supported upgrade).

2. AIR FORCE

FD 78-00787 (UD upgraded to GD; mitigating factors of low mental category, lack of formal education, and immaturity).

FD 78-00973 (UD for civil conviction upgraded to GD; discharge improper because applicant was separated in October, 1958, but not convicted until March, 1959).

FD 78-01102 (UD upgraded to GD; marital and financial problems affected ability to perform and were responsible for "aberrant behavior"; "squadron commander's recommendation for a General Discharge was a significant factor"; overall record of 16 years 5 months of good military service).

FD 78-01291 (UD for one Art. 15 and three SCMs upgraded to GD; mitigating factors of limited aptitude, low level of education, and prior 24 years of effective service).

FD 78-01327 (UD upgraded to GD; "by committing offenses in order to be sentenced to hard labor, applicant revealed characteristics of defective attitude and an inability to expend effort constructively . . . such behavior demonstrated his unsuitability for military service . . . a General Discharge more appropriately reflected his record of service.").

FD 78-01392 (UD upgraded to GD; servicemember "displayed signs of defective attitude, apathy, and inability," but his AWOL and other minor offenses warranted a discharge for unsuitability rather than unfitness).

FD 78-01402 (UD upgraded to GD because of two prior HDs, three overseas tours, four and one-half years of "notable" recent service, and good post-service achievements).

FD 78-01467 (UD upgraded to HD; mitigating factors of immaturity, low aptitude scores, and substandard performance; "if current policy had prevailed at the time he most probably would have been identified and discharged as a marginal performer").

FD 78-01486 (UD for four SCMs and two Art. 15s upgraded to GD; acts of misconduct were not of sufficient severity to warrant a UD under current standards).

FD 78-01532 (UD upgraded to GD; while "the crime of stealing from a fellow airman is considered one of the most serious offenses," the one isolated offense and servicemember's youth were mitigating factors to be considered along with the overall military record).

FD 78-01688 (UD for three SCMs involving four AWOLs upgraded to GD; "defective attitude" and personality traits made him incapable of rendering good service despite the fact that he had been counseled many times).

FD 78-01834 (UD upgraded to GD; mitigating factors of "diagnosed personality disorder," overall military behavior and trait average marks, and meritorious WW II combat achievements).

FD 78-01994 (UD upgraded to GD; commander had recommended a GD and "overall service record" warranted it).

FD 79-00039 (UD upgraded to GD; misconduct was "relatively minor"; servicemember had marital problems, was "young, immature, weak, vulnerable, easily swayed by others and not too intelligent"; "prior to enlistment he displayed good citizenship which suggests that his conduct was probably an aberration").

FD 79-00113 (UD for four Art. 15s and one SPCM upgraded to GD; SM diagnosed as having a severe "personality disorder"; and misconduct mitigated "by heavier weighting on cause than is ordinarily accorded in character behavior disorders").

FD 79-00115 (UD for three Art. 15s and two SCMs upgraded to GD; misconduct minor in nature; deprived family background; "under current policies" the applicant would be separated "for frequent involvement and most likely issued a General Discharge").

FD 79-00331 (UD for a civil conviction for indecent exposure (for which servicemember was confined 234 days) upgraded to GD; deprived family background and sexual problems in the family; successfully completed a treatment program; two military legal reviews had recommended a GD; "sufficient mitigating circumstances to warrant recharacterization").

FD 79-00487 (UD for civil conviction upgraded to HD; "incident for which applicant was discharged was an isolated [and minor] one; applicant exhibited no pattern of similar or other serious misconduct during his service. In view of the overall quality of service rendered by applicant . . . , the Board considers the foregoing discharge recharacterization appropriate").

FD 79-00766 (UD upgraded to GD; "overall military service was sufficiently meritorious" to warrant partial relief).

FD 79-00779 (UD (drunk and disorderly) on record of one AWOL (two days lost), one Art. 15, and one SCM upgraded to GD; "overall military service [was] sufficiently meritorious to warrant upgrade," but HD was not warranted because of the "repeated nature of [the] offenses that indicated a deliberate attempt . . . to gain separation").

FD 79-00784 (UD for acts of minor misconduct upgraded to GD; mitigating factors of youth, immaturity, substandard education, and below average intelligence, resulting in difficulty with proper judgment).

FD 79-00823 (UD upgraded to GD; misconduct not serious and was mitigated by immaturity, low mental category, and lack of education).

FD 79-01267 (UD for several Art. 15s, three SCMs, and one SPCM upgraded to GD; acts of indiscipline were minor; good duty performance over four years).

3. NAVY/MARINE CORPS

MD 78-00360 (UD for four NJPs upgraded to GD; the "severity" of the offenses "do[es] not equate to those for which" UDs are "normally reserved").

MD 78-01381 (UD for four NJPs, one SCM, and one SPCM upgraded to GD; UD too harsh in view of acts of indiscipline).

MD 78-03762 (UD for five NJPs and one SPCM upgraded to GD; UD too harsh for offenses and lengthy prior creditable service).

MD 78-04036 (UD for one NJP, and two SPCMs upgraded to GD; "overall record" (Purple Heart and a Bronze Star in 13 years service)).

MD 78-04175 (UD for five NJPs, one civil conviction, and three days lost time upgraded to GD; UD too harsh based on good overall service record).

MD 78-04637 (UD for five NJPs upgraded to GD; two of the NJPs were related to physical prob-

lems and three were for minor offenses; acts of indiscipline were "not the flagrant, serious nature offenses for which an Undesirable Discharge is usually reserved").

MD 79-00115 (UD upgraded to GD; offenses were minor; under current standards the servicemember would be issued a GD for frequent involvement).

MD 79-00306 (UD for three NJPs, two SCMs, and one civil conviction upgraded to GD; diagnosed "personality disorder" diminished ability to serve).

MD 79-00473 (Board found offenses minor; Bronze Star for heroism in combat; UD too harsh).

MD 79-01478 (UD upgraded to GD; "diagnosed paranoid personality," "antisocial personality, chronic, severe"; overall record warranted upgrade).

MD 79-01690 (UD for dishonorable failure to pay debts upgraded to GD by reason of financial irresponsibility; offenses not of the flagrant nature current regulations require for a UD).

MD 79-01752 (UD for one civil conviction, one NJP, two SCMs, and one SPCM upgraded to GD; offenses were not "aggravated type" associated with UDs; servicemember's "overall record" considered).

MD 79-02240 (UD upgraded to GD; indiscipline was an "isolated incident mitigated by 31 years" of good "post-service conduct"; alcohol abuse led to the offense for which servicemember was discharged).

MD 79-02636 (UD for two SPCMs and one Art. 15 upgraded to GD; offenses mitigated by the "unique academic disciplinary environment of the Basic School where he was stationed" and overall record of service).

MD 79-0891 (UD for two deck courts, six NJPs, and one civil conviction upgraded to GD; "there is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available at the time of his discharge").

ND 78-01245 (UD (child molestation) upgraded to GD).

ND 78-01486 (UD for four SCMs and two NJPs upgraded to GD; offenses were not of sufficient severity to warrant a UD under current standards).

ND 78-01677 (UD for sleeping on watch and two AWOLs, totalling 24 hours over a period of four years and four months, upgraded to HD; offenses "did not constitute frequent involvement" and final average military behavior mark of 3.7 and final overall trait average of 3.5 warranted full relief).

ND 78-01834 (UD for repeated AWOLs upgraded to GD; "diagnosed personality disorder"; good overall record of service, marks of 3.9 and 3.85; meritorius WWII combat achievements).

ND 78-02380 (UD (drugs) upgraded to GD; "BUPERSMAN Article 3420180 provides that [UDs] . . . are directed only in the most flagrant type cases, such as civil conviction for offenses against minors and violent type cases"; Board stated "the civil conviction for possession of heroin is not of the flagrant type as stated in BUPERSMAN").

ND 78-02547 (UD for two NJPs, three SCMs, and 73 days total lost time upgraded to GD; applicant had a diagnosed "personality disorder" and overall behavior and trait marks of 3.1).

ND 78-02579 (UD for six NJPs upgraded to GD; minor offenses not of the "flagrant type" for which a UD is now reserved).

ND 79-00143 (UD for one SCM (theft) and one AWOL of four hours upgraded to GD; UD too harsh because "had applicant been placed on probation as directed by the convening authority, he, in all probability, could have completed his enlistment"; good behavior marks and an overall good trait average; indiscipline was "not considered to be of the degree of severity normally reserved" for a UD).

ND 79-00201 (UD upgraded to GD; indiscipline was not so flagrant "as to be of grave detriment to order and discipline and to the military effectiveness of the unit").

ND 79-00242 (UD upgraded to GD because of overall record of service and because offenses "lacked that degree of aggravation for which [UDs] . . . are reserved today").

ND 79-00368 (UD for one SPCM, one SCM, and one NJP upgraded to GD; "while an average behavior mark of 3.8 does not warrant . . . [HD], UD should be upgraded to [GD] . . . based on overall record of service").

ND 79-01126 (UD for several NJPs upgraded to GD; offenses lacked that degree of aggravation for which a UD is normally reserved).

ND 79-01298 (UD for one SCM and seven Art. 15s upgraded to GD; "frequent military involvement, including unauthorized absence, failure to obey lawful orders and striking a PO, did not consti-

tute offenses of a flagrant degree of severity normally reserved for [a UD]"; CO recommended GD).

ND 79-01399 (UD for one SPCM, one SCM, and four NJPs upgraded to GD; "overall record is more properly characterized as under honorable conditions").

ND 79-01544 (UD for one SCM and seven Art. 15s upgraded to GD; record of conduct of an "aggravated nature", four years of prior active service, two of which were in war, and average enlisted performance evaluation "is more equitably characterized as Under Honorable Conditions").

ND 79-01727 (UD for one SCM, two NJPs, and civil conviction upgraded to GD; "[t]he type of discharge should be changed because under current standards, the applicant would not have received an undesirable separation for a misdemeanor civil offense").

ND 79-01805 (UD for one SPCM, four NJPs, and an average military behavior mark of 3.25 for three years, three months service upgraded to GD; offenses "of insufficient aggravation").

ND 79-01875 (UD for AWOL, one SPCM, and civil offense involving moral turpitude upgraded to GD; applicant had been released to inactive duty with a GD; administrative action to discharge him with a UD was not effected until 19 months later, was based upon no additional matters, and was contrary to recommendation of ADB).

ND 79-01885 (UD for three SCMs and five NJPs, upgraded to GD based upon overall record of service; misconduct "lacked that degree of aggravation" for which UDs are reserved).

ND 79-02027 (UD for debts and one SPCM for 33-day AWOL upgraded to GD; indebtedness and generally good service "lacks that degree of aggravation" normally reserved for a UD).

ND 79-02249 (UD for several UAs, one SPCM, and four Art. 15s upgraded to GD; discharge "should be changed because the applicant's frequent [short AWOLs] . . . [do] not constitute offenses of flagrant and severity [sic] normally reserved for [UDs]").

ND 79-02310 (UD for one SPCM, one SCM, and numerous NJPs upgraded to GD; overall record and the minor nature of the offenses "lacked that degree of aggravation" for which a UD is now reserved).

ND 80-0002 (UD for four NJPs and one deck court-martial upgraded to GD; offenses "lack that degree of aggravation" for which UDs are reserved).

TABLE OF MAXIMUM PUNISHMENTS

SECTION A

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Months	Days	Forfeiture of two-thirds pay per month not to exceed— Months	Forfeiture of pay not to exceed— Days
77	Principals.[1]							
78	Accessory after the fact.[2]							
79	Conviction of lesser included offense. (See 158 and Art. 79.)							
80	Attempts.[3]							
81	Conspiracy.[4]							
82	Soliciting or advising another:							
	If the offense is not committed or attempted—							
	To desert	Yes		3				
	To mutiny	Yes		10				
	If the offense is not committed—							
	To commit an act of misbehavior before the enemy.	Yes		10				
	To commit an act of sedition	Yes		10				
83	Fraudulent enlistment:							
	Procured by means of false representation concerning, or failure fully to disclose, any detail of membership in, association with, or activities in connection with, any of the organizations, associations, movements, groups, or combinations listed in the enlistment documents processed and noted at the time of enlistment.	Yes		5				
	Other cases of	Yes		1				
	Fraudulent separation	Yes		5				

[1] Any person punishable under the code who aids, abets, counsels, commands, procures, or causes the commission of an offense punishable by the code shall, unless otherwise specifically prescribed, be subject to the maximum punishment authorized for the commission of the offense.

[2] Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for such offense, except that in no case shall the death penalty be imposed nor the confinement authorized exceed more than one-half of the maximum confinement authorized for such offense, nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 10 years.

[3] Unless otherwise provided in this table, any person subject to the code who is found guilty of an attempt to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be imposed nor the authorized period of confinement exceed 20 years.

[4] Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Months	Days	Forfeiture of two-thirds pay per month not to exceed— Months	Forfeiture of pay not to exceed— Days
84	Effecting an unlawful enlistment or appointment:							
	Of a person having membership in, association with, or activities in connection with, any prohibited organization, association, movement, group, or combination listed in enlistment or appointment documents.	Yes		5				
	Other cases of	Yes		1				
	Effecting an unlawful separation	Yes		5				
85	Desertion:							
	With intent to avoid hazardous duty or to shirk important service.	Yes		5				
	Other cases of—							
	Terminated by apprehension	Yes		3				
	Terminated otherwise	Yes		2				
	Attempted desertion:							
	With intent to avoid hazardous duty or to shirk important service.	Yes		5				
	Other cases of	Yes		1				
* 86	Absence without leave:							
	Failing to go to, or going from, the appointed place of duty.				1		1	
	From unit, organization, or other place of duty—							
	For not more than 60 days, for each day or fraction of a day of absence.					3		2
	For more than 60 days	Yes			6			
	From guard or watch				3		3	
	With intent to abandon		Yes		6			
	With intent to avoid maneuvers or field exercises.				6		6	
* 87	Missing movement of ship, aircraft, or unit:							
	Through design	Yes			6			
	Through neglect		Yes		3			
89	Behaving with disrespect toward his superior officer.		Yes		6			
90	Striking, drawing, or lifting up any weapon or offering any violence to his superior officer in the execution of his office.	Yes		10				
	Willfully disobeying a lawful order of his superior officer.	Yes		5				

*See E.O. 10565(1964) *infra*.

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
91	Striking or otherwise assaulting, while in the execution of his office, a:							
	Warrant officer	Yes		5				
	Noncommissioned or petty officer	Yes		1				
	Willfully disobeying the lawful order of a:							
	Warrant officer	Yes		2				
	Noncommissioned or petty officer		Yes		6			
	Treating with contempt or being disrespectful in language or deportment, while in the execution of his office, a:							
	Warrant officer		Yes		6			
	Noncommissioned or petty officer				3		3	
92	Violating or failing to obey any lawful general order or regulation.[1]	Yes		2				
	Knowingly failing to obey any other lawful order.[1]		Yes		6			
	Being derelict in the performance of duties.				3		3	
93	Cruelty toward or oppression or maltreatment of any person subject to his orders.	Yes		1				
94	Mutiny, sedition, failing to report, etc. (See Art. 94.)							
95	Resisting apprehension		Yes	1				
	Breaking arrest		Yes		6			
	Escaping from custody or confinement	Yes		1				
96	Releasing, without proper authority, a prisoner duly committed to his charge.	Yes		2				
	Suffering a prisoner duly committed to his charge to escape:							
	Through design	Yes		2				
	Through neglect		Yes	1				
97	Unlawful detention of another	Yes		3				
98	Unnecessary delay in disposing of a case, or failing to enforce or comply with procedural rules.		Yes		6			
99	Misbehavior before the enemy. (See Art. 99.)							
100	Subordinate compelling surrender. (See Art. 100.)							
101	Improper use of countersign. (See Art. 101.)							

[1] The punishment for this offense does not apply in those cases wherein the accused is found guilty of an offense which, although involving a failure to obey a lawful order, is specifically listed elsewhere in this table.

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
102	Knowingly forcing a safeguard. (See Art. 102.)							
103	Captured or abandoned property, failing to secure, give notice and turn over, selling, or otherwise wrongfully dealing in or disposing of:							
	Of a value of $20 or less		Yes		6			
	Of a value of $50 or less and more than $20.	Yes			1			
	Of a value of more than $50	Yes			5			
	Looting or pillaging. (Any punishment other than death.)							
104	Aiding the enemy. (See Art. 104.)							
105	Misconduct as a prisoner. (Any punishment other than death.)							
106	Spies. (See Art. 106.)							
107	Signing any false record, return, regulation, order, or other official document.	Yes			1			
	Making any other false official statement:							
	By a noncommissioned or petty officer.	Yes			1			
	By any other enlisted person				3		3	
108	Selling or otherwise disposing of military property of the United States:							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes			1			
	Of a value of more than $50	Yes			5			
	Through neglect damaging, destroying, or losing, or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property of the United States of a value or damage:							
	Of $20 or less				3		3	
	Of $50 or less and more than $20				6		6	
	Of more than $50	Yes			1			
	Willfully damaging, destroying, or losing, or willfully suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property of the United States of a value or damage:							
	Of $20 or less	Yes			6			
	Of $50 or less and more than $20	Yes			1			
	Of more than $50	Yes			5			

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Months	Days	Forfeiture of two-thirds pay per month not to exceed— Months	Forfeiture of pay not to exceed— Days
109	Wasting, spoiling, destroying, or damaging any property other than military property of the United States of a value or damage:							
	Of $20 or less	Yes			6			
	Of $50 or less and more than $20	Yes		1				
	Of more than $50	Yes		5				
110	Hazarding or suffering to be hazarded, negligently, any vessel of the armed forces.	Yes		2				
111	Operating any vehicle while drunk or in a reckless or wanton manner:							
	Resulting in personal injury	Yes		1				
	Otherwise		Yes		6			
112	Found drunk on duty		Yes		9			
113	Misbehavior of sentinel or lookout	Yes		1				
114	Dueling	Yes		1				
115	Feigning illness, physical disablement, mental lapse, or derangement.	Yes		1				
	Intentional self-inflicted injury	Yes		7				
116	Riot	Yes		10				
	Breach of the peace				6		6	
117	Provoking or reproachful words or gestures.				3		3	
118	Murder. (See Art. 118.)							
119	Manslaughter:							
	Voluntary	Yes		10				
	Involuntary	Yes		3				
120	Rape. (See Art. 120.)							
	Wrongful carnal knowledge of a female below the age of 16 years.	Yes		15				
121	Larceny of property:							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		5				
	Wrongful appropriation of property:							
	Of a value of $20 or less				3		3	
	Of a value of $50 or less and more than $20.				6		6	
	Of a value of more than $50		Yes		6			
	Of any motor vehicle	Yes		2				
122	Robbery	Yes		10				
** 123	Forgery	Yes		5				
124	Maiming	Yes		7				
125	Sodomy	Yes		5				

**See E.O. 11009(1962) *infra*.

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Months	Days	Forfeiture of two-thirds pay per month not to exceed— Months	Forfeiture of pay not to exceed— Days
126	Arson:							
	Aggravated	Yes		20				
	Simple, where the property is—							
	Of a value of $50 or less	Yes		1				
	Of a value of more than $50	Yes		10				
127	Extortion	Yes		3				
128	Assault				3		3	
	Assault (consummated by a battery)				6		6	
	Assault, aggravated:							
	With a dangerous weapon or other means or force likely to produce death or grievous bodily harm.	Yes		3				
	Intentionally inflicting grievous bodily harm, with or without a weapon.	Yes		5				
129	Burglary	Yes		10				
130	Housebreaking	Yes		5				
131	Perjury	Yes		5				
132	Forging or counterfeiting a signature, or making a false oath in connection with a claim, and offenses related to either of these.	Yes		5				
	Other cases:							
	When the amount involved is $20 or less.	Yes			6			
	When the amount involved is $50 or less and more than $20.	Yes		1				
	When the amount involved is more than $50.	Yes		5				
134	Abusing a public animal				3		3	
	Adultery	Yes		1				
	Assault:							
	Indecent	Yes		5				
	Upon a commissioned officer of the Air Force, Army, Coast Guard, Navy, or a friendly foreign power, not in the execution of his office.	Yes		3				
	Upon a warrant officer, not in the execution of his office.	Yes		1½				
	Upon a noncommissioned or petty officer, not in the execution of his office.		Yes		6			
	Upon any person who, in the execution of his office, is performing air police, military police, shore patrol, or civil law enforcement duties.	Yes		1				

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Months	Days	Forfeiture of two-thirds pay per month not to exceed— Months	Forfeiture of pay not to exceed— Days
134	Assault—Continued							
	With intent to commit voluntary manslaughter, robbery, sodomy, arson, burglary, or housebreaking.	Yes		10				
	With intent to commit murder or rape.	Yes		20				
	Assault (consummated by a battery) upon a child under the age of 16 years.	Yes		2				
**	Bigamy	Yes		2				
	Bribe or graft, accepting, asking, receiving, offering, or promising.	Yes		3				
	Check, worthless, making and uttering:							
	With intent to defraud (given in payment of a preexisting debt).	Yes			6			
	By failing to maintain sufficient funds.				4		4	
	Debt, just, failing to pay, under such circumstances as to bring discredit upon the military service.	Yes			6			
	Disloyal statements undermining discipline and loyalty, uttering.	Yes		3				
	Disorderly:							
	In command, quarters, station, camp, or on board ship.				1		1	
	Under such circumstances as to bring discredit upon the military service.				4		4	
	Drinking liquor with a prisoner				3		3	
	Drugs, habit forming, or marihuana, wrongful possession or use.	Yes		5				
	Drunk:							
	In command, quarters, station, or camp.				1		1	
	Prisoner found				3		3	
	Under such circumstances as to bring discredit upon the military service.				3		3	
	Incapacitating self to perform duties through prior indulgence in intoxicating liquor.				3		3	
	Drunk and disorderly:							
	Aboard ship		Yes		6			
	In command, quarters, station, or camp.				3		3	
	Under such circumstances as to bring discredit upon the military service.				6		6	

**Id.

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Months	Days	Forfeiture of two-thirds pay per month not to exceed— Months	Forfeiture of pay not to exceed— Days
134	False or unauthorized military or official pass, permit, or discharge certificate, making, using, altering, possessing, selling, or otherwise disposing of.	Yes		3				
	False swearing	Yes		3				
	Firearm, discharging:							
	Through carelessness				3		3	
	Wrongfully and willfully, under such circumstances as to endanger life.	Yes		1				
	Fleeing from the scene of an accident		Yes		6			
	Gambling by a noncommissioned or petty officer with a person of lower military grade.						3	
	Homicide, negligent		Yes	1				
	Impersonating an officer, warrant officer, noncommissioned or petty officer, or agent of superior authority:							
	With intent to defraud	Yes		3				
	All other cases		Yes		6			
	Indecent act or liberties with a child under the age of 16 years.	Yes		7				
	Indecent exposure of person				6		6	
	Indecent, insulting, or obscene language, communicating to a female.	Yes		1				
	Indecent or lewd acts with another	Yes		5				
	Loaning money, either as principal or agent, at a usurious or unconscionable rate of interest to another in the military service.						3	
	Mail matter in the custody of the Post Office Department or in the custody of any other agency, or not yet delivered or received: taking, opening, abstracting, secreting, destroying, stealing, or obstructing.	Yes		5				
	Mails, depositing or causing to be deposited obscene or indecent matter in.	Yes		5				
	Misprision of a felony	Yes		3				
	Nuisance, committing				3		3	
	Pandering	Yes		5				
	Parole, violation of		Yes		6			
	Perjury, statutory	Yes		5				
	Perjury, subornation of	Yes		5				
	Prisoner, allowing to do an unauthorized act.				3		3	

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
134	Public record, willfully and unlawfully altering, concealing, destroying, mutilating, obliterating, removing, or taking and carrying away with intent to alter, conceal, destroy, mutilate, obliterate, remove, or steal.	Yes		3				
	Quarantine, medical, breaking				6		6	
	Refusing, wrongfully, to testify before a court-martial, military commission, court of inquiry, or board of officers.	Yes		5				
	Restriction, administrative or punitive, breaking.				1		1	
	Sentinel or lookout:							
	Offenses against, while in the execution of his duty—							
	Behaving in an insubordinate or disrespectful manner toward.				3		3	
	Striking or otherwise assaulting	Yes		1				
	Offenses by—							
	Loitering or sitting down on duty				3		3	
	Stolen property, knowingly receiving:							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		3				
	Straggling				3		3	
	Threat, communicating	Yes		3				
	Unclean accouterment, arms, clothing, equipment, or other military property, found with.				1		1	
	Uniform, unclean, appearing in, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed.				1		1	
	Unlawful entry		Yes		6			
	Weapon, concealed, carrying				3		3	
	Wearing unauthorized insignia, medal, decoration, or badge.				6		6	

SECTION B

Permissible additional punishments.—If an accused is found guilty of an offense or offenses for none of which dishonorable or bad conduct discharge is authorized, proof of two or more previous convictions will authorize bad conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months. In such a case no forfeiture shall be imposed for any period in excess of the period of confinement so adjudged. See 75*b* (2) as to limitations concerning evidence of previous convictions which may be considered; see also 126*c* (1) concerning the limitations on the power of special courts-martial to adjudge confinement and forfeitures.

If an accused is found guilty of two or more offenses for none of which dishonorable or bad conduct discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more will, in addition, authorize bad conduct discharge and forfeiture of all pay and allowances. But see 126*c* (1).

A fine may be adjudged against any enlisted person, in lieu of forfeitures, provided a punitive discharge is also adjudged. A fine should not ordinarily be adjudged against a member of the armed forces unless the accused was unjustly enriched by means of an offense of which he is convicted. However, a fine may always be imposed upon any member of the armed forces as punishment for contempt (Art. 48).

If an enlisted person of other than the lowest enlisted grade is convicted by a court-martial the court may, in its discretion, adjudge reduction to an inferior grade (but see 126*c* (2) concerning the limitations on summary courts-martial) in addition to the punishments otherwise authorized. Reprimand or admonition may be adjudged in any case.

EXECUTIVE ORDER 10565

AMENDMENT OF PARAGRAPHS 76*a* AND 127*c* OF THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951

By virtue of the authority vested in me by Articles 36 and 56 of the Uniform Code of Military Justice (established by the act of May 5, 1950, 64 Stat. 107), and as President of the United States, it is ordered that the Manual for Courts-Martial, United States, 1951 (prescribed by Executive Order No. 10214[1] of February 8, 1951), be, and it is hereby, amended as follows:

2. The offenses and punishments listed in the Table of Maximum Punishments, contained in paragraph 127*c*, for violations of Articles 86 and 87 of the Uniform Code of Military Justice are revised so that they shall be as follows:

Offenses	*Punishments*
Absence without leave:	
1. Failing to go to, or going from, the appointed place of duty.	Confinement at hard labor not to exceed one month, and forfeiture of two-thirds pay per month not to exceed one month.
2. From unit, organization, or other place of duty:	
(a) For not more than 3 days of absence.	Confinement at hard labor not to exceed one month, and forfeiture of two-thirds pay per month not to exceed one month.
(b) For more than 3 days but not more than 30 days of absence.	Confinement at hard labor not to exceed six months, and forfeiture of two-thirds pay per month not to exceed six months.
(c) For more than 30 days of absence	Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor not to exceed one year.
3. From guard or watch	Confinement at hard labor not to exceed three months, and forfeiture of two-thirds pay per month not to exceed three months.
With intent to abandon	Bad conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor not to exceed six months.
4. With intent to avoid maneuvers or field exercises.	Confinement at hard labor not to exceed six months, and forfeiture of two-thirds pay per month not to exceed six months.
Missing movement of a ship, aircraft or unit:	
1. Through design	Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor not to exceed one year.
2. Through neglect	Bad conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor not to exceed six months.

3. Section B, *Permissible Additional Punishments*, of paragraph 127*c* is amended by adding thereto at the beginning thereof the following language:

"If an accused is found guilty of an offense or offenses for none of which dishonorable discharge is authorized, proof of three or more previous convictions during the year next preceding the commission of any offense of which the accused stands convicted will authorize dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than one year, confinement at hard labor for one year. In computing the one-year period preceding the commission of any offense, periods of unauthorized absence as shown by the findings in the case or by the evidence of previous convictions should be excluded. See 75*b* (2) as to further limitations concerning evidence of previous convictions which may be considered."

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
September 28, 1954.

[1] 19 F. R. 855; 26 CFR (1939) 458.321.
[2] 3 CFR, 1951 Supp., p. 90.

Executive Order 11009

AMENDING THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, TO IMPLEMENT SECTION 923a OF TITLE 10, UNITED STATES CODE, RELATING TO PROSECUTION OF BAD CHECK OFFENSES

By virtue of the authority vested in me by the Uniform Code of Military Justice (established by the Act of May 5, 1950, 64 Stat. 107) and as President of the United States, it is ordered that the Manual for Courts-Martial, United States, 1951 (prescribed by Executive Order No. 10214 of February 8, 1951), be, and it is hereby, amended as follows:

1. The offenses and punishments listed in the Table of Maximum Punishments, contained in paragraph 127*c*, are amended as follows:

(a) By inserting the following new item:

"Article	Offenses	Punishments
123a	Check, worthless, making, drawing, uttering, delivering, with intent to defraud (for the procurement of an article or thing of value), in the face amount of:	
	(a) $50 or less;	Bad conduct discharge, forfeiture of all pay and allowances and confinement at hard labor not to exceed one year.
	(b) $100 or less and more than $50;	Bad conduct discharge, forfeiture of all pay and allowances and confinement at hard labor not to exceed five years.
	(c) more than $100.	Dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor not to exceed six months."
123a	Check, worthless, making, drawing, uttering, delivering, with intent to deceive (for payment of past due obligation or any other purpose).	

(b) By striking out the following item under article 134:

"• • • • • • • •

"With intent to deceive (given in payment of a preexisting debt).

"• • • • • • • •"

and the punishments listed therefor.

TABLE OF MAXIMUM PUNISHMENTS
SECTION A

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Confinement at hard labor not to exceed— Months	Forfeiture of two thirds pay per month not to exceed— Months
77	Principals.[1]					
78	Accessory after the fact.[2]					
79	Conviction of lesser included offense. (See 158 and Art. 79.)					

[1] Any person punishable under the code who aids, abets, counsels, commands, procures, or causes the commission of an offense punishable by the code shall, unless otherwise specifically prescribed, be subject to the maximum punishment authorized for the commission of the offense.

[2] Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for the offense to which he is an accessory, except that in no case shall the death penalty be imposed nor the confinement authorized exceed more than one-half of the maximum confinement authorized for that offense, nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 10 years.

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Confinement at hard labor not to exceed— Months	Forfeiture of two-thirds pay per month not to exceed— Months
80	Attempts.[3]					
81	Conspiracy.[4]					
82	Soliciting or advising another:					
	If the offense is not committed or attempted—					
	To desert	Yes		3		
	To mutiny	Yes		10		
	If the offense is not committed—					
	To commit an act of misbehavior before the enemy.	Yes		10		
	To commit an act of sedition	Yes		10		
83	Fraudulent enlistment:					
	Procured by means of false representation concerning, or failure fully to disclose, any detail of membership in, association with, or activities in connection with, any of the organizations, associations, movements, groups, or combinations listed in the enlistment documents processed and noted at the time of enlistment.	Yes		5		
	Other cases of	Yes		1		
	Fraudulent separation	Yes		5		
84	Effecting an unlawful enlistment or appointment:					
	Of a person having membership in, association with, or activities in connection with, any prohibited organization, association, movement, group, or combination listed in enlistment or appointment documents.	Yes		5		
	Other cases of	Yes		1		
	Effecting an unlawful separation	Yes		5		
85	Desertion:					
	With intent to avoid hazardous duty or to shirk important service.	Yes		5		
	Other cases of—					
	Terminated by apprehension	Yes		3		
	Terminated otherwise	Yes		2		
	Attempted desertion:					
	With intent to avoid hazardous duty or to shirk important service.	Yes		5		
	Other cases of	Yes		1		
86	Absence without leave:					
	Failing to go to, or going from, the appointed place of duty.				1	1
	From unit, organization, or other place of duty—					
	For not more than 3 days				1	1
	For more than 3 days but not more than 30 days				6	6
	For more than 30 days	Yes		1		
	From guard or watch				3	3
	With intent to abandon		Yes		6	
	With intent to avoid maneuvers or field exercises				6	6
87	Missing movement of ship, aircraft, or unit:					
	Through design	Yes		1		
	Through neglect		Yes		6	
89	Behaving with disrespect toward his superior commissioned officer.		Yes		6	

[3] Unless otherwise provided in this table, any person subject to the code who is found guilty of an attempt to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be imposed nor the authorized period of confinement exceed 20 years.

[4] Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
90	Striking, drawing, or lifting up any weapon or offering any violence to his superior commissioned officer in the execution of his office.	Yes		10		
	Willfully disobeying a lawful order of his superior commissioned officer.	Yes		5		
91	Striking or otherwise assaulting, while in the execution of his office, a:					
	Warrant officer	Yes		5		
	Noncommissioned or petty officer	Yes		1		
	Willfully disobeying the lawful order of a:					
	Warrant officer	Yes		2		
	Noncommissioned or petty officer		Yes		6	
	Treating with contempt or being disrespectful in language or deportment, while in the execution of his office, a:					
	Warrant officer		Yes		6	
	Noncommissioned or petty officer				3	3
92	Violating or failing to obey any lawful general order or regulation.[1]	Yes		2		
	Knowingly failing to obey any other lawful order[1]		Yes		6	
	Being derelict in the performance of duties				3	3
93	Cruelty toward or oppression or maltreatment of any person subject to his orders.	Yes		1		
94	Mutiny, sedition, failing to report, etc. (See Art. 94.)					
95	Resisting apprehension		Yes	1		
	Breaking arrest		Yes		6	
	Escaping from custody or confinement	Yes		1		
96	Releasing, without proper authority, a prisoner duly committed to his charge.	Yes		2		
	Suffering a prisoner duly committed to his charge to escape:					
	Through design	Yes		2		
	Through neglect		Yes	1		
97	Unlawful detention of another	Yes		3		
98	Unnecessary delay in disposing of a case, or failing to enforce or comply with procedural rules.		Yes		6	
99	Misbehavior before the enemy. (See Art. 99.)					
100	Subordinate compelling surrender. (See Art. 100.)					
101	Improper use of countersign. (See Art. 101.)					
102	Knowingly forcing a safeguard. (See Art. 102.)					
103	Captured or abandoned property, failing to secure, give notice and turn over, selling, or otherwise wrongfully dealing in or disposing of:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100	Yes		5		
	Looting or pillaging. (Any punishment other than death.)					
104	Aiding the enemy. (See Art. 104.)					
105	Misconduct as a prisoner. (Any punishment other than death.)					

[1] This punishment does not apply in the following cases:
(1) If in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed in this table.
(2) If the violation or failure to obey is a breach of restraint imposed as a result of an order.

In these instances, the maximum punishment is that specifically prescribed elsewhere in this table for the offense.

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
106	Spies. (See Art. 106.)					
107	Signing any false record, return, regulation, order, or other official document.	Yes		1		
	Making any other false official statement:					
	By a noncommissioned or petty officer	Yes		1		
	By any other enlisted member				3	3
108	Selling or otherwise disposing of military property of the United States:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100	Yes		5		
	Through neglect damaging, destroying, or losing, or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property of the United States of a value or damage:					
	Of $50 or less				3	3
	Of $100 or less and more than $50				6	6
	Of more than $100		Yes	1		
	Willfully damaging, destroying, or losing, or willfully suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property of the United States of a value or damage:					
	Of $50 or less		Yes		6	
	Of $100 or less and more than $50		Yes	1		
	Of more than $100	Yes		5		
109	Wasting, spoiling, destroying, or damaging any property other than military property of the United States of a value or damage:					
	Of $50 or less		Yes		6	
	Of $100 or less and more than $50		Yes	1		
	Of more than $100	Yes		5		
110	Hazarding or suffering to be hazarded any vessel of the armed forces:					
	Willfully and wrongfully (See Art. 110(a)).					
	Negligently	Yes		2		
111	Operating any vehicle while drunk or in a reckless or wanton manner:					
	Resulting in personal injury	Yes		1		
	Otherwise		Yes		6	
112	Found drunk on duty		Yes		9	
113	Misbehavior of sentinel or lookout:					
	In areas designated as authorizing entitlement to special pay for duty subject to hostile fire.	Yes		10		
	In all other places	Yes		1		
114	Dueling	Yes		1		
115	Feigning illness, physical disablement, mental lapse, or derangement.	Yes		1		
	Intentional self-inflicted injury	Yes		7		
116	Riot	Yes		10		
	Breach of the peace				6	6
117	Provoking or reproachful words or gestures				3	3
118	Murder. (See Art. 118.)					
119	Manslaughter:					
	Voluntary	Yes		10		
	Involuntary	Yes		3		
120	Rape. (See Art. 120.)					
	Wrongful carnal knowledge of a female under the age of 16 years.	Yes		15		

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Confinement at hard labor not to exceed— Months	Forfeiture of two-thirds pay per month not to exceed— Months
121	Larceny of property:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100 or any motor vehicle, aircraft, or vessel	Yes		5		
	Wrongful appropriation of property:					
	Of a value of $50 or less				3	3
	Of a value of $100 or less and more than $50				6	6
	Of a value of more than $100		Yes		6	
	Of any motor vehicle, aircraft, or vessel	Yes		2		
122	Robbery	Yes		10		
123	Forgery	Yes		5		
123a	Check, worthless, making, drawing, uttering, delivering, with intent to defraud (for procurement of an article or thing of value), in the face amount of:					
	$50 or less		Yes		6	
	$100 or less and more than $50		Yes	1		
	More than $100	Yes		5		
	Check, worthless, making, drawing, uttering, delivering, with intent to deceive (for payment of past due obligation or any other purpose).		Yes		6	
124	Maiming	Yes		7		
125	Sodomy:					
	By force and without consent	Yes		10		
	With a child under the age of 16 years	Yes		20		
	Other cases of	Yes		5		
126	Arson:					
	Aggravated	Yes		20		
	Simple, where the property is—					
	Of a value of $100 or less	Yes		1		
	Of a value of more than $100	Yes		10		
127	Extortion	Yes		3		
128	Assault				3	3
	Upon a commissioned officer of the Air Force, Army, Coast Guard, Navy, or a friendly foreign power, not in the execution of his office.	Yes		3		
	Upon a warrant officer, not in the execution of his office.	Yes		1½		
	Upon a noncommissioned or petty officer, not in the execution of his office.		Yes		6	
	Upon any person who, in the execution of his office, is performing Air Force security police, military police, shore patrol, or civil law enforcement duties.	Yes		1		
	Upon a sentinel or lookout while in execution of his duty.	Yes		1		
	Assault (consummated by a battery):					
	On a child under the age of 16 years	Yes		2		
	Other cases of				6	6
	Assault, aggravated:					
	With a dangerous weapon or other means or force likely to produce death or grievous bodily harm.	Yes		3		
	Intentionally inflicting grievous bodily harm, with or without a weapon.	Yes		5		
129	Burglary	Yes		10		
130	Housebreaking	Yes		5		
131	Perjury	Yes		5		

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments: Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed— Years	Confinement at hard labor not to exceed— Months	Forfeiture of two-thirds pay per month not to exceed— Months
132	Frauds against the United States:					
	In connection with making or presenting a claim or obtaining the approval, allowance, or payment of a claim (Art. 132(1) and (2)).	Yes		5		
	By delivering an amount less than called for by a receipt or by making or delivering a receipt without knowledge of the facts (Art. 132(3) and (4))—					
	When the amount involved is $50 or less		Yes		6	
	When the amount involved is $100 or less and more than $50.		Yes	1		
	When the amount involved is more than $100.	Yes		5		
134	Abusing a public animal				3	3
	Adultery	Yes		1		
	Assault:					
	Indecent	Yes		5		
	With intent to commit voluntary manslaughter, robbery, sodomy, arson or burglary.	Yes		10		
	With intent to commit housebreaking	Yes		5		
	With intent to commit murder or rape	Yes		20		
	Bigamy	Yes		2		
	Bribe or graft, accepting, asking, receiving, offering, or promising.	Yes		3		
	Burning with intent to defraud	Yes		10		
	Check, worthless, making and uttering (by dishonorably failing to maintain sufficient funds).		Yes		6	
	Correctional custody:					
	Escape from	Yes		1		
	Breach of restraint during		Yes		6	
	Criminal libel	Yes		5		
134	Debt, dishonorably failing to pay		Yes		6	
	Disloyal statements undermining discipline and loyalty, uttering.	Yes		3		
	Disorderly:					
	In command, quarters, station, camp, or on board ship.				1	1
	Under such circumstances as to bring discredit upon the military service.				4	4
	Drinking liquor with a prisoner				3	3
	Drugs, habit forming, wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft.	Yes		10		
	Drugs, marihuana, wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft.	Yes		5		
	Drunk:					
	Aboard ship				3	3
	In command, quarters, station, or camp				1	1
	Prisoner found				3	3
	Under such circumstances as to bring discredit upon the military service.				3	3
	Incapacitating self to perform duties through prior indulgence in intoxicating liquor.				3	3
	Drunk and disorderly:					
	Aboard ship		Yes		6	
	In command, quarters, station, or camp				3	3
	Under such circumstances as to bring discredit upon the military service.				6	6

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
134	False or unauthorized military pass, permit, discharge certificate, or identification card:					
	Making, altering, selling	Yes			3	
	Possessing or using with intent to defraud or deceive.	Yes			3	
	Other cases		Yes		6	
	False pretenses, obtaining services under:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100	Yes		5		
	False swearing	Yes			3	
	Firearm, discharging:					
	Through carelessness				3	3
	Wrongfully and willfully, under circumstances as to endanger life.	Yes		1		
	Fleeing from the scene of an accident		Yes		6	
	Gambling by a noncommissioned or petty officer, with a person of lower military grade.					3
	Homicide, negligent		Yes	1		
	Impersonating an officer, warrant officer, noncommissioned or petty officer, or agent of superior authority:					
	With intent to defraud	Yes			3	
	All other cases		Yes		6	
	Indecent acts or liberties with a child under the age of 16 years.	Yes		7		
	Indecent exposure of person				6	6
	Indecent, insulting, or obscene language:					
	Communicated to a female of the age of 16 years or over.	Yes			1	
	Communicated to any child under the age of 16 years.[6]	Yes			2	
134	Indecent or lewd acts with another	Yes			5	
	Mail matter in the custody of the Post Office Department or in the custody of any other agency, or not yet delivered or received; taking, opening, abstracting, secreting, destroying, stealing, or obstructing.	Yes			5	
	Mails, depositing or causing to be deposited obscene or indecent matter in.	Yes			5	
	Misprision of a felony	Yes			3	
	Nuisance, committing				3	3
	Obstructing justice	Yes			5	
	Pandering	Yes			5	
	Parole, violation of		Yes		6	
	Perjury, statutory	Yes			5	
	Perjury, subornation of	Yes			5	
	Prisoner, allowing to do an unauthorized act				3	3
	Public record, willfully and unlawfully altering, concealing, destroying, mutilating, obliterating, removing, or taking and carrying away with intent to alter, conceal, destroy, mutilate, obliterate, remove, or steal.	Yes			3	
	Quarantine, medical, breaking				6	6
	Refusing, wrongfully, to testify before a court martial, military commission, court of inquiry, board of officers, investigation under Article 32, or officer taking deposition.	Yes			5	

[6] See indecent acts or liberties with a child when the offense is so charged as a result of an indecent, insulting, or obscene communication in the physical presence of a child.

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
134	Restriction, administrative or punitive, breaking				1	1
	Sentinel or lookout:					
	Behaving in an insubordinate or disrespectful manner toward, while in the execution of his duty.				3	3
	Loitering or sitting down by, while on duty				3	3
	Soliciting another to commit an offense.[7]					
	Stolen property knowingly receiving, buying, concealing:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100	Yes		3		
	Straggling				3	3
	Threat, communicating	Yes		3		
	Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce.	Yes		5		
	Unclean accouterment, arms, clothing, equipment, or other military property, found with.				1	1
	Uniform, unclean, appearing in, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed.				1	1
	Unlawful entry		Yes		6	
	Weapon, concealed, carrying		Yes	1		
	Wearing unauthorized insignia, medal, decoration, or badge.				6	6
	Wrongful cohabitation				4	4

[7] Unless otherwise provided in the Table, any person subject to the Code who is found guilty of soliciting or inducing another person to commit an offense which, if committed by one subject to the Code, would be punishable under this Table, shall be subject to the maximum punishment authorized for the offense solicited or induced, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years.

SECTION B

Permissible additional punishments. If an accused is found guilty of an offense or offenses for none of which dishonorable discharge is authorized, proof of three or more previous convictions adjudged by a court during the year next preceding the commission of any offense of which the accused stands convicted will authorize dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than one year, confinement at hard labor for one year. In computing the one-year period preceding the commission of any offense, periods of unauthorized absence as shown by the findings in the case or by the evidence of previous convictions should be excluded. See 75*b*(2) as to further limitations on consideration of previous convictions.

If an accused is found guilty of an offense or offenses for none of which dishonorable or bad-conduct discharge is authorized, proof of two or more previous convictions adjudged by a court during the three years next preceding the commission of any offense of which the accused stands convicted will authorize bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months. See 15*b* concerning the limitations on the power of special courts-martial to adjudge a bad-conduct discharge and forfeitures and 75*b*(2) for limitations on consideration of previous convictions.

APPENDIX 17C
CHRONOLOGICAL DEVELOPMENT OF CURRENT STANDARDS FOR UNFITNESS/MISCONDUCT DISCHARGES

1. ARMY

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	GENERALLY:	
Pre-1959	UD is mandatory for unfitness or misconduct discharges.	§ 17.2
1959	Mandatory UD is dropped; UD is presumed for unfitness or misconduct discharges. GD or HD is authorized, if warranted by the SM's record.	§ 17.2
1970	Criteria for issuance of unfitness or misconduct discharge are clarified: A] Drug abuse, use, or possession of a small amount of marijuana may be dealt with through the use of an Art. 15, as compared to discharge.	Ch. 15
1971	Criteria for issuance of unfitness or misconduct discharge are clarified: A] Drug abuse: UD is prohibited for drug abuse discovered through urinalysis or voluntary disclosure to enter rehabilitation. GD or HD must be issued.	Ch. 15
1974	Special programs for trainees and SMs with less than 36 months active duty who demonstrate an inability to adjust to military life are initiated.	§ 16.15
1975	Criteria for issuance of unfitness or misconduct discharges are clarified: A] Drug abuse: HD required for drug abuse discovered through urinalysis or voluntary disclosure in order to enter rehabilitation.	Ch. 15
1976	Unfitness is dropped as reason for discharge; types of conduct regarded as bases for unfitness discharges are consolidated under misconduct as a reason for discharge.	§ 17.2
1978	Criteria for issuance of misconduct discharges are clarified: Civil convictions, for offenses for which the maximum punishment is death or confinement for one year or more.	§ 17.6
	Discharge decision requires finding that it is clearly established that the SM is unlikely, notwithstanding rehabilitation, to succeed as a satisfactory soldier.	§ 17.3
1980	Court decision requires discharge to be based only on conduct that has a direct effect on the performance of the SM's military duties.	§ 12.4
1981	Homosexuality as a basis for discharge is removed from the misconduct category.	Ch. 14
	FREQUENT INVOLVEMENT:	
Pre-1978	Discharge is authorized for unfitness or misconduct by reason of frequent involvement of a discreditable nature with civil and/or military authorities.	§ 17.2
1978	Frequent involvement must be demonstrated by an established pattern of misconduct, as compared to incidents that are dissimilar in character or basis, or that are remote in time.	Ch. 17

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
1979	Rehabilitative transfer, as compared to discharge, should occur for misconduct that occurs very closely in time; in addition, transfer is more appropriate than discharge when personality conflicts may underlie the misconduct.	Ch. 17
	SHIRKING:	
	Discharge is authorized for misconduct by reason of an established pattern for shirking. An established pattern is to be distinguished from incidents isolated in time or dissimilar in character; the misconduct must be volitional, *i.e.*, not beyond the SM's ability to control. For non-volitional conduct, discharge for unsuitability by reason of a character and behavior disorder, apathy, or inaptitude (GD/HD) is authorized.	§ 17.5
	CIVIL COURT CONVICTIONS:	
1959	Discharge for unfitness or misconduct is authorized for SMs found guilty in civil courts for offenses: A] For which the maximum punishment is death or confinement in excess of one year. B] Which involve moral turpitude, to include: i) narcotics violations; ii) sexual perversion, defined as lewd and lascivious acts, homosexual acts, sodomy, indecent exposure, indecent acts or assault on a child, other indecent acts; iii) for which the SM is adjudicated a juvenile offender and which involve moral turpitude.	
	SMs convicted of offenses for which the maximum punishment is one year or less, or which do not involve moral turpitude normally are retained.	§ 17.6
1974	Special discharge programs are initiated for trainees (TDP), and SMs who have less than 36 months AD (EDP), and who demonstrate an inability to adjust to military life.	§ 16.15
1978	Definition of civil convictions is clarified to include offenses: A] For which the maximum punishment is death or confinement for one year or more. B] Which involve moral turpitude. C] For which the SM is adjudicated a juvenile offender *and* which involve moral turpitude.	
	SMs convicted of offenses for which the maximum punishment is not death, or is confinement for less than one year, or which do not involve moral turpitude normally are retained. If discharged for such convictions, GDs or HDs are to be issued.	§ 17.6
	Discharge proceeding may be initiated regardless of the appellate status of the convictions. Execution of a discharge decision, however, normally will be withheld until all appellate rights have been exhausted.	
	BAD DEBTS:	
	Discharge for misconduct is authorized for SMs who engage in an established pattern of dishonorable failure to pay just debts or to provide adequate support to dependents. An established pattern is not shown by incidents isolated in time or dissimilar in character. In addition, mere financial irresponsibility, a specific reason for discharge for unsuitability (GD/HD), does not constitute a basis for a misconduct discharge.	§ 17.7

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	ALCOHOL OR DRUG ABUSE:	
Pre-1971	Discharge is authorized for unfitness or misconduct for alcohol or drug abuse, to include addiction, use, possession, sale, transfer, or introduction onto a military facility.	§ 17.10; Chs. 14, 15
1970	Criteria for discharge by reason of drug abuse are clarified: Misconduct involving use or possession of a small amount of marijuana may be dealt with through the use of an Art. 15, as compared to discharge.	
1971	Criteria for discharge by reason of drug abuse are clarified: UD is prohibited if SM's drug abuse is discovered through urinalysis or voluntary disclosure in order to enter rehabilitation. GD or HD must be issued.	
1975	Criteria for discharge by reason of drug abuse are clarified: HD is required if drug abuse is discovered through urinalysis or voluntary disclosure in order to enter rehabilitation.	Ch. 15
1978	Criteria for discharge by reason of alcohol or drug abuse are clarified: UD is authorized for the sale, possession for other than personal use, transfer, manufacture, or introduction into a military facility of alcohol, controlled substances, or drugs. In addition, UD is authorized for possession for personal use of alcohol, controlled substances, or drugs if the SM already has been granted an exemption to participate in counseling or rehabilitation.	
	SEXUAL PERVERSION OR HOMOSEXUALITY:	
	Discharge is authorized for misconduct for SMs who engage in, or attempt perverse sexual or homosexual acts regardless of whether force or coercion is involved. Sexual perversion includes: A] Lewd and lascivious acts. B] Sodomy. C] Indecent exposure. D] Indecent acts or assault upon a child. E] Other. Discharge processing is mandatory.	Ch. 14
1981	Homosexuality as reason for discharge is removed from misconduct category; option to issue UD is narrowed to certain aggravating circumstances	Ch. 14
	FRAUDULENT ENLISTMENT:	
Pre-1978	Discharge is authorized for misconduct for SMs who fraudulently enlist by means of deliberate material misrepresentations of matters that, if known, might have resulted in rejection for service, to include: A] Prior service under OTHC. B] True citizenship status. C] Civil court convictions for offenses: i) for which the maximum punishment is death or confinement in excess of one year; ii) which involve moral turpitude; iii) for which the SM is adjudicated a juvenile offender and where the SM is found morally unsuited for retention. D] Deserter or AWOL status. E] Physical defects.	Ch. 18

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	UD normally is issued for fraudulent enlistment discharges. Pre- or prior service conduct may not be considered in grading discharge. However, because the SM fraudulently received pay and allowances resulting from the willful and deliberate false representation or concealment as to his/her qualifications for service, this fact may be considered in grading the discharge.	Ch. 18
1978	Definition of fraudulent enlistment is clarified: C] Civil court conviction or juvenile offender adjudication for a "felonious offense." F] Concealment of other disqualifying matters.	Ch. 18
	SMs who conceal prior service under OTHC, or desertions, or AWOL status will receive voided enlistments, with no character of service included. For all other matters, the fraudulent enlistment is waivable if the SM is otherwise fit for retention, and no discharge is required. Normally, SMs who conceal civil court convictions for felonious offenses will not be considered for retention.	Ch. 18
	Misrepresentation as to age alone does not constitute fraudulent enlistment. However, if the SM is less than 17 when discovered, discharge is required. The enlistment will be voided, with no character of service included. If the SM is 17-18 when discovered and enlisted without parental consent, discharge will be effected upon parental request if within 90 days of enlistment. Such enlistments also may be terminated by the Secretary of the Army. GD or HD will be issued. If the SM if 18 or older when discovered, no discharge related to age is authorized.	Ch. 18

2. NAVY

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	GENERALLY:	
1940s-1950s	UD is mandatory for unfitness or misconduct discharges.	§ 17.2
1959 & 1966	Mandatory UD is dropped; UD is presumed for unfitness or misconduct discharges. GD or HD is possible based on the circumstances of the case.	§ 17.2
1974	Presumption of UD is dropped; UD is reserved for only the "most flagrant cases," to include: A] Drug sale or trafficking. B] Drug abuse after counseling or rehabilitation. C] Fraudulent enlistment by misrepresentation of a prior discharge under other than honorable conditions (UD, BCD, DD). D] Civil convictions for offenses involving violence, minors, or for which the actual punishment imposed is confinement for one year or more. E] Frequent involvement of a discreditable nature with civil and/or military authorities, or a pattern of continued minor civil offenses. F] Homosexual acts involving minors or coercion.	§ 17.2
1974	Special programs for trainees and SMs with less than 36 months active duty who demonstrate an inability to adjust to military life initiated.	§ 16.15

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
1977	Unfitness is dropped as a reason for discharge; types of conduct regarded as bases for unfitness discharges are consolidated under misconduct as a reason for discharge.	§ 17.2
1978	Definitions of conduct for which UD may be issued are clarified: C] Fraudulent enlistment by misrepresentation of a prior discharge under other than honorable conditions (UD, BCD, DD) or for an offense committed prior to service which would normally result in an other than honorable discharge.	§ 17.6
1980	Definitions of conduct for which UD may be issued are clarified: A] Drug sale or trafficking. B] Drug abuse subsequent to rehabilitation. E] Flagrant frequent involvement which generally requires 3 U.C.M.J. or misdemeanor convictions during the past year, or 5 U.C.M.J. or misdemeanor convictions during the past 2 years; or 2 or more drug related offenses. G] Drug abuse as evidenced by the amount, type, and/or number of incidents subsequent to warning.	
1980	Court decision requires discharge to be based only on conduct that has a direct effect on the performance of the SM's military duties.	§ 12.4
1981	Homosexuality as a basis for discharge is removed from the misconduct category.	Ch. 14
	FREQUENT INVOLVEMENT:	
Pre-1978	Discharge for misconduct is authorized for frequent involvement of a discreditable nature with military and/or civil authorities.	
1979	Definition of flagrant frequent involvement is clarified to authorize a UD if the SM had a minimum of: A] 3 or more U.C.M.J. punishments within the past 1 year. B] 3 or more minor civil convictions (misdemeanors) within the past 1 year. C] A combination of the punishments listed above. D] 2 or more drug related offenses within the past 1 year. Rehabilitation is required prior to processing for discharge. Waiver of offenses and retention of the SM is possible; however, discharge processing is mandatory for drug related offenses.	
1980	Definition of flagrant frequent involvement is clarified to authorize a UD if the SM had a minimum of: A] 3 or more U.C.M.J. or minor civil convictions (misdemeanors), or a combination of the two, within the past 1 year. C] 5 or more U.C.M.J. or minor civil convictions (misdemeanors), or a combination of the two, within the past 2 years. D] 2 or more drug related offenses within the past 1 year.	
	SHIRKING:	
Pre-1976	Discharge for misconduct is authorized for SMs who engage in an established pattern for shirking.	§ 17.5
1974	UD generally is not authorized for shirking.	§ 17.5

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
1976	Rehabilitation is required prior to discharge; waiver of the offenses and retention is authorized.	
1979	Definition of "an established pattern for shirking is clarified to include: The deliberate evasion of duty. For conduct that is other than deliberate, discharge for unsuitability, by reason of a character and behavior disorder, apathy, or inaptitude should be considered.	
	To be "shirking," the conduct must be volitional, *i.e.*, within the ability of the SM to control. In addition, if the SM is a "misfit," *i.e.*, if it is "impressively evident" that the SM cannot adjust, a discharge for convenience of the government (COG; GD/HD) is authorized.	§ 17.5
	CIVIL CONVICTIONS:	
1976	Discharge for misconduct may be issued for the following civil convictions: A] Offenses for which the punishment can be confinement for 1 year or more. B] Offenses involving moral turpitude, which is defined as: i) a Federal Court conviction for an offense which is punishable under the U.S. Code by confinement for 1 year or more; ii) a conviction in other courts of a felony; iii) a conviction of any offense involving fraud, deceipt, larceny, wrongful appropriation, or making a false statement. C] Offenses involving sexual perversion, which includes: i) lewd and lascivious acts; ii) sodomy; iii) indecent exposure; iv) homosexual acts or assault upon a minor; v) other acts of sexual perversion. D] Offenses involving drug abuse, to include the following acts regarding illegal drugs: i) use; ii) possession; iii) sale; iv) transfer. E] Adjudications as a juvenile offender for offenses that are listed above [A-D]. Discharge processing may continue without regard to the appellate status of the SM's civil convictions. However, generally, the execution of the discharge decision is to await the exhaustion of all appeals. Discharge processing based on convictions by civil courts may be waived and the SM retained, except for offenses involving homosexual acts or sexual perversion.	§ 17.6
1978	Criteria for the issuance of a UD are clarified, to include: A] Offenses for which the actual punishment imposed is confinement for one year or more. C] Convictions for homosexual acts with minors. C] Convictions for sexually deviant acts or homosexual acts involving force or coercion. F] Violent offenses. G] Felony convictions. I] Flagrant frequent involvement with civil authorities.	

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
1979	Criteria for issuance of a discharge for misconduct based on civil convictions are clarified, to include: A] Convictions for offenses punishable by death or confinement for one year or more. B] Convictions for offenses involving moral turpitude, to include: i) federal court convictions for offenses for which the maximum punishment is death or confinement for one year or more; ii) convictions by other courts for offenses listed as felonies; iii) convictions for offenses involving fraud, deception, larceny, wrongful appropriation, or making a false statement; iv) convictions for offenses of sexual perversion; v) convictions for sale, use, possession, or transfer of unlawful drugs; vi) adjudications as a juvenile offender for offenses listed above [i-vi]; vii) fraudulent enlistment for misrepresentation of a conviction for sale or transfer of drugs, or for pre-service homosexual acts (Class IV); viii) prolonged AWOL. Discharge processing is mandatory for fraudulent enlistment for misrepresentation of convictions for sale or transfer of drugs, or pre-service homosexual acts.	§ 17.6
	HOMOSEXUALITY/SEXUAL PERVERSION:	
Pre-1976	Discharge for misconduct is authorized for homosexual acts or for sexual perversion, to include: lewd and lascivious acts; sodomy; indecent exposure; homosexual or indecent acts or assault upon a minor. Discharge for unsuitability is authorized for homosexual tendencies or aberrant sexual tendencies if no in-service homosexual or aberrant sexual acts have been committed. Discharge processing for misconduct is mandatory for SMs who have engaged in homosexual acts or acts of sexual perversion; discharge processing for unsuitability is mandatory for SMs who have homosexual or aberrant sexual tendencies.	§ 17.8; Ch. 14
1978	Definition of homosexuality is clarified: A] *Class I:* homosexual acts are solicited, attempted, accomplished with assault or coercion, or with a minor (without regard to assault or coercion). B] *Class II:* 1 or more homosexual act has occurred, or solicitation has occurred, but not in a manner outlined in Class I circumstances. C] *Class III:* homosexual tendencies. D] *Class IV:* homosexual acts occurred prior to service which were falsely denied upon entry. A basis for discharge under fraudulent enlistment. For all four classes of homosexuality, discharge processing is mandatory; UD is authorized only for Class I.	
1981	Homosexuality as reason for discharge is removed from misconduct category; option to issue UD is limited to certain aggravating circumstances.	Ch. 14

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	BAD DEBTS:	
Pre-1976	Discharge for misconduct is authorized for an established pattern of: dishonorable failure to pay just debts; dishonorable failure to provide adequate support.	
1974	UD is not authorized for bad debts related discharges.	
	Rehabilitation period is required; waiver of offenses and retention is possible.	
1979	Discharges for misconduct based on bad debts are to be distinguished from "financial irresponsibility" for which an unsuitability discharge is authorized. To constitute an established pattern of a dishonorable failure to pay just debts or provide adequate support, more than mere negligent failure to pay debts must be involved. If the SM merely has expenses that are greater than income, and the SM's debt continues to increase, financial irresponsibility is shown. Unless there is additional evidence relating to the failure to pay debts, a misconduct discharge is not authorized.	§ 17.7
	UNSANITARY HABITS:	
Pre-1976	Discharge for misconduct is authorized for SMs who contract venereal disease.	§ 17.9
1976	Discharge for SMs who contract venereal disease is recharacterized as a basis for an unsuitability discharge rather than misconduct.	
	DRUG ABUSE:	
Pre-1976	Discharge for misconduct is authorized for drug abuse, *i.e.*, the sale, use, possession, transfer, or introduction into a military facility of illegal drugs.	§ 17.10; Ch. 15.
	Discharges of less than fully honorable may be issued for drug abuse only if the evidence of abuse is obtained through means other than compulsory urinalysis testing or voluntary disclosure in order to obtain rehabilitation. If decision to discharge is based on evidence obtained through urinalysis or voluntary disclosure, HD must be issued.	§ 17.10; Ch. 15
	Rehabilitation period is required; retention is authorized if the SM demonstrates a potential for continued service, and does not require extended rehabilitation. If the SM fails or refuses to participate in rehabilitation, discharge is authorized.	§ 17.10; Ch. 15
1978	Discharge is authorized for fraudulent enlistment for misrepresentation of preservice sale or transfer of drugs. Discharge processing is mandatory.	§ 17.10; Ch. 15
	Discharge is authorized for civil convictions involving drug abuse; such convictions are considered to involve moral turpitude.	§ 17.10; Ch. 15
1980	UD criteria are clarified to authorize UD for drug abuse based on the amount and type of the drug that is possessed and/or the number of times the SM has been subject to warnings concerning drug abuse.	§ 17.10; Ch. 15
	FRAUDULENT ENLISTMENT:	
Pre-1976	Discharge for misconduct is authorized for fraudulent enlistment based upon a deliberate material misrepresentation of a matter that, if known, "might have resulted in rejection."	Ch. 18

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
1978	Definition of conduct for which discharge for fraudulent enlistment may be issued is clarified: A] Misrepresentation of a prior period of service under other than honorable conditions, of pre-service sale or trafficking of drugs, or of pre-service homosexual acts (Class IV homosexuality).	Ch. 18
	Discharge processing is mandatory.	Ch. 18
1978	Definition of conduct for which discharge for fraudulent enlistment may be issued is clarified: A] Misrepresentation of a prior period of service under other than honorable conditions, or for an offense committed prior to service which would normally result in the award of an other than honorable discharge.	Ch. 18

3. MARINE CORPS

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	GENERALLY:	
Pre-1959	UD is mandatory for unfitness or misconduct discharges.	§ 17.2
	Discharge for unfitness or misconduct is authorized for the following conduct: A] Habits or traits or characteristics manifested by anti-social or anti-moral trends, criminalism, chronic alcoholism, drug abuse, pathological lying, homosexuality or sexual perversion). B] Repeated petty offenses not necessitating trial by CM. C] Habitual shirking. D] Unclean habits. E] Personality disorders. F] Civil conviction of criminal offenses for which the maximum punishment is death or confinement in excess of one year. G] Fraudulent enlistment involving the deliberate misrepresentation of prior police or service record or physical defects.	§ 17.2
1959	Discharge for unfitness by reason of chronic alcoholism is dropped; discharge for unsuitability by reason of alcohol abuse (GD/HD) is authorized. Unfitness discharge may be issued for: A] Drug abuse, to include unauthorized use or possession of habit forming narcotic drugs or marijuana; A] Sexual perversion, to include: lewd and lascivious acts; homosexual acts; sodomy; indecent exposure; indecent acts or assault on a minor; other. B] Frequent involvement of a discreditable nature. C] Established pattern for shirking. E] Discharge for unfitness or misconduct by reason of a personality disorder is dropped; discharge for unsuitability (GD/HD is authorized). F] Civil convictions, to include offenses for which the maximum punishment is death or confinement in excess of one year, or for offenses involving moral turpitude, or for which the SM was adjudicated a juvenile offender and which involved moral turpitude.	§ 17.2

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	G] Fraudulent enlistment by means of a deliberate material misrepresentation of a matter that if known, might have resulted in rejection from service, to include: i) police record or conviction by a civil court; ii) juvenile offender record, although for SMs who are less than 21, discharge for unsuitability (GD/HD) is authorized; iii) previous service; iv) physical defects; v) marriage or dependents; vi) preservice homosexual acts or tendencies. H] An established pattern of dishonorable failure to pay just debts. Mandatory UD for unfitness or misconduct discharges is dropped. UD is presumed for unfitness or misconduct discharges. GD or HD is possible based on the SM's military record.	
1968	Criteria for award of unfitness or misconduct discharges are clarified: A] Discharge for homosexual acts is distinguished from homosexual tendencies. Discharge is authorized for unsuitability by reason of homosexual tendencies, and for unfitness by reason of homosexual acts/sexual perversion. B] Frequent involvement requires the SM to be clearly unqualified for retention. D] Unsanitary habits. F] Civil convictions; discharge processing is to proceed regardless of the appellate status of the convictions. G] Fraudulent enlistment, by means of a deliberate material misrepresentation of a matter which would have reasonably been expected to have precluded, postponed, or otherwise affected the member's eligiblity for enlistment or induction. H] An established pattern of dishonorable failure to pay just debts or adequate support. Rehabilitation before discharge is required for frequent involvement, shirking, bad debts, and unsanitary habits.	
1969	Criteria for award of unfitness or misconduct discharges are clarified: A] Drug abuse, to include addiction, use or possession of addictive or narcotic drugs. However, for marijuana use or possession, if the SM already has been subject to CM action, no discharge is required. For discharge, an additional finding that the SM is unqualified for retention is necessary. B] Frequent involvement: SMs who are subject to repeated minor disciplinary matters also qualify for discharge for COG. C] Shirking: SMs who repeatedly receive low marks also qualify for discharge for COG (GD/HD).	
1972	Criteria for award of unfitness or misconduct discharges are clarified: A] Drug abuse: if discovered through urinalysis or voluntary disclosure to enter rehabilitation, a GD or HD must be issued.	

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	G] Fraudulent enlistment, to include: i) police record or civil court convictions; ii) juvenile record (although COG is available); iii) prior service; iv) dependents or marriage, although discharge for COG (GD/HD) is available; v) physical defects; vi) preservice homosexual acts or tendencies; vii) preservice drug abuse, although discharge for COG is available.	
1973	Criteria for award of unfitness or misconduct discharges are clarified: A] Drug abuse: discharge for unfitness is authorized if the drug abuse is discovered through means other than urinalysis or voluntary disclosure in order to enter rehabilitation; discharge for unsuitability by reason of drug abuse is authorized for discovery through urinalysis or voluntary disclosure in order to enter rehabilitation; for marijuana use or possession; if SM already has been subject to CM action, no discharge is required. A finding that the SM is unqualified for retention is required.	
1974	Special programs for trainees and SMs with less than 36 months active duty who demonstrate inability to adjust to military life initiated.	§ 16.15
1976	Unfitness is dropped as a reason for discharge; discharge for misconduct is authorized for conduct previously listed as basis for discharge for unfitness.	§ 17.2
	Criteria for award of unfitness or misconduct discharges are clarified: D] Discharge for unfitness by reason of unsanitary habits is dropped; discharge for unsuitability by reason of unsanitary habits is authorized.	
1978	Criteria for award of misconduct discharges are clarified: F] Civil convictions: i) for offenses for which the maximum punishment is death or confinement for one year or more; ii) for offenses involving moral turpitude; iii) for offenses for which the SM was adjudicated a juvenile offender and which involved moral turpitude. G] Fraudulent enlistment: ii) juvenile record (COG is available; HD must be issued); iv) dependents or marriage (COG is available; HD must be issued); vii) preservice drug abuse (COG is available; HD must be issued).	
1980	Court decision requires discharge to be based only on conduct that has a direct effect on the performance of the SM's military duties.	§ 12.4
1981	Homosexuality is established as a reason for discharge, separate from misconduct.	Ch. 14
	FREQUENT INVOLVEMENT:	
1968	Definition of frequent involvement is clarified, to require a finding that the SM clearly is unqualified for retention.	§ 17.2

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	SHIRKING:	
Pre-1961	Discharge for unfitness or misconduct is authorized for habitual shirking.	§ 17.5
1961	Criteria for issuance of an unfitness or misconduct discharge are clarified to include: an established pattern for shirking.	§ 17.5
1968	A period of rehabilitation before discharge is required.	§ 17.5
1969	Discharge for COG (GD/HD) is authorized for SMs who repeatedly receive low marks.	§ 17.5
	CIVIL CONVICTIONS:	
	Discharge proceedings will continue regardless of the appellate status of the convictions; however, normally, execution of a discharge decision will be withheld until all appellate rights have been exhausted.	§ 17.5
1968	Discharge for misconduct is authorized for SMs tried by CM or civil court and are acquitted, but such discharges must be GD or HD.	§ 17.5
1970	Definition of "conviction" is clarified *to include* acquittals or other terminations of criminal proceedings based on "legal technicalities," and the expungement of a record after payment of a fine or completion of a jail term or probation.	§ 17.5
	BAD DEBTS:	
1968	A period of rehabilitation before discharge is required.	§ 17.7

4. AIR FORCE

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	GENERALLY:	
Pre-1959	UD is mandatory for unfitness or misconduct discharges.	§ 17.2
1959	Mandatory UD is dropped; UD is presumed for unfitness or misconduct discharges. GD or HD is possible based on the SM's military record.	§ 17.2
Pre-1970	Discharge for unfitness or misconduct is authorized for the following conduct: A] Frequent involvement. B] Sexual perversion or homosexual acts. C] Drug abuse or unlawful use or possession of narcotics, marijuana, or other drugs. D] Established pattern for shirking. E] Established pattern for dishonorable failure to pay just debts or provide adequate support. F] Unsanitary habits. G] Fraudulent enlistment.	§ 17.2
	Moral turpitude is defined as B] Sexual perversion, considered broadly to include sodomy, lesbianism, homosexuality, sadism, voyeurism, possession of pornography, lewdness, and indecent acts with minors. C] Drug abuse, to include illegal use or possession of narcotics.	§ 17.2

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	Waiver of offenses and retention of the SM is authorized for almost all conduct. Constructive waiver exists where discharge proceedings are not initiated within a reasonable time after the misconduct becomes known. Discharge is authorized if rehabilitation is impossible or impracticable, or if retention could cause a serious morale problem.	§ 17.2
1969	Conditions for which rehabilitation is required before discharge are clarified: A] Frequent involvement. D] An established pattern for shirking. E] Bad debts. F] Unsanitary habits. H] Civil convictions where moral turpitude is not involved. Rehabilitation is not required before discharge for the following conduct: B] Sexual perversion. C] Drug abuse. H] Civil conviction for offenses involving moral turpitude.	§ 17.2
1970	Definition of moral turpitude is clarified to include: B] Sexual perversion: i) lewd and lascivious acts; ii) homosexual acts; iii) sodomy; iv) indecent exposure; v) indecent acts or assault upon a child; vi) other indecent acts. C] Drug abuse.	§ 17.2
	Conditions for which rehabilitation is required before discharge are clarified to include: all conduct to which unfitness or misconduct discharges apply, except sexual perversion and drug abuse.	§ 17.2
1971	Conditions for which rehabilitation is required before discharge are clarified to include: all conduct to which unfitness or misconduct discharges apply, and will apply to all SMs who can be influenced to return to a productive capacity; i) when a sincere desire for rehabilitation exists; ii) when the SM is morally fit to continue service; iii) when no factor is present which after rehabilitation would "clearly result in an adverse impact upon esprit de corps and maintenance of good order and discipline."	§ 17.3
1972	Definition of moral turpitude is clarified to include: B] Sexual perversion: vii) transvestitism or other aberrant sexual behavior.	
	Criteria for issuance of an unfitness or misconduct discharge are expanded to include discharge for "multiple reasons."	
1974	Special programs for trainees and SMs with less than 36 months active duty who demonstrate an inability to adjust to military life initiated.	§ 16.15
	Criteria for issuance of an unfitness or misconduct discharge are clarified to include: C] Drug abuse, to include unlawful use, possession, sale, transfer, or introduction onto a military facility of any narcotic, marijuana, or other drug, *if* the disclosure is not related to urinalysis or the SM's voluntary disclosure in order to enter rehabilitation.	§ 17.2

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	G] Fraudulent enlistment, to include SMs who conceal convictions of *a single offense* for which the maximum punishment is death or confinement in excess of 1 year. The addition of charges to reach a maximum punishment in excess of 1 year is *not* permitted.	
1976	Unfitness is dropped as a reason for discharge; types of conduct considered as bases for unfitness discharges are consolidated under misconduct as a reason for discharge.	§ 17.2
	Criteria for issuance of misconduct discharges are clarified: F] Unsanitary habits is dropped as a reason for unfitness or misconduct discharge; discharge for unsuitability (GD/HD) by reason of unsanitary habits is authorized. G] Fraudulent enlistment, to include concealment of a civil conviction for an offense for which the maximum punishment is death or confinement for 1 year or more. H] Civil convictions, to include offenses for which the maximum punishment is death or confinement for 1 year or more.	
1977	Definition of moral turpitude is clarified: B] Sexual perversion. C] Drug addiction, use, or supply. I] Offenses of burglary, larceny, forgery, robbery, and housebreaking.	
1980	Court decision requires discharge to be based only on conduct that has a direct effect on the performance of the SM's military duties.	§ 12.4
1981	Homosexuality is made a category of discharge, separate from misconduct.	Ch. 14
	FREQUENT INVOLVEMENT:	
	Discharge for unfitness or misconduct is authorized for SMs who engage in frequent involvement of a discreditable nature with civil and/or military authorities.	§ 17.2
	SEXUAL PERVERSION/HOMOSEXUAL ACTS:	
Pre-1972	Discharge for unfitness or misconduct is authorized for SMs who engage in sexual perversion, to include: lewd and lascivious acts; homosexual acts, but without force or coercion, and which do not involve minors; sodomy; indecent exposure; indecent acts or assault upon a child; other.	
	A mental status exam is required before discharge.	
1972	Definition of sexual perversion is clarified to include transvestitism or other aberrant sexual behavior.	
	DRUG ABUSE:	
1971	Drug Abuse Identification Program is initatied: UD for unfitness or misconduct is prohibited for SMs whose drug abuse is discovered through urinalysis or voluntary disclosure in order to enter rehabilitation. B] Unfitness or misconduct discharges by reason of drug abuse other than for sale or intent to sell (*e.g.*, possession of a large quantity), must be GDs or HDs.	
1975	Discharges for drug abuse, discovered through urinalysis or voluntary disclosure in order to enter rehabilitation are required to be HDs.	

DATE OF CHANGE OF STANDARD	NATURE OF CHANGE OF STANDARD	CROSS-REFERENCE TO MANUAL
	SHIRKING:	
1976	Discharge for unfitness or misconduct by reason of shirking has been used infrequently. For continued substandard performance, discharge for unsuitability by reason of apathy is more appropriate in most cases.	§ 17.5
	CIVIL CONVICTIONS:	
Pre-1976	Discharge for unfitness or misconduct is authorized for SMs who are found guilty of an offense: A] For which the maximum punishment is death or confinement in excess of one year. B] Which involves moral turpitude. C] For which the SM was adjudicated a juvenile offender and which involves moral turpitude (if no moral turpitude is involved, discharge is not authorized).	§ 17.6
Pre-1970	Discharge proceedings may be initiated regardless of the appellate status of the conviction; normally, execution of a decision to discharge will be withheld until the SM's appellate rights are exhausted.	
	FRAUDULENT ENLISTMENT:	
	Discharge for unfitness or misconduct is authorized for SMs who fraudulently enlist in the Air Force by means of deliberate material misrepresentations of matters that, if known, might have resulted in rejection: A] Civil court convictions of an offense: i. for which the maximum punishment is death or confinement in excess of one year; ii. which involves moral turpitude; iii. for which the SM was adjudicated a juvenile offender, and which involves moral turpitude. B] Prior service. C] Citizenship status. D] Medical defects. E] Other matters.	Ch. 18
	Waiver is not available for concealment of civil convictions for offenses involving moral turpitude.	Ch. 18

CHAPTER 18
FRAUDULENT ENLISTMENT AND VOID DISCHARGES

18.1 INTRODUCTION AND OVERVIEW

Fraudulent enlistment has always been grounds for "misconduct" discharges.[1] Fraudulent enlistment differs from other reasons for discharges for cause, however, because it results from conduct or other factors that occurred prior to entry on active duty.

Fraudulent enlistment was treated as a more serious offense in the 1940s and 1950s than in recent years; it was even listed as a criminal offense under the 1951 Uniform Code of Military Justice.[2] The harsh early treatment of fraudulent enlistment not only reflected the rigid disciplinary code in effect at the time but was also a means of discouraging people from wrongfully using military service as a way of obtaining medical treatment, support for dependents, or avoiding jail sentences.

Until the late 1960s, persons found to have enlisted fraudulently were usually given Undesirable Discharges (UDs). Since then, however, Honorable (HDs) or General Discharges (GDs) normally have been awarded unless there is a finding of malicious and fraudulent intent. In the 1970s, most service regulations were changed, making this policy explicit. Thus, reference to the current standards approach is important in older cases.

A fraudulent enlistment case typically involves the following:

- The existence of disqualifying factors rendering enlistment either legally impermissible, or permissible only after the formal granting of a waiver by appropriate military authority;[3]
- Discovery of a disqualifying factor subsequent to the servicemember's enlistment;
- A decision will be made whether a waiver, if available, should be granted: the quality and length of the servicemember's service weighs heavily in this decision; and
- Any discharge which may occur will be characterized based on the quality of the service and the seriousness of the fraud.

A fraudulent enlistment is usually discovered in one of the following situations:

- A background investigation conducted for purposes of a security clearance reveals a record of arrests and/or convictions;
- The servicemember confesses to providing fraudulent information at enlistment in an attempt to get out of the military;
- Certain pre-service activities are uncovered as part of an investigation involving in-service homosexuality or drug use;
- Where recent recruits are urged to disclose information concerning preservice drug use or homosexuality;[4] and

[1] DoD Dir. 1332.14, 29 Dec. 1976, defines fraudulent enlistment:
> Procurement of a fraudulent enlistment, induction or period of active service through any deliberate material misrepresentation omission or concealment which, if known at the time, might have resulted in rejection. The enlistment of a minor with false representation as to age without proper consent will not, in itself, be considered as fraudulent enlistment.

See § 21.4 *infra* (proposed change to 1332.14).

[2] Art. 83, U.C.M.J., 10 U.S.C. § 883.

[3] *See* § 7.2 *supra* (discussion of enlistment standards).

[4] Jack Anderson reports that such practices were common in some Navy basic training commands in the mid-1970s. *See, e.g.,* Washington Post, Nov. 26, 1977, § B, at 11; *id.,* Dec. 7, 1977, § D, at 17; *id.,* Jan. 6, 1978, § C, at 15. *See also* § 12.9.4 *supra* (concerning validity of confessions).

- Recruiting practice investigations reveal violations with recruiter involvement.

Fraudulent enlistment is usually based on the failure to disclose, in response to a specific question, the following types of information:

- Arrests and/or convictions;
- Use of drugs;
- Homosexual acts or homosexual tendencies;
- Prior service;
- The correct number of dependents; or
- Medical information.

Failure to disclose that one is underage is not a fraudulent enlistment, but it is grounds for a "minority" discharge.[5] "Erroneous enlistment" occurs when the recruiter was properly given all of the information but did not inform the enlistee that (s)he was disqualified, or did not seek the appropriate waiver.[6] In such cases, the veteran should argue that no fraud was intended and that characterization of service should be based solely on the quality of the service record.

There has been much public discussion recently about the involvement of recruiters in fraudulent enlistment.[7] The services do not automatically shift the fault to a recruiter who is shown to have participated in the fraud; however, any proof that the recruiter was instrumental in the fraud can clearly work to the advantage of the applicant.[8] Demonstrating that the applicant is a good person and that the overall equities dictate an upgrade is very important.

Regulations have changed frequently, particularly with regard to waiver and guidance to commanders; it is essential that counsel obtain the complete regulations in effect at the time of the discharge. The following are contentions which, if applicable, should be used in fraudulent enlistment cases:

- The information not disclosed was not a disqualifying factor;
- The information was not true;
- No fraudulent intent on the part of the servicemember existed;
- The recently discovered information is not an absolute bar to enlistment and the quality of the servicemember's service record should have warranted a decision to retain him/her in the service;
- The primary fraudulent force was the recruiter; and
- Current standards require a discharge based on the applicant's service record.

18.2 PROPRIETY APPROACHES

Many of the same procedural errors that are likely to occur in unfitness or misconduct cases also apply to fraudulent enlistment cases.[9] The following sections discuss propriety approaches peculiar to fraudulent enlistment cases.

18.2.1 DISCHARGE SHOULD BE BASED ON CHARACTER OF SERVICE

While the regulations have not been a model of clarity in recent years,[10] the intent of the military seems to be to base the character of discharge for fraudulent enlistment on the quality of the servicemember's service record, unless there is evidence of a serious motive to defraud. To determine the character of discharge, the Navy and Marines look to the final average of conduct and efficiency ratings, and the Army looks to the "overall service record."[11] The Air Force regulation seems to presume an Other Than Honorable Discharge but does permit processing for hardship, medical disability, or other reasons if appropriate.

18.2.2 WITHHOLDING OF THE INFORMATION WAS NOT FRAUDULENT

If the enlistee did not intend to deceive when (s)he completed the enlistment forms, then the element of fraud did not exist. To the extent that military criminal law can be used for analogy, the *Manual for Courts-Martial* provides guidance in determining fraudulent intent:

> A fraudulent enlistment, appointment, or separation is one procured by means of either knowingly false misrepresentation, . . . or a deliberate concealment in regard to any of those disqualifications.
>
> The misrepresentation or concealment may be with regard to matters which if truthfully stated or revealed, would induce an inquiry by the recruiting, appointing, or separating officer concerning the qualifications or disqualifications for enlistment, appointment, or separation, such as answers to questions as to previous service, previous application for enlistment or appointment, or attendance.[12]

Honest mistakes as to the facts or the meaning of a question, or a failure to disclose information un-

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[5] *See* note 1 *supra*; § 12.6.3.4 *supra*. Sometimes a BCMR will void, rather than upgrade, a bad discharge based on minority. *See* FC 78-02462.

[6] *See* § 12.6.3.3 *supra* (discussion of erroneous induction and enlistment); DRB Index categories A06.00, A99.06, A99.08.

[7] Report of Audit, U.S. Army Audit Agency Report No. 5073-49, 12 April 1973. In 1978, the Senate Armed Services Committee held hearings on allegations of Marine recruiting abuses.

[8] *See* § 18.2.4 *infra*.

[9] *See* § 12.5 *supra*. In some cases where a UD is not recommended, the right to a hearing has been limited. *See, e.g.,* AR 635-200, para. 14-11b, 23 Aug. 1972.

[10] Even though AR 635-200 prohibited use of preservice conduct to characterize service, there was a confusing reference to the receipt of pay and allowances as a "bad" "in-service" activity. This confusion was noted at [Nov. 1974] ARMY LAW 13, DA Pam 27-50-23. *See also* note 14 *infra*. In addition, para. 14-11b, AR 635-200, 23 Aug. 1972, refers to para. 1-9 for determining whether an HD or GD should be awarded. This latter paragraph is normally thought to apply only to characterization of service when separation is not for cause. ADRB SOP, SFRB Memo #3-79, attach., N.2, 44 Fed. Reg. 25,098 (1979).

[11] *See* Ch. 7 *supra*; § 12.8 *supra* (computing overall performance ratings).

[12] MANUAL FOR COURTS-MARTIAL, para. 162 (rev. ed. 1969).

knowingly, eliminates fraud from fraudulent enlistment.[13] Most accusations of fraudulent enlistment involve responses to questions about arrests and/or convictions.

Typically, the applicant will seek a board resolution of whether:

- A conviction of a minor offense was in fact disqualifying under the regulations;
- An arrest was disqualifying;[14]
- A juvenile involvement, *e.g.*, adjudication as a juvenile offender, was disqualifying;[15] or
- Special programs for first offenders, *e.g.*, probation without findings, must be disclosed.

On many occasions the enlistee may have relied on state law that permitted the nondisclosure of a juvenile record. If this is the case, a copy of that law should be presented to the Board.

18.2.3 WHAT INFORMATION HAS TO BE DISCLOSED

Disclosure usually involves a regulatory question concerning what information has to be provided, assuming both the recruit and recruiter understand the regulatory requirements.[16] Recruiting standards at various times may not have required the disclosure of:

- Homosexual tendencies, as opposed to specific acts;
- Arrests without convictions; or
- Dispositions of criminal or juvenile cases without actual findings of guilt or its equivalent.

18.2.4 RECRUITER CONNIVANCE

In recent years, recruiters attempting to meet enlistment quotas have discouraged recruits from mentioning any disqualifying information in their responses to the standard questionnaire.[17] This is done to avoid rejection of recruits or to avoid the work involved in obtaining a waiver from a higher command. Such recruiter misconduct can shift the blame from the servicemember and result in an upgrade.[18]

Recruiter misconduct is, however, difficult to prove. The recruiter will rarely admit to the allegation; it will be necessary to provide some form of corroboration either through direct or circumstantial evidence. The needed corroboration can be provided by any of the following methods:

- A statement from another enlistee or a family member who was present at the applicant's enlistment.
- A statement from a person to whom the veteran disclosed the transaction shortly after the event.
- Evidence that the recruit enlisted in a town other than his/her own, if there was a recruiting station in his/her town: the recruit might have told the recruiter about disqualifying information and the recruiter referred the prospective recruit to another town with the instruction not to disclose the information to the second recruiter.
- The demonstration that the recruiter cut corners in other ways during the process. For example, in one case it was discovered that while the enlistee had a false draft card, the recruiter's verification of his age was not properly attested to, because the birth certificate number listed by the recruiter as proof of verification also showed that the enlistee's age differed from that stated.
- Evidence that a court in effect ordered "jail or the Army." Reference to the transcript of the hearing or the criminal case jacket might disclose that a recruiter was present in the courtroom and made a representation to the judge or person preparing a pre-sentence report.
- Sometimes the recruiter's record will evidence other allegations of assistance with fraudulent entry or a pattern of recruits having substantially lower aptitude scores than recorded at enlistment and this will shift blame away from the servicemember.[19]

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[13] *See* AD 79-06585; FD 80-0119; ND 78-00906.

[14] While disclosure of arrests usually has been required, failure to disclose has not always been grounds for a discharge for fraudulent enlistment. *See, e.g.*, AR 635-200, para. 5-38, 1 Oct. 1972 (discharge for "the convenience of the government" permitted for failure to disclose an arrest for a felony and warrants an HD or GD depending on the quality of service measured by the standards of para. 1-9 of AR 635-200).

These distinctions were apparently unclear to field commanders because the Judge Advocate General was asked to elucidate the regulations. DAJA-AL 1976/5253, 13 Sep. 1976, *reported in* [April 1977] ARMY LAW. 23. *See also* DRB Index category A11.00.

[15] These cases often present complex regulatory requirements. *See, e.g.*, MD 79-03210.

[16] *See* § 7.2 *supra* (enlistment standards).

[17] *See* ADRB SOP, Annex F-1, para. 3.E., 44 Fed. Reg. 25,070-71 (1979):

> *Fraudulent Entry.* The panel must be extremely cautious in this area so as not to assume that every instance of concealment of otherwise disqualifying factors for enlistment was perpetrated by deliberate intent to defraud the government. The panel must attempt to establish what the motivation of the applicant was at the time of enlistment and must give consideration to his/her conduct subsequent to enlistment. Of equal importance is the time

[17] (continued)

> of enlistment and the pressures that were present on the procurement system and what could have been at times a simple human failing of procurement personnel who were motivated to meet quotas. It is incumbent upon the panel to determine whether or not the fraud was concealed for the purpose of innocence or for the purpose of evil. Conduct subsequent to entry must be a major consideration in this area.

[18] *Id.*, DRB Index categories A62.06, A99.06. *See also* §§ 12.6.3.3, 12.6.3.5 *supra* (discussions of the case law developed by the courts around this issue); AD 78-04632; AD 79-06360; MD 80-00425.

[19] Recruits are tested by the recruiter for "mental eligibility." Sometimes recruiters assist the recruits with the test answers; recruits are then retested in basic training. A pattern of dissimilar scores from recruits from the same recruiter implies that the tests were improperly administered by the recruiter.

It is possible to find out whether a Marine recruiter has a pattern of recruits whose test scores in basic training do not comport with those on the enlistment AFQT. The Monthly Recruiter Report lists, by recruiter's social security number, each recruit, and each recruit's test scores at enlistment and again in basic training. Serious pat-

- Age, education, and aptitude of the recruit might be relevant.[20]
- Evidence that the crime the servicemember failed to disclose was reported in the local press, or was otherwise well-known, might lead to the conclusion that the recruiter probably was aware of it.

18.2.5 DISCHARGE SHOULD HAVE BEEN FOR MINORITY

There is and always has been a minimum age at which a servicemember may enlist with or without parental consent.[21] If a servicemember is enlisted before reaching the minimum age, and (s)he is not yet at the age where a "constructive enlistment" is allowable, the servicemember should be discharged for minority.[22] Where an underage servicemember has committed an offense and the commander waits until (s)he reaches the minimum age for purposes of obtaining jurisdiction over him/her, it should be argued that the servicemember should have been processed for minority as soon as the age was verified, and therefore the bad discharge is void.[23] Because the servicemember did reach majority while enlisted, the character of service should be based on the record of service and not voided without characterization.

18.2.6 CONSTRUCTIVE WAIVER

Boards may upgrade where a commander discovers a fraudulent enlistment but does not act to discharge the servicemember within a reasonable period of time,[24] reasoning that it is not fair to hold

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[19] (continued)
terns of discrepancies may appear. This is located at the Recruiting Branch, Marine Corps, Room 4101, Navy Annex, Washington, D.C. 20370 (Tel. 202-694-2523 or 694-4166).

In Army cases, a Freedom of Information Act request to C.G., U.S. Army Command, Attn: Director of Recruiting Force Management, Ft. Sheridan, Ill. 60037 (Tel. 312-926-2370), can get the record of recruits by a particular recruiter. The following exchange took place between the authors and the Director of Recruiting Force Management:

REQUEST

In the May/June 1975 issue of *The Society Magazine* there appears the following passage:

> In June of 1973, the Army announced that its criminal investigation division had discovered extensive recruitment fraud during a seven-month investigation and that 107 recruiters had been reassigned for malpractice.

This is a request made pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. 552, for the names of the cities in which those recruiters were working during their "malpractice" and for the names of the individual recruiters in order that we may prepare a complete case for our clients before the Discharge Review Boards.

RESPONSE

In response to your request of 23 July 1976, the attached list of names of recruiters and the cities they are assigned to is provided.

A thorough search of available records revealed only 70 recruiters who would be included in the scope of your request. Since this Headquarters did not participate in a June 1973 news release identifying "107 recruiters" as being reassigned for malpractice, there is no basis for determining how that number was reached.

The following list was attached. If one of these recruiters' names appears on the applicants' enlistment papers, a claim of recruiter connivance might be corroborated.

ATTACHED LIST

NAME	DRC/DUTY STATION
ALLESSIE, Charles T.	Pittsburgh/Dubois, PA
ARBOGAST, John W.	Chicago/Chicago, IL
ARNOLD, James R.	San Antonio/Alice, TX
BOOTH, Carl E.	Chicago/Chicago, IL
CESARI, Robert A.	Santa Ana/Fullerton, CA
DOYLE, William E.	Chicago/Chicago, IL
FALLS, Richard A.	Detroit/Grand Rapids, MI
GRACE, Harold F.	Indianapolis/Indianapolis, IN
GREGORY, Donald F.	San Francisco/Mtn. View, CA
LAMMERT, George F.	Chicago/Chicago, IL
McLEOD, George C.	Boston/Lynn, MA
MARLER, Charles R.	Chicago/Chicago, IL
PEZZUTO, James M.	Richmond/Richmond, VA
RAFFERTY, Thomas V.	Los Angeles/Hollywood, CA
RAYGO, Norman G.	Milwaukee/Milwaukee, WI
RHODES, Carey H.	Raleigh/Rockingham, NC
SHADLE, Ronald M.	Salt Lake City/Butte, MT
SPIVEY, Harry A.	New York/Freeport, NY
STRUNKS, John J.	San Francisco/Sunnyvale, CA
THOMALLA, Vernon W.	Chicago/Peoria, IL
VILLAVICENCIO, Joan M.	San Antonio/San Antonio, TX
BEARDEN, Theodore R.	Detroit/Detroit, MI
BEVIL, Daniel P.	Pittsburgh/Johnstown, PA
BISHOP, James E. Sr.	Albany/Plattsburgh, NY
BLANCO, Antonio B.	San Francisco/Mtn. View, CA
BOYLES, Raymond A.	Indianapolis/Indianapolis, IN
BROWN, Gary D.	Amarillo/Abilene, TX
CORNELISON, John E.	New Orleans/New Iberia, LA
DALLOS, Ronald J.	Syracuse/Newark, NY
DOWLING, Johnny L.	Lansing/Grand Rapids, MI
EDWARDS, William A.	Cleveland/Maumee, OH
FERRIS, Ronald G.	Syracuse/Hornell, NY
FRANTZ, Emerson T.	Pittsburgh/New Kensington, PA
GAINES, Willie F. Jr.	Nashville/Chattanooga, TN
GALLUCCI, Paul D.	Providence/East Providence, RI
HALL, Freddie	Detroit/Detroit, MI
HAYES, Alfred C. Jr.	Syracuse/Elmira, NY
HENARD, Raymond Jr.	New Orleans/New Iberia, LA
HIGH, Horace H.	Philadelphia/Willingboro, NJ
JACKSON, Edward Jr.	Philadelphia/Kensington, PA
JEWETT, Douglas R.	Houston/Houston, TX
KOENIG, James A. Jr.	Charlotte/Monroe, NC
LEGGETT, Clayburn D.	Nashville/Camden, TN
LOVE, James H.	Peoria/South Bend, IN
LOWERY, George D.	Oklahoma City/Tulsa, OK
McLEMORE, David W.	Harrisburg/Chambersburg, PA
MABON, Johnny F.	Boston/Fall River, MA
MARSHALL, Kirk B.	Syracuse/Hornell, NY
MARTINEZ, Manuel C.	San Francisco/Alameda, CA
MODGLING, Jack D.	Houston/Houston, TX
MURRAY, Johnnie L.	San Francisco/Alameda, CA
OELKE, David W.	Milwaukee/Fond du Lac, WI
PETROSKY, Harry J.	Syracuse/Elmira, NY
PHILLIPS, John F.	Indianapolis/Indianapolis, IN
PRATER, Jerry L.	Chicago/Chicago, IL
PRICE, Bruce L.	Louisville/Vincennes, IN
REGAN, Willie J.	Providence/Greenfield, MA
RISNER, Warren I.	Philadelphia/Willingboro, NJ
SILVERS, Daniel C.	Richmond/Petersburg, VA
SKAGGS, Clifford L.	Milwaukee/Marinette, WI
STOREY, Lawrence G.	Jackson/Hattiesburg, MS
ST. THOMAS, Joseph R.	Syracuse/Watertown, NY
TURNER, Edward	Cleveland/Youngstown, OH
VINING, Larry G.	New Orleans/New Iberia, LA
WATSON, Ronald L.	Cincinnati/Cincinnati, OH
WELLS, Marion	Philadelphia/Willingboro, NJ
WORKMAN, Robert L.	New York/Ft. Hamilton, NY
WRIGHT, Leo	Syracuse/Elmira, NY
WYNS, Jessie J.	Detroit/Detroit, MI
YOUNG, Robert A.	Pittsburgh/Southside, PA

[20] *See* FD 80-0526.
[21] *See* Ch. 7 *supra;* § 12.6.3.4 *supra*; DRB Index category A34.00.
[22] *See* FC 78-02462.
[23] *Cf.* AD 78-04588.
[24] *See* AD 78-04588.

such information in reserve against a person until the commander deems it appropriate to use it. This concept is similar to that of "constructive waiver" recognized specifically by some service regulations.[25]

18.2.7 MISCELLANEOUS PROPRIETY ISSUES

Failure to perform a required mental status evaluation can result in an impropriety.[26]

After January 1, 1974, counsel for consultation had to be a Judge Advocate or other properly certified lawyer.[27]

18.3 EQUITY APPROACHES

The distinctions between propriety and equity approaches are often blurred. Counsel therefore should contend that propriety issues also raise questions of equity.[28] The most important factors are the quality of the servicemember's service record and mitigating circumstances. Some general equitable approaches considered by the Boards to be relevant in fraudulent enlistment cases follow:

- A waiver probably would have occurred at enlistment even if the information had been disclosed;[29]
- The command, upon discovery of the fraudulent enlistment, failed to process the case within a reasonable period of time;[30]
- The recruiter knew, or should have known, the true facts;[31]
- The undisclosed offense was not serious;[32]
- The applicant's overall service record warranted an HD and/or the conduct had no adverse impact on the quality of service or on the military;[33] and
- Waiver and retention in the service would have been more appropriate in light of the offense and/or the servicemember's service record.[34]

It is important for counsel to demonstrate that the concealment of disqualifying factors did not involve a deliberate intent to defraud the government.[35] Reference to a servicemember's subsequent conduct and other factors can be relevant when attempting to prove that there was no intent to defraud.[36] When the enlistee conceals a medical condition and enlists for the purpose of obtaining medical treatment, the case for an upgrade is more difficult. This is viewed as a fraudulent intent to obtain benefits from the government as opposed to a failure to disclose information for the sole purpose of serving in the armed forces.

18.4 CONCEALMENT OF PRE-SERVICE HOMOSEXUAL ACTS

Past regulations have permitted discharge for fraudulent enlistment when pre-service homosexual acts are discovered through investigation of a servicemember's in-service alleged homosexuality. These cases should be treated the same as any other cases involving in-service homosexual acts.[37]

18.5 THE CURRENT STANDARDS APPROACH

There have been significant policy and procedural changes that give rise to strong arguments that if current standards and procedures had been in effect at the time of the applicant's discharge, there is a substantial likelihood that a better discharge would have been issued.[38]

In the 1940s and 1950s, relatively few procedural rights were available to a servicemember being discharged for fraudulent enlistment. Today a servicemember is entitled to legal counsel, a hearing, and the attendant rights provided all servicemembers being discharged for misconduct. It can be argued that, in past cases, had these rights been available, the applicant could have had an opportunity to prove that fraud did not occur.

Under some of the old regulations, waiver was not permitted after the discovery of disqualifying information. Current regulations permit a convening authority to grant exceptions. The most important change involves the policy on character of discharge. While UDs were the rule until the mid-1960s, it wasn't until the late 1960s that HDs and GDs began to be the most common discharges issued for fraudulent enlistment. Current regulations generally base the character of discharge in fraudulent enlistment cases on the service record, absent a finding of an intent to defraud the government.[39] In using this approach, the applicant must argue that his/her service record was sufficient to warrant an HD.[40] Where the applicant's conduct no longer would support processing for

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[25] *See, e.g.*, AFR 39-21, para. 4, 17 Mar. 1959; AFM 39-12, para. 2-48. Regulations normally permit waiver, by a commander of processing for discharge in specified instances of fraudulent enlistment. "Constructive waiver" is invoked when such time has passed that a servicemember should have reasonably expected that a waiver occurred. It is unclear if a constructive waiver can occur if the defect was one for which regulations prohibited a "normal" waiver.

[26] *See* DRB Index category A62.04; AD 7X-11868.

[27] ADRB SOP, Annex 0-1, SFRB Memo # 17, 22 Nov. 1976, 44 Fed. Reg. 25,085 (1979). *See also* § 12.5.7.3 *supra* (further discussion of the right to counsel).

[28] *See* Ch. 11 *supra* (discussion of making contentions).

[29] *Cf.* DRB Index category A93.28.

[30] *See* AD 78-04588.

[31] *See* § 18.2.4 *supra*.

[32] *See* AD 79-06585.

[33] *See* ADRB SOP, Annex F-1, para. 2.C.(1)(h), 44 Fed. Reg. 25,070 (1979). *See also* AD 80-00520; AD 80-01654; AD 80-01840; AD 80-03419; FD 80-0119; FD 80-0526; FD 80-1351; AD 80-01840 ("too harsh").

[34] *See* AFM 39-12, para. 2-47, change 11, 20 Jul. 1976.

[35] *See* note 17 *supra*. *See also* AD 79-06585; FD 80-0119; ND 78-00906.

[36] *See* note 17 *supra*; FD 80-0895.

[37] *See* Ch. 14 *supra* (homosexuality); MD 80-02590 (based on pre-1981 standards, which may have been more liberal than current regulation).

[38] *See generally* Ch. 21 *infra*.

[39] Unfortunately DoD Dir. 1332.14 literally presumes a UD for fraudulent enlistment, and each service's regulations must be consulted. Army: *see* notes 10, 14 *supra*; AD 79-01021; AD 80-01154; AR 635-200, para. 14-10. Navy: *see* BUPERSMAN 3420180 (the UD is to be used only in "the most flagrant cases" such as failure to disclose a prior UD); ND 78-01198; MD 77-1802; MD 80-02590. *See* § 21.4 *infra* (proposed change to 1332.14).

[40] *See generally* § 12.8 *supra*.

fraudulent enlistment, current standards may warrant an upgrade.[41]

18.6 VOIDED DISCHARGES

Where an attempt is made to prove that the servicemember was not at fault, but that an enlistment still would not have been legally permissible, the issue becomes whether an uncharacterized discharge would be the most appropriate solution.[42] This is complicated by current regulations which permit uncharacterized or voided enlistments to occur in cases where enlistment was found to be erroneous, particularly when recruiter misconduct was invoked, to avoid court-martial jurisdiction.[43]

DRBs do not have the authority to change a characterized discharge to a voided enlistment or an uncharacterized discharge.[44] When the veteran has a voided enlistment and some creditable service time, the DRB can review the case. When there is no character of service, no creditable time, and the enlistment is voided, the case must be heard by a BCMR.[45]

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[41] *See* AC 78-01317.

[42] *See* FC 78-02462; NC 77-3378 (two different approaches).

[43] AR 635-200, para. 14-5, change 3, 1 May 1980, authorized void enlistments:

> when the service of the member is of too short duration to properly apply establishment standards for award of an honorable, general, or an under other than honorable discharge as in paragraphs 1-13 and 1-14, unless other conditions exist which clearly justify award of such a discharge. The purpose here is to preserve the value of honorable service, preclude unmerited award of honorable discharges to individuals who, in many cases, would not be in the Army had their disqualifications been known at enlistment/reenlistment. By the same token, soldiers should be discharged and their enlistment not voided when commanders believe that their performance and conduct clearly merit a characterized discharge under standards in paragraphs 1-13 and 1-14 (see para 1-7b for instructions on ARNGUS and USAR personnel).

[44] *See* AD 78-00316 (DRB upgraded in a situation where under current standards a voided enlistment would have occurred); AD 79-01423 (same).

[45] ADRB SOP, SFRB Memo # 1-80, 29 Jan. 1980, 45 Fed. Reg. 16,309 (cancelling SFRB Memo # 8-79 of 31 Aug. 1979) provides:

> b. Panels of the ADRB will review subject discharge appeals or RFAD appeals for which a service characterization has been made but no creditable service was awarded. The Board hearing the case will render a decision and recommendation in accordance with appropriate regulations.
>
> c. Panels of the ADRB will also review subject discharge appeals or RFAD appeals where the service contract was voided and no characterization of service rendered, but creditable service was awarded. The Board hearing the case will render a decision and recommendation in accordance with appropriate regulations.
>
> d. Those subject cases for which an appeal has been made, but the applicant's service was voided and no characterization of service or creditable time was rendered by the discharge or releasing authority, will be transferred to the Army Board for Correction of Military Records.
>
> 2. Panels members who have questions regarding subject type cases which have not been identified above will present them to the legal section of the ADRB for resolution or guidance.

See NC 77-3378; NC 76-6007; NC 79-2377; NC 78-4289; NC 78-02083 (voided enlistments changed by BCMR to GDs). *See also* NC 77-2455 (voided enlistment changed by BCMR to an HD).

In the late 1970s, after the Court of Military Appeals held that certain forms of recruiter misconduct divested a court-martial of jurisdiction (*see* § 12.6.3 *supra*), the Navy and Marine Corps voided the enlistments of servicemembers successfully utilizing this jurisdictional defense. The JAG of the Navy subsequently held that voiding these enlistments exceeded the authority of the Navy, absent a change to DoD Dir. 1332.14, and that the void enlistments should be changed to a discharge characterized as Honorable or General. JAG memo JAG 131.1: TDK: ado ser 13/5019, Jan. 13, 1978; JAG memo JAG 131.2: TDK: vmg ser 13/5097, Feb. 21, 1978; JAG memo JAG 131.1: TDS: cse ser 13/5273, July 25, 1980.

APPENDIX 18A
DRB/BCMR DECISIONS

These cases are arranged numerically by service. The volume of cases and the imprecise manner in which they are indexed requires counsel to pursue his/her own research to assure completeness. The authors would appreciate any significant cases called to their attention.

A. CASE LISTS

These lists of cases are provided for convenience. Copies of cases cited in supporting briefs should accompany the briefs and may be obtained by contacting: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310.

1. ARMY

AD 78-00315; AD 79-01021; AD 78-04588; AD 78-04632; AD 79-06360; AD 79-06585; AD 80-00520; AD 80-01154; AD 80-01654; AD 80-01840; AD 80-02629A; AD 80-03419; AD 80-04776.

2. AIR FORCE

FD 80-0119; FD 80-0526; FD 80-0895; FD 80-1351.

3. NAVY

ND 78-01198; MD 77-01802; MD 79-03210; MD 80-00425; MD 80-02590.

B. DIGESTS OF CASES RELIED UPON

1. ARMY BCMR

AC 78-01317 (1933 UD for fraudulent concealment of marital status; upgraded to GD/COG in light of honorable service, wartime service with Department of Commerce, subsequent service with Civil Service, and regulatory change relating to fraudulent entry; regulations published subsequent to discharge no longer indicate concealment of marital status as basis for discharge by reason of fraudulent entry).

2. ARMY DRB

AD 7X-11868 (1972 GD for fraudulent concealment of rape and incest conviction; upgraded to HD in 1977 under regulations requiring mental status or neuropsychiatric evaluation for fraudulent entry case, neither of which was performed).

AD 78-00316 (1958 UD for fraudulent concealment of extensive civilian record; upgraded to HD as under current standards would have been voided; only one Art. 15 punishment for indiscipline and diagnosis for C&B at time of entrance should have barred entry).

AD 79-01021 (1962 UD for fraudulent concealment of prior arrest for assault and misdemeanor conviction; upgraded to HD taking into account current regulations stating that the specific act supporting the fraud should not be used to characterize service; service was without misconduct and fraudulent act not serious; deserved full relief; excellent conduct and efficiency ratings for four months service).

AD 78-04588 (1974 UD for fraudulent concealment of prison record; upgraded to GD because servicemember was held in a hold status for an inordinate amount of time and had unwaiverable disqualifying scores for military service).

AD 78-04632 (1955 UD for fraudulent concealment of criminal record; upgraded to HD because of doubt about complicity of Army recruiter and probation officer in concealment of record; record included 1 SCM for AWOL of 19 days and unsatisfactory C&E ratings).

AD 79-06360 (1949 UD for fraudulent concealment of child; upgraded to HD because of recruiter connivance and seven and a half months good service).

AD 79-06585 (1971 GD for fraudulent entry for failure to disclose minor offenses; upgraded to HD because record showed that the offenses omitted from enlistment application were minor and there was no intent to conceal; five months of clean service sufficiently satisfactory to warrant HD).

AD 80-00520 (1952 UD for fraudulent concealment of probationary status; upgraded to HD because servicemember had commendable active duty record).

AD 80-01154 (1930 UD for fraudulent concealment of medical condition; upgraded to HD as there was no finding of deliberate concealment of a medical defect or disability in order to gain benefits, good post-service record, and application of current standards; U P Chapter 5, AR 635-40: a person who purposefully failed to disclose a disqualifying medical condition, but not for purpose of obtaining medical benefits receives discharge based on character of service).

AD 80-01654 (1949 UD for fraudulent concealment of a prior enlistment which resulted in UD; upgraded to HD because period of service contained no disciplinary record and satisfactory or better ratings).

AD 80-01840 (1949 UD for fraudulent concealment of discharge forms attached to third HD indicating he was not eligible for re-enlistment; upgraded to HD because of three prior HDs, UD too harsh, no lost time during last service, time and good post-service record).

AD 80-02629A (1931 UD for fraudulent concealment of two prior UDs when inducted; upgraded to HD because performance was satisfactory, had an award for valor, and, at time of discharge, unit commander stated he would be willing to retain SM).

AD 80-03419 (1964 UD for fraudulent concealment of age and arrest and conviction record including eight crimes and one parole violation each carrying sentence of one year; upgraded to GD — no acts of indiscipline, no lost time, and excellent character and efficiency ratings).

AD 80-04776 (1961 UD for fraudulent concealment of arrest and prior discharge for inaptitude; upgraded to HD because of prior honorable service, good ratings, and overall quality of service).

3. AIR FORCE BCMR

FC 78-02462 (1948 DD for robbery and several military offenses; changed to voided enlistment because of enlistment at age 15, immaturity, and current standard of voiding enlistments in such cases because of lack of court-martial jurisdiction).

4. AIR FORCE DRB

FD 80-0119 (1952 UD for fraudulent concealment of prior service and UD for homosexuality; upgraded to HD because servicemember's only motive in hiding previous enlistment was to prove he was not a homosexual, and had a good record of service).

FD 80-0526 (1953 UD for fraudulent concealment of juvenile record for statutory rape and resisting an officer, drunkenness and disturbing the peace; upgraded to HD because of applicant's strong patriotism, low educational level, deprived background, and good service record).

FD 80-0895 (1958 UD for fraudulent concealment of 100 days lost time during previous enlistment; upgraded to HD because Board did not believe that he had altered his enlistment form based on his demeanor, reputation for honesty, position in church, etc., and his clean record and prior good service record).

FD 80-01351 (1954 UD for fraudulent concealment of arrest for homosexual conduct; upgraded to HD because the offense was a single act due to immature curiosity, and because of good service record).

5. NAVY DRB

ND 78-00754 (1977 UD for fraudulent concealment of arrest record; upgraded to HD/COG because enlisting command had complete knowledge of pre-service dismissed charges).

ND 78-00906 (1970 GD for fraudulent concealment of drug use; upgraded to HD finding no intent to defraud as testimony of applicant credible that he thought prior use not "excessive" by peer group standards and he intended to complete service despite prior active evasion of military service).

ND 78-01198 (UD issued because servicemember had friend take enlistment tests; upgraded to GD since conduct not "flagrant." Overall record included 3 AWOLs, 2 SCMs, theft of car and 106 days lost time).

MD 77-01802 (GD for concealment of prior HD and three dependents; upgraded because of enlistee's clean record and discovery of offense in first week of enlistment).

MD 79-03210 (UD for concealment of juvenile adjudications; upgraded to GD/COG where in contravention of the ADB recommendation, the discharge authority recommended discharge without SECNAV review; after being rejected for enlistment three times, applicant concealed five prior civil convictions (car thefts) from recruiter; juvenile record was sealed but applicant voluntarily disclosed record to commander; the ADB recommended retention on a split vote and pursuant to CMC review a UD was issued).

[The Marine Corps Separation and Retirement Manual, ¶ 6017.3b(2), provides for special processing of fraudulent enlistment cases involving failure to disclose a juvenile record. If the discharge is deemed proper, it may be issued under honorable conditions. Paragraph 6024.96(7) of the Manual directs referral to SECNAV where the ADB and CMC are in disagreement. Upon approval by SECNAV, a fully honorable discharge for COG may be issued. The Board applied these current standards to the above case, denying full relief because of two disciplinary infractions (DOLOs)].

MD 80-00425 (UD for concealment of convictions for drunk and disorderly, possession of marijuana, and resisting arrest; upgraded to GD where the recruiter was the primary perpetrator and concealment by recruiter, while known to applicant, was not at his request; record included two Art. 15s for AWOL).

MD 80-02590 (UD for concealment of homosexual acts; upgraded to HD under current standards).

CHAPTER 19
DISCHARGES FOR GOOD OF THE SERVICE (IN LIEU OF COURT-MARTIAL)

19.1 INTRODUCTION AND OVERVIEW

A discharge for the good of the service (GOS) is the only administrative discharge for cause that is not formally initiated by the command. Instead, it is initiated by a servicemember against whom court-martial charges have been preferred. The servicemember requests a GOS discharge to avoid trial by court-martial and the possibility of receiving a punitive discharge and/or a jail sentence.

Prior to 1966, the GOS procedure was used rarely, generally only to provide an officer or noncommissioned officer with the opportunity to avoid a court-martial. In the Navy, it was frequently used in all cases involving homosexual acts. In 1966, the Department of Defense administrative discharge directive permitted the use of the GOS discharge for all enlisted members.[1] The Navy did not begin to use the GOS discharge in all cases until 1971, and the other services used it in only a few hundred cases a year until 1970.[2] The GOS procedures grew in popularity as the Vietnam War began to draw to a close. Tens of

[1] DoD Dir. 1332.14, para. VII.K. (Dec. 20, 1965), effective March 20, 1966. *See* DRB Index categories A70.00; A94.08; A80.00 (officer cases).

[2] The increased use of the GOS procedures is shown by the following figures:

FY	ARMY	NAVY	MARINE CORPS	AIR FORCE	DoD TOTAL
67	294	N/A	1	88	383
68	384	N/A	7	179	570
69	532	N/A	471	168	1,171
70	6,993	N/A	3,272	118	10,383
71	12,041	209	4,556	303	17,109
72	23,122	1,333	1,691	588	26,734
73	18,352	1,610	1,593	330	21,885
74	15,882	2,264	2,657	164	20,967

During the latter half of the Vietnam era, the GOS procedure was used extensively by the military services to eliminate tens of thousands of servicemembers with moderate to lengthy periods of unauthorized absences. The Army established processing centers, referred to as Special Processing Detachments (SPDs), later renamed Personnel Control Facilities (PCFs) at various locations throughout the country. Court-martial charges would be preferred against AWOL servicemembers who surrendered or were returned to military authorities at SPDs. The servicemember would request a GOS discharge to avoid trial by court-martial and would be discharged, usually with a UD, in an assembly-line fashion. The ADRB, at least, is aware of the assembly-line nature of the SPDs. Army DRB SOP, Annex F-1, para. D., 44 Fed. Reg. 25,068 (1979).

thousands of AWOL servicemembers chose the GOS procedures as the quickest way to become civilians. The use of this device was so popular that the term "chapter ten discharge," after the relevant chapter of the Army discharge regulation, became the slang term used for all GOS separations. The GOS procedures grew in popularity, and by 1977, Undesirable Discharges for GOS represented 82% of all Undesirable Discharges issued.[3]

The GOS procedures permit punishment of servicemembers without utilizing the U.C.M.J. The procedures have become a routine but unofficial part of the plea bargaining process. There is no interjection of a military judge, however, because a GOS is an administrative discharge. GOS procedures have therefore been criticized, particularly because they lack explicit congressional authorization,[4] as a circumvention of the U.C.M.J.

Many of the arguments generally used to obtain upgrades also apply to upgrading GOS cases (*e.g.*, "too harsh in light of overall record" and certain factors "mitigated the seriousness of the offense"). One of the difficulties in upgrading a GOS discharge, however, is that the servicemember received it as a result of a criminal offense for which (s)he could have theoretically received a punitive discharge at a court-martial. The servicemember not only avoided the possible punitive discharge but the stigma of a federal court conviction and possible jail sentence as well.[5] While the Review Boards generally recognize that GOS procedures permit a frightened, confused, or immature servicemember to opt for the easiest, but often not the wisest, course of action, this recognition is often balanced by the concern that the servicemember escaped U.C.M.J. punishment for an offense. There is also the concern that the facts now presented to obtain the upgrade may be one-sided because the government's case was never presented at trial. Other Board members feel that the GOS discharge, particularly when used for petty offenses, reflects poor leadership because servicemembers who might not have been rehabilitated were never given a chance.

In reviewing GOS discharges, as in review of other reasons for discharge, the Boards consider both propriety and equity issues. Because these issues tend to overlap, contentions should always be framed alternatively, alleging both inequity and impropriety.

There are several important changes in current standards and procedures which the Boards apply retroactively in GOS cases.

19.2 PROPRIETY APPROACHES

19.2.1 GENERAL

Initial propriety considerations in GOS discharge cases include the following:

- Violations of the regulations governing GOS discharges,[6]
- Improper or incompetent counsel;[7]
- Coercion or lack of knowing and intelligent request for GOS separation;[8] and
- Lack of jurisdiction over the servicemember for failure to discharge at an earlier time or because of improper induction or enlistment procedures.[9]

19.2.2 SPECIFIC PROPRIETY CONSIDERATIONS

Regulations governing GOS separations have been relatively simple. They permit a servicemember charged with an offense of a specified severity under the U.C.M.J. to request, with the advice of counsel, a discharge in lieu of court-martial. The request is to contain an acknowledgement of the probable consequences of a General or Undesirable Discharge. A personal statement may accompany the request. A medical and/or psychiatric examination may or may not be required. As the request moves up in the chain of command, each intervening commander may recommend acceptance or disapproval, and frequently recommends the character of discharge which should be issued. The request is then forwarded to the officer who has the power to convene the court-martial to make the final determination whether to accept the GOS request. Sometimes the servicemember may withdraw the request for discharge.

19.2.2.1 Voluntary Request

A request for a GOS discharge involves waiving certain important rights. The request must threfore be knowing, intelligent, and voluntary.[10] Any one or a combination of the following may render a discharge for GOS improper:

- Servicemember was not mentally competent;[11]
- Servicemember's request for discharge was affected by drugs or alcohol;

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[3] The dramatic increase in the percentage of UDs issued through GOS procedures compared to all UDs issued was well documented in GOVERNMENT ACCOUNTING OFFICE, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW NEEDED, Report No. B-197168 at 64 (Jan. 15, 1980). By 1979, GOS UDs comprised 79% of all UDs issued.

[4] From 1951 to 1978 the percentage of all bad discharges resulting from court-martial sentences declined from 28% to 5%. *Id.* at 67. For an excellent discussion of this issue, see Effron, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L.L. REV. 227 (1974).

[5] In discussing discharge possibilities with clients, many young JAG officers overemphasized the stigma of a federal court conviction, making GOS procedures appear to be more advantageous to servicemembers than they necessarily were. In reality, civilian employers and licensing boards are not very concerned about court-martial convictions, especially when the convictions are for strictly military offenses. *See generally* Lance, *A Punitive Discharge – An Effective Punishment?*, [July, 1967] ARMY LAW., DA Pam. 27-50-43; D. ADDLESTONE, THE RIGHTS OF VETERANS ch. 3 (1978).

[6] *See* § 12.5 *supra* (procedural violations); § 12.5.10 *supra* (discussion of a violation of GOS regulations).

[7] *See* § 12.5.7.3 *supra*; DRB Index category A02.18.

[8] *See* §§ 12.5.5 *supra*; 19.2.2.1 *infra*.

[9] *See* § 12.6 *supra*; DRB Index categories A70.14, A70.16.

[10] *See also* §§ 12.5.5, 12.5.10 *supra*. *See also* DRB Index categories A70.12, A02.10; Robinson v. Resor, 469 F.2d 945 (D.C. Cir. 1972).

[11] *See* MD 7X-00810A; AD 7X-11918A. *Cf.* AD 77-06875.

- Servicemember was in illegal pretrial confinement;
- An administrative discharge proceeding and court-martial were being processed simultaneously, thereby leaving the servicemember little choice;[12]
- Servicemember's age, intelligence, health, or personal problems rendered him/her incapable of acting rationally;[13]
- The fact that the court-martial was not authorized to issue a sentence including a Bad Conduct Discharge was frequently not explained to servicemembers who thought they were actually avoiding jail time *and* the likelihood of a bad discharge;[14]
- The conditions in the stockade at the time clouded the servicemember's ability to act rationally;
- If the case involved charges of homosexual acts, the court-martial charges were merely brought as a device to scare the servicemember into requesting a GOS discharge;[15]
- The servicemember was not properly advised by counsel, was not properly apprised of the nature of the charges and the evidence to support them, or did not understand the full import of the proceedings;[16] or
- Minimum time to consult with counsel, as required by regulation, (usually 72 hours) was neither permitted nor waived.[17]

An important consideration in determining whether a GOS discharge was requested voluntarily is the nature of the surrounding circumstances in which the servicemember made the request. Many of these discharges were issued toward the end of the Vietnam War (1971-74) when large numbers of servicemembers were AWOL. The returning or captured AWOLs were often processed at large confinement facilities.[18] Hundreds of cases were processed weekly in these facilities with young and often inexperienced JAG lawyers advising hundreds of clients each year. Groups of soldiers were often counseled at one time.[19] The stockades housed AWOLs with a variety of problems including the mentally ill, people addicted to drugs and alcohol, those with serious personal and family problems, Vietnam returnees[20] unable to readjust, and many clever individuals who carefully planned an AWOL to obtain a GOS discharge.

The Review Boards are all aware of these facts but are particularly concerned that generalized arguments relating to the inherently coercive nature of "jail or GOS" not be used to excuse the actions of the perfectly competent manipulator. Many of the issues relating to voluntariness of the request are viewed by the Boards as equitable considerations.[21]

19.2.2.2 Timing of the Request

When a servicemember, usually an immediate commander, prefers charges against another servicemember, the military criminal system is triggered. Preferring charges involves a brief and informal investigation and the formal act of swearing to specific charges against the servicemember. This procedure differs from a referral of charges. A referral is a decision by a convening authority to send a case to trial, as opposed to dismissing the charges or using some lesser form of punishment.[22] GOS requests may properly be processed prior to referral. This practice, however, might support an argument that the servicemember was unaware of the exact nature of the charges for which (s)he could be court-martialed.[23] This argument would be made even stronger if the GOS was processed prior to preferral of charges, which is generally considered to be inappropriate.[24]

19.2.2.3 Offense Must Be Punishable by a Punitive Discharge

A GOS discharge request may be accepted only when the offense for which the servicemember was charged *could* result in a punitive discharge under the U.C.M.J.[25] This rule raises two different considerations.

First, the rule permits the acceptance of a GOS request on the theory that a punitive discharge could issue, but in reality particular courts-martial are not authorized to issue punitive discharges. For example, a summary court-martial (SCM) and a special court-martial (SPCM) not assigned a reporter to produce a verbatim transcript, and, after 1969, a military judge and or lawyer/counsel are not authorized to issue a punitive discharge.[26]

Second, it is improper to accept a request for a GOS discharge when the offense itself could result in

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[12] *Cf.* ADRB SOP, Annex F-1, para. 3.0., 44 Fed. Reg. 25,072 (1979); AD 77-10836. Misuse of the administrative process is discussed in § 12.9.2 *supra*.

[13] *See* notes 11, 12 *supra*; *see also* § 19.3.2 *infra*.

[14] This usually occurred when the charge sheets indicated that no court reporter was authorized for an SPCM. Without a verbatim transcript, a BCD was legally impossible. These are called "non-BCD Special Courts-Martial." *See* ADRB SOP, Annex F-1, para. 2.C.(2), 44 Fed. Reg. 25,070 (1979). *See* AD 77-05178 (non-BCD SPCM); AD 78-04347 (intended to send to SCM). The DRB felt it was unfair to accept a GOS in both these cases.

[15] *See* Ch. 14 *supra*. This occurred with some frequency in the Navy, and to officers of any service through the mid-1960s.

[16] AD 7X-13230A (did not fully understand); AD 77-11588 (group counseling); AD 78-01959 (thought charges more serious than they were); MD 78-01420 (poor advice of counsel); AD 77-10085 (unaware of weakness of evidence); AD 78-02779 (not properly informed of charges and thought would get GD); AD 7X-06310A (inadequate advice of counsel). *Cf.* ADRB SOP, Annex F-1, paras. 2.C.(2) (no BCD intended by command), 3.N. ("stacking" of minor offenses), 44 Fed. Reg. 25,070, 25,072 (1979).

[17] ADRB SOP, Annex 0-1, SFRB Memo # 4, Jan. 26, 1976, 44 Fed. Reg. 25,083 (1979).

[18] *See* note 2 *supra*. These places were little more than assembly-line discharge factories. The Ft. Dix stockade, for example, was known as the "meatgrinder."

[19] *See* AD 77-11588; ADRB SOP, Annex F-1, para. 1.D., 44 Fed. Reg. 25,068 (1979).

[20] Known as "post-Vietnam syndrome" (or PVS). *See* ADRB SOP, Annex F-1, para. 3.B., 44 Fed. Reg. 25,070 (1979).

[21] *See* § 19.3 *infra*.

[22] *See* § 4.3.2 *supra* (overview of U.C.M.J. procedures).

[23] *See* note 16 *supra*.

[24] AD 78-01959; DRB Index category A70.02. *Cf.* MD 78-03258 (delay of seven months to prefer charges).

[25] DRB Index category A70.04.

[26] *See* note 14 *supra*. *See also* § 4.3.2 *supra* (summary of 1969 U.C.M.J. changes).

a punitive discharge under the Table of Maximum Punishments (TMP).[27] This consideration arises most often when a servicemember was thought to be AWOL more than 30 days but actually was not,[27a] or when special rules in the TMP relating to minor offenses which could lead to punitive discharge are misconstrued. This latter situation was more likely to occur around January 1, 1976, when the GOS regulations were amended to preclude the use of this part of the TMP,[28] because many commanders were unaware of the change.

19.2.2.4 Not Guilty of the Offense

If it can be demonstrated to a Review Board that the servicemember was not guilty of the offense charged, the Board will conclude that it was improper to accept the GOS request.[29] It should be remembered that the testimony of the servicemember will be viewed with some skepticism, however, particularly since the government was never given an opportunity to present its case.[30] Demonstrating to the Review Board that the servicemember was not guilty of the offense resembles a weighing of equities more than a finding of innocence. Some general propriety considerations in this regard follow:

- Accepting the GOS request is improper when the court-martial was a legal impossibility;[31]
- When the servicemember had a legal defense to the court-martial, acceptance of a GOS request may be improper. This would be true when evidence was illegally seized,[32] when the court-martial lacked jurisdiction to try the accused,[33] or when trial would have been barred by the military's 90-day speedy trial rule;[34]
- When the evidence is insufficient for a conviction, the Boards more readily accept the applicant's testimony;[35]
- When a serious offense has been charged and a GOS request is accepted, it usually indicates that the command did not believe a conviction was likely. (When the servicemember had a good service record, however, acceptance of a GOS request in the face of serious charges may be viewed as appropriate leniency.)

19.2.2.5 Improper Counsel

The following circumstances may give rise to a claim of impropriety with regard to counsel or advice provided to the servicemember:

- The servicemember was not permitted to consult with counsel;[36]
- The counsel was not a lawyer as required or defined by the regulations;[37]
- The servicemember was not counseled on an individual basis but rather was counseled as a member of a group;[38]
- The counsel inadequately assisted the servicemember by failing to describe the defenses available or the weaknesses of the case;[39]
- Counsel did not give attention to the servicemember's special problems, such as drug addiction or family problems;
- Counsel failed to inform the servicemember that the particular court-martial could not issue a punitive discharge.[40]

19.2.2.6 Medical or Psychiatric Examination

GOS regulations often require that a medical and/or psychiatric examination be given before a GOS request is accepted to enable the command to determine if alternative processing is more appropriate.[41] The psychiatric examination could reveal that the servicemember is incompetent, legally insane, or so impaired that the apparent seriousness of the of-

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[27] *See* App. 17B *supra* (Manual for Courts-Martial (MCM), Table of Maximum Punishments (TMP)). *See also* AD 79-00622; MD 78-01420; AD 77-05178; AD 7X-20527; AD 78-04343; AD 79-02093 (cases upgraded to HD). Whether there is an upgrade to an HD or a GD seems to depend on the service record. This is not entirely proper. *See* § 12.5.1.3 *supra*. Applicants' UDs were upgraded only to GDs in the following cases: ND 78-00228; AD 79-01666; AD 77-00082; AD 79-00372 (AWOL less than 30 days); AD 79-05233 (same); AD 79-05994 (same); MD 78-00104 (same); MD 77-03700; MD 77-03706; MD 78-00351; MD 78-04315; MD 78-01405; MD 78-01355; MD 78-03970.

[27a] An AWOL might be less than 30 days because of it being legally terminated by certain acts such as an attempt to surrender to appropriate authorities. AWOL is a very technical offense. *See* § 26.3.3.7 *infra* (defenses to AWOL discussed).

[28] After 1975, the DoD discharge directive did not permit approval of a GOS request when a punitive discharge was only authorized because of § B, TMP. That section permits a court-martial to award a BCD if two offenses, neither of which individually permit a BCD, are charged. DoD Dir. 1332.14, encl. 2, para. 1 (Sept. 30, 1975) (effective Jan. 1, 1976). A similar rule permits a punitive discharge if there have been recent prior convictions even though the offense itself does not permit a discharge. § B, TMP, MANUAL FOR COURTS-MARTIAL, para. 127d (1969 rev. ed). *See* AD 77-00082 (regulation change ignored); MD 7X-02352A (insufficient number of prior CMs), MD 78-01803 (same). For retroactive application, see § 19.3.7 *infra*. *But see* proposed revision of DoD Dir. 1332.14, § 21.4 *infra*.

[29] *See generally* Robinson v. Resor, 469 F.2d 945 (D.C. Cir. 1972).

[30] The "presumption of regularity" (32 C.F.R. § 70.5(b)(12)(vi)), however, permits the DRBs to give weight to an admission of guilt in a GOS proceeding and to the fact that charges were preferred. *See* § 9.3.3 *supra*; ADRB SOP, Annex 0-1, SFRB Memo 7-78, 44 Fed. Reg. 25,098 (1979); AD 78-04016 (DRB believed applicant's story); note 50 *infra* (discusses forced acknowledgment of guilt).

[31] Neal v. United States, 177 Ct. Cl. 937 (1966) (charges illegally preferred and insufficient evidence as a matter of law); Middleton v. United States, 170 Ct. Cl. 36 (1965) (Navy regulations would not permit CM after civilian court acquittal).

[32] DRB Index category A01.24. *See* AD 78-00722; AD 77-08493 (illegally seized evidence); *cf.* AD 78-04383 (drunkenness). *See* note 27a *supra* (AWOL defenses).

[33] DRB Index category A70.14; A70.16. *See also* § 12.6 *supra*.

[34] *See* § 20.6.2 *infra*.

[35] AD 77-10173 (only evidence was "weak third party statement"); AD 77-10836 ("couldn't convict"); FD 77-01984A (insufficient evidence in record); AD 78-01246 (would not be convicted); *cf.* AD 78-04383 (drunkenness); AD 78-04016 (believed applicants' version).

[36] DRB Index category A70.08; Ingalls v. Zuckert, 309 F.2d 659 (D.C. Cir. 1962). See §§ 12.5.7.3, 12.5.5 *supra*.

[37] AD 79-06080; AD 77-21977; AD 77-09766; AD 77-08051; AD 77-09104. The regulations usually require certification of an attorney pursuant to Art. 27, U.C.M.J. ADRB SOP, Annex 0-1, SFRB Memo # 17 (Nov. 22, 1976), 44 Fed. Reg. 25,085 (1979). If the counsel signing the waiver statement was not a member of the JAG and did not assert Art. 27 certification, there should be no presumption of regularity, because regulations require the recording of this information. *See* ADRB SOP, Annex 0-1, para. 2.A.(3), 44 Fed. Reg. 25,069 (1979).

[38] *See* AD 77-11588.

[39] *See* § 19.2.2.1 & note 16 *supra*.

[40] DRB Index category A70.08. *See* note 2 *supra*.

[41] *See* § 12.5.4 *supra*; ADRB SOP, Annex 0-1, SFRB Memo 2-80, Feb. 8, 1980 (unpublished).

fense is mitigated. The medical examination could reveal that a medical condition is in part responsible for the offense or that the servicemember has a service-connected disability for which (s)he should be separated.[42] It can be argued that the results of these examinations were improperly ignored or that had they been performed, the GOS would not have been accepted. Even if the exams were not required, such medical conditions provide a basis for an equitable argument.[42a]

19.2.2.7 Withdrawal of the Request

While the servicemember does not have an absolute right to withdraw a GOS request once it has been submitted, the regulations usually provide some guidelines on when a request may be withdrawn.[43] Acceptance of a GOS may be improper in the following situations:

- A withdrawal request is not acted upon by the discharge authority;
- A withdrawal request is not accepted, even though recently discovered evidence would prove the innocence of the servicemember;[44]
- A withdrawal request is denied for improper reasons such as reliance on previously overturned convictions;[45] and
- When a GOS request has been denied, later approval would be improper because there is no longer a pending request.[46]

19.2.2.8 Acceptance of the Request After Trial

The regulations are unclear as to whether a discharge request for GOS can be accepted after trial. It may be improper for a convening authority to accept a GOS request after the government failed to obtain a conviction or concluded during the trial that a conviction was unlikely. The following are some of the situations in which acceptance of the request after the trial begins may be improper:

- The GOS request was accepted after the servicemember was acquitted of charges at trial;[47]
- The GOS discharge request was accepted after the servicemember was convicted at trial, but the sentence did not include a punitive discharge;[48]
- The GOS discharge request was accepted after the prosecution decided it was losing the case;
- The GOS discharge request was accepted after a local review of the court-martial conviction disclosed that the conviction was defective; or
- When a request had been previously denied, a GOS request cannot be accepted without a renewal of the request. (There is no legally pending request before the convening authority after a request for GOS discharge is denied.)[49]

19.2.2.9 Statement of the Servicemember

Regulations governing GOS discharges permit the servicemember to submit a statement with the request for discharge. In most instances, the servicemember merely signs a request form similar to the examples contained in the discharge regulations. These forms, particularly those used in recent years, contain standard statements laying the basis for regulatory compliance (*e.g.*, warnings as to consequences of a UD, acknowledgement of the right to submit a statement and an indication of consultation with counsel).

Occasionally, however, the servicemember will submit a statement requesting a GOS discharge as a matter of leniency, or requesting an Honorable or General Discharge. In both cases, the servicemember will probably rely on the quality of his/her service record to justify the requests. It is important, therefore, to be sure that the service record actually contains the favorable information alleged by the servicemember.

These statements signed by the servicemembers rarely contain any allegation of innocence or defense to the offense leading to the discharge. One reason for this is that post-1974 regulations have generally required an acknowledgement of guilt as a prerequisite to obtaining the GOS discharge.[50] A veteran who acknowledged guilt in a signed statement but later asserts innocence should be prepared to answer many questions concerning the contradiction.

Another possible reason these statements rarely allege innocence has to do with a common practice at some commands of offering a court-martial, rather than the GOS procedure, to any servicemember who

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[42] AD 77-06875 (should have had psychiatric examination when psychiatric problems were suspected). For the application of current standards, see § 19.3.7 *infra*. For other cases involving psychiatric and medical problems, see § 19.3.2 *infra*.

[42a] *See* §§ 22.5.7. 22.5.8, 22.5.9 *infra*.

[43] *See* § 12.5.5 *supra*; DRB Index category A70.10.

[44] *See* AD 78-00913.

[45] *See* AD 77-07713.

[46] DAJA-AL 1972/4796, 19 Aug. 1972.

[47] *See* AD 77-09587.

[48] *See* AD 7X-02495. *Cf.* § 12.9.3 *supra* (administrative discharge improper after court-martial sentence did not require discharge).

[49] *See* note 46 *supra*.

[50] The purpose of the acknowledgment of guilt has been candidly stated:

> The requirement that an accused acknowledge his guilt of the charged offenses as a requisite to requesting discharge under Chapter 10, AR 635-200, *supra*, was intended to discourage frivolous appeals of the administrative discharge to discharge review boards and to preclude later claims of innocence, or similar assertions.

DAJA-MJ 1974/11185, 21 Feb. 1974. The author of this opinion, Col. Alton H. Harvey (currently the Judge Advocate General of the Army), further stated that the use of such an admission at a court-martial would likely be found to be involuntary within the meaning of Art. 31(b), U.C.M.J., 10 U.S.C. § 831(b). United States v. White, 14 C.M.A. 646, 34 C.M.R. 426 (1964) (promise of administrative discharge renders confession invalid); United States v. Tanner, 14 C.M.A. 447, 34 C.M.R. 227 (1964). A cover memo signed by Col. Harvey, on file with the NVLC, states that this opinion was not being published because it "would have an adverse effect in the event the issue is litigated."

The acknowledgment of guilt requirement was probably prompted by Robinson v. Resor, 469 F.2d 945 (D.C. Cir. 1972). In light of the recent clarification of the applicability of Art. 31 to the administrative process, (Giles v. Secretary, 627 F.2d 554 (D.C. Cir. 1980)), the DRBs' use of "the presumption of regularity" concerning this acknowledgment of guilt may be inappropriate. *See* note 30 *supra*; § 12.9.4 *supra*.

wishes to prove innocence. This practice has an obvious chilling effect on a servicemember who does not want to risk a court-martial or jeopordize the GOS request. If this is the case, the DRB should be so informed.

19.2.2.10 The Legal Review

Most requests for GOS discharges are routed through the Office of the Staff Judge Advocate (SJA) where legal advice concerning the case is rendered to the convening authority. Sometimes these reviews amount to no more than a single statement in a cover letter indicating that the GOS request was "legally sufficient."

These legal reviews should be carefully scrutinized for possible errors. In summarizing the case, the SJA may, for example, fail to include favorable information, erroneously include unfavorable information,[51] or misstate the offense or offenses charged. A failure by the SJA to detect a minor regulatory violation which was apparent tends to magnify, in the eyes of the Board, the gravamen of the otherwise nonprejudicial error.[52]

19.2.2.11 Information Presented to the Convening Authority

The convening authority (CA) is the person who decides whether to refer a case to a court-martial. This decision, based on the papers and file presented by subordinates, rarely involves individualized decision-making, but it is a decision that can only be made by the CA as a quasi-judicial officer.

Any defects in the documents presented to the CA may constitute improprieties sufficient to warrant an upgrade. This would be especially likely if decisions by the CA based on the defective information were legally prejudicial to the servicemember's case.

The following types of defective information in the file may constitute improprieties sufficiently prejudicial to warrant an upgrade:[53]

- Misinformation as to the nature and seriousness of the offense charged;
- Misinformation or lack of information concerning the applicant's medical and/or psychiatric condition;[54]
- Failure to include the servicemember's statement if one was submitted; or
- Failure to include in the file any favorable information concerning the servicemember, such as prior honorable service, medals, awards, recommendations for a good discharge by lower level commanders, or the inclusion of erroneous unfavorable information.[55]

[51] *See* AD 79-01545 (mentioned prior conviction when none existed); MD 78-01196. *See also* § 19.2.2.11 *infra*.
[52] *Cf.* FD 77-01984A.
[53] *See* §§ 12.5.6, 12.5.7.8 *supra*.
[54] *See* AD 77-06875.
[55] *See* AD 77-10497 (pending civilian charge); FD 77-01984A (mention of prior acquittal); AD 77-09463 (failure to mention Vietnam service); AD 77-07713 (overturned SCM considered); MD 78-01196 (mitigating evidence left out).

19.3 EQUITY APPROACHES

19.3.1 GENERAL

As with discharges for unfitness/misconduct, the GOS regulations tend to presume that a GOS discharge will be characterized as Undesirable regardless of the servicemember's record. Consequently, until recently, the vast majority of servicemembers discharged for the good of the service received Undesirable Discharges.[56] This presumption appears to be based on the notion that the specific conduct for which the servicemember is being discharged deserves punishment. Furthermore, since the servicemember is being separated short of his/her obligated term of service, the entire period of service should be characterized as Undesirable notwithstanding the actual quality of service during the period of enlistment. The Review Boards have upgraded these discharges to General on equitable grounds if the discharge was too harsh or unwarranted, if there were mitigating factors, or if the original offenses were minor in nature.

These concepts do not appear in the basic discharge regulations. Instead the Review Boards derive the authority to use these concepts through interpretation of their enabling statute. This approach[57] enables the Review Boards to review the characterization of discharges as an appellate body within a broader spectrum than the individual commanders who characterize discharges in the first instance.

Some of the general factors considered, at least subconsciously, by the Boards in reviewing all GOS cases to determine whether the discharge is inequitable are:

- The suspicion that the servicemember "got away with something" by avoiding trial by court-martial;
- The actual or implied acknowledgement of guilt by the servicemember who chose the GOS option;[58]
- A concern that the government was never given an opportunity to prove its case fully;
- A realization that elimination of servicemembers through the GOS discharge is not the best personnel management technique; and
- A concern whether the applicant is a "good guy," was given a fair shake, and/or whether the Undesirable Discharge accurately describes the overall quality of the veteran's service.

19.3.2 MITIGATING FACTORS AND OVERALL RECORD APPROACH

Mitigating factors and overall service record are looked at by the Boards in almost all discharge cases. This process involves an examination of the offense to determine whether there are mitigating factors reducing the seriousness of the offense and

[56] *See* note 3 *supra*.
[57] *See* § 22.1 *infra*.
[58] *See* note 50 *supra*.

whether the discharge awarded accurately reflected the quality of the servicemember's overall record. Migigating factors[59] can include the following:

- Drug problems;[60]
- Alcohol problems;[61]
- Psychological problems;[62]
- Physical problems or limitations;[63]
- Limitations of ability warranting a lesser standard of culpability, due to age, lack of education, disadvantaged social background, or similar factors;[64]
- External pressures, such as personal or family problems;[65] and
- A recommendation for a GD or HD from an intermediate commander.[66]

After the Board reviews all the circumstances of the case, it concludes one or a combination of the following:[67]

- The discharge was "too harsh" given the nature of the offense;
- The servicemember's "overall service record warranted" a better type of discharge, and/or
- The offense was "minor in nature" or not serious enough to warrant the type of discharge issued.

While it is difficulty to quantify the mitigating factors, the process involves a balancing of positive and negative factors to reach one of the above conclusions. No numerical score can be calculated to predict results. The process reflects the decision that, given the totality of the circumstances, the servicemember was treated unfairly.

While different Board members may view different factors as carrying more or less weight, and while cases tend to turn on their specific facts, it is helpful to refer to the reasoning of prior Board decisions to determine which negative facts are considered to be the most serious and which must always be confronted. The most serious negative factors seem to be:

- Offenses involving violence;
- Offenses involving sale of illegal drugs;
- Offenses occurring close to a war zone or involving refusal to participate in hostilities;
- Lengthy AWOL;
- Offenses against officers or which tend to threaten the command structure;
- Lack of creditable service;
- Clear capacity to have chosen another course of action;
- Absence of mitigating factors to explain the offense; and
- Offender was of sufficient rank or maturity to appreciate the magnitude of his/her actions.

[59] *See* DRB Index Part G.
[60] *See* Ch. 15 *supra*. *See also* AD 77-05907; AD 77-12083; AD 78-02779; AD 78-00359.
[61] *See* Ch. 13 *supra*. *See also* AD 77-12083; AD 78-04383; AD 79-05710.
[62] *See* § 19.2.2.6 *supra*; § 19.3.6 *infra*. *See also* AD 7X-20527; MD 7X-00801A; AD 7X-20014A; AD 78-02778.
[63] DRB Index category A93.22.
[64] *See* AD 79-05132; AD 7X-15460; MD 7X-07136.
[65] ADRB SOP, Annex F-1, para. 3.G., 44 Fed. Reg. 25,071 (1979); AD 78-01959; AD 78-02779; AD 78-04343; MD 7X-07136; AD 78-04347.
[66] *See* AD 77-10173; AD 78-04427.

19.3.3 A PUNITIVE DISCHARGE WOULD LIKELY NOT HAVE RESULTED HAD THERE BEEN A COURT-MARTIAL

A GOS discharge is issued when a servicemember commits an offense for which (s)he could have received a punitive discharge under the Table of Maximum Punishments at a court-martial. One way to argue for a discharge upgrade is to show that had the applicant gone to trial, no punitive discharge would have issued because of the nature of, or circumstances surrounding, the offense.[68] The Naval DRB appears to be the only Board that routinely examines whether a court-martial would likely have sentenced the servicemember to an unsuspended punitive discharge.[69] The Army and Air Force use this approach, but express it in other ways, such as, "too harsh considering the nature of the offense." Each service is more comfortable when it can be shown that the command never intended to send the case to a court-martial empowered to adjudge a punitive discharge[70] or that the command charged many minor offenses ("stacking") to make the charges appear more serious.[71] The most common situations in which the Naval DRB will use this approach are:

- Relatively short AWOLs;[72]
- Minor military offenses;[73]
- Sufficiently mitigating circumstances surround the offense;[74] and
- Offenses which are not of a "serious aggravated type."[75]

19.3.4 SERVICEMEMBER WAS NOT GUILTY OF THE OFFENSE CHARGED

The Boards are skeptical about basing a decision to upgrade on a servicemember's allegation of innocence of the offense.[76] The source of this skepticism is that the government may never have had a chance to present its full evidence in the GOS process, and that there is sometimes invoked a "presumption of regularity" in the original acknowledgement of guilt.[77] The federal courts, however, have recognized lack of guilt as a significant factor in overturning a refusal to upgrade.[78] While the Boards will occasionally accept just the testimony of the veteran,[79] this

[67] DRB Index category 94.08. *See generally* App. 19A (case digests). The decisions in most cases are based on a combination of the factors discussed in this section and in Ch. 22 *infra*.
[68] This approach is logical even if the only consideration were the seriousness of the punishment possible at a court-martial. A UD is considered to be as serious as a BCD. *See* Effron, *supra* note 4, at 270-71.
[69] *See generally* DRB Index category A94.08. *Cf.* AD 79-00860; AD 79-01967 (too harsh considering the nature of the offense); MD 7X-02030; MD 7X-06056; MD 7X-02458.
[70] *See* ADRB SOP, Annex F-1, para. 2.C.(2), 44 Fed. Reg. 25,070 (1979); AD 7X-13230A; AD 78-04347. *Cf.* AD 78-04016 (where Art. 15 offered first).
[71] ADRB SOP, Annex F-1, para. 3.N., 44 Fed. Reg. 25,072 (1979).
[72] *See* MD 7X-2458.
[73] Cf MD 78-00725 (UD improper unless most serious single offense would be punishable by a BCD under the TMP.
[74] *See* MD 78-01420; MD 7X-02458; MD 7X-01788; MC 7X-02030.
[75] *See* MD 78-01420; MD 78-03258. *See also* § 19.3.7 *infra*.
[76] *See* § 19.2.2.4 *supra*.
[77] *See* note 50 *supra*.
[78] *See* Robinson v. Resor, 469 F.2d 945 (D.C. Cir. 1972).
[79] *See* AD 78-04016.

approach is most often successful when the "defense" can be bolstered by evidence outside the service record.

19.3.5 APPROACHES IN AWOL CASES

19.3.5.1 General

The most common offense for which GOS discharge requests have been accepted is absence without leave. The Boards are most likely to analyze these cases by examining the following issues:[80]

- Whether mitigating circumstances, such as family, financial, drug, and/or alcohol problems existed, and whether anything was done to seek assistance through the chain of command;
- The length of the AWOL status;
- What the applicant did while in AWOL status;
- Where the applicant went while in AWOL status;
- Whether the applicant was apprehended or returned voluntarily;
- Whether AWOL was from a leave status, and, if so, whether an extension of leave had been requested; and
- Whether the reason for going AWOL existed prior to entering the armed forces.

19.3.5.2 1974-75 Ford Clemency Program Cases

In 1974 and 1975, thousands of returning AWOLs were processed under the Ford Clemency Program at Fort Benjamin Harrison, Indiana. This program permitted certain Vietnam era absentees to return and accept a GOS Undesirable Discharge on the condition that they agreed to perform a period of alternative service, after discharge, as assigned by a special military board.[81] Completion of the alternative service resulted in the substitution of a Clemency Discharge for the Undesirable Discharge. The vast majority of participants did not complete their alternative service, a factor likely to be viewed negatively by the Boards. The veteran in this situation should be prepared to explain why alternative service was not completed.[82]

19.3.6 A DISCHARGE FOR UNSUITABILITY OR AS A TRAINEE FAILURE WAS MORE APPROPRIATE

As in misconduct/unfitness cases, it may be possible to argue that the servicemember should more appropriately have been discharged for unsuitability or as a trainee failure. Such an argument is based on a showing that the servicemember was willing but not able to perform ("would but couldn't" as opposed to "could but wouldn't"). The Boards realize that many people, particularly those who enter the military service under reduced standards, cannot be expected to perform as well as their peers.[83] Key factors which tend to assist in making this argument are:

- Age;
- Educational background;
- Test scores;
- Family/social background;
- Psychiatric diagnosis; and
- Physical limitations.

Cases discussing the distinction between misconduct/unfitness and unsuitability are also relevant here.[84]

19.3.7 CURRENT STANDARDS APPROACH

Another approach to upgrading GOS discharges involves the retroactive application of current standards to determine whether there is "substantial doubt" that the servicemember, if processed today, would have received the same discharge. This approach can be used in many cases and most commonly in the following:[85]

- Use or possession of drugs;[86]
- Alcohol abuse;[87]
- Homosexual acts;[88]
- Discharges during basic training or shortly thereafter when the current trainee failure discharge program would apply;[89]
- Discharges for relatively short AWOLs;[90]
- Discharges from the Navy and Marines for offenses not of "an aggravated type";[91]
- Discharges for several short periods of AWOL none of which alone would authorize a punitive discharge but combined would permit a punitive discharge at a court-martial. Under current discharge regulations such violations may no longer form the basis for a GOS discharge;[92] and
- Army cases where a mental status examination was not performed.[93]

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[80] *See* DRB Index category A71.00.

[81] The procedures for arriving at appropriate terms of alternative service were unsuccessfully challenged in Vincent v. Schlesinger, 388 F. Supp. 370, 3 MIL. L. REP. 2134 (D.D.C. 1975), *remanded to determine mootness,* 590 F.2d 1137, 6 MIL. L. REP. 2455 (D.C. Cir. 1978). *See* Ch. 23 *infra* (complete discussion of this program).

[82] *See* § 23.4 *infra*. The receipt of a Clemency Discharge was one of the automatic upgrading criteria for those who applied to the 1977 Carter Special Discharge Review Program. *See* Ch. 23 *infra*; SDRP Manual, 4 MIL. L. REP. 6017, 6030-31; DRB Index category A94.16.

[83] *See* DRB Index categories A94.02; *id.* Part G; § 22.5 *infra; see also* MD 7X-07136; AD 78-02778; AD 78-02784.

[84] *See* Ch. 17 *supra*.

[85] *See* Ch. 21 *infra* (discussion of current standards approach).

[86] *See* Ch. 15 *supra*.

[87] *See* Ch. 13 *supra*.

[88] *See* Ch. 14 *supra*.

[89] *See* § 16.15.9 *supra*.

[90] *See* notes 27, 28 *supra*. The 1976 change in regulations no longer permits the use of more than one less-than-30-day AWOL to justify a GOS discharge. Current standards will also not usually permit a UD to issue for only a short (30 to 90 days) AWOL. *But see* 1981 proposed change to DoD Dir. 1332.14, § 21.4 *infra*.

[91] The 1974 change to BUPERSMAN 3420180 permits a UD only for "the most flagrant cases." *See* MD 78-03258.

[92] *See* notes 27, 28, 88, 90 *supra*; ADRB SOP, Annex 0-1, SFRB Memo #12, 4 Oct. 1976, 44 Fed. Reg. 25,084 (1979). *But see* DoD Dir. 1332.28, § 70.6(c)(1) (1978); MD 79-00267 (specifically applies the change in MARCORSEPMAN para. 6021 retroactively).

[93] ADRB SOP, Annex 0-1, SFRB Memo # 2-80, 8 Feb. 1980 (unpublished).

APPENDIX 19A
DRB/BCMR DECISIONS

These cases are arranged numerically by service. While the research is through Index Supplement Nine, the volume of cases and the imprecise manner in which they are indexed requires counsel to pursue his/her own research to assure completeness. The authors would appreciate having any significant cases called to their attention.

A. CASE LISTS

The case lists are provided for convenience if counsel wants to order all of the cases used in this chapter. Note that copies of cases cited in supporting briefs should accompany the briefs. Copies may be obtained without charge from: DA Military Review Boards Agency, ATTN: SFBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310.

1. ARMY

AD 7X-01588V; AD 7X-02495V; AD 7X-06310A; AD 7X-11918A; AD 7X-13230A; AD 7X-15460; AD 7X-20014A; AD 7X-20527; AD 77-00082; AD 77-05178; AD 77-05907; AD 77-07713; AD 77-08051; AD 77-08493; AD 77-09104; AD 77-09463; AD 77-09587; AD 77-09766; AD 77-10085; AD 77-10173; AD 77-10497; AD 77-10836; AD 77-11588; AD 77-12083; AD 77-21977; AD 78-00708; AD 78-00722; AD 78-00913; AD 78-01246; AD 78-01959; AD 78-02778; AD 78-02779; AD 78-02784; AD 78-04016; AD 78-04343; AD 78-04383; AD 78-04427; AD 79-00372; AD 79-00622; AD 79-00860; AD 79-01545; AD 79-01967; AD 79-05132; AD 79-05233; AD 79-05671; AD 79-05710; AD 79-05994; AD 79-06080; AD 79-07284.

2. NAVY

ND 78-00228.

3. MARINES

MD 7X-00801A; MD 7X-02352A; MD 7X-07136; MD 78-00104; MD 78-01196; MD 78-01420; MD 78-03258; MD 79-00267; MD 7X-02030; MD 7X-06056; MD 7X-02458.

4. AIR FORCE

FD 77-01984A.

B. DIGESTS OF CASES RELIED UPON

1. ARMY

AD 7X-01588V (1977 UD (21-day AWOL, DOLO, assault, and disrespect to officer) upgraded to HD based on 21 months good service including tour in Vietnam).

AD 7X-02495V (UD (AWOL) upgraded to GD because GOS accepted after SPCM convicted SM but did not sentence him to discharge).

AD 7X-06310A (1972 UD (2 drug offenses, 2 AWOLs totaling 14 days, breach of restriction) upgraded to GD because "appointed defense counsel did not make [SM] . . . fully aware of options . . . ," consequently GOS request not an informed decision).

AD 7X-11918A (1970 UD (several short AWOLs) upgraded to GD because applicant was not fully capable of comprehending overall GOS process, outstanding service for 18 months in Vietnam, and history of promotions).

AD 7X-13230A (1972 UD (DOLO , disrespect to officer, and wrongfully communicating a threat all to same officer at same time) upgraded to GD because SM did not understand alternatives to GOS, and UD too harsh particularly because charges arose out of one transaction).

AD 7X-15460 (1970 UD (2 AWOLs, 4 days and 96 days) upgraded to GD because of mitigating factors of age, aptitude, educational level, length of service, and personal problems which may have contributed to AWOL).

AD 7X-20014A (1972 UD ("substantial number of acts of indiscipline") upgraded to GD because of prior good record; should have been referred for psychiatric examination in light of a prior determination that SM was not qualified for retention due to psychiatric problems).

AD 7X-20527 (1970 UD (14-day AWOL) upgraded to HD because offense not punishable by punitive discharge and good prior record (almost served to ETS, one Art. 15, 1 SCM and mitigating psychiatric evaluation)).

AD 77-00082 (1977 UD (several less-than-30-day AWOLs) upgraded to GD because processing initiated after regulation change no longer permitting GOS based on § B of TMP (where BCD authorized for multiple minor charges)).

AD 77-05178 (1976 UD (larceny) upgraded because "an element of fairness toward the applicant was absent. It appeared that the submission of the Ch. 10 request was questionable and that the applicant's overall service could have been considered to have merited fully honorable recognition." SPCM to which cases referred not authorized to adjudicate BCD).

AD 77-05907 (1976 UD (possession of heroin, syringe, and needles) upgraded to HD because of overall record (length of service, clean record, and nature of charges)).

AD 77-06875 (UD upgraded to GD because regulatory requirement of a mental status exam prior to approving a GOS request if there is reason to believe psychiatric problems exist violated; SM had requested psychiatric help).

AD 77-07713 (1973 UD (129-day AWOL) upgraded to GD because in denying request for withdrawal of GOS request, command considered an SCM conviction which had been overturned upon review).

AD 77-08051 (1974 UD (4 AWOLs, totaling 253 days) upgraded to GD because SM not given properly certified attorney as required by regulation).

AD 77-08493 (1976 UD (possession of heroin and another drug) upgraded to HD because too harsh in light of overall record and doubts about propriety of seizure of the evidence).

AD 77-09104 (1974 UD (86-day AWOL) upgraded to GD because counsel not properly certified as required by regulation).

AD 77-09463 (UD upgraded to GD because legal review given CA did not mention Vietnam service, awards for combat duty, and overall record).

AD 77-09587 (UD upgraded to GD because GOS accepted after acquittal at the court-martial).

AD 77-09766 (1974 UD (3 AWOLs, totaling 51 days) upgraded because counsel not properly certified as regulations required).

AD 77-10085 (1976 UD (possession of drugs and needles) upgraded to GD; because lab report indicated only a trace, SM wasn't aware of that at time of GOS request, and two years prior good service with only minor infractions).

AD 77-10173 (1976 UD (theft of $420 worth of property) upgraded because only proof was "a weak statement by a third party," two intermediate commanders recommended a GD, and 4 years, 9 months prior good service).

AD 77-10497 (UD (AWOL) upgraded to GD because CO report mentioned pending civilian offense (drugs)).

AD 77-10836 (1974 UD (attempted rape, assault, and indecent exposure) upgraded to GD because of the statement in the file by the regimental commander indicating that the administrative discharge was taken as the most expeditious manner to discharge a soldier not suited for military service, casting considerable doubt as to whether the applicant could have been convicted for the charges against him).

AD 77-11588 (UD upgraded to HD because request not knowing and intelligent. The SM had been counseled in a group of three to four others and was briefly told by the JAG that if he wanted a discharge he could sign a GOS request).

AD 77-12083 (1972 UD (unlawful entry and attempted theft of $194 from government) upgraded because of severe psychiatric problems, drug and alcohol problems, 1 year, 8 months good service with only one SPCM, and good post-service adjustment).

AD 77-21977 (1974 UD (110-day AWOL) upgraded to GD; applicant was not properly separated because counsel for consultation was not qualified under Art. 27(b)(1) U.C.M.J. and was not a member of the JAG Corps).

AD 78-00708 (1976 UD (31-day AWOL) upgraded to GD because of overall record and mitigating factors).

AD 78-00722 (UD upgraded to GD because evidence supporting charges resulted from an illegal search).

AD 78-00913 (1976 UD (32-day AWOL, selling heroin and possession of marijuana) upgraded to HD because defense counsel and command aware of witnesses recanting story, and SM was not permitted to withdraw GOS request).

AD 78-01246 (1975 UD (possession of LSD and marijuana) upgraded to HD because DRB believed applicant would not have been convicted of charges had CM been held and because of applicant's outstanding service).

AD 78-01959 (1974 UD (60-day AWOL) upgraded to HD because of impropriety of accepting GOS request prior to preferral of charges and SM thought he was facing more charges then he actually was; one prior Art. 15 and family problems).

AD 78-02778 (1976 UD (communicating a threat) upgraded to HD because of prior clean record and failure of command to recognize personality disorder).

AD 78-02779 (1974 UD (43-day AWOL) upgraded to HD because SM not informed of change in charges (from desertion to AWOL) after GOS request and mitigating factors of overall record (total of 76 days lost time and one Art. 15) and drug and marital problems).

AD 78-02784 (1974 UD (1752-day AWOL) upgraded to GD because of mitigating factors of good service during tour of Vietnam, obtained a rank of E4, RVN syndrome due to unexplained change of duty assignments; SM was a Project 100,000 inductee and was marginal upon induction in area of aptitude and ability, and evidence that he was being processed for separation prior to his AWOL).

AD 78-04016 (1977 UD (2 AWOLs totaling 23 days and theft of wallet) upgraded to GD because SM served satisfactorily for 7 months; was offered an Art. 15 for these offenses, but refused it and command prepared charges for which the applicant ultimately requested separation; DRB believed the applicant's testimony concerning his noninvolvement in the theft, and concluded a UD was too harsh).

AD 78-04343 (1977 UD (30-day AWOL) upgraded to HD because offense could not lead to BCD and mitigating family hardship).

AD 78-04347 (1972 UD (108-day AWOL) upgraded to GD because of overall service (never reduced below E-3) marital and family problems, and the fact that command only intended to refer case to SCM).

AD 78-04383 (1977 UD (DOLO, disrespect, and breach of restriction) upgraded to GD because of 10 months clean record and DRB's belief that SM was drunk at time of offenses).

AD 78-04427 (1973 UD (31-day AWOL) upgraded to GD because SM had clean record for 7 months, personal problems and commander recommended a GD).

AD 79-00372 (1977 UD (32-day AWOL) upgraded to GD because DRB found to have been AWOL for only 25 days and therefore GOS not permitted).

AD 79-00622 (1978 UD (assault, FTG, disrespect to NCO) upgraded to HD because none of charges would allow BCD, excellent overall record, and insufficient legal counsel).

AD 79-00860 (1978 UD (fraudulent use of government telephone) upgraded to GD because of clean record and charges not serious enough to warrant UD).

AD 79-01545 (1973 UD upgraded to GD when endorsement of GOS request that went to CA contained erroneous information about a prior conviction).

AD 79-01967 (1976 UD upgraded to GD because UD too harsh considering offense and overall service).

AD 79-05132 (1977 UD (72-day AWOL) upgraded to GD because SM's capacity to serve was influenced by age (17 at enlistment) and only ninth grade education).

AD 79-05233 (1970 UD (24-day AWOL) upgraded to GD because GOS not permissible for that offense).

AD 79-05671 (1975 UD (5-day AWOL, 2 FTGs, and disrespect to NCO) upgraded to GD based on mitigating factors of 29 months with above-average efficiency reports and problem with rehabilitative transfer).

AD 79-05710 (1973 UD (possession and delivery of marijuana) upgraded to GD because offenses related to drug addiction, 18 months service completed with excellent ratings, charges relatively minor, and UD too harsh).

AD 79-05994 (1973 UD (28-day AWOL) upgraded because GOS not permissible for offense).

AD 79-06080 (1969 UD (93-day AWOL) upgraded to HD and reason changed to "Secretarial authority" because there was no evidence that SM was properly counseled by a JAG).

AD 79-07284 (1978 UD (assault with gun) upgraded to GD because UD too harsh in light of overall service even though offense was serious).

2. NAVY

ND 78-00228 (UD to GD because offense not punishable by BCD).

3. MARINES

MD 7X-00801A (UD upgraded to GD/unsuitability because SM lacked mental capacity to make voluntary or rational choice).

MD 7X-02352A (UD upgraded to GD because GOS not permissible as no offense authorized BCD and no prior CMs in three years preceding offense).

MD 7X-07136 (1974 UD (173-day AWOL) upgraded to GD/unsuitability because of mitigating factors, including enlistment at 17, alcoholic mother harrassing SM, and command had said SM couldn't adjust to military life).

MD 78-00104 (UD (58-day AWOL) upgraded to GD because DRB found only a 28-day AWOL and JAG had missed this error in legal review).

MD 78-01196 (UD to HD/COG where legal review failed to include mitigating evidence and SM had inadequate counsel).

MD 78-01420 (1975 UD (sleeping on post) upgraded to HD/COG because SM thought she was already under suspended BCD and her inadequate counsel failed to tell her it had been disapproved on review; based on her testimony and record, DRB felt she would not have been sentenced to an unsuspended BCD had she gone to trial).

MD 78-03258 (1975 UD (unlawful entry and larceny) upgraded to GD because of 7 months delay in preferring charges, psychiatric problems, and conclusion that offense was "not serious aggravated type" warranting UD; 18 months service with 23-day AWOL and one Art. 15).

MD 79-00267 (1974 UD (4 AWOLs totaling 17 days) upgraded to GD/COG because retroactively applying current standards of MARCORSEPMAN, para. 6021, GOS would be impermissible for these offenses).

MD 7X-02030 (1972 UD (14-day AWOL and possession of drugs) upgraded to GD because under current standards SM would not have received unsuspended BCD if he had gone to trial; 24 months good service and tenth grade education).

MD 7X-02458 (1970 UD (two AWOLs totaling 66 days) upgraded to GD (HD given under SDRP) because if tried would not likely receive unsuspended BCD; previous good service and personal problems).

MD 7X-06056 (UD (drugs) upgraded to GD because charges would not have resulted in unsuspended BCD had case gone to trial; had good prior record).

4. AIR FORCE

FD 77-01984A (UD upgraded to HD where there was no evidence in the record to support charges, no legal or commander's review to ensure charges proper, and error for CA to consider a prior acquittal).

CHAPTER 2
HOW TO USE THIS MANUAL AND CASE CHECKLISTS

2.1 INTRODUCTION

Discharge upgrading first appears to the uninitiated advocate to consist of a myriad of unknown subjects. It is the authors' hope that this manual will help solve the dilemma of deciding where and how to start a discharge upgrading case.

Each chapter of the manual can be viewed as an explanation of the various steps taken in the discharge upgrading procedure. This chapter, for example, describes how the manual is to be used to enable the advocate to learn the relatively simple but essential steps in discharge upgrade advocacy without reading the whole manual. In addition, a checklist is provided at the end of this chapter, which will:

- Alert the advocate to special problems;
- Save time by identifying relatively simple cases;
- Allow intake personnel to screen cases for those that have the most potential for success;
- Provide guidance to clients who wish to work on their own cases; and
- Minimize the problems occasioned when a new advocate takes over a case in progress.

This chapter is intended to demonstrate that discharge upgrading is easy, even though some abstract procedural issues appear complicated. With proper use, this manual can assist an advocate in streamlining the processing of a large docket of discharge upgrade cases.

2.2 SUMMARY OF THE DISCHARGE REVIEW PROCESS

Who May Apply. Almost any veteran may apply at any time to have a less than fully honorable discharge reviewed. In cases of death or incompetency, the veteran's surviving spouse, next of kin, or legal representative can apply.

Obtain Service Records. The first step the applicant should take is to request and receive a free copy of his/her relevant military personnel records, a process that takes several weeks.

Where To Apply. There are two discharge review agencies, the Discharge Review Board (DRB) and the Board for Correction of Military Records (BCMR). Each military service has a DRB and a BCMR. These Boards were established in the 1940s by acts of Congress. The DRBs operate under uniform standards and procedures promulgated by the Department of Defense (DoD), with some Boards issuing internal guidance for deciding cases. The BCMRs do not have written standards. Both Boards issue individualized decisional documents.

How To Apply. An application need only consist of a simple one-page form provided by the Boards.

Which Board To Choose. Normally an applicant should apply to a DRB, if possible, because a personal appearance hearing is guaranteed. The DRBs can hear any discharge except a Bad Conduct Discharge (BCD) or Dishonorable Discharge (DD) issued by a General Court-Martial (GCM). If the discharge was issued within the last 15 years or if the veteran's discharge is one of the type covered by the waiver of the normal statute of limitations (until April 1, 1981, at this writing), (s)he may apply to a DRB. All other discharges and appeals from denial of full relief at a DRB are presented to a BCMR.

Where Hearings Are Held and Who Can Be Counsel. The DRBs hear cases in Washington, D.C., but may also travel to regional locations when there are a sufficient number of applications from that region. If an applicant determines that a personal appearance hearing is not necessary or feasible, the DRB will consider the case without a formal hearing in Washington, D.C. All BCMR cases are heard in Washington, D.C.; the BCMRs rarely grant a personal appearance hearing. Counsel before either of these

Boards can be almost anyone chosen by the applicant.

What the Standards Are and What Evidence Should Be Submitted. The burden is on the applicant to prove the discharge to be either improper (illegal) or inequitable (unfair). The Boards tend to view the discharge historically, trying to decide whether the discharge issued years ago would be issued under today's liberalized standards, or whether it remains fair to continue the stigma of the bad discharge. The Boards are specifically required to consider the case in light of current policies. Some current policies mandate a better discharge for many of the reasons for which bad discharges were issued in the past. The Boards do not neatly compartmentalize propriety and equity considerations; instead, they look for evidence that the applicant is a good person but was incapable of performing military duties, that mitigating factors existed, that the overall service record was good, or that there was a serious violation of discharge regulations. No evidence is required because the Board is obliged to review the military records to determine whether the discharge was improper or inequitable. However, military records usually contain sufficient information to support the original discharge action. Therefore, it is important for the applicant to present his/her version of the case, contentions as to why the discharge was improper or inequitable, and any other relevant evidence. Evidence may be submitted at any time after the application is filed, and no formal rules of evidence apply.

How Long Does an Application Take? A records-only review usually is held within six months and a personal apperance hearing in a regional location within one year or more. The BCMRs take from nine months to two years to hear an application. All time estimates vary, however, according to a Board's case load and region.

Why Waive a Hearing at a DRB? The DRB regulations permit a request for reconsideration even after a denial at a non-personal appearance hearing. In some cases the veteran cannot attend a hearing or there is a good chance for an upgrade without a hearing.

What Is a Hearing Like? Hearing procedures are informal. The DRBs are composed of five high-ranking military officers; the BCMRs are composed of three to five high-ranking civilian employees of the Department of Defense. The veteran usually testifies under oath and is questioned by the Board. Counsel presents arguments and directs the applicant's testimony. The government is not represented.

Is There an Appeal? Many Navy and Marine DRB decisions are subject to review by the Secretary of the Navy. All favorable BCMR decisions are subject to review by the appropriate Secretary. In most cases, after denial of relief by either or both Boards, the federal district courts can review the cases without regard to any statute of limitations, using the same standards of review that apply to other administrative agencies.

What Research Materials Are Available? Free copies of old regulations, their current editions, and Board decisions in other cases are available to applicants.

Confidentiality and Upgrade Rates. All discharge reviews are strictly confidential. The overall upgrade rate is approximately 40%, with much higher percentages in personal appearance cases and older cases. The Naval DRBs currently have the lowest upgrade rate.

Veterans Benefits. Veterans benefits are automatically available to almost all holders of Honorable and General Discharges and can be determined to be available by the VA in some cases of Undesirable and Bad Conduct Discharges. Upgrades of Undesirable, Bad Conduct, and Dishonorable Discharges make a veteran eligible for veterans benefits in most instances. When the veteran currently needs VA benefits and in some other cases, the veteran should apply simultaneously for a determination of eligibility to the VA. In other cases, the reason for discharge will require a BCMR or VA adjudication of the case, because a DRB upgrade will not be binding on the VA.

2.3 ROAD MAP TO MANUAL

2.3.1 OVERVIEW OF MANUAL STRUCTURE

The first five chapters of this manual provide an overview of the military criminal and discharge systems, a glossary, an explanation of military structure, and a historical summary of discharge regulations.

Chapters 6 through 11 deal with case preparation: intake, obtaining records, interpreting military records, general case preparation, Review Board procedures, and ordering research materials.

Chapter 12 covers almost all legal issues that can be raised in discharge upgrade cases, except for those issues peculiar to a particular reason for discharge discussed in separate chapters.

Chapters 13 through 20 deal with specific reasons for discharge, typical approaches used for each, and approaches to relief from all court-martial convictions even if a discharge was not a direct result.

Chapters 21 and 22 deal with generalized concepts of the equitable approach to discharge upgrading and specifically with the equitable standard of applying current standards and procedures retroactively to determine whether there is substantial doubt that the same type of discharge would issue under today's standards.

The remainder of the manual contains discussions of special or related issues such as the 1974 and 1977 special upgrade programs, litigation, VA considerations and VA procedures, outreach, monetary considerations that arise as a result of an upgrade, and a bibliography.

There is overlap in some of the chapters because of the importance of some issues, because of the need to isolate and discuss in detail some aspects of discharge upgrading, and because of the need to eliminate awkward cross-referencing.

Some advocates with a background in discharge upgrading will not need all of the chapters we have included. Others, after experience, will develop methods more suited to their own style.

2.3.2 HOW TO USE THIS MANUAL IN A TYPICAL CASE

The following essential steps must be taken in most discharge upgrade cases. With each we identify the chapter or section that relates to that step.

Intake, Completing Necessary Forms, and Ordering Military Records. Chapter 6 and its appendices contain all the information and sample forms that are needed to complete this stage of the case. Section 6.8 contains a checklist of these items.

Easy Case and Problem Area Checklist. Section 2.4 contains a checklist that should be consulted at intake. The checklist is important and will alert counsel to important special considerations, such as peculiar VA benefit problems. The checklist can also be used to identify easy cases that may be resolved by a simple application identifying the case category and requesting a review without a hearing.

VA Problems. If it appears that the reasons for the discharge might create special VA considerations despite a discharge upgrade, or if some reason to apply to the VA is identified through the checklist, Chapter 26 should be consulted. Chapter 27 discusses VA procedures.

Receipt of Military Records. Consult Chapter 7 to assist in the interpretation of the documents contained in the military personnel file. Section 7.6 contains a checklist to help determine whether the file is complete. Military records that might be relevant, but which are not contained in the personnel file, may be ordered as described in Sections 6.2 through 6.6.3.3. After analyzing the service records, again consult the checklist in Section 2.4.

Forum and Mode of Hearing. At this stage, determine where the application should be sent and, if it is to go to the DRB, whether a personal appearance or records-only review is appropriate. Consult Chapter 8 for guidance at this stage and for information on further case development. A case preparation checklist appears at Section 8.7. Chapter 9 contains a more detailed discussion of the Review Board procedures if, for example, a continuance in a pending case is needed.

Regulatory Issues. Consult the regulatory summary in Chapter 5 to ascertain whether there may have been any procedural violations. Then consult the regulation under which the veteran was discharged, which can be ordered by using instructions in Chapter 10. Next, consult the legal issue checklist contained in Section 12.10, which cross-references the appropriate section in Chapter 12 and other chapters.

Issues Relating to Specific Reasons for Discharge. Chapters 13 through 20 discuss approaches peculiar to specific reasons for discharge. Most of these chapters also contain an issue checklist.

Equitable Approaches. Chapter 22 discusses common equitable considerations in discharge upgrade cases, with cross-references to the appropriate sections of other chapters.

Current Standards Approach. Chapter 21 contains a checklist of circumstances in which the Boards have or might apply the current standards approach to justify upgrade.

Researching Other Review Board Cases and Military Law. Chapter 10 describes how Review Board decisions can be researched to determine whether there have been any cases similar to yours. If military law research is necessary, consult Section 4.6.

Procedural Guidance. Chapters 8, 9, and 11 contain information concerning conduct of hearings, Review Board procedures, and detailed instruction on when and how to make careful, written contentions.

2.4 CHECKLISTS OF SPECIAL CONSIDERATIONS AND EASY CASES

2.4.1 HOW TO USE THE CHECKLISTS

Three checklists are included, which permit identification of:

- Special problem issues that are not obvious;
- Easy cases to upgrade listed by reason of discharge; and
- Other special classes of cases or problems based on date of discharge or prior discharge review.

After each item, an answer and a cross-reference are stated.

2.4.2 SPECIAL PROBLEM AREA CHECKLIST

A series of special problem areas is listed below with references to sections of the manual which contain information helpful to solving such problems.

Veterans Administration Benefits May Be Barred Despite DRB Upgrade if Discharge [Cross-reference Chapter 26]:

- Resulted from a General Court-Martial even if changed to a Clemency Discharge;
- Was of a conscientious objector who refused to perform military duty or wear a uniform;
- Was of a deserter;
- Was Other Than Honorable or General and as the result of 180-day AWOL;
- Was of an officer who resigned for the "good of the service" in lieu of court-martial;
- UD had been upgraded in 1977 by Ford or Carter special programs and notified in 1978 that the discharge does not carry VA benefits.

Other Instances Where VA Adjudication Should Be Sought [Cross-reference Chapter 26]:

- Undesirable or Bad Conduct Discharge from a special court-martial and veteran desires benefits pending DRB review;
- To prevent VA educational assistance eligibility from running out in cases of UD or BCD where VA would favorably adjudicate case, such as discharge for homosexual act, venereal disease, or other minor isolated offenses;
- Where veteran had a prior HD as a result of a discharge to re-enlist and subsequent enlistment ended with UD, BCD, or DD;
- Where medical care is desired for "in line of duty" injuries and veteran has a UD from that period of service.

Veteran Has Clemency Discharge Which [Cross-reference Chapter 23]:
- Replaced a BCD or DD from a GCM, must apply to BCMR;
- Replaced a UD, then is treated for all purposes as a UD.

Veteran Had BCD or DD Previously Changed by Secretary Under Art. 74(b), U.C.M.J. to a UD [Cross-reference § 20.4.4]:
- Apply to DRB;
- Is treated in all respects like a UD.

Veteran Has BCD or DD for Drug Use or Possession [Cross-reference § 20.4.4; Chapter 15]:
- Consider an alternative application under Art. 74(b), U.C.M.J.

Discharge or Discharge Characterization Based on a Clear Violation of a Regulation Where no Discretion Involved [Cross-reference Chapter 25]:
- Consider a Privacy Act application where, for example, GD from Navy and Marines and final ratings in an unsuitability or ETS discharge required an HD by regulation; there was mathematical error in their calculation; or Army ETS GD but service record had no GCM, no more than one SPCM, and all conduct ratings of at least "good" and efficiency ratings of at least "fair."

Statute of Limitations Problems Are:
- Six years from date of discharge to file court action for back pay [Cross-reference Chapter 24];
- Fifteen years from date of discharge to apply to a DRB except in cases of UDs, Blue Discharges, or GDs or BCDs previously reviewed by a DRB before March 31, 1978 *and* the waiver of statute of limitations is still in effect [Cross-reference § 9.2.3];
- One year to appeal from last VA Regional Office decision denying a claim.

Prior DRB or BCMR Review:
- Reconsideration is possible [Cross-reference §§ 9.2.16, 9.4.15];
- If the DRB decisional document was issued after April 1, 1977, and does not provide an adequate statement of findings or reasons, or fails to address all material contentions, there can be an appeal [Cross-reference § 11.5].

2.4.3 CHECKLIST OF EASY CASES TO UPGRADE LISTED BY REASON FOR DISCHARGE

REASON FOR DISCHARGE	CROSS-REFERENCE	EXPECTED RESULTS
Alcoholism (GD or UD)	Ch. 13	GD or HD[1]
Alcohol-related misconduct (GD or UD)	Ch. 13	GD or HD
Drugs (unfitness, civil conviction, or in lieu of court-martial)		
— Possession or use case in process on or before July 7, 1971 (UD, BCD, DD)	Ch. 15	GD
— First offense possession or use Navy or Marines 1971- present (UD)	Ch. 15	GD
— Based directly or indirectly on compelled urinalysis (GD or UD)	Ch. 15	HD
Homosexual tendencies (GD)	Ch. 14	HD
Homosexual acts (adult, consenting) (GD or UD)	Ch. 14	GD or HD
Venereal disease (GD or UD)	§§ 16.12 17.9	GD or HD
Fraudulent enlistment w/o intent to defraud (GD or UD)	Ch. 18	GD or HD
Personality or character and behavior disorder from Army with no psychiatric diagnosis (GD)	§ 16.7.2	HD
Personality or character and behavior disorder from Army where record contains no GCM and only one SPCM conviction (GD)	§ 16.7.2	HD
Army discharge for unsuitability with a clean record (usually pre-1966) (GD)	Ch. 16	HD
Enuresis (bed-wetting) (GD)	§ 16.10	HD

[1] "GD or HD" means a UD will be upgraded to a GD or HD depending on the veteran's overall record of service or, in the Navy and Marines, final rating averages.

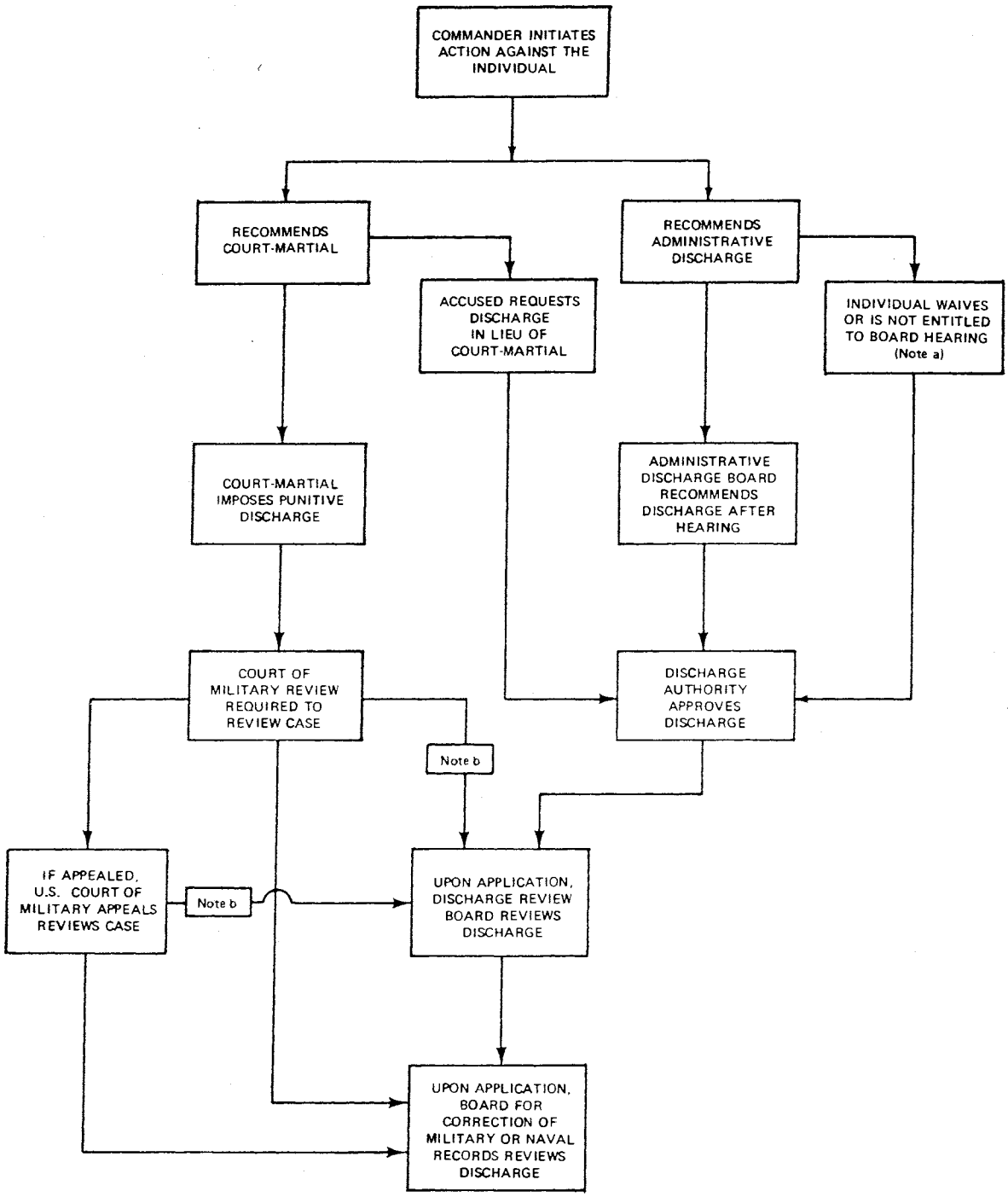
REASON FOR DISCHARGE	CROSS-REFERENCE	EXPECTED RESULTS
Any Army unfitness or misconduct discharge where required mental status exam not conducted (UD or GD)	§ 17.4.2	GD or HD
Failure to pay debts or support dependents (UD or GD)	§ 17.7	GD or HD
For any civilian conduct that occurred while in the reserves (UD or GD)	§ 12.4	GD or HD
Any pre-1966 UD or Blue Discharge where a personal appearance is now possible	Chs. 13-20	GD or HD
Pre-1960 DD or BCD for nonserious offense and some creditable service	Ch. 20	GD
Any serious procedural violations (UD or GD)	§ 12.5	GD or HD
Political associations or beliefs (UD or GD)	§ 12.4	HD

2.4.4 CLASSES OF CASES SPECIALLY HANDLED BY BOARDS

CASE DESCRIPTION AND DATES	CROSS-REFERENCE(S)	STATUS
Where DRB heard on own motion case involving 1950s GD or UD for some form of political associations or failure to answer questions concerning loyalty.	§ 12.4	Should be easy to upgrade; prior DRB review around 1960 narrowly interpreted Supreme Court case of *Harmon v. Brucker.*
Where DoD caused to be reviewed in 1977 those UDs, BCDs, or DDs of people with combat wounds or decorations for valor who had applied to 1974-75 Clemency Program.	Ch. 23	Cases heard without formal applications and most upgraded to GD; eligibility for VA benefits affected by P.L. 95-126 (Oct. 8, 1977).
UDs or GDs issued between 8/4/64-3/28/73 reviewed by DRB under Special Discharge Review Program after April 5, 1977, whether upgraded or not.	Ch. 23	VA benefits upon upgrade affected by P.L. 95-126; possibility for some cases to still be reviewed under SDRP's liberalized criteria.
DRB cases heard between April 1, 1977 and August 23, 1978 (including SDRP cases) and letter sent to applicant in 1978 by DRB explaining new rights.	§§ 9.1.3.5, 11.5; Ch. 23.	Can appeal defective decisional document; can receive *de novo* hearing either under SDRP (liberal upgrade criteria) or P.L. 95-126 re-review (determination as to VA benefits) those discharged between 1964-66 who applied to SDRP might get a new DRB hearing despite end of current waiver of DRB statute of limitations.
Army BCMR applicant who had a request for reconsideration denied by BCMR staff instead of a panel of members (usually before 12/6/76).	§ 9.4, notes 141, 165.	BCMR required by settlement in *Heiler v. Williams* to review previous six years of discharge upgrade cases; present any other cases to Board where applicant claims previous rule violated standard of new evidence which must be considered by Board and not staff.

CASE DESCRIPTION AND DATES	CROSS-REFERENCE(S)	STATUS
Navy DRB cases where Secretary of Navy reversed DRB decision without providing a statement of reasons or giving applicant an opportunity to comment on DRB decision (pre-1977).	§ 9.2.15.1, note 94.	In *Attard v. Secretary*, court ordered NDRB to re-open class of 57 cases so treated from 9/10/70. Prior cases should be able to gain a new DRB review.
Navy DRB cases where a former Marine applicant's case was heard by a DRB panel with a Navy officer as President (pre-1977).	§ 9.2.8, note 54.	In *Harvey v. Secretary*, court ordered that these 150 identified pre-1977 cases be reprocessed with a proper panel.
Marine cases processed at Marine Corps Reserve Hq., Kansas City, from 1966-1976 where command failed to certify nonavailability of lawyer counsel and state qualifications for non-lawyer counsel.	§ 12.5.7.3. *See also* § 12.4 as the class is likely covered by *Wood v. Secretary*.	In response to a petition after acknowledging the violation in *Bird v. Secretary*, the Secretary of the Navy ordered that some of the class be identified; unidentified members likely to get relief.
Marines discharged by an ADB from January through June, 1974, in the 2nd Marine Aircraft Wing, Cherry Point, N.C.	§ 12.5.7.7	In response to a petition alleging command influence, these cases were reviewed by the NDRB; NDRB improperly was not informed of the allegation of command influence; action needs to be brought.
Army members given a GD at normal separation where record contained no GCM and only one SPCM conviction with conduct marks of at least good and efficiency at least fair (between 1955 and 5/19/75).	§ 12.8.2.4	Should be easy to upgrade; might be able to use Privacy Act as in *Maness v. Secretary*.
Pre-1980 veterans discharged from the reserves for civilian misconduct.	§ 12.4	In *Wood v. Secretary*, a class action review was ordered but full class not identified; upgrade likely in all cases.
All services discharged based directly or indirectly on compelled urinalysis testing (most cases are GDs from 1971-75).	Ch. 15	In *Giles v. Secretary*, court ordered automatic upgrading of around 7,000 Army cases, action completed around 12/80; other services depend on application or another pending suit.

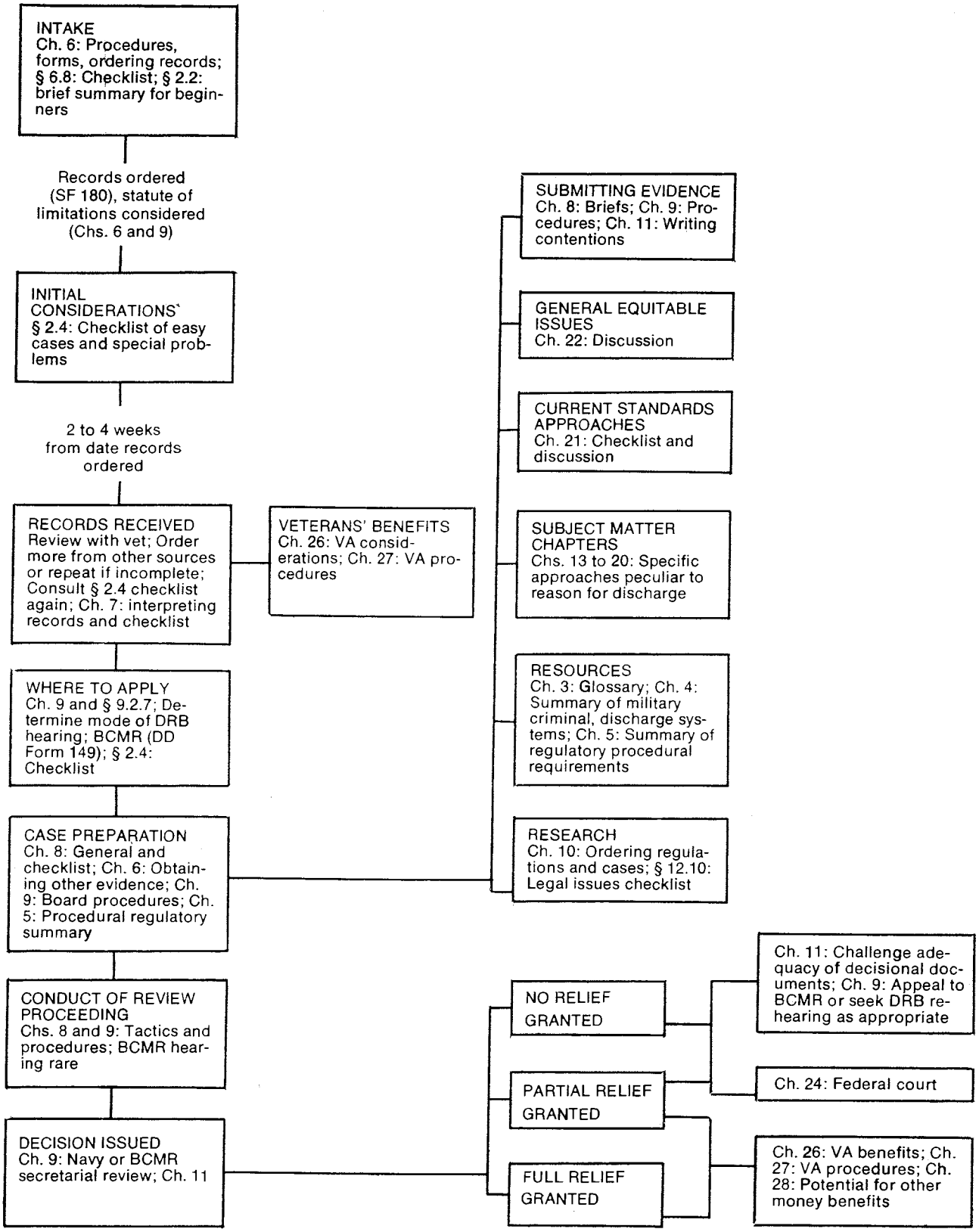
APPENDIX 2A
PROCESSES FOR IMPOSING AND REVIEWING DISCHARGES FOR ADVERSE REASONS



a/ All service members separated for misconduct are entitled to administrative discharge board hearings. Eligibility for hearings varies among the services when members are separated for unsuitability. Members separated for marginal performance are never given this option.

b/ A bad conduct discharge imposed by a special court-martial may be reviewed by a discharge review board.

APPENDIX 2B
CASE PREPARATION FLOW CHART



CHAPTER 20
UPGRADING COURT-MARTIAL AWARDED DISCHARGES AND APPEALING COURT-MARTIAL CONVICTIONS

20.1 INTRODUCTION

The military criminal justice system is uniform among the military services and has been since 1951. It is described in the Uniform Code of Military Justice (U.C.M.J.).[1] Prior to 1951, the services were permitted greater latitude in procedure under the Articles of War.[2] The following disciplinary proceedings are authorized by the U.C.M.J.:

- Nonjudicial punishment (NJP or Article 15), which does not involve a criminal conviction,[3] and in which no discharge can be included, but the presence of which in a record of service can influence a decision on upgrading;
- Summary Court-Martial (SCM), which may result in a criminal conviction, the sentence for which cannot include a discharge but the

[1] 10 U.S.C. §§ 801-940. *See* Ch. 4 *supra* (description of the U.C.M.J.).
[2] *See* § 4.3.1 *supra* (overview of the Articles of War).
[3] *See* § 12.7 *supra* (discussion of methods of attacking the validity of such punishments).

presence of which in a record of service can influence a decision on upgrading;[4]

- Special Court-Martial (SPCM), in which the sentence can include a Bad Conduct Discharge (BCD), but usually does not;[5] and
- General Court-Martial (GCM), in which the sentence can include a BCD or Dishonorable Discharge (DD), also called a Dismissal in the case of an officer.

The important distinctions[6] between discharges awarded through the administrative process (HD, GD, and UD) and punitive discharges (BCD and DD) are:

- Punitive discharges result solely from criminal convictions under a statutory scheme, while administrative discharges are never part of a court-martial's sentence and have no specific statutory authorization;[7]
- Since 1951, mandatory in-service appeal to a higher court, at which the plea's providency, the conviction's validity, and the sentence's appropriateness are reviewed, has existed for all cases in which punitive discharges are adjudged (in contrast, no in-service appeal of an administrative discharge to a higher tribunal exists, and review of any kind rarely occurs above the level of the convening authority);
- Administrative discharges can be issued for non-criminal conduct and under circumstances affording fewer procedural protections.

Review Boards are more likely to overturn an administrative discharge than the sentence of a criminal tribunal which provided defendants with reasonably broad procedural safeguards and whose adverse decisions were subjected to appellate scrutiny as well as a clemency review contemplating restoration to active duty. However, the Boards view it as their role in all cases to look at military discipline through the tunnel of history and to act as an equalizing agency.[8] This allows them to overturn on occasion the sentence of a court-martial that has already been affirmed on appeal. The Boards generally articulate their reasons for upgrading punitive discharges as follows:

- Equitable considerations (*e.g.*, good post-service conduct) outweigh minor offenses for which the veteran "has been punished long enough";
- The veteran's military record of good service clearly outweighs the incident(s) which led to the discharge;[9]
- Under current standards, the veteran probably would not have been prosecuted and, even more probably, would not have received a punitive discharge;[10] or
- The conviction was invalid for legal reasons, or the applicant was in fact innocent (DRBs rarely upgrade for these reasons).

Despite the large number of BCDs awarded by SPCMs, Boards for Correction of Military Records (BCMRs), rather than DRBs, have become the main forum for reviewing punitive discharges because:

- A DRB can only review BCDs that were awarded by SPCMs fewer than 15 years ago,[11] whereas a BCMR can review any punitive discharge, no matter how old, if the veteran who received it is not eligible to apply to a DRB;[12]
- BCMRs take a more lenient attitude toward punitive discharges than do DRBs.[13]

The BCMR power to expunge a conviction, as opposed to upgrading a discharge that was part of a sentence, is unclear.[14]

Alternatives to DRB or BCMR review are direct application to the Secretary of the appropriate service, collateral attack on the conviction in federal court, and application for a writ of error *coram nobis* in the Court of Military Appeals. Rarely are these alternatives practical except for applications to the Secretary in drug-related cases. While a presidential pardon can reinstate some lost civil rights, it cannot expunge the conviction or upgrade the discharge; nonetheless, it is a useful document to include with an upgrade application.

This chapter focuses on BCMR cases, but the strategies apply equally to DRB practice.

20.2 BCMR PRACTICE

Since the primary forum for upgrading punitive discharges is the BCMRs, knowledge of the major features of BCMR practice is important:[15]

- The three-year statute of limitations is waived in almost all cases unless the veteran can still apply to a DRB for relief;
- BCMRs have broad power to "correct any military record" as "necessary to correct an error

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[4] The SCM, since 1951, differs from the Navy summary court-martial established by the Articles of the Government of the Navy and in which a BCD was authorized. *See* § 4.3 *supra*.

[5] Prior to 1969, a BCD could not be awarded at an SPCM unless the convening authority authorized a verbatim transcript. After 1969, an amendment to the U.C.M.J. required further procedural protections before a BCD could be authorized. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[6] *See* Ch. 4 *supra* (fuller description of the administrative and criminal systems).

[7] *See generally* Effron, *Punishment of Enlisted Personnel Outside the U.C.M.J.: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L.L. REV. 227 (1974).

[8] *See* ADRB SOP, § I, para. A.2.; *id.* Annex F-1, para 1.a., 1.b., 44 Fed. Reg. 25,046, 25,067 (1979).

[9] The Boards recognize that servicemembers were subjected to harsher disciplinary measures during World War II and the 1950s than in more recent years.

[10] This reason is frequently used as an alternative to stating that the offenses were minor and did not justify such harsh consequences in the first place. The Boards have apparently not discussed the U.C.M.J. as it affects "the substantial enhancement of rights" branch of the current standards rule contained in 32 C.F.R. § 70.6(c)(1). *See* § 20.3.3.3 *infra*; Ch. 21 *infra*.

[11] The waiver of the 15-year statute of limitations until April 1, 1981, only applied to UDs and to the small number of BCDs previously reviewed and upheld by a DRB.

[12] No punitive discharge issued by a GCM can ever be reviewed by a DRB.

[13] This may be because BCMR members are civilians who view court-martial verdicts less deferentially than do career military people.

[14] *See* § 9.4.2 *supra*.

[15] *See* § 9.4 *supra* (full explication of BCMR procedures).

or injustice" and can therefore grant relief to the extent of changing a discharge to a medical retirement;
- BCMRs do not hold regional hearings and rarely grant personal appearance hearings;
- BCMRs and their support staffs are composed of civilian employees of the service;
- BCMRs frequently obtain advisory opinions on legal, medical, or personnel matters from expert military authorities; BCMR staff members prepare formal summaries of cases for the panels that review them;
- Lacking published uniform standards for review, BCMRs generally apply considerations used by the DRBs, particularly considerations of fairness and the application of current standards; and
- All decisions to upgrade must be reviewed by the Secretary of the affected service, with no opportunity given for comment on BCMR recommendations prior to Secretarial review.

As a result of these features, it is necessary to submit clear and complete written documents presenting the applicant's entire case, particularly because many conventional advocacy techniques are useless in BCMR practice. Access to all documents obtained by the BCMR before its decision is made is crucial in order to present a rebuttal and to deal with weak aspects of the client's case.[16]

20.3 BCMR DECISION-MAKING

20.3.1 OVERVIEW

The BCMR upgrade rate for punitive discharges is surprisingly high;[17] the DRB upgrade rate, however, is quite low. The BCMRs will upgrade a BCD or DD to a GD and on occasion to an HD.[18]

Analyzing the BCMR decision-making process is difficult. BCMRs do not index their decisions as carefully as DRBs do.[19]

A BCMR tends to base its decision to upgrade on patterns of factors (rather than a single dispositive factor), viewed in a time frame broader than an applicant's actual period of service. A BCMR looks to the applicant's civilian background, innate abilities, prior service, in-service accomplishments, and post-service experience, weighing any positive factors gleaned from these time periods against the nature of the offense(s) which led to the BCD or DD. Vague considerations of equity pervade BCMR opinions, and the Board's sensitivity to the stigma of a bad discharge finds recurrent expression in phrases such as the "length of time suffered." No single factor will likely be determinative; behavior patterns which permit a conclusion that the applicant is a "good guy" are paramount. Once the Board determines whether the applicant is a "good guy" or a "bad guy," it generally becomes easy to determine the outcome of the case.

20.3.2 CHART OF IMPORTANT FACTORS

The following chart gives a general overview of positive and negative factors identified in BCMR decisions. It will be followed by a section discussing Board decisions that consider these important factors.[20] While the chart does not claim mathematical accuracy, and while factors not listed may be important in a particular case, the chart can provide a quick impression of the posture of many cases and an indication of what issues need individual development.

The chart first lists crimes for which BCDs or DDs may be issued, separated into military offenses and civilian/common law offenses; the offenses are ordered within each category from less to more serious. It then describes factors BCMRs consider as mitigating or aggravating the seriousness of the crime(s) and as bearing upon the fairness of maintaining the discharge issued.

Each item is paired with a block. A solid block (■) indicates that the offense or factor named is particularly serious in itself or will tend to convert other, normally minor offenses into more serious offenses in a BCMR's assessment. A clear block (□) indicates that the offense is not particularly severe in itself or that the factor named will tend to lessen the fault a BCMR will attribute to an applicant for an offense. A diagonally lined block (▨) indicates that the extent to which the named factor will mitigate an offense is dependent upon whether the applicant was responsible for creating the factor free from demonstrable outside pressure or whether (s)he sought help from official channels in dealing with the factor once it existed. If these additional elements are not present, "fault" is weighed more heavily against the veteran.

MILITARY OFFENSES

Maintenance of Military Discipline (disobedience, disrespect)	
Peacetime	□
Wartime	■
Close to Hostilities	■
Far From Hostilities	□
Dereliction Presenting Threat to Command Structure	■
Routine Dereliction	□
Misuse of Rank	■
Maintenance of Military Control Over a Territory (curfew, pass, off-limits, black marketing)	
Within U.S.	□
Outside U.S. (particularly during war or occupation)	■

[16] A BCMR will almost always obtain a copy of the court-martial transcript. A copy is always given to the accused following trial; however, few veterans retain their copy. *See* Ch. 6 *supra* (obtaining copies of transcripts).

[17] LEGAL SERVICES CORPORATION, SPECIAL LEGAL PROBLEMS AND PROBLEMS OF ACCESS TO LEGAL SERVICES OF VETERANS, Vol. I, A-38 (1979).

[18] Occasionally, the Board for Correction of Naval Records will upgrade a DD or BCD to a UD. The other Boards rarely do this.

[19] Most indexed cases are listed under category 105.00 (Courts-Martial); the Boards, however, have invited public comment on a planned revision. 45 Fed. Reg. 71,839 (1980).

[20] Cases involving alcohol, homosexuality, and drugs are treated separately. *See* Chs. 13, 14, 15 *supra*.

MILITARY OFFENSES con't.

Absence Related Offenses	
Peacetime	☐
Short Absence	☐
Long Absence	■
Wartime	■
Misconduct Before Enemy	■

CIVILIAN/COMMON LAW OFFENSES

Non-violent	☐
Theft From Fellow Servicemember	■
Tending to Violence	■
Use of Violence	■

MITIGATING FACTORS

Personal Characteristics	
Age (immaturity)	☐
Aptitude (as reflected by test scores and education)	☐
Psychological Problems	☒
Social Background/Race	☐
Family Problems	☒
Drugs/Alcohol	☒
Combat Shock	☒
Conscientious Objection	☒
Time, Place, and Character of Service	
Lack of Prior Offenses or Punishments	☐
Good Performance Reports	☐
Medals and Awards	☐
Lengthy Good or Previous Service	☐
Isolated, Foreign, or Difficult Duty	☐
Post-trial Conduct and Disproportion of Punishment to Crime	
Good Conduct in Confinement	☐
Lengthy Confinement Enough Punishment	☐
Good Civilian, Post-service Conduct	☐
Minor Offenses "Stacked"	☐
Lengthy Time Bearing Bad Service Discharge Enough Punishment	☐
Miscellaneous (pure equity)	
Present Need for VA Benefits	☐
Current Standards or Changed Social Mores Would Produce Different Result Today	☐
Procedural Problems and Validity of Conviction	
Poor Representation at Trial	☐
Appearance of Innocence	☐
Conviction Legally Defective	☐

AGGRAVATING FACTORS

Suspended Sentence Revoked	■
Waived Restoration to Duty	■
Lengthy Bad Time (AWOL or confinement)	■
Poor Service Record	■
No Positive Contribution to Service	■
Recently Discharged	■
No Confinement Served	■

20.3.3 ANALYSIS OF BCMR DECISIONS

The authors of this manual conducted a survey of cases decided before 1979 to discern decision-making patterns. The cases discussed here are fairly representative of the Board's reasoning.[20a]

The nature of the offense alone may suggest the probable outcome of the appeal, *e.g.*, an applicant found guilty of armed rape has virtually no chance of receiving an upgrade no matter how many mitigating factors exist. If the offense appears relatively minor, the applicant must begin developing the mitigating factors and minimizing the aggravating ones.

BCMRs are generally not concerned with the legal nuances of terms such as accomplice, conspiracy, principal, or accessory but seem interested in understanding the surrounding circumstances of a case to gauge the seriousness of the applicant's conduct. Their conclusions (often boilerplate) are typically expressed as follows:

- "In light of the seriousness of that offense, we do not find the evidence offered in mitigation sufficient to warrant upgrading his discharge";[21] or
- "Consideration should be given to the fact that his offenses were of a military nature and not crimes against society; and that they were not of such seriousness as to have warranted his being given a bad conduct discharge."[22]

20.3.3.1 Military Offenses

A Board frequently upgrades in part because of a finding that the offense was purely military in nature. Military offenses, however, are not always viewed by the Boards as less serious than civilian-type crimes. Some military offenses (*e.g.*, those thought by the Boards to threaten the very fabric of military society) are particularly difficult to mitigate. However, many offenses, when viewed in the context of a veteran's whole life, can appear relatively minor, particularly in light of the severity of the punishment of a BCD or DD already endured for many years.

Offenses Relating to the Maintenance of Military Discipline. Because duty in military life is a constant obligation, almost any transgression against authority at any time is technically a crime. The Boards recognize that some technical offenses in reality are not very serious. For example, speaking disrespectfully to an officer in front of a whole company that is preparing for a serious mission is more serious than refusing an order to pick up cigarette butts.[23]

The seriousness of an offense frequently depends on the existence of, and proximity to, hostilities. Offenses occurring when American forces are not engaged in an armed conflict tend to be treated as less serious. When hostilities exist, however, the nearer an offense occurs to the battlefield, the more serious it becomes.[24]

[20a] The facts for cases cited in the footnotes, when not included there, are summarized in App. 20A *infra*.

[21] FC 76-3320. *See also* NC 77-2810; MC 69-0619; AC 77-02519.

[22] AC 75-7304. *See also* NC 77-3868; MC 76-2368.

[23] MC 76-1920; AC 77-00450; AC 75-06995; AC 76-02149; MC 76-2318; NC 77-5074; AC 77-02672; FC 77-03624; AC 76-09996; AC 77-02942; AC 77-03339; AC 76-08510; AC 76-06439; AC 76-00577; AC 77-03913; AC 76-03079; AC 77-03382; MC 76-1009; NC 77-3868; AC 77-00732; MC 77-0712; FC 77-00222.

[24] *Compare* AC 77-02418 *with* MC 75-1742 (combat refusal: no upgrade).

Wartime offenses are treated with varying degrees of sympathy. Two major factors affecting treatment of offenders are lapse of time (the greater the historical distance from the war to the present, the more lenient the treatment) and degree of general mobilization (the greater the involvement of the general populace in the war effort, the more severe the treatment). World War II is distant, but extensively involved the citizenry; the Korean and Vietnamese Wars occurred more recently, but elicited a lesser degree of popular involvement.[25]

Other circumstances considered significant by the Boards are:

- An officer or NCO taking advantage of rank (*e.g.*, to extract favors or sex) will not be sympathetically received;
- An offense that threatens the command structure (*e.g.*, an assault on a superior who is performing his/her duties) is generally viewed as serious; but
- Minor offenses accumulated, or covering the same incident, to give the appearance of seriousness (stacked) will be viewed realistically.[26]

Offenses Relating to Military Control Over a Territory. When the military has established rules to maintain an occupied territory, to control the daily nonduty conduct of personnel assigned to foreign service, or otherwise control an abnormal geographic setting, breach of these rules can be more serious than if the violation occurred within the United States.[27]

Important considerations are:

- The degree to which the servicemember profited from the misconduct;
- The willfulness of the offender;
- The isolated nature of the offense in the applicant's record; and
- The frequency with which such offenses were committed by others ("everybody did it").

Absence-Related Offenses. While absence-related offenses (AWOL) could logically be discussed under "disciplinary offenses," they will be discussed separately because they occur so commonly and hold a special place in military culture. Absence offenses vary in seriousness from short periods in peacetime to long periods in wartime. Significant factors are:

- Whether there was an intent to remain away permanently (desertion);[28]
- Whether there was a design to miss a transporting aircraft or ship (missing movement);
- Whether the AWOL was terminated voluntarily or by apprehension;
- Whether total lost time (bad time) represents a significant portion of the servicemember's service;[29] and
- Whether the AWOL was part of a larger pattern of misconduct.[30]

Misconduct Before the Enemy. The most serious offenses are those that jeopardize the lives of other servicemembers before the enemy. Cases involving cowardice or misconduct before the enemy, collaboration, refusal to fight or move out, and similar offenses are extremely hard to upgrade unless legal innocence or its moral equivalent can be shown.[31]

20.3.3.2 Civilian/Common Law Offenses

Military law in this century has usually permitted the trial and punishment of servicemembers at courts-martial for offenses that would also be crimes in civilian society. Such offenses can be subdivided into several categories. Violent or felonious offenses are normally considered to be the most serious.

Nonviolent Offenses. These offenses typically include theft, fraud, and destruction of property. Some general rules of thumb are:

- Where the amount at issue is small and the victim is the government, the offense is not serious;[32]
- Where the victim is another servicemember, the offense is more serious, absent mitigating factors such as dispute over a debt, mistake, or repayment of the theft before the trial;[33]
- The smaller the amount, the less serious the offense;[34] and
- Barracks or shipboard thefts are generally considered serious.[35]

Offenses Tending to Violence. This type of offense, which may involve the possession of weapons or negligent acts which cause injuries to others, can cast the applicant in a negative light if it is part of a continuing pattern of behavior. Mitigating factors are very important in such cases.[36]

Violence. These offenses include arson, rape, homicide, robbery, and assault. Boards consider them to be very serious, and strong mitigating factors must exist to warrant an upgrade. No set rules seem to exist;[37] however, offenses against foreign nationals may be treated as less serious.[38]

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[25] AC 75-06995; FC 77-03624.

[26] *See* ADRB SOP, Annex F-1, para. 3.N., 44 Fed. Reg. 25,072 (1979) (effect of multiple minor offenses covering one period of time).

[27] AC 77-02942; AC 75-05758.

[28] It is not clear whether the Boards actually consider a conviction for desertion as conclusive that the servicemember actually intended to remain absent permanently. Desertion in World War II was much easier to prove (and indeed was presumable from the circumstances) than in recently years. Length of AWOL alone is no longer considered proof of desertion. *See generally* Gallant, *Article 85 and Appellate Review — A Precursor to the Changing Attitude Toward Desertion*, [Nov. 1974] ARMY LAW. 7, DA Pam. 27-50-23.

[29] 10 U.S.C. § 972; ADRB SOP, Annex 0-1, SFRB Memo 11-78, 44 Fed. Reg. 25,097 (1979).

[30] AC 77-02418; AC 76-05810. *Cf.* note 26 *supra* (effect of charging several minor offenses arising out of one incident).

[31] *See, e.g.*, AC 78-05586A (DD for cowardice upgraded to HD where the applicant refused to function as a combat medic, because he had not been so trained and had had soldiers he had treated die due to his incompetence to assist them). AC 77-06991. *See also* note 60 *infra*.

[32] AC 75-05758; AC 77-02627; FC 77-00222; AC 77-03948; AC 77-03949. *Cf.* 77-03611 (no upgrade: larceny of over $27,000).

[33] MC 61-3847; AC 77-00731.

[34] MC 76-2207 (forgery of 7 checks); MC 78-1308 (larceny of sweater); FC 76-03532 (passing 2 bad checks); AC 77-00731 (theft of $45.00); AC 77-00248 (theft of bicycle).

[35] NC 77-3178 (shipboard theft: no upgrade); NC 76-0430 (same). *Cf.* NC 77-5538 (current standards would have permitted opportunity for rehabilitation).

[36] MC 75-2246; AC 76-05606.

[37] MC 61-3847.

[38] MC 75-2246.

The Boards usually do not distinguish attempted offenses from accomplished ones. Intent is the most significant factor, and an offender's change of heart is considered a better basis for leniency than accidental noncompletion of the offense.[39]

20.3.3.3 Mitigating Factors

As the chart reflects, the Boards rely heavily on factors that relate specifically to the individual's abilities, mental status, and outside pressures as well as subsequent conduct and post-service record. To a lesser degree, they are concerned with changing standards of discipline and the legal issues in the case. No factors should be ignored, but factors successfully presented by past applicants should be stressed.

Mitigating Factors Relating to Personal Characteristics. Factors making adequate performance difficult or causing misfeasance are important in all cases, particularly if the servicemember sought help for the problems. The following factors have been favorably considered in cases where BCMRs have sought to understand an applicant's behavior:

- Youth or immaturity (often in conjunction with other factors such as family problems) at the time of the offense and at enlistment (in cases where the applicant's service record reflects a steady pattern of inability to cope with military life);[40]
- Aptitude (often as part of determining intent or degree of fault based on the applicant's intellectual capacity) as measured by test scores and level of formal schooling when the offense was committed;[41]
- Psychological problems that affect conduct or that provoke unusually stringent command reactions;[42]
- Social background and racial considerations;[43]
- Family and personal problems, in connection with other factors or alone, serious enough to cause the servicemember to lose control;[44]
- Drug-induced behavior, particularly when demonstrably induced by outside pressures and where attempts to have the condition treated are documented;[45]
- Alcohol-related conduct under circumstances similar to those noted above for drug-induced behavior;[46]
- Combat shock (usually undocumented) as deduced from a pattern of inability to conform following proof of such ability in a combat setting;[47]
- Conscientious objection (usually where CO status has officially been sought) as an explanation for harassment suffered by the applicant.[48]

Most of these factors have a negative side. For example, a person of above-average intelligence would be closely quizzed as to why (s)he did not seek command approval before going home to visit a sick mother. Similarly, voluntary intoxication by a relatively mature nonalcoholic would not be as sympathetically viewed as a drinking binge by a sailor just returned from arduous sea duty or by an alcoholic. Consequently, counsel must be alert to the potential weakness inherent in casual arguments resting on the assertion of a mitigating factor unless it contains an explanation of why fault should not be assessed against the applicant. Documentation is often crucial.

Mitigating Factors Relating to Time, Place, and Character of Service. The nature of the veteran's service, separate from the offense that led to discharge, is of particular concern to the Board because it often helps in determining whether the applicant contributed beneficially to the service or consistently indulged in inappropriate behavior, whether the discharge issued was an appropriate description of the service rendered, and whether overriding personal problems were in fact responsible for the discharge offense.[49] Mitigating factors relating to time, place, and character of military service which help demonstrate overall good service include:

- A lack of prior offenses (good overall record), indicating that the misconduct leading to discharge was isolated and that the applicant might have completed service honorably had rehabilitative procedures been available;[50]
- Conduct and efficiency reports and promotions establishing lengthy periods of good and honorable service, to counter periods or isolated acts of misconduct;[51]

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[39] *But see* AC 77-02942.

[40] MC 76-2318; MC 76-2207; AC 77-00450; MC 77-1127; NC 78-1998; MC 49-2221; AC 77-01950; AC 77-03948; NC 77-3868.

[41] MC 76-1920; AC 75-06995; AC 76-02149; MC 76-2318; AC 75-05758; AC 77-02627; AC 76-09996; MC 77-1127; NC 78-1998; MC 49-2221; AC 76-10093; AC 77-3948; MC 76-09996; AC 77-03949; AC 76-03079; AC 77-01950.

[42] AC 76-02149.

[43] AC 76-10093 ("minimal parental guidance"); AC 77-00450 ("lack of stable home life"); MC 75-2246 (poverty and race).

[44] MC 76-2318; AC 76-09852; AC 77-03340; MC 77-1127; NC 78-1998; MC 75-4500; AC 76-00577; AC 76-03039. *See also* § 12.6.2.2 *supra* (discussion of hardship discharge and compassionate reassignment claims).

[45] *See* Ch. 15 *supra* (discussion of discharges for drug offenses); AC 75-06995.

[46] *See* Ch. 13 *supra* (discussion of alcohol cases); AC 77-02672; MC 49-2221; AC 76-10093; AC 76-06439; AC 77-02437; FC 77-03166.

[47] This was known as "post-Vietnam syndrome" (PVS) during the Vietnam war. *See* ADRB SOP, Annex F-1, para. 3.b., 44 Fed. Reg. 25,070 (1979); AC 77-03339; AC 76-08510; § 22.5.12 *infra*.

[48] *Cf.* AC 76-03079 (assistance sought for problems). *See generally* § 12.6.2.1 *supra* (discussion of conscientious objection claims).

[49] AC 77-03340; § 22.5 *infra*.

[50] Where a pattern of prior offenses emerges from the record, a Board may conclude that termination of the applicant's military service was appropriate even though the offense named in the discharge proceeding was minor. Prior minor offenses can, of course, be treated as minor, whatever their frequency.

See § 22.4.8 *infra*; MC 76-2207; AC 76-08510; AC 76-09852; AC 77-00248; AC 77-00731; AC 77-02627; AC 77-02672; AC 77-03339; MC 76-1009; MC 78-1998; AC 75-4500; MC 58-10698.

[51] *See* § 22.4.1 *infra*; MC 76-1920; AC 77-02942; AC 77-03948.

- Medals and awards;[52]
- Lengthy periods of good time, focusing attention on the amount of service contract, or obligated period of service, successfully completed (particularly useful for discharges in the early 1950s, when most existing contracts were extended by executive order until the end of the Korean hostilities);[53] and
- Difficult service, such as foreign, isolated, or combat duty, which may have adversely affected the applicant's behavior or for which the country is indebted.[54]

Mitigating Factors Relating to Post-Trial Conduct, Disproportion of Punishment to the Crime, and Miscellaneous Issues. Conduct while in confinement or on duty pending appellate review of the conviction is deemed by the Boards to be important, as is a veteran's post-service conduct. The Boards consider the following factors significant:

- Good conduct in confinement is expected and deviation from it is an aggravating factor. Nonadjustment (bad conduct) can be found in confinement reports or in psychological evaluations conducted during confinement.[55]
- Lengthy confinement is often a mitigating factor supporting a "punished enough" argument.
- Good post-service conduct is extremely important. Evidence of civic involvement, educational attainment, awards, volunteer service, church work, reputation, family life, and similar endeavors helps to establish an applicant's good citizenship.[56]
- The AFBCMR and BCNR rely on good post-service conduct more than the ABCMR does. Because BCMRs frequently obtain copies of an applicant's FBI file, circumstances surrounding subsequent offenses must be explained. Arrests not followed by charges must be acknowledged for precisely what they were because the FBI "rap sheet" usually does not reflect final disposition of the case. Subsequent military duty, even if through fraudulent re-enlistment, can be helpful.[57]
- Length of time since discharge is important because it enhances the "suffered enough" argument. The argument is that the veteran has been adequately punished for the offense and nothing further is gained by continuing the stigma. This is often the deciding factor in a decision to upgrade.[58]
- Actual need for VA benefits can be a factor when, for example, there is a service-connected disability or a widow who needs assistance. The primary criterion is actual need. Elapsed time since discharge and amount of good service time seem to affect application of this factor.[59]
- If current standards or changed social mores would dictate a different result if the same case occurred today, the Boards view the case as a chance to be a historical equalizing agency, something that could not have been done in the course of normal appellate review.[60]
- Inadequate assistance of counsel at trial can be claimed in order to explain why mitigating factors were not adequately raised at trial.
- While the appearance of innocence can help an applicant, it is very difficult to prove innocence in a nonadversary context after a full adjudication, absent new evidence.
- Legal defects in the court-martial can be raised but must be strongly presented because the judicial appeal has ended and legal advisory opinions will contain strong rebuttals. The BCMRs are reluctant to address such issues, but the courts have made it clear that a

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[52] A good conduct medal is often taken as conclusive proof of honorable service over the period it covers. A purple heart for wounds received in combat suggests extraordinary service to the United States.

See § 22.4.2 *infra*; AC 77-02672; MC 61-3847; AC 77-03339; AC 76-08510; AC 76-05606; FC 77-00222.

[53] *See* § 22.4.6 *infra* (length of time served); AC 77-03913; AC 77-00732; MC 76-1920; AC 77-00450; NC 77-5074; AC 77-02672; AC 77-02942; AC 75-05758; MC 78-1308; AC 77-00731; MC 61-3847; AC 77-00248; AC 77-02627; AC 76-09852; AC 76-08510; AC 76-06439; AC 76-00577; AC 76-03079; AC 77-02437; AC 76-05606; MC 75-4500; AC 77-03948; AC 77-03949; MC 77-0712; AC 77-03882 (involuntary extension cases).

[54] Combat service is considered the most difficult of all service, but must not be confused with mere presence in a combat zone.

A shortened tour of duty must be explained. Tours were measured in World War II by campaigns, in Korea by battle stars, and in Vietnam by months. One year was the standard length of a tour in Vietnam; longer or multiple tours are quite significant.

Duty in "hot areas" such as Berlin, the Dominican Republic, and post-war Korea is also significant. Any tour that exposes a servicemember to cultural or racial/ethnic isolation or abuse can constitute a factor making the servicemember's duty more than usually taxing of his/her abilities and emotions. Black soldiers have had a particularly difficult time while stationed in Germany. *See* § 22.5.6 *infra*.

See AC 75-06995; AC 77-02672; AC 77-02418; AC 77-03339; AC 76-08510; MC 78-1308; AC 76-09996; AC 76-09852; MC 77-1127; AC 77-03913; AC 76-03079; AC 77-02437; AC 76-05606; FC 76-00222; AC 76-08510.

[55] MC 76-0991 (misconduct in confinement: no upgrade).

[56] MC 76-2318; NC 77-5074; MC 78-1308; MC 49-2221; FC 77-03166; FC 76-3592.

The Boards are impressed if a veteran can become an "honorable person" despite the stigma of a bad discharge. The DRBs look to post-service conduct to help understand the in-service conduct. *See* § 22.4.7 *infra*.

[57] MC 78-1308.

[58] FC 76-03532 ("The needs of justice and discipline have long been satisfied"); AC 77-03882 (applicant "has lived with the burden long enough"); AC 77-00731; MC 61-3847; NC 77-3868; AC 77-00732; MC 58-10698; FC 76-3592. *But see* FC 77-01646 (denied because elapsed time alone insufficient to justify upgrade).

[59] FC 77-00737 (upgrade needed to obtain better career position); MC 58-10698 (upgrade needed for funeral benefits).

[60] This concept has not been refined by the BCMRs since they do not have a written rule in this regard as do the DRBs. *See* Ch. 21 *infra*.

Some possible situations for application of this concept are where current rehabilitation procedures would likely have produced restoration to duty (NC 77-5538; AC 76-06439; FC 77-00222; FC 77-03166); where there were no procedures such as exist today for discharge of sincere conscientious objectors; and where there was a court-martial for consenting homosexual acts (FC 77-03166). *See also* AC 77-06991 (ABCMR held that a former officer's cooperation with his Korean captors solely to benefit his men was an offense that would not be tried under current standards and that an upgrade was warranted).

BCMR can upgrade if it accepts such a contention.[61]

- Where minor offenses have been multiplied to give the appearance of a more serious offense, a Board will recognize that fact.[62]

20.3.3.4 Aggravating Factors

While aggravating factors are most often opposites of mitigating factors or reflections of the nonexistence of mitigating factors, some require special scrutiny:

- Where a suspended sentence to a BCD or DD was revoked due to subsequent misconduct, the applicant will be suspected of having abused the original court's lenience.[62a]
- Specific waiver of restoration to duty by the applicant must be explained, particularly in Navy and Marine Corps cases. Often the applicant's file contains a written statement of reasons for the waiver.[63]
- Where no actual confinement was served, BCMRs may conclude either that insufficient punishment was decreed in the first place or that the court-martial viewed a lifetime sentence of a punitive discharge as the only adequate punishment.

20.3.4 IMPROPER EXECUTION OF A PUNITIVE DISCHARGE

A court-martial sentence including a punitive discharge is subject to appellate review; the discharge cannot be issued until the review has been completed. If issuance occurs prior to final review, the accused is prejudiced by not having the opportunity to serve further and to prove through good conduct that clemency is warranted.[64]

Frequently, a sentence to a BCD or DD will be suspended for a probationary period. Probation can only be revoked after a hearing at which the veteran is represented by counsel.[65]

[61] Baxter v. Claytor, 652 F.2d 181 (D.C. Cir. 1981). (Contending legal defects in a conviction may cause a Board to force the applicant to exhaust other remedies.) *See* Ch. 9, note 134 *supra*.

[62] *See* note 26 *supra*.

[62a] *See* notes 64, 65 *infra* (improperly revoked probation).

[63] NC 77-2451 (contention that signature on waiver was coerced rejected); MC 76-2887 (same); *see also* AC 76-00543 ("failed to respond to rehabilitative measures"); *cf.* MC 49-2221 (sincerely sought restoration).

[64] In NC 57-10642, the Board held that Arts. 71 and 72 of the U.C.M.J. were violated when the petitioner was discharged before completion of appellate review and that his acquiescence in returning the discharge for one properly issued after appellate review was an uninformed waiver of an important right, "without the benefit of counsel," which he would have received had he remained on active duty. *See also* United States v. Moles, 10 M.J. 154, 9 MIL. L. REP. (C.M.A. 1981).

[65] In ND 78-01542, the NDRB held that the discharge was a violation of Art. 72, U.C.M.J., because there was no revocation hearing. *Cf.* MC 76-1009 (lack of documentation). In United States v. Bingham, 3 M.J. 119, 5 MIL. L. REP. 2107 (C.M.A. 1977) and United States v. Rozycki, 3 M.J. 127, 5 MIL. L. REP. 2110 (C.M.A. 1977), the U.S.C.M.A. held that Morrissey v. Brewer, 408 U.S. 471 (1972), is applicable to the vacating of sentences to suspended discharges and that there must be notice as to time, place, and purpose of the hearing, notice as to the

20.4 ALTERNATIVES TO DRB OR BCMR REVIEW OF A PUNITIVE DISCHARGE

20.4.1 INTRODUCTION

Because a BCD or DD is based on a criminal conviction, it must be upgraded if the conviction is reversed. In addition to providing for petitions for new trials, the U.C.M.J. provides a separate procedure (Article 74(b)) for upgrading BCDs and DDs outside the DRBs and BCMRs. Some pre-U.C.M.J. (prior to 1951) convictions can be appealed under Article 69 to the appropriate Judge Advocate General.[66]

20.4.2 COLLATERAL ATTACK ON A COURT-MARTIAL CONVICTION

A long-since-final court-martial conviction can be reversed by the military appellate courts by a writ of error *coram nobis* or by a federal district court acting upon a civil action challenging the validity of the conviction. Such collateral attacks rarely succeed.

20.4.2.1 Writ of Error *Coram Nobis* in Military Tribunals

The military appellate courts will sometimes rehear cases or hear cases that they have previously refused to review. This occurs most frequently when a jurisdictional error is later discovered,[67] when the law has changed in favor of the accused,[68] or when the court earlier "misperceived or improperly assessed a material fact."[69]

Normally, petitions must first be addressed to the appropriate Court of Military Review before going to the Court of Military Appeals.[70] Extraordinary writ practice before the military appellate courts is beyond the scope of this manual.[71]

20.4.2.2 Review of Court-Martial Convictions in the Federal Courts

Convictions by courts-martial can be reviewed by federal district courts and the United States Court of Claims. If a back-pay suit is filed with the latter, it must be filed within six years of discharge, while the prevailing rule in the district courts is that the general

[65] (continued)
nature of violation, opportunity to cross-examine witnesses and present evidence, the right to receive a summary or digest of the hearing. No delegation of authority by the convening authority is possible.

[66] *See* § 20.4.5 *infra*.

[67] United States v. Gallagher, 22 C.M.A. 191, 46 C.M.R. 191, 1 MIL. L. REP. 2091 (1973).

[68] United States v. Johnson, 1 M.J. 291, 4 MIL. L. REP. 2068 (C.M.A. 1976); Schmeltz v. United States, 1 M.J. 273, 4 MIL. L. REP. 2059 (C.M.A. 1976).

[69] Del Prado v. United States, 23 C.M.A. 132, 48 C.M.R. 748, 2 MIL. L. REP. 2055 (1974); McPhail v. United States, 1 M.J. 457, 4 MIL. L. REP. 2477 (C.M.A. 1976).

[70] Rules 25 and 26 of the Rules of the United States Court of Military Appeals govern extraordinary writ procedure.

[71] *See* H. MOYER, JUSTICE AND THE MILITARY §§ 2-830 *et seq.* (1972); *Military Law Reporter* (generally). The U.S.C.M.A. rules can be obtained from the Clerk, U.S. Court of Military Appeals, Washington, D.C. 20442.

federal statute of limitations does not apply to purely equitable actions to expunge a conviction and bad discharge.[72]

The scope of review is quite narrow and is generally limited to serious errors.[73] The federal courts have rarely overturned court-martial convictions in recent years; resorting to that remedy should take place only after all else has failed. The present Supreme Court has seemed willing to accept the government's asserted "military necessity" argument in all cases.[74]

20.4.3 APPLICATION FOR A NEW TRIAL

A petition for a new trial may be filed with the appropriate Judge Advocate General within two years of approval of the sentence by the convening authority. The grounds for petition are fraud on the court or newly discovered evidence.[75]

20.4.4 APPLICATION UNDER ARTICLE 74(b), U.C.M.J.

20.4.4.1 The Nature of the Application

Article 74(b)[76] of the U.C.M.J. allows the Secretary of each service, for good cause, to substitute an administrative discharge for a punitive discharge. It appears that no definition of good cause exists in military regulations, although the Army has stated that "guidance and procedure regarding clemency are set forth in AR 15-130 [Army Clemency and Parole Board] and Sec. IV of AR 190-47 [Army Correctional Systems]."[77] This material, however, relates to applications for clemency under Article 74(a) of the U.C.M.J., which governs reduction by the Secretary of sentences of incarcerated servicemembers.

Until recently, the Navy's position was that applications for Secretarial review of punitive discharges under Article 74(b) should go to the Board for Correction of Naval Records. The Navy changed its position in December 1978 and the Secretary now accepts and considers such applications; however, the Navy will not entertain contentions that attack the validity of the conviction. Its view is that good cause encompasses only matters over which Secretarial clemency and control of sentence uniformity are appropriately exercised.[78]

All of the services delegate Article 74(b) authority to an Assistant Secretary. Justification for this delegation is based on the Secretary's general authority to delegate matters.[79]

The services receive very few applications under Article 74(b); therefore, little is known about the desirability of this route.

Because BCMR case backlogs can delay applications for up to 18 months, submission of an Article 74(b) application may be worthwhile despite the several months required to process it. This is true in a case where equity suggests granting relief, for example, in an old case that clearly would not produce a punitive discharge under today's standards. It may be procedurally difficult to have a DRB or BCMR application pending at the same time as an Article 74(b) petition, but it is theoretically possible to file simultaneous and similar requests.

Slipping a close case through a BCMR may be easier than passing a careful TJAG review. Article 74(b) petitions are scrutinized at a high level because of the stature of the Secretarial reviewing authority. The result of the review is production of a memorandum of advice more extensive than a routine TJAG advisory opinion. If it is adverse, it will surely reappear before the BCMR if an application is later filed there,[79a] and will telegraph to the Board the views of the Secretarial reviewing authority, who usually reviews the Board's recommendations as well. Even though the Secretary's office usually follows Board recommendations, a Board might be disinclined to approve an upgrade just rejected by its own reviewing authority.

Three situations seem particularly appropriate for petitioning under Article 74(b):

- When a punitive discharge for drug use or drug possesion for personal use has been issued;[80]
- When an upgrade of a BCD or DD (or a Clemency Discharge that replaced a GCM-issued DD or BCD as a result of President Ford's Clemency Program) might result at least in a UD, making the veteran eligible to apply to a DRB, at which a personal appearance might benefit the applicant;[81] and

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[72] *See* § 24.3.12 *infra*.

[73] Schlesinger v. Councilman, 420 U.S. 738, 3 MIL. L. REP. 2009 (1975) ("lack of jurisdiction or some other equally fundamental defect").

[74] *See, e.g.,* Middendorf v. Henry, 425 U.S. 25, 4 MIL. L. REP. 2148 (1976) (no right to counsel at an SCM even though a jail sentence was possible and even though the U.S.C.M.A. had held such a right to be present).

[75] Art. 73, U.C.M.J., 10 U.S.C. § 873. *But see* § 20.5.1 *infra* (discussion of grounds for review of non-BCD cases under Art. 69).

[76] 10 U.S.C. § 874(b). *See* Turcotte, *Possible New Attack on Punitive Discharges*, 4 DISCHARGE UPGRADING NEWSLETTER 3 (April 1979).

[77] DAJA-AL 1975/1624.

[78] *See* JAGMAN ¶ 0155, ". . . [T]he primary Secretarial concern will be with the applicant's record in the civilian community. . . ."

[79] 10 U.S.C. § 3012 (Army); 10 U.S.C. § 8012(c) (Air Force). The AFDRB has also cited Art. 74(b) when upgrading a BCD. *See* FD 78-02027.

[79a] A copy of this opinion should be obtainable under the Privacy Act, 5 U.S.C. § 552a (*see* Ch. 25 *infra*).

[80] Absent evidence of trafficking, these cases (if they were "in process" prior to July 7, 1971) are almost automatically upgraded under the "Laird Drug Policy" (*see* Ch. 15 *supra*). The Air Force has devised a procedure whereby the AFBCMR forwards such cases to the Judge Advocate General to announce the upgrade. To take advantage of this procedure, a BCMR application (DD Form 149) should be filed in the normal manner with a cover letter stating an understanding that the TJAG will forward the file to the Director of the Secretary of the Air Force Personnel Council for action under Art. 74(b). *See* Ch. 9 *supra* (discussion of BCMR procedures). The original Laird Memorandum referenced such applications as appropriate. 44 Fed. Reg. 25,111 (1979) *reprinted in* App. 15B *supra*.

[81] Change of a punitive discharge to any administrative discharge under Art. 74(b) will make the veteran eligible for DRB review, even though the initial forum producing the discharge was a GCM. 43 Fed. Reg. 13,566 (1978).

It is not clear if the Clemency Discharges issued by President Ford under his pardon power pursuant to his Clemency Program (*see* Ch. 23 *infra*) are also reviewable under Art. 74(b). Those clem-

- When the punitive discharge was issued under circumstances today viewed as likely to have been the result of racial insensitivity or as a reaction to a demand for a scapegoat.[81a]

20.4.4.2 How To Apply

An application for review of a punitive discharge under Article 74(b) should be submitted to the appropriate address below:

- Army: Secretary of the Army, THRU: Office of TJAG, ATTN: DAJA-CL, Washington, D.C. 20310.
- Air Force: HQ USAF/JAJR, Washington, D.C. 20314.
- Navy/Marine Corps: Secretary of Navy (Judge Advocate General, Code 20), 200 Stovale Street, Alexandria, Va. 22332.

A cover letter should indicate that application is being made under Article 74(b), U.C.M.J. and should make clear that only an upgrade to a nonpunitive discharge is sought, unless a UD is acceptable. It is not necessary to submit a copy of any court-martial transcript because TJAG will secure the original transcript before review occurs. In the application, references to pages or exhibits of the court-martial transcript are sufficient. A brief discussing as many issues as possible should accompany each application since there is, to date, no certainty as to how the Secretaries make their decisions.

20.4.5 APPEALING CERTAIN PRE-1951 PUNITIVE DISCHARGES UNDER ARTICLE 69, U.C.M.J.

Article 69 of the U.C.M.J.[81b] is normally used for SCM convictions and for SPCMs not resulting in a BCD. Under its terms, however, some pre-U.C.M.J. courts-martial that resulted in punitive discharges (even though previously reviewed by a Board of Review) have, since 1969, been reviewable by the JAG of the appropriate service.

20.5 APPEALING COURT/MARTIAL CONVICTIONS NOT RESULTING IN A PUNITIVE DISCHARGE PURSUANT TO ARTICLE 69, U.C.M.J.

20.5.1 THE NATURE OF THE APPLICATION

Prior to 1968, convictions by an SCM or an SPCM (not resulting in a BCD) were not appealable except for some form of corrective action as to the sentence (to a BCMR) or to a federal district court. In 1968, Congress expanded Article 69, U.C.M.J.[82] to permit each TJAG to review any final court-martial conviction not previously reviewed by a Court of Military Review. This is a quasi-judicial appeal that is not adversary; no oral argument is permitted.[83] The following kinds of cases are affected:

- Pre-U.C.M.J. cases that were never reviewed by a U.C.M.J. appellate body;
- All post-U.C.M.J. SCMs;
- All post-U.C.M.J. SPCMs in which the sentence did not include a BCD; and
- All post-U.C.M.J. GCMs not resulting in a BCD, a DD, or confinement for one year (automatically reviewed under Article 69 with possibility of reconsideration if requested).

Article 69 can be used to challenge convictions that supported GDs or UDs for exhibiting a pattern of misconduct. While the propriety of a conviction can be raised in a DRB or BCMR application for an upgrade, the Boards are less interested in the legal validity of charges than in equitable considerations, such as whether there even should have been a court-martial for the conduct in question.

The grounds for Article 69 review are:

- Newly discovered evidence;
- Fraud on the court;
- Lack of jurisdiction over the accused or the offense; and
- Error prejudicial to "substantial rights" of the accused.[84]

20.5.2 APPLICATION PROCEDURES FOR EACH SERVICE

There are no time limits on Article 69 appeals, and the application process is relatively simple. The veteran must sign the appeal before a notary in Army and Navy cases; a lawyer may sign an Air Force application under oath.

20.5.2.1 Air Force Procedure

Address applications to: The Judge Advocate General, HQ USAF/JAJ, Forrestal Building, Washington, D.C. 20314.

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[81] (continued)
ency discharges having their bases in GCM convictions are not reviewable by the DRBs. 43 Fed. Reg. 13,566 (1978).

The date of initial Secretarial action pursuant to Art. 74(b) will start the 15-year statute of limitations running, not the date of original discharge. It is likely that Art. 74(b) action will eliminate the VA's rule barring benefits to a person discharged through a GCM. *See* Ch. 26 *infra*.

[81a] On December 2, 1980, the Secretary of the Army substituted eleven Honorable Discharge certificates for eleven Dishonorable ones issued during World War II to a group of Japanese-Americans court-martialed for refusing orders in a classic civil rights protest. The grounds for granting relief were the applicants' "many years of honorable civilian conduct." DAJA-CL 1980/5179.

[81b] 10 U.S.C. § 869. *See* § 20.5 *infra* (procedures under Art. 69).

[82] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 10 U.S.C. § 869, included provisions expanding the power of the Judge Advocates General to review these cases. Prior to that time, each TJAG only reviewed nonautomatic appeals from GCM convictions, and had the power to refer them to a Court (then, "Board") of Military Review.

[83] Denial of relief under Art. 69 is theoretically appealable to the U.S.C.M.A. United States v. McPhail, 1 M.J. 457, 4 MIL. L. REP. 2477 (C.M.A. 1976). However, the authoring judge has recently indicated that he would change his vote if the issue were to reappear. Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978). In addition, the Court's membership has changed since *McPhail* was decided. No cases subsequent to *McPhail* complaining about the denial of an Art. 69 appeal have been decided.

[84] 10 U.S.C. § 869. The last category is the most important as it includes all forms of legal errors.

The Navy and Army index their decisions; the Air Force does not, and was able to convince a district court that no decisional documents other than the order stating the general ground for relief need be indexed. NMDRP v. Stetson, CA No. 78-2190 (D.D.C. July 22, 1980). The indexes of decisions are located in the DRB/BCMR Reading Room in the Pentagon (*see* Ch. 10 *supra*).

An application[84a] should be in writing, under oath or affirmation, and signed by the accused or his/her legal representative. The application must contain:

- The name, Social Security number, and present mailing address of the accused;
- The date and place of trial and kind of court;
- The sentence of the court as approved or affirmed and any subsequent reduction by clemency or otherwise;
- A statement of the specific grounds on which relief is requested and the specific relief requested; and
- Any documentary or other evidence that the applicant believes pertinent to the facts asserted under the specific grounds alleged, including copies of court-martial orders, if available.

20.5.2.2 Navy and Marine Corps Procedure

Address applications to: The Judge Advocate General, Department of the Navy, Washington Navy Yard, Washington, D.C. 20374.

Applications[84b] should be in writing, under oath, and signed by the accused (unless (s)he is incapable, in which case the spouse, next of kin, executor, guardian, "or other person with a proper interest in the matter" may sign). The application must contain:

- Full name of the applicant;
- Service number (if any) and branch of service;
- Social Security number;
- Present grade if on active duty or retired, or "civilian" or "deceased," as applicable;
- Address at time the application is mailed;
- Date of trial;
- Place of trial;
- Command title of the organization at which the court-martial was convened (convening authority);
- Command title of the officer exercising general court-martial jurisdiction over the applicant at the time of trial (supervisory authority);
- Type of court-martial that convicted the applicant;
- General grounds for relief;
- An elaboration of the specific prejudice resulting from any error cited (legal authorities to support the applicant's contentions may be included, and the format used may take the form of a legal brief, if the applicant so desires);
- Any other matter that the applicant desires to submit; and
- Relief requested.

20.5.2.3 Army Procedure

Address applications to: The Judge Advocate General, Department of the Army, Attn: Examination and New Trials Division, U.S. Army Judiciary, Nassif Building, Falls Church, VA 22041.

AR 27-10 states:

The application must be signed by the individual convicted by court-martial. In those cases where the individual is deceased, incapable of making application himself, or where his whereabouts are unknown, the Judge Advocate General may permit application to be made by such person as he shall determine to be competent and suitable, and to have a proper interest therein, including, but not limited to, a spouse, parent, or relative of the person convicted by court-martial substantially affected as a result of the findings or sentence, or both, that the applicant maintains should be vacated or modified. If the application is not signed by the individual convicted, full explanation should be included.

The application must be submitted under oath or affirmation executed before an official authorized to administer oaths.

The applicant should describe the error(s) on which the request for relief is based. Relevant facts that support the applicant's contentions should be included. Legal authorities may be presented in this section, or may be attached in the form of a legal brief, if the applicant desires. Other matters tending to support the applicant's allegations of error or impropriety, including, but not limited to, sworn affidavits, official records, and other documents, may be attached, and should be listed. The applicant bears the burden of establishing an alleged impropriety. Unsupported allegations of matters outside the record of trial will seldom be sufficient to warrant relief.

A copy of the court-martial order promulgating the findings, sentence, and action of the convening authority in the case, and a copy of any later modifying order(s), if available to the applicant, should be submitted with the application.

A copy of the record of trial should be submitted in connection with the application for relief from a summary court-martial tried more than 1 year before application is made, or a special court-martial tried more than 10 years before application, if available. The applicant's copy of the record in other cases, including those tried by general court, should not be submitted.

Also include:

1. Name.
2. Service number.
3. Social Security number.
4. Date of trial.
5. Place of trial.
6. Command convening court-martial.
7. Type of court-martial.
8. Offenses charged.

[84a] *See* AFM 111-1.

[84b] MANUAL OF THE JUDGE ADVOCATE GENERAL OF THE NAVY para. 0144.

9. Findings of court, sentence adjudged, and later modifications, if any.
10. Relief requested.
11. Name and address of counsel, if any.

20.5.2.4 Coast Guard Procedure

Address applications to: Commandant, U.S. Coast Guard, (G-L), Washington, D.C. 20590.

The Coast Guard *Military Justice Manual*,[84c] requires a written submission, by the applicant or by someone else who may prove authority to act for the applicant, of the following:

- The full name and service number of the accused;
- Date and place of trial;
- Command of convening authority;
- Type of court-martial;
- Date of action of supervisory authority;
- General grounds for relief;
- A description of the specific grounds for relief, including relevant facts; if the general ground for relief is prejudicial error, an explanation of the nature of the asserted error; legal authorities to support the applicant's contention may be cited; and
- A statement as to the relief requested; signature of applicant and present address.

20.6 COMMON ERRORS AT COURTS-MARTIAL

The errors discussed in this section merely present examples of some of the common type of errors that can occur at courts-martial.[84d] Most of the rules discussed apply retroactively. If retroactivity is not mentioned in the discussion of a particular issue, it is still an open legal question.

Assertions by a veteran that (s)he is innocent, that a witness lied, or that other people were not tried for similar offenses, when made without strong support, will be of no help in appealing the conviction. Innocent (or the "least guilty") people can be and are convicted, and sometimes the error is never overturned. A guilty plea is usually extremely hard to overturn on appeal.

20.6.1 JURISDICTIONAL ERRORS

Since the entire court-martial system was created by statute (the U.C.M.J.), courts-martial are unlike most other courts. As a result, if the U.C.M.J.'s statutory procedures are not followed, the court-martial convened is normally without jurisdiction to try the accused. In other words, if the statute requires X number of events to occur and X minus one occur, the court-martial is without power to act in the case. Legal prejudice usually need not be shown because the omission itself is considered to be automatically fatal to the court-martial's jurisdiction. Jurisdictional errors are almost always retroactive. Some common jurisdictional errors are:

- Failure to include in the record, a request (executed before trial), for trial by a specifically named military judge without a jury;[85]
- Failure to include a written request for enlisted members, if it is desired that they serve on the court, who, in that case, must make up at least one-third of the members after challenges;[86]
- Failure to keep a verbatim transcript in a BCD or DD case;[87]
- Failure to obtain parental consent to enlistment when accused is 16 or 17 years old;[88]
- Trial of an accused who was improperly enlisted, inducted, or activated from the Reserves or National Guard;[89]
- Failure to provide the accused with qualified legal counsel at a GCM;
- Proceeding at any time with a GCM composed of fewer than five members or an SPCM composed of fewer than three members;
- Production of a summarized record of court-martial so inadequate that it prohibits meaningful review;
- Failure to swear in the law officer (military judge) or the court members in the presence of one another;
- Improper delegation of authority to convene an SPCM in the Navy or Marines (between June 1961 and May 29, 1970);[90] and

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[84c] CG-488, Part 522.

[84d] *See* Ch. 4 *supra* (military law research).

[85] United States v. Dean, 40 C.M.A. 212, 43 C.M.R. 52 (1970) (in writing); United States v. Brown, 21 C.M.A. 516, 45 C.M.R. 290 (1972) (request signed in blank without name of judge); United States v. Rountree, 21 C.M.A. 62, 44 C.M.R. 116 (1971) (new judge named after request); United States v. Nix, 21 C.M.A. 76, 44 C.M.R. 130 (1971) (request must be submitted before assembly of the court); Belichesky v. Bowman, 21 C.M.A. 146, 44 C.M.R. 200 (1972) (*Dean* held retroactive).

[86] United States v. White, 21 C.M.A. 583, 45 C.M.R. 357 (1972) (in writing); United States v. Gallagher, 22 C.M.A. 191, 46 C.M.R. 191, 1 MIL. L. REP. 2091 (1973) (*White* held retroactive); United States v. Stipe, 23 C.M.A. 11, 48 C.M.R. 267, 2 MIL. L. REP. 2012 (1974) (withdrawal of request before pretrial session must be allowed).

[87] United States v. Boxdale, 22 C.M.A. 414, 47 C.M.R. 351, 1 MIL. L. REP. 2416 (1973) (transcript had to be reconstructed due to loss of reporter's notes or tapes).

[88] *See* § 12.6.3.4 *supra*.

[89] *See* §§ 12.6.3.2, 12.6.3.3, 12.6.3.5 *supra*.

[90] This error typically occurred in courts-martial aboard small vessels, in small Navy detachments, or in small Marine advisory groups. These commands are extremely numerous and produced hundreds of unlawful SPCMs.

The cases finding the delegation procedure improper are United States v. Ortiz, 15 C.M.A. 505, 35 C.M.R. 3 (1965), *rehearing denied*, 16 C.M.A. 127, 36 C.M.R. 283 (1966); United States v. Greenwell, 19 C.M.A. 460, 42 C.M.R. 62 (1970); and United States v. Ferry, 22 C.M.A. 339, 46 C.M.R. 339, 1 MIL. L. REP. 233 (1973). *Ferry* held *Greenwell* retroactive in a case in which an invalid *Greenwell* conviction was used to increase the sentence in a subsequent court-martial. In Brown v. United States, 508 F.2d 618, 2 MIL. L. REP. 2658 (3d Cir. 1974), the court held *Ortiz* and *Greenwell* not to be retroactive. The Navy has been limiting its application of retroactivity under *Ferry* strictly to the facts of that case. Nonetheless, the U.S.C.M.A., given the opportunity, might ignore *Brown* and hold the cases fully retroactive. The U.S.C.M.A. is not bound by any federal court except the Supreme Court.

- Trial of a "non-service connected" offense within the meaning of *O'Callahan v. Parker*[91] on or after June 2, 1969 (the date of the *O'Callahan* decision).

20.6.2 OTHER POTENTIAL ERRORS

The following list of typical errors is to alert counsel to some other common errors and is by no means all-inclusive:

- Pretrial confinement for over 90 days, without defense-requested delays (in cases tried after December 17, 1971), is a denial of speedy trial;[92]
- An SCM conducted without prior written consent of the accused;[93]
- Use of evidence obtained by an unreasonable, improperly authorized, or otherwise defective search;[94]
- Use of confession obtained in violation of the strict military counterpart of the fifth amendment, U.C.M.J. Article 31;[95]
- Acceptance by the court-martial of an improvident guilty plea;[96]
- Submission of a guilty plea as part of a plea bargain (pretrial agreement in exchange for a set maximum sentence where such submission occurs "prior to presentation of any evidence on the merits and/or presentation of motions going to matters other than jurisdiction"), forcing the accused effectively to waive any pretrial motion that might result in dismissal of the charges;[97]
- Conviction of an accused for violation of non-punitive regulations, of non-self-implementing regulations that were not properly in force, or of regulations alleged to be general but not so in fact; and
- Conviction of an accused for refusal to submit to urinalysis testing for drugs.[98]

[91] 395 U.S. 258 (1969). The U.S.C.M.A. has wrestled with the meaning of "service-connected" particularly in cases involving drug offenses, changing its approach with each new appointment to the court. The law is currently too unsettled to make discussion of it worthwhile here. As a practical matter, *O'Callahan* itself is not retroactive (although five members have not so held). *See* Gosa v. Mayden, 413 U.S. 665, 1 MIL. L. REP. (1973).

[92] United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[93] Page 4 of the charge sheet (DD Form 458) provides for such consent.

[94] H. MOYER, JUSTICE AND THE MILITARY §§ 2-110 to 2-195 (1972).

[95] *Id.* §§ 2-200 to 2-295.

[96] Unlike civilian law, military law strictly requires the withdrawal of an improvident guilty plea at any time during trial (including the sentencing stage) when a defense available to the accused comes to light. Moreover, the court-martial is charged with the duty to recognize an improvidently submitted plea of guilt and to see that it is withdrawn before resuming the case.

For example, in a court-martial for assault, an accused who mentions at some point in the trial that "The person [I supposedly assaulted] was coming at me with a knife," has set the groundwork for a defense of self-defense. It would be error for the court-martial to proceed without a further inquiry into the plea.

The *Manual for Courts-Martial* lists all the elements of all military offenses.

[97] United States v. Holland, 23 C.M.A. 442, 50 C.M.R. 461, 3 MIL. L. REP. 2408 (1975); United States v. Schmeltz, 23 C.M.A. 377, 50 C.M.R. 83, 3 MIL. L. REP. 2266 (1976) (holding *Holland* retroactive).

[98] *See* § 15.3 *supra*.

20.7 PRESIDENTIAL PARDONS

20.7.1 THE NATURE OF THE POWER AND CURRENT POLICIES[99]

The President's power to pardon[100] extends to all federal criminal convictions. All violations of the U.C.M.J. are federal offenses and are pardonable through Executive Clemency.

While a pardon signifies forgiveness of an offense, it neither alters the nature of the original discharge nor expunges a record of conviction. It usually, however, relieves legal disabilities attached to a federal conviction, although the extent of the loss of civil rights resulting from such a conviction depends upon the laws of the state in which the offender resides or attempts to exercise those rights. State authorities may, in some instances, restore lost civil rights without a presidential pardon.

There is no automatic entitlement to Executive Clemency. The usual basis for a pardon is the petitioner's demonstrated good conduct over a significant period of time following conviction and completion of his/her sentence. Many factors are considered in assessing good conduct, including the petitioner's prior and subsequent arrest record, candor in disclosing that record, financial and family responsibility, and reputation in the community. A determination is then made as to whether the petitioner has become and is likely to remain a responsible, productive, law-abiding citizen. Even if the petitioner's conduct after conviction has been exemplary, the recentness or seriousness of the offense may bar a pardon. Pardons are not normally granted on a claim of innocence or miscarriage of justice.

Presidential pardons are of particular advantage to veterans whose court-martial convictions support wholly or in part bad discharges. In those cases, pardons, coming from the Commander-in-Chief of the Armed Forces, produce a strong suggestion to the equity-oriented Review Boards that the recipients' military records have been outweighed by post-service conduct. The Pardon Attorney's Office discourages veterans, particularly those with court-martial convictions for offenses equivalent to civilian misdemeanors,[101] from seeking pardons merely as part of an effort to upgrade discharges. The Pardon Attorney's Office will decline to process a pardon application if it concludes that no relief from denial of civil rights (as opposed to denial of veteran's benefits) is being sought.

The Pardon Attorney will almost automatically refuse to process applications for a pardon from an

[99] Most of the information contained in this and the following subsection has been drawn from a response of the Pardon Attorney's Office to a request by the authors of this manual for clarification of that office's current policies towards petitions for pardons.

[100] U.S. CONST. art. II, § 2. *See* 28 C.F.R. §§ 1.1 to 1.9 (executive clemency regulations given in full).

[101] It is unclear what military offenses can be equated to a civilian felony conviction. *See* D. Addlestone, F. Gross, S. Hewman, *The Rights of Veterans* 33 (1978); People v. Calderon, 205 Cal. App. 2d 566, 23 Cal. Rptr. 62 (1962); People v. Benjamin, 8 N.Y.2d 812, 202 N.Y.S.2d 320, 168 N.E. 389 (1960); Scott v. United States, 24 CRIM. L. REP. (BNA) 2042 (D.C. Cir. 1978).

SCM or SPCM conviction (and perhaps GCMs for minor military offenses) unless a showing is made of continuing harm stemming from the conviction or some other "exceptional circumstances." Nonetheless, the following arguments[102] might be useful:

- Any court-martial resulting in a BCD or DD is a felony equivalent;
- The conviction has prohibited occupational advancement;
- The conviction continues to block the full exercise of some state-controlled civil right(s), *i.e.*, the right to sit for a particular employment examination or the obtaining of a professional license;
- An applicant for federal employment is asked to reveal GCM convictions; and
- The nature of the offense is serious (for example, all convictions for theft, fraud, or false statements) and can cast continuing doubt regarding the applicant's honesty.

20.7.2 PROCEDURES FOR APPLICATIONS FOR PARDON[103]

Three years must pass after conviction (when there is no sentence of confinement) or after completion of confinement before an applicant is eligible to petition for a pardon. Offenders convicted of perjury, violation of public trust involving personal dishonesty, or other serious crimes or convictions under narcotics laws or income tax laws, must wait five years. At the time of application, the applicant must not be under parole supervision or probation. Most applicants convicted of felonies or felony-equivalents, who have completed the prescribed waiting period, are eligible to petition for a pardon; applicants convicted of misdemeanors or misdemeanor-equivalents must show a clear need for relief to qualify.

Prospective pardon applicants must write to the Office of the Pardon Attorney, Department of Justice, Suite 208, 1 West Park Boulevard, 5550 Friendship Boulevard, Bethesda, MD 20014, requesting a petition and stating:

- Date and place of conviction;
- Nature of the court-martial (*i.e.*, GCM, SPCM, or SCM);
- Nature of the offense;
- Sentence imposed and the date of sentence;
- Place of confinement (if imposed);
- Date of release from custody; and
- Date of completion of sentence (if applicable).

Applicants deemed eligible by the Pardon Attorney's Office will be sent the necessary forms and instructions to proceed with the petition. Petitions can, of course, be filed with the appropriate service without this approval but may be rejected later by the Pardon Attorney.

Completed petitions should be sent to the address of the appropriate service, bearing the notation, "Executive Clemency Petition," on the envelope. The service addresses are:

- Army: Commander, USARCPAC, 9700 Page Boulevard, St. Louis, MO 63132.
- Air Force: HQ USAF/JAJR, Washington, D.C. 20314.
- Navy/Marine Corps: Secretary of the Navy, Navy Department, Washington, D.C. 20352.
- Coast Guard: Commandant (G-P/62), U.S. Coast Guard, Washington, D.C. 20590.

Petitions from all *eligible* petitioners are accepted regardless of why relief is sought. Processing time is at least one year.

Petitioners and their character references are interviewed by the FBI. There is no hearing and no appeal from a denial of pardon. Reapplication may be made two years after such a denial.

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[102] These approaches are based on the author's interpretation of correspondence from the Pardon Attorney and on logic; it is not possible to provide any clear rules at this time due to the current policies of the Pardon Attorney.

[103] Eligibility requirements for pardon application are codified in 28 C.F.R. §§ 1.3, 1.4.

APPENDIX 20A
DRB/BCMR DECISIONS

1. ARMY

AC 75-05758 (1946 general court-martial (GCM) for selling roofing to Phillipine national upgraded because of low I.Q., lack of education, and two years good service).

AC 75-06995 (1969 GCM for DOLO of officer and two days AWOL upgraded because of AFQT of nine, desire to serve country, combat service, and drug and alcohol problems).

AC 76-00577 (1963 GCM for eight months AWOL upgraded because of military nature of offense, three years good service, and severe family problems).

AC 76-02149 (1948 GCM for disrespect upgraded because of diagnosed psychiatric problems, dull-normal intelligence, and favorable recommendations from six court-members and staff judge advocate).

AC 76-03079 (1955 GCM for four months AWOL upgraded because of military nature of offense, low I.Q., four years prior service including combat tour in Korea, and failure of authorities to assist ill wife).

AC 76-05606 (1970 GCM for failure to salute, pushing officer and MP, and possession of marijuana upgraded because of previous Purple Heart, one complete tour in Vietnam and start of second, and prior honorable enlistment, and because offenses were precipitated by officer and MP who were subsequently relieved of duty because of incident).

AC 76-06439 (1945 GCM for nine days AWOL upgraded because of five years of prior honorable service, related drinking problem which would warrant alcoholism discharge today, and military nature of offense).

AC 76-08510 (1955 GCM for 1 year AWOL upgraded because of 11 years good service in WW II and Korea, numerous medals, and purely military nature of offense).

AC 76-09852 (1953 GCM for one day AWOL upgraded because of six years good service and relation of violation to death of brothers).

AC 75-09996 (1946 GCM for 16 days AWOL upgraded because of overseas service, minor nature of offense, and applicant's ratings as "high grade moron").

AC 76-10093 (1944 GCM for 19 days AWOL upgraded because of applicant's lack of schooling, mental deficiency, minimal parental guidance, and alcoholism).

AC 77-00248 (1935 GCM for theft of a bicycle upgraded because of minor nature of offense and six years good service).

AC 77-00450 (1945 GCM for DOLO and 17 days AWOL upgraded because of 1½ years good service, immaturity, lack of stable home life, and inability to cope with undisciplined unit).

AC 77-00731 (1933 GCM for theft of $45.00 upgraded because of applicant's attempt to repay it, 10 years good service with 5 prior HDs, and length of time of stigma).

AC 77-00732 (1951 SPCM for 10 days AWOL upgraded because of shortness of AWOL, previous completion of 3-year term contracted for, and length of elapsed time since offense).

AC 77-01950 (1943 GCM for FOLO (failing to "double time") upgraded because of applicant's low intelligence and youth).

AC 77-02418 (1954 GCM for 57 days AWOL upgraded because of good Korean service and because AWOL was in U.S.).

AC 77-02437 (1954 GCM for 11 days AWOL, speeding, and reckless driving upgraded because of applicant's 3 prior honorable enlistments through 2 wars, excellent combat record, and drinking problem).

AC 77-02627 (1959 GCM for larceny of four wheels upgraded because of two years good service and minimal education).

AC 77-02672 (1956 GCM for sleeping on guard upgraded because of five years good service, combat duty, medals, and long history of alcoholism).

AC 77-02942 (1951 GCM for conspiracy to obtain military pay certificates upgraded because of three years service and failure to consummate offense).

AC 77-03339 (1954 GCM for 90 days AWOL upgraded because of military nature of offense, combat service, Purple Heart, and inability to adjust after Korea).

AC 77-03340 (1954 GCM for AWOL upgraded because applicant went AWOL to care for family after death of father and loss of family farm).

AC 77-03882 (1921 GCM for three AWOLs, FOLO, and breach of arrest upgraded because of military nature of crimes, two years good service, and length of time with stigma).

AC 77-03913 (1951 SPCM for 22 days AWOL upgraded because of military nature of offense, 1 year of service in Korea, and because applicant was on extension of enlistment due to Executive Order at time of offense).

AC 77-03948 (1951 GCM for larceny of government property worth $35.46 upgraded because of 6 excellent character and efficiency ratings, 2 years 6 months good service, immaturity, and lack of formal education).

AC 77-03949 (1946 GCM for wrongful disposal of government property upgraded because of applicant's mental deficiency and two years good service).

2. AIR FORCE

FC 76-3592 (1953 SPCM for 381 days AWOL upgraded because of extensive good post-service conduct and length of time since offense).

FC 77-00222 (1947 GCM for intent to defraud upgraded because under current standards applicant could have utilized probation and rehabilitation, because offense was not serious, and because of war record and medals).

FC 77-03166 (1954 GCM for intentionally committing an indecent act upgraded because of subsequent rehabilitation from alcohol abuse, good conduct and citizenship since discharge, and because present policy toward discharges for homosexuality warrants HD).

FC 77-03624 (1944 GCM for eight days AWOL upgraded because discharge unnecessarily harsh in light of offense).

3. NAVY/MARINE CORPS

NC 77-3868 (1919 SCM for three-day UA upgraded because of applicant's immaturity, minor nature of offense, and length of time with stigma).

NC 77-5074 (1918 GCM for sleeping on guard upgraded because of one year good service, hearing problem which contributed to offense (making it minor), and good post-service conduct).

NC 78-1998 (1954 GCM for 71-day UA upgraded because of applicant's overall record, youth, lack of education, and extreme financial and personal pressures).

MC 49-2221 (1947 GCM for drunkenness upgraded because of applicant's youth, low GCT, limited education, sincere request for restoration, good post-service conduct, and because of alcoholism).

MC 58-10698 (1955 GCM for 6½-hour UA, 13-hour UA, and breaking arrest upgraded because of applicant's overall service record, length of time he had suffered stigma, harshness of sentence, and need for VA burial benefits).

MC 61-3847 (1942 GCM for robbery from civilian upgraded because of repayment, good service, medals, and length of time of stigma).

MC 75-2246 (1972 GCM for murder upgraded because applicant was a poor black, because of youth, inexperience in combat, inequality in results of trial (platoon leader who ordered shooting of 16 Vietnamese civilians was acquitted), and because federal district court strongly suggested granting relief).

MC 75-4500 (1954 GCM for 114-day UA upgraded because of 5 years good service, documented family problems, and honorable service).

MC 76-1009 (1953 SPCM for one-day UA, three offenses of FOLO, and breaking restriction upgraded because of overall record, minor nature of offenses, and lack of documentation supporting the vacating of suspended BCD).

MC 76-1920 (1975 SPCM for 2 FOLOS, 5½-day UA, 3-day UA, and 5 absences from duty upgraded because of minor nature of offenses, good service time, and low intelligence of applicant).

MC 76-2207 (1957 GCM for forgery of seven checks upgraded because of applicant's youth and isolated nature of offenses).

MC 76-2318 (1959 SPCM for 14-day UA upgraded because of minor nature of offense, applicant's youth, limited education, family problems, and good post-service conduct).

MC 77-0712 (1912 SCM for FOLO and disrespect to NCO upgraded because of minor nature of offenses and good service).

MC 77-1127 (1970 GCM for over one-year UA upgraded because of applicant's extenuating family problems, two tours of duty in Vietnam, age, immaturity, level of education, and limited capacity for service).

MC 78-1308 (1919 SCM for larceny of a sweater upgraded because of good service, good post-service conduct, and duty in World War II).

APPENDIX 20B
RESEARCH KEY

Old DRB/BCMR Index

(11.00) Bad Conduct Discharge
(11.01) Equitableness of
(11.02) Legal Sufficiency
(11.03) Other
(34.02) BCD by SPCM
(21.00) Desertion

New Index

(A68.00) Bad Conduct Discharge
(A68.02) BCD not affirmed on appellate review
(A92.26) Record of Courts-Martial Convictions
(indicates isolated/minor offenses)
(105.00) Courts-Martial
(105.01) Sentence (including Dismissal/Discharge)
(105.02) Mental Incompetency/Capacity
(105.03) Lack of Opportunity for Restoration
(105.04) Conscientious Objection
(105.05) Impeachment of Testimony
(105.06) Use or Possession of Drugs
(106.00) Clemency Discharge/Pardon

The BCMRs should also index cases under relevant equitable considerations in Parts F, G, H, and I of the DRB Index but have not been consistently doing so.

CHAPTER 21
RETROACTIVE APPLICATION OF CURRENT STANDARDS

21.1 INTRODUCTION

Many administrative separation standards and policies have changed over the years, making current servicemembers less likely to receive derogatory discharges than their predecessors were. Some changes have been required as a matter of law, while others have been matters of military policy. An example of the former is the United States Court of Military Appeals decision in 1974[1] that military departments could not use compelled urinalysis results to support a General Discharge (GD); the military departments thereupon changed their regulations, requiring an Honorable Discharge (HD) anytime compelled urinalysis results are used in an administrative separation proceeding.

An example of the latter involves the military policy on alcoholism. In the 1950s, regulations authorized an Undesirable Discharge (UD) for alcoholism. These were later changed to require at least a GD under such circumstances. Another example is the policy of requiring (in many cases) at least one rehabilitative transfer to provide a new start for a servicemember experiencing disciplinary problems before the military initiates formal separation proceedings.

A veteran should always check for significant changes in administrative separation standards and procedures that have occurred since (s)he was separated and might result in a better character of discharge if the separation occurred today. DRBs are rated and that might result in a better character of discharge if the separation occurred today. DRBs are charges. BCMRs often upgrade discharges based on changes in standards and procedures, but are not required to do so.

21.2 DRB APPLICATION OF THE CURRENT STANDARDS TEST

The uniform discharge review standards[1a] contain two standards requiring DRBs to apply current administrative separation standards and procedures retroactively. Under the first standard, a discharge is *improper* if a change in policy by the relevant military service:

- Has been made expressly retroactive to the type of discharge under consideration; and
- Requires a change in the character of discharge.[1b]

There are only two such policy changes. One is the Laird Memorandum,[1c] applicable to certain discharges for drug abuse and retroactive for all military services. The other is the current separation standard applicable to Army servicemembers discharged for character and behavior or personality disorders.[2]

Under the second DRB discharge review standard, a discharge is *inequitable* if the following three-pronged test is satisfied:

- A change in the policies and procedures under which the applicant was discharged has occurred since the applicant was discharged; and
- The change in policies or procedures was "substantial" and gives servicemembers more rights than before; and
- There is "substantial doubt" that the applicant would have received the same discharge if current policies and procedures had been applicable at the time of his/her discharge.[3]

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[1] United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797 (1974); *see* Ch. 15 *supra*.

[1a] *See* Ch. 9 *supra*.

[1b] 32 C.F.R. § 70.6(b)(2) provides:

> (b) *Propriety*. A discharge shall be deemed to be proper unless, in the course of discharge review, it is determined that:
>
> ....
>
> (2) That a change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

[1c] *See* Ch. 15 *supra*.

[2] *See* § 16.7.2 *supra*.

[3] 32 C.F.R. § 70.6(c)(1) provides that a discharge is inequitable if:

> (1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently ap-

Dozens of changes in administrative separation policies and procedures meet the first two prongs of this test. The third prong is the most difficult to satisfy and is consequently most often invoked by a DRB when it rejects a current standards argument.

The substantial doubt test is basically subjective, allowing a DRB to speculate about what might have happened had current policies and procedures been applicable at the time of an applicant's discharge. The great degree of speculation allowed is illustrated in *Giles v. Secretary of the Army,*[4] in which the Army explained to a federal district court its application of this equity standard.

The Army policy involved in *Giles* concerned the type of discharge issued a servicemember separated in a proceeding in which the Army introduced evidence obtained from a compelled urinalysis. Before 1975, Army regulations authorized issuance of a GD in these circumstances. After 1975, the Army changed its regulations to require an HD in such circumstances, regardless of the servicemember's overall service record. The Army represented to the court that this policy change substantially enhanced servicemembers' rights, thereby meeting the first two prongs of the equity rule. However, the Army also stated that, in determining whether substantial doubt existed under the third prong, the DRB was to consider whether the discharge authority in a particular case would have submitted evidence of compelled urinalysis if (s)he had known that this would result in issuance of an HD, or whether (s)he would have attempted to separate the servicemember for a different reason, for which a less than honorable discharge could still be imposed.[5]

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[3] (continued)

> plicable on a Service-wide basis to discharges of the type under consideration, provided that:
>
> (i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and
>
> (ii) There 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. . . . .

[4] 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980).

[5] The Army explained why a discharge authority might have acted differently:

> Prior to the [1975] change in the Army Regulations . . . , an Army commander considering discharge of a soldier could initiate administrative discharge proceedings based upon drug abuse and evidence of compelled urinalysis knowing that the soldier could, and most likely would, receive less than an honorable discharge. Thus soldiers whose military service did not merit an honorable discharge because of misbehavior or poor performance could be discharged for drug abuse rather than the many other reasons for administrative discharge. In contrast, after the change in Army Regulations, a commander who determined that a soldier whose military service did not merit an honorable discharge would be unlikely to choose to discharge that soldier for drug abuse since the soldier would automatically receive an honorable discharge. Rather, the commander would initiate administrative discharge of the soldier who did not deserve the honorable discharge for administrative reasons other than drug abuse.

Defendant's Reply Memorandum to Plaintiff's Memorandum of Dec. 13, 1979, filed Dec. 14, 1979, Giles v. Secretary of the Army, Civ. No. 77-0904 at 2 (D.D.C.).

The *Giles* case discussed above illustrates how to avoid losing a case because of the substantial doubt test. The plaintiffs in *Giles* argued that basing a less than honorable discharge in whole or in part upon test results from a compelled urinalysis violates Article 31 of the Uniform Code of Military Justice. They further argued that the 1975 change in Army regulations was made to conform the regulations to the Article 31 requirements. The D.C. Circuit agreed with the plaintiffs' argument.[6]

The court held that an HD was automatically required because a violation of law had occurred in the discharge process[7] and that the Army DRB could not, as a matter of law, refuse to upgrade a discharge by invoking the substantial doubt test. The court gave two reasons for the latter conclusion: first, that it "would be grossly unfair because it would allow the Army to belatedly raise charges against a [servicemember] even though those charges were never contemplated or raised in the original discharge proceedings";[8] second, that the substantial doubt test, because applied at the appellate level by the Army DRB, would deny the servicemember "the safeguards that are otherwise available in an administrative discharge proceeding."[9] The *Giles* court's analysis makes clear that applicants should argue whenever possible that the standards and procedures used in their discharge proceedings violated regulatory, statutory, or constitutional requirements.

Applicants should also attempt to prove that substantial doubt exists that they would have received the same discharges under current standards and procedures. This can be accomplished by presenting evidence and indicating parts of the record that help demonstrate what probably would have occurred. For example, if current procedures require a rehabilitative transfer before discharge, but regulations at the time of a DRB applicant's discharge did not, the applicant should support his/her claim that a substantial doubt exists by presenting evidence that a rehabilitative transfer probably would have been effective in improving his/her service.[10]

If an applicant testifies that (s)he did not commit the offense for which (s)he was discharged, the DRB may conclude that the evidence presented is not substantial or credible enough to warrant a finding that the facts are as the applicant contends. If, however, changes in procedural safeguards have occurred since the applicant was discharged, the applicant has a better chance for an upgrade. (S)he can argue that because of the enhanced procedural

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[6] 627 F.2d at 557.

[7] *Id.* at 558-59.

[8] *Id.* at 558.

[9] *Id.* at 559. *See also* Mulvaney v. Stetson, 493 F. Supp. 1218, 1224-25, 8 MIL. L. REP. 2628 (M.D. Ill. 1980); Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977).

[10] This can be done by pointing out that all of the veteran's disciplinary problems occurred in the one unit from which (s)he was separated, that the veteran's post-service conduct was exemplary (further demonstrating that the disciplinary problems were an aberration of an otherwise upstanding citizen), or that certain individuals in the veteran's last unit were involved in all of the disciplinary problems (thereby indicating that a change in unit may well have provided the new atmosphere that would have allowed the veteran to improve the quality of service).

safeguards currently required, it is likely that (s)he would have been able to prevail with this evidence at an administrative discharge board, where the government bore the burden of proof. If the applicant waived his/her right to an administrative discharge hearing, the applicant should also contend and present evidence showing that, had the currently required procedural safeguards been available to the applicant at the time of discharge, (s)he would probably have not waived his/her right to a hearing.

21.3 SAMPLE CONTENTIONS

The following sample contentions may be used when a veteran makes a current standards argument.

1. The regulations pursuant to which the applicant was discharged violated [identify the source of law—*e.g.*, a specific Article of the Uniform Code of Military Justice or the due process clause of the fifth amendment] in that [describe the violation].

2. Because the applicant was discharged pursuant to regulations that violate [identify the source of law] in that [describe the violation], the applicant's discharge should be recharacterized to Honorable. *See Giles v. Secretary of the Army*, 627 F.2d 554 (D.C. Cir. 1980); *Dilley v. Alexander*, 627 F.2d 407 (D.C. Cir. 1980); *Wood v. Secretary of Defense*, 496 F. Supp. 192 (D.D.C. 1980).

3. [Cite the regulation containing the current standard or procedure being relied upon] differs in material respects from the policies and procedures under which the applicant was discharged and represents a substantial enhancement of the rights afforded a respondent in such proceedings in that these current policies and procedures require [describe what they require], whereas the regulations pursuant to which the applicant was discharged did not require [describe].

4. There is substantial doubt that the applicant would have received the same character of discharge if current standards and procedures had been in effect at the time the applicant was discharged because [describe reasons].

5. Because of the validity of Contentions 3 and 4, the applicant's discharge is inequitable within the meaning of 32 C.F.R. § 70.6(c)(1) and should be recharacterized to Honorable.

6. To conclude that Contentions 3 and 4 are not grounds for recharacterization to Honorable would violate due process and fundamental principles of administrative law because it would be inconsistent with the result in each of the following cases in which the DRB recharacterized the discharge to Honorable because of a similar change in policies and procedures under circumstances that are similar to the applicant's case in all relevant respects: [cite cases].

21.4 JUNE 1981 PROPOSED CHANGE TO DOD'S ADMINISTRATIVE SEPARATION DIRECTIVE

The Department of Defense (DoD) has been in the process of revising its directive governing the administrative separation of all enlisted personnel[11] since the controversial Special Discharge Review Program in 1977.[12] The 1979 proposed change,[13] which would have mandated an HD for any person discharged for unsuitability or marginal performance, met with congressional hostility[14] and was withdrawn.[15] A new directive was proposed just as this manual was going to press.[16]

It is likely that the proposed change will be adopted without significant modification. Any changes in the final version and subsequent interpretations that affect discharge upgrading will be reported in the *Veterans Rights Newsletter*.

The terms of the proposed directive are unclear in many respects particularly where radical alterations in terminology have been adopted without explanation. The proposal also appears to leave the services great latitude to adopt differing separation policies when they promulgate their own regulations implementing the directive. The thrust of the directive appears to be:

- The early identification of persons who cannot perform and their elimination without a stigmatizing discharge;
- An emphasis on patterns of behavior and overall record, rather than on individual acts, as a basis for issuing a GD or UD (under Other than Honorable Conditions);
- An emphasis on the importance of rehabilitation attempts; and
- Adequate notice prior to separation, with an opportunity to respond.

Once it is finally adopted, the new directive will contain many new separation standards and procedures that substantially enhance servicemembers' rights. The changes it will produce fall into three general categories:[16a]

- Changes improving the types of discharge likely to be issued for particular reasons for discharge;

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[11] DoD Dir. 1332.14, 32 C.F.R. § 41, provides the minimum standards and procedures that all the services, and the Coast Guard by agreement, must follow. The services may adopt additional safeguards.

[12] *See* Ch. 23 *infra*; GENERAL ACCOUNTING OFFICE, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED, Report No. B-197168 (Jan. 15, 1980); OFFICE OF ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER, RESERVE AFFAIRS AND LOGISTICS, REPORT OF THE JOINT-SERVICE ADMINISTRATIVE STUDY GROUP (1977-78) (Aug. 1978).

[13] 44 Fed. Reg. 35,248 (June 19. 1979).

[14] *Blanket Discharge Plan Challenged*, Army Times, Oct. 8, 1979.

[15] 46 Fed. Reg. 31,663 (June 17, 1981).

[16] *Id.* The recent change in policies concerning homosexuality (*see* 46 Fed. Reg. 9,571 (Jan. 19, 1981)) is unaffected by the proposed amendment). *See* Ch. 14 *supra* (discussion of effect of new homosexuality rules). Because the proposed amendment to DoD Dir. 1332.14, 32 C.F.R. § 41 was not finalized before this manual went to press, all references to this regulation in the other parts to this manual are to the regulation as promulgated in 1976.

[16a] *See* App. 21A *infra* (checklist of specific changes to be instituted by the proposed DoD directive).

- Changes improving treatment of classes of servicemembers; and
- Procedural changes.

The proposed directive creates a new uncharacterized discharge, the Entry Level Separation (ELS), for most servicemembers separated within the first 180 days of service. It is unknown whether a DRB or BCMR will change a less than honorable discharge to an ELS. It is unlikely, however, that a characterized discharge issued before the creation of the ELS will be changed by a DRB or BCMR to this new form of discharge.

21.5 SITUATIONS IN WHICH DRBS APPLY CURRENT STANDARDS RETROACTIVELY

When DRBs upgrade discharges under current standards principles, their decisional documents often do not clearly identify which current administrative separation standards or procedures are being applied retroactively. Current separation standards and procedures are applied in three general situations:[17]

- When the character of discharge being reviewed is no longer authorized or normally issued for the specific reason for which the servicemember was separated;[18]
- When the pattern of misconduct or underlying cause of the misconduct is currently treated as a medical problem, amenable to rehabilitation attempts,[19] or as grounds for early separation of inefficient servicemembers; and
- When procedural rights have improved for the reason for which the person was discharged.[20]

The *Military Law Reporter* and the *Veterans Rights Newsletter* report important decisions involving the application of current standards.

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[17] *See* DRB Index Part E.

[18] *See also* Chs. 13-20 *supra* (discussions of approaches to specific reasons for discharge).

[19] An example of this category of case that commonly results in an upgrade is a veteran discharged for frequent acts of a discreditable nature who is able to persuade the DRB that the root cause of the misconduct was alcoholism, which under current standards would be detected and treated rather than being handled as a grounds for discharge.

[20] *See* App. 21B *infra* (checklist of instances within the three general situations just named in which Boards routinely conclude that application of current standards warrants upgrading).

APPENDIX 21A
CHECKLIST OF CHANGES TO BE INSTITUTED BY PROPOSED DOD DIRECTIVE AMENDMENT

A. Reasons for Discharge

The proposed directive, 32 C.F.R. § 41, alters the previous structure that specified subcategories under each major reason for discharge. The new reasons for separation are also not defined with specificity. Consequently, it is difficult to determine whether some subcategory reasons for a discharge for misconduct have been eliminated entirely, altered so that a misconduct discharge is warranted only if a pattern of behavior exists, or included within the newly created reason for discharge of "unsatisfactory performance." A brief analysis follows of each reason for discharge that is affected by the proposed directive.

REASON	CHANGE/COMMENT	SUBSECTION OF NEW DIRECTIVE
Expiration of Term of Service (ETS).	HD mandatory; particularly important because ETS standard often must be used when an impropriety is found (*see* § 12.5.1.3 *supra*).	§ 41.7(c)(2)(ii)(A).
Convenience of the Government (COG) (certain early releases, hardship, conscientious objection, etc.).	GD still possible, but more guidance and procedural rights provided.	§ 41.7(c)(2) (characterization); § 41.6(b)(3) (notice requirement).
Enuresis (Bed-Wetting).	Now a category of COG; same comments as for COG apply.	Same as for COG, plus § 41.6(b)(4)(viii).
Venereal Disease (Unsanitary Habits).	Probably included in COG, but not specified; intent unclear and some services might use it for a misconduct discharge.	Same as for Enuresis.
Personality (Character and Behavior) Disorder.	Now category of COG; same comments as for COG apply; cannot be used if there is a basis for discharging for another reason; diagnosis must be by psychiatrist.	Same as for Enuresis.
Minority, Defective Enlistment, Erroneous Enlistment.	HD or uncharacterized; improved procedural rights.	§ 41.6(d).
Fraudulent Enlistment.	No longer category of misconduct; Hd likely unless negative aspects of service outweigh the positive; retention possible; misrepresentations have become negative factors.	§ 41.6(d)(4); § 41.7(c)(2)(iii)(B) (Misrepresentations can be considered in characterizing discharge).
Apathy, Inaptitude.	Appears to be included in new category of "unsatisfactory performance"; HD likely, unless negative aspects of service outweigh the positive.	§ 41.6(f).
Financial Irresponsibility, Homosexual Tendencies (formerly reasons for unsuitability discharge).	No longer appear to be categories for discharge.	§§ 41.6(f),(g).
Homosexuality.	HD more likely (*see* Ch. 14, *supra*).	§ 41.6(g).
Drug or Alcohol Rehabilitation Failure.	HD likely unless negative aspects of service outweigh the positive; no mention is made of excluding evidence of urinalysis results.	§ 41.6(h).

Frequent Involvement, Shirking, Drug Abuse, Dishonorable Failure to Pay Debts or Support Family Members, Civil Conviction.	All appear to be included in a new category of "misconduct" aimed at patterns of "discreditable involvement" or the commission of "a serious military or civilian offense" (for which a punitive discharge would be warranted); appears that GD is more likely absent a pattern of non-minor misconduct or the commission of a serious offense; UD no longer seems to be presumed as most appropriate in most cases.	§ 41.6(i).
Good of the Service in Lieu of Court-Martial (GOS).	UD no longer seems to be presumed as the most appropriate discharge in most cases.	§ 41.6(j).
From the Reserves.	For UD, conduct must directly affect the performance of military duties (*see* § 12.4 *supra*).	§ 41.7(c)(2)(iii)(D).

B. Improved Treatment of Classes of Servicemembers

CLASS OR BEHAVIORAL PATTERN	CHANGE/COMMENT	SUBSECTION OF NEW DIRECTIVE
Servicemembers who appear capable of rehabilitating and becoming productive members.	Should be retained or placed on probation	§ 41.7(a); § 41.3(b).
Unsatisfactory performance, minor infractions, lack of ability or reasonable effort, exhibited during first 180 days of service.	Given uncharacterized entry level separation (ELS).	§ 41.6(e); § 41.7(c)(3).
Commission of minor offenses, even if in a pattern.	GD for misconduct or HD or GD for unsatisfactory performance.	§ 41.6(f); § 41.7(c)(2).
Personality disorder causing impairment of ability to function or other physical or mental conditions that potentially interfere with duties.	Discharge for COG.	§ 41.6(b)(4)(viii).

C. Procedural Changes

CHANGE	SUBSECTION OF NEW DIRECTIVE
Detailed notice and opportunity to respond with advice of counsel in all cases where GDs are possible, and hearings for NCOs or those with over eight years service. (Exception: where a GD for COG is based on numerical rating averages).	§ 41.8.
Improved right to a lawyer at all stages.	§ 41.5(h)
Improved specificity of notice of factural basis for proposed action.	§ 41.8(b)(2).
Improved procedures for suspended discharge.	§ 41.7(b).
Improved opportunity to obtain witnesses for ADB.	§ 41.7(c)(6)(iii).

APPENDIX 21B
CHECKLIST OF COMMON INSTANCES IN WHICH DRBS APPLY CURRENT STANDARDS RETROACTIVELY

The checklist that follows is divided into three main sections, corresponding to the three general situations in which Boards routinely conclude that current standards or procedures warrant upgrading of discharges.

A. Reasons for Discharges

REASON	CURRENT STANDARD	CROSS-REFERENCE
Alcoholism.	UD no longer authorized; commanders have an affirmative duty to identify SMs who have alcohol abuse problems; rehabilitation is mandatory; punishment for any alcohol-related misconduct should be judiciously used to permit rehabilitation.	Ch 13 *supra*; when misconduct which is basis for discharge was caused by alcohol abuse, this standard also applies.
Homosexual Acts.	Absent specified aggravating circumstances, an HD or GD is required depending on service record.	Ch 14 *supra*.
Homosexual Tendencies.	No longer reason for discharge.	Ch 14 *supra*.
Use of Drugs or Possession of Drugs for Own Use.	Treatment and rehabilitation attempted prior to discharge; pre-July 7, 1971 cases almost automatically upgraded to at least GDs; discharge not usual for possession of marijuana (Memorandum: DoD Policy Regarding Cannabis Use, of Oct. 29, 1979, Dep. Sec. of Defense).	Ch. 15 *supra*.
Unclean Habits (Venereal Disease).	UD no longer authorized; HD or GD, depending on service record.	§§ 16.12, 17.9 *supra*.
Fraudulent Enlistment.	HD or GD, unless intent to defraud, in which case a UD still possible.	Ch. 18 *supra*.
Unfitness or Misconduct (for minor act(s) of misconduct).	UD not appropriate. Navy and Marines weigh "severity" of offense, with UD reserved for most "flagrant" cases. (Chief of Naval Operations Message of August 22, 1974).	Ch. 17 *supra*; MD 78-01331; MD 78-03073; MD 79-03093; MD 7X-00352.
Character and Behavior (or Personality) Disorder.	HD required unless convicted by one GCM or more than one SPCM (Army). HD unless GD warranted by ratings (Navy and Marines). HD presumed (Air Force).	Ch. 16 *supra*.
Any Reason for Unsuitability (Air Force).	HD presumed.	Ch. 16 *supra*.
Good of Service (GOS) in Lieu of Court-Martial (for AWOLs of less than 30 days).	GOS no longer authorized (32 C.F.R. § 41.7(j) (1980)).	Ch. 19 *supra*.
GOS (where BCD would not likely result at court-martial for the offense(s)).	UD not appropriate (Navy and Marines).	Ch. 19 *supra*; MD 78-00725.
Enuresis (Bed-Wetting).	No longer reason for discharge.	§ 16.10 *supra*.
Expiration of Term of Service (ETS).	HD mandatory (proposed change). Currently mandatory only in the Air Force (AFR 39-10, change of June 20, 1980).	§ 21.4 *supra*.

B. Treatment of Patterns of Conduct and Underlying Causes

PATTERN OR CAUSE	CURRENT STANDARD	CROSS-REFERENCE
Alcohol Abuse or alcoholism leading to acts of misconduct for which the SM is discharged.	To detect and attempt to treat as a medical problem; if rehabilitation fails, discharge is with an HD or GD; acts of misconduct can be mitigated if alcohol a contributing factor.	Ch. 13 *supra*.
SM incapable of performing; training failure.	Discharge more appropriate under special programs aimed at eliminating unproductive or inept SMs or for unsuitability; HD or GD depending on service record.	Chs. 16, 17 *supra*; FD 77-02863 (BCD or HD; would be discharged as marginal performer today); AD 80-02690 (UD to HD; same reason); FD 78-01510 (UD to HD; same reason); NC 79-01817 (GD to HD; same reason).
No attempts at rehabilitation prior to discharge.	To attempt meaningful rehabilitation designed to correct problems prior to discharge action.	Ch. 17 *supra*.
Drug abuse or addiction leading to acts of misconduct for which SM is discharged.	Same as alcohol abuse.	Ch. 15 *supra*; § 22.5.8 *infra*.
Underlying cause of misconduct was personal or family problems, psychiatric or medical; or SM's actions otherwise affected by incapability to serve.	These are mitigating factors.	Ch. 22 *infra*.

C. Procedural Rights

CHANGE	CROSS-REFERENCE
Psychiatric diagnosis by physician trained in psychiatry needed to support GD for character and behavior (or personality) disorder.	§ 2.1.4 *supra* (proposed regulation); § 16.7.2 *supra* (current policy).
Discharge authority no longer permitted to convene a new administrative discharge board if (s)he disagrees with recommendation of retention in service.	§ 12.9.3 *supra*; FD 80-00264; 32 C.F.R. § 41.10(h).
Administrative discharge may not be based on court-martial conviction if a suspended punitive discharge was a part of the sentence, SM restored to duty, and no additional misconduct occurred.	AD 79-06968
UD may not be based in whole or in part on an acquittal at a court-martial.	§ 12.9.3 *supra*; 32 C.F.R. § 41.10(g)
Administrative discharge is inappropriate after a court-martial which could have discharged but did not.	§ 12.9.3 *supra*.
Mental status examination required prior to acceptance of GOS (Army).	ADRB SOP, SFRB Memo #2-80, Feb. 8, 1980.
Specific notice of reasons for discharge; right to respond, have a hearing, cross-examine witnesses and consult with and be represented by lawyer-counsel.	DRB Index category A 90.00 (procedural); § 12.5 *supra*; § 21.4 *supra* (proposed directive requires very specific notice).
Mental status examination by psychiatrist required prior to discharge for misconduct.	ADRB SOP, Annex 0-1, SFRB Memo #16, Nov. 11, 1976, 44 Fed. Reg. 25,084 (Apr. 27, 1979); Annex H-3, 44 Fed. Reg. 25,079 (Apr. 27, 1979); DRB Index category 50.06.

CHAPTER 22
GENERAL EQUITABLE APPROACHES TO UPGRADING

22.1 INTRODUCTION AND OVERVIEW

A Review Board generally attempts to determine in each discharge upgrade case whether or not the original discharge was improper (legal error) or inequitable (fairness). The two concepts often merge through confusion, the lack of a lawyer's viewpoint of the case, or the absence of any need to distinguish between the two when relief is granted. As a result, a Board may conclude that a legal error (for example, a violation of a regulation or failure to discharge a veteran for a noncause reason) is an instance of inequity. The distinction is rarely significant if the Board grants full relief.

The Boards seem to prefer to view cases within the equitable framework because propriety considerations are often presented in legalistic terms, requiring prejudice to be found. Therefore, a propriety contention should always be alternatively phrased as an equity contention.[1]

Usually, an inequitable discharge is one (or a combination) of the following:

- A discharge too harsh under the standards in effect at the time of the discharge;

[1] *See* Ch. 11 *supra*. (framing contentions); §§ 12.9, 12.10 *supra* (miscellaneous propriety considerations and propriety checklist).

- A discharge that would probably not have occurred if current standards and procedures had been in effect at the time of discharge;
- A discharge that occurred without allowing the servicemember sufficient opportunity to demonstrate his/her usefulness to the military;
- A discharge based on conduct that is mitigated by overall good service or overriding external pressures;
- A discharge based on conduct that is mitigated by the servicemember's limited capacity to perform, whether innate or affected by illness, addiction, or overriding personal problems; or
- A discharge that is simply unfair in light of all relevant factors, giving the veteran the benefit of a doubt.

Although any of the above concepts can, by itself, support a discharge upgrade based on equity, Boards are also invariably concerned with the quality of each veteran's military service. Proving a case of inequity is thus easier when the veteran has had a long period of good service. When attempting to prove that outside pressures caused the veteran's conduct, documentary evidence is very important. The more serious a veteran's offense was, the stronger the record and/or mitigation must be to produce an upgrade.

Boards often conclude that discharges are inequitable on general grounds, such as:

- The discharge was too harsh;
- The offenses were of a minor nature;
- There were mitigating factors;
- An Undesirable Discharge (UD) was not warranted; or
- The overall record warrants an upgrade.

The basic discharge regulations never mention the above phrases and usually provide very vague standards such as:

- Honorable or General depending on the record of service; and
- Undesirable unless circumstances warrant otherwise.

Review Boards fulfill their statutory role as appellate bodies by inquiring more broadly into the circumstances surrounding each case than did the commanders who characterized the discharges in the first instance. This approach has produced a flexible review process that can respond retroactively to improved procedural rights for servicemembers and enlightened discharge grading standards. By applying equity concepts with reason and compassion, some Review Boards have become "equalizing agencies" concerned with worldwide, historically developed standards of fairness and propriety rather than with expeditiousness (one of the principal considerations during initial characterization).[2]

Critics of the discharge review system contend that use of various equity standards not statutorily enunciated provides Review Boards with subterfuges for awarding upgrades to applicants whose postservice conduct has been good on grounds that they "have suffered long enough." Such critics argue that the proper scope of discharge review is the period of a servicemember's service, to be graded according to the standards then current.

The criticism is not realistic, however. Applicants to Review Boards have already had to endure the unfairness of waiting years for the Boards to arrive at definitive and proper characterization standards. That unfairness is compounded by the lack of notice of newly available remedies, the diminution of procedural rights at an appellate proceeding, and the shift (to applicants) of the burden of proof. In addition, regulations governing initial characterization of discharges have always been too vague to provide proper guidance, and the commanders attempting to apply them are usually both inexperienced in discharge proceedings and constrained by pressing external demands to deal quickly with nonproductive servicemembers or undisciplined behavior. Finally, the premium placed upon discipline and regimentation by the active military as means of deterring insubordination works against military appreciation of social trends towards tolerance of nonconformity, making nonconformists in the services unlikely to benefit from such emerging trends.

The generalities in which upgrade criteria are expressed by Review Boards lend an air of unpredictability to individual cases. Nonetheless, experience with and reference to successful case approaches can provide a framework within which to assess the strength of a case. The following generalizations should be kept in mind:

- The finding of an inequity most often results from a combination of factors, such as a good record plus one or more mitigating factors;
- A good record or lengthy service is always an extremely important positive factor;
- The servicemember's ability to perform is important (a mature or educated servicemember will be held to a higher standard than one from a deprived background);[3]
- Aggravating factors beyond the mere absence of mitigating factors may exist (for example, if

[2] *See* Ch. 1 *supra.* (discussion of the evolution of discharge review). More importantly, the ADRB SOP addresses this issue in its guidance to the Army Board: "It is the essence of discharge review to act as an 'equalizing agency' to ensure that the application of the discharge process remains a relatively uniform procedure with uniform standards irrespective of the unit or the commander at the time of discharge." ADRB SOP, para. I.A.1., 44 Fed. Reg. 25,046 (Apr. 27, 1979). In addition:

[2] (continued)

> [T]he experience of thousands of cases and the statistical pattern evidenced over the past ten years indicates that some personnel were discharged administratively from the U.S. Army by means which were either improper or inequitable, and while it is almost certain that these inadequacies could not be perceived at the time, in retrospect, it is possible to perceive them as such now. . . . While circumstances can vary, there are certain parameters within which all types of cases fit and by which these various cases can be considered, so as to apply what might be called a "worldwide standard" for the consideration of discharge review appeals.

ADRB SOP, Annex F-1, para. 1.F., 44 Fed. Reg. 25,068 (Apr. 27, 1979). "Determinations made at the time of discharge are defensible and comprehensible when considered against the broad spectrum of the Army as a whole both at the time the discharge was awarded and on the date of review." *Id.* at para. 1.B., 44 Fed. Reg. 25,067 (Apr. 27, 1979).

[3] *See* § 22.5.1 *infra.*

the servicemember was clearly manipulating the system solely to effectuate a discharge)[4] and must be recognized and explained because Boards often do not specifically address them;[5] and
- As the offense becomes more serious, the need for stronger mitigating factors becomes greater.

The general equity approach is very much like a shifting three-dimensional spectrum in which aggravating factors must be balanced against mitigating factors (usually quality of service record) in light of the servicemembers' capacity to perform. It is important to keep the Board's focus on positive factors and to diminish the impact of negative factors.[6]

22.2 RETROACTIVE APPLICATION OF CURRENT POLICIES

The DRB standards promulgated in 1978 for the first time clearly articulated a uniform current standards policy: when current policies and procedures represent a substantial enhancement of a servicemember's rights, and there is substantial doubt that the same results would occur under today's policies, grounds for an upgrade exist.[7] This approach should be investigated first in all cases.[8]

The Army's revised approach to unsuitability discharges provides an example of the importance of this policy. The Army recently agreed to amend its regulations to reduce the number of General Discharges (GDs) issued for unsuitability,[9] but expressly made the amendment not retroactive. The 1978 DRB regulations, however, seem to mandate retroactive application of the unsuitability regulations regardless of the Army's understanding of their applicability.[10]

22.3 DISCHARGE TOO HARSH WHEN ISSUED

A discharge is inequitable if, at the time it was issued, it was not consonant with other discharges then being issued for the conduct in question.[11]

This type of inequity is difficult to define because the discharge regulations rarely indicate with any precision the distinguishing factors between a UD and a GD, or a GD and an Honorable Discharge (HD). A DRB finding of this form of inequity is usually expressed as "discharge was too severe" or "too harsh" and is most likely to occur when:
- The offense was minor when compared with the overall record;[12]
- Mitigating factors were apparent to the command;[13]
- Special factors mentioned in the discharge regulations (such as personal decorations) were not considered.[14]

This form of inequity is similar to and usually indistinguishable from considerations of overall service record and capacity to serve because, in each type of inequity, some combination of the following is usually found:
- Offense was minor or not serious enough;
- Overall service record or mitigating factors warrant an upgrade; or
- Capacity to serve was limited.

While emphasis on the harshness of a discharge usually involves analysis of the offense, rarely is this the only equitable consideration. An unrelieved focus on an offense might harmfully highlight the offense's serious aspects. It should thus be argued, when possible, that a discharge was inequitable considering the nature of the offense, the applicant's overall service record, and his/her capacity to serve.

22.4 QUALITY OF SERVICE OR OVERALL RECORD

The most detailed standards in the DRB directive concern the elements in a service record relevant to discharge upgrading.[15] However, the standard for determining an inequity is rather unclear, because the directive states that an upgrade based on an inequity can occur even if the discharge has been determined to have been equitable and proper at the time of discharge.[16] This standard of equity is merely a catch-all permitting the Board to act as an "equalizing agency."[17]

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[4] *See* § 22.6.1 *infra* ("Corporal Klinger syndrome").
[5] *See* § 22.6 *infra* (discussion of aggravating factors).
[6] DRB regulations and the DRB Index identify equitable considerations. These are tracked by the sections constituting the remainder of this chapter.

While not specifically bound by DRB standards, BCMRs generally follow the same thought processes and are supposed to index cases using the DRB Index. *See* App. 22A *infra* (relevant Index categories and regulatory criteria).
[7] *See* 32 C.F.R. § 70.6(c)(1); ADRB SOP, Annex F-1, para. 2.B.(1)(a)-(b), 44 Fed. Reg. 25,069 (Apr. 27, 1979); Discharge Index Part E (A90.00, A91.00).
[8] *See* Ch. 21 *supra* (checklist of many cases that can be affected by current policy and discussion of current standards approach).
[9] *See* Lipsman v. Brown, 6 MIL. L. REP. 2064 (1978) (reprinted in App. 16A, *supra*); ADRB SOP, Annex H-3, 44 Fed. Reg. 25,079 (Apr. 27, 1979).
[10] *See* Ch. 16 *supra* (unsuitability cases).
[11] *See* 32 C.F.R. § 70.6(c)(2); ADRB SOP, Annex F-1, para. 2.B.(2), 44 Fed. Reg. 25,069 (Apr. 27, 1979); DRB Index category A94.06.
[12] *See* MD 77-03212.
[13] *See* MD 77-03496; *cf.* AC 77-04781 (BCMR appears to have used this approach, but not expressly). *See also* § 22.5.13 *infra*.
[14] *See* ND 78-00183.
[15] *See* 32 C.F.R. § 70.6(c)(3)(i); ADRB SOP, Annex F-1, para. 2.B.(3), 44 Fed. Reg. 25,069 (Apr. 27, 1979); DRB Index category A92.00.
[16]

> (3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's Service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this subparagraph and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:
>
> (i) Quality of service, as evidenced by factors such as: . . . .
>
> (ii) Capability to serve, as evidenced by factors such as: . . . .

32 C.F.R. §§ 70.6(c)(3)(i),(ii).
[17] *See* note 2 *supra*. Most bad discharges were issued without meaningful fact-finding proceedings.

22.4.1 SERVICE HISTORY

An applicant's service history, including date of enlistment, period of enlistment, highest rank achieved, and conduct and efficiency ratings, is invoked by Review Boards as a general equitable consideration. Among the included subcategories of service history, conduct and efficiency ratings are most important.[18] The rating systems of the different military services are, in summary:

- The Navy and Marines use numerical ratings (marks) with narrative ratings for higher-ranking enlisted personnel;
- The Air Force uses a mixed numerical and narrative system; and
- The Army uses a system of terms ranging from "unsatisfactory" to "excellent" and a narrative for higher ranking enlisted personnel.

Officers in every service generally receive narrative ratings with overall number values.

The following generalizations are relevant to equity considerations:

- High ratings indicate honorable service during the period rated;
- Improper ratings can be removed before calculating an overall average;
- In unsuitability cases, or when a Board finds that unsuitability or some not for cause reason for discharge should have been the reason for discharge, or when a GD not for cause was issued, the standards governing characterizations at expiration of term of service normally apply; and
- In cases in which UDs were given or were possible, the overall rating averages are not solely determinative of the outcome, but are usually one of a combination of factors used to upgrade.[19]

Sometimes the Boards merely refer to a "good" or "excellent" service record when upgrading.[20] This usually indicates a finding of high ratings and/or few acts of misconduct.

22.4.2 AWARDS AND DECORATIONS

Servicemembers generally may receive four types of awards or decorations:[21]

- Personal awards (*e.g.,* for valor or good conduct);
- Unit citations for the performance of the servicemember's entire unit;
- Campaign or other decorations indicating that the servicemember served at a particular place or during a particular time; and
- Routine decorations indicating the completion of routine tasks (*e.g.,* a marksman's medal).

Only the first category particularly impresses Review Boards.[22]

These awards are usually reflected in the service record; however, the confusion of wartime frequently resulted in lost recommendations for awards. Other modes of proof are necessary in such situations, for example:

- A notice to family that the servicemember was wounded to prove that (s)he was entitled to a Purple Heart;
- Review of unit diary or history to prove acts of valor;
- Search of records in the appropriate office of the branch of service that would have acted on such an award; or
- Statements of witnesses.

22.4.3 LETTERS OF COMMENDATION AND ACTS OF MERIT NOT FORMALLY RECOGNIZED

Letters of commendation are usually given to express appreciation for jobs well done. The higher the rank of the person who signs it, the more important the commendation is. Such letters are found in service records; recipient veterans may also have retained copies. These letters are positive factors[23] and may indicate honorable service during a period when poor final ratings were entered. Because higher ranking servicemembers are more apt to receive letters of commendation, the lower the rank of the recipient, the greater the importance of such a letter. A letter of reprimand (or admonition) is the opposite of a commendation.[24]

"Acts of merit" not resulting in "formal recognition" can result in an upgrade.[25]

22.4.4 COMBAT SERVICE AND WOUNDS RECEIVED IN ACTION

Combat experience, an extremely important positive factor,[26] can be proved by:

- Wounds;
- Decorations and awards; and
- Entries in service records.

Wounds not recorded can be proved by:

- Receipt of a Purple Heart;
- Letters or telegrams sent to family members;
- Hospital records; and
- Certain types of scars.

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[18] The various systems of periodic conduct and performance evaluations, and the errors that can occur, are discussed elsewhere in this manual. *See* §§ 7.3, 12.8 *supra*; DRB Index categories A92.02, A92.32.

[19] This is because the acts forming the basis of the action can alone support a GD or UD.

[20] *See* AC 68-02043; AC 78-02440; AD 7X-23301; AD 77-06766; AD 77-07159; AD 77-11871; AD 78-00642 (upgraded because of applicants' excellent service records); AC 77-06681; AC 78-01645; AC 78-02228; AC 78-03308; AC 78-04132; AD 7X-04550; AD 77-06560; AD 77-09676 (upgraded because of applicants' good service records). There seems to be no difference between a good and an excellent service record. Many of these cases were indexed at DRB Index category A92.32.

[21] *See* § 3.4 *supra*.

[22] *See* DRB Index category A92.04. *See also* AD 77-11871; AD 7X-04550; AC 78-03421; AC 78-04411; AC 78-04876 (discharges upgraded, in part because of applicants' awards and decorations).

[23] *See* DRB Index category A92.06. *See also* MD 78-01131 (UD upgraded to GD because of applicant's letter of commendation).

[24] *See* § 12.7.3 *supra* (reprimands).

[25] *See* DRB Index category A92.16; MD 78-00862; ND 78-00183.

[26] *See* DRB Index categories A92.08, A92.10. *See also* AC 77-01308 (UD upgraded to GD, in part because of applicant's combat service); AC 77-04619 (same); AC 78-03421 (UD upgraded to GD, in part because of applicant's receiving wounds in combat); AC 78-04411 (same); AC 78-04880 (same).

A serious injury may sometimes warrant an upgrade even though not combat-related.[27]

22.4.5 RECORDS OF PROMOTIONS, DEMOTIONS, AND LEVEL OF RESPONSIBILITY AT WHICH THE APPLICANT SERVED

These factors[28] are important in the following respects:

- Promotions demonstrate honorable service and effective forgiveness for any previous misconduct;
- Lack of demotion proceedings, especially for senior enlisted members, undercuts a commander's assertion of substandard performance;
- Adequate service at a rank of responsibility indicates the ability to perform; however, inability to perform at such a level might indicate that the servicemember was frustrated by having too much responsibility; and
- Demotions indicate inadequate service.

22.4.6 LENGTH OF TIME SERVED DURING SERVICE PERIOD IN QUESTION AND PRIOR HONORABLE SERVICE

Enlisted members are normally inducted or enlist for a set term of years. With some exceptions, the shortest term is two years in the Army and Marines and four years in the Air Force and Navy. Once this initial period is completed, or if the servicemember agrees to an early discharge for purposes of reenlistment, (s)he receives an HD and enters a new term of service (two to six years in length).

The Boards consider the completion of any lengthy period of honorable service an important positive factor.[29] The definition of "lengthy" varies, however, according to:

- The term of the contract;
- The time period in which the service occurred;
- The relative harshness of the conditions of the applicant's service; and
- Productivity during that period of service.

22.4.7 POSTSERVICE CONDUCT

The DRBs are permitted to consider "outstanding post-service conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of discharge review."[30] Although governed by no explicit rule, BCMRs consider good postservice conduct to be an important factor but do not necessarily tie it to an understanding of in-service conduct.[31]

Prior to the first written DRB standards in 1978, DRBs treated postservice conduct in different ways. Some would upgrade solely as a matter of clemency, in effect concluding that the veteran had "suffered long enough," an approach still used by the BCMRs.[32] Under current policy, DRBs look to postservice conduct to understand in-service conduct; however, if it can be demonstrated that the applicant is a good citizen and is not undesirable, the Board will usually look for a way to grant relief, absent a very serious offense.

There is no definition of "outstanding" postservice conduct and this requirement should not be taken too literally. The applicant should attempt to demonstrate that (s)he has matured and has lived a productive life contributing positively to society. Even if the applicant is not a leading citizen, steady employment and no criminal behavior can make in-service misbehavior appear minor or perhaps the fault of someone else (*e.g.*, an inadequate supervisor). When possible, however, the presentation should be phrased in a way relating postservice conduct to an understanding of in-service conduct. For example an applicant may state that his/her postservice conduct indicates that (s)he:

- Is a person who should be believed;
- Is a person who would not have committed the act for which (s)he was discharged;
- Is a person who merely made (one) mistake, but not maliciously;
- Is a person whose overall character outweighs the in-service conduct ("whole man" concept);[33]

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[27] *See* AD 77-09676.

[28] *See* DRB Index categories A92.12, A92.14; MD 77-03212 (upgrade in part based on record of promotions).

[29] *See* DRB Index categories A92.18, A92.20; AD 77-11744; AC 78-03379; AC 78-00333; AC 61-01513; AC 68-02043; AC 71-03201; AC 76-00564; AC 77-06681; AD 77-07159; MD 77-03212; AD 77-05456; note 20 *supra* (cases cited therein).

[30] 32 C.F.R. § 70.6(c)(3)(i).

[31] The BCMR's enabling statute permits broader discretion because BCMRs were created to replace the system of "private members' bills" in Congress. *See* § 9.4 *supra*.

[32] *See* Ch. 20 *supra* (BCMRs' approach to punitive (court-martial) discharge cases).

[33] The ADRB SOP provides:

> Post Service Conduct. The panel may take into consideration postservice circumstances of the applicant's life when reviewing appeals. Specific factors of unusual importance can be given consideration, but of greater value is the sum total of the manner in which the applicant has conducted himself since separation. By and of itself, postservice conduct of an outstanding nature is not enough to outweigh in-service conduct which clearly could not be tolerated by a military organization. However, if the panel can establish to its satisfaction that in-service conduct was not major in scope and represented an abnormality to the normal pattern of the individual's life, then outstanding post-service conduct can be given significant weight. It is the overall character of the applicant that is of importance, and it is in that determination, of character that the panel may establish what weight it may give to post-service conduct.

ADRB SOP, Annex F-1, para. 3.A., 44 Fed. Reg. 25,070 (Apr. 27, 1979).

> The Whole Man. The function of discharge review is theoretically limited to consideration of events that transpired from the day of entry into the service to the day of separation from the service. Consequently, documentation and data from those timeframes is adequate for determination of regulatory and procedural propriety. However, such are not necessarily adequate when attempting to read the human element into the equation, since it is evident that there is and was both a before, during and after to the period of

- Is a person of limited capacity who *could not* perform the duties assigned or conform to military life;[34] and
- Is a good citizen.[35]

Good post-service conduct[36] can be shown by demonstrating

- Stable family life through birth and marriage certificates;
- Steady work history through employer statements or (to protect privacy) tax returns;
- Civic involvement by statements from, among others, ministers, friends, neighbors, and politicians;
- Law-abiding nature through statements from local law enforcement authorities or proof of a clean record by a request for one's FBI rap sheet;[36a]
- Educational achievement through transcripts or diplomas;
- Reform or treatment for the root of the in-service problem (*e.g.*, by successfully completing an alcohol rehabilitation program or therapy, or by obtaining a pardon).

The methods of proof for the variety of factors making up outstanding postservice conduct are virtually unlimited.

22.4.8 RECORDS OF MISCONDUCT INDICATING ISOLATED OR MINOR OFFENSES

Some service records may contain very few offenses, isolated offenses, or minor offenses, What constitutes isolated or minor offenses[37] is impossible to describe with any certainty because each service has different standards. For example, the same number of nonjudicial punishments as found in a Marine record would likely be viewed as a worse record by the Air Force. In general, common sense and the following guidelines should be used to assess the seriousness of a disciplinary record:

- Minor breaches of military discipline are measured by time and place;
- Minor offenses in basic training are not serious;
- Offenses in wartime, especially in close proximity to hostilities, are more serious than in another time and place;
- Successful completion of two years service, the normal term of a draftee, with only a few offenses tends to be viewed sympathetically;
- Reprimands are minor;
- General court-martial convictions are serious;
- Minimal punishments cause offenses to be viewed less seriously;
- Multiple offenses arising out of the same incident can be viewed as a single offense;[38]

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[33] (continued)

> military service, which involves human concern that may or may not be documented. This can have a distinct bearing on the conduct during service and ability to cope with service. During review it is incumbent upon members to attempt to establish an understanding of the human involved before endeavoring to objectively evaluate the propriety and equity of the separation process. In some respects, this understanding of the human involved can have a major bearing on paragraph i [inability to perform] above.

Id. at para. 3.U., 44 Fed. Reg. 25,073 (Apr. 27, 1979). *See also* AD 77-10048 (application of "whole man" concept).

[34] *See* §§ 17.3, 17.4.1 *supra* (discussion of "would but couldn't" approach). *See also* § 22.5.11 *infra*.

[35] DRB Index category A92.22 is listed as "Post Service Conduct (Good Citizenship)."

[36] *See* DRB Index category A92.22; AC 77-04619; AC 78-03308; AD 7X-11062; FD 80-00151; MD 7X-02234; ND 78-02579; ND 77-02414.

[36a] *See* § 9.2.6.3.3 *supra* (discussion of FBI rap sheets).

[37] *See* DRB Index categories A92.24, A92.26, A92.28, A92.30; AD 7X-11062; AD 77-10809; AC 78-00663. The ADRB SOP provides:

> Conviction or Confinement by Civil Authority. Board members must be conscious of the fact that action by civil authorities for a similar offense may not be uniform on a nationwide basis. Consideration must be given to idiosyncrasies of legal jurisdictions when they are contiguous to major military areas. If it is not clear that the conviction by itself justifies an undesirable discharge, then board members must be satisfied that the offense, if committed within the military environment, would have justified the UD. In absence of such justification, board members have a clear obligation to give consideration to upgrading.

ADRB SOP, Annex F-1, para. 3.Q., 44 Fed. Reg. 25,072 (Apr. 27, 1979).

[38] The ADRB SOP provides:

> Multiple Minor Offenses. There are circumstances and cases in which board members will find that a series of insignificant minor offenses have been used to justify initiation of board action more properly suited to the resolution of serious disciplinary problems. This is particularly true when a series of minor offenses suggest that they are precipitated by a personality conflict or in many cases just plain inability to comprehend on the part of the offender. In certain units individuals in commission of such offenses tend to be an irritant to the commander and a "case" is made to justify processing that individual administratively for separation. Since the basis upon which the process is initiated is the commission of disciplinary offenses, it can only be justified as an action of unfitness as opposed to one of unsuitability. Consequently, the action terminates normally in the individual being awarded an undesirable discharge when, in fact, the offenses for which separated would not justify such a characterization. Board members must insure that the listing of a multiplicty of offenses has not been done simply for the purpose of making a "case" but is, in fact, an honest and fair rendition of indicators that clearly establish that the perpetrator is "unfit" for service as opposed to manifestation of a character and behavior disorder which would be a basis for a determination of unsuitability. If any other conclusion can be drawn, then board members should give serious consideration to relief.
>
> Stacking of Offenses to Justify BCD SPCM. As in the preceding discussion of multiple minor offenses, at times board members will find that a multiplicity of charges have been prepared based on a single incident. As an example, an individual will be charged with more than 3 but not more than 30 days AWOL, breaking restriction and with failure to repair at the same time. While it is true that all offenses were committed, it is clear that the more serious one of AWOL is the one in which consideration may justify special court-martial action. It is also clear that it is not wrong nor illegal to list the other charges for which the individual could be tried; but it is often clear from other action that the listing of these charges has been done deliberately to make the circumstances appear to be of a greater magnitude than they truly are. Board members must insure that they are not unduly and incorrectly influenced when it is apparent that "stacking" has occurred simply because there is a listing of multiple offenses associated with the same time period. It is incumbent upon board

- Offenses that threaten the chain of command are more serious than offenses of omission or short absences from duties;
- The higher the rank of the victim (or the person whose command was threatened), the more serious the offense; and
- Promotion after punishment for an offense tends to lessen the seriousness of the offense.

22.4.9 MISCELLANEOUS EQUITABLE FACTORS RELATING TO QUALITY OF SERVICE

Apart from personal problems and ability to serve, there are several recurring situations which can be used as defenses to a poor service record. The most common situations are:

- Enlistment promises were not kept;[39]
- Previous receipt of a Clemency Discharge under the 1974-75 Ford Clemency Program;[40]
- Inadequate attempts were made to assist the servicemember in dealing with his/her deficiencies (*e.g.*, through counseling or rehabilitation);[41]
- Failure to accord a servicemember adequate time to experience the rehabilitative affects of confinement or of a retraining facility;[42]
- The conduct had no adverse impact on the quality of the person's service or on the military organization;[43]
- The servicemember was forced into a job for which (s)he was not trained or qualified, or was given a different job from that promised;
- An intermediate commander, who knew the servicemember's daily performance record recommended a better form of discharge than the one (s)he actually received.[44]

22.5 FACTORS RELATING TO A SERVICEMEMBER'S ABILITY TO PERFORM

A third aspect of the equity analysis, which can often tip the balance between aggravating factors and relatively high quality of service, involves what the DRB regulation terms "capability to serve."[45] Boards will not hold a servicemember completely responsible if his/her actions were affected wholly or partially by innate ability; personal, physical, mental, drug, or alcohol problems; age; maturity; education; racism; conscientious objection; or other contemporary social pressures.[46]

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[38] (continued)

> members to give consideration to the nature, seriousness, and circumstances under which the offenses occurred before they have a right to deduce that "stacking" may be a factor. Additionally, board members must consider whether "stacking" was used to justify or support discharge processing or was simply added "window dressing."

ADRB SOP, Annex F-1, paras. 3.M., 3.N., 44 Fed. Reg. 25,072 (Apr. 27, 1979). *See also* DRB Index category A94.10.

[39] *See* DRB Index category A99.10; BCMR Index category 112.04; AD 79-05052; AD 78-01779; AD 77-09369; AD 77-07032; AD 7X-10481; AD 7X-05110; FD 77-02483; MD 7X-04052; NC 77-03378; ND 78-00183. *Cf.* §§ 12.6.3.3, 12.6.3.5 *supra* (discussion of improper enlistments leading to loss of jurisdiction over servicemembers).

[40] *See* DRB Index categories A94.16, A94.18, A94.20; AD 77-10336; AD 77-05463. *See also* Ch. 23 *infra* (Ford Clemency Program).

[41] Military regulations usually required such attempts. *See* § 12.5.2 *supra*. Even under the old regulations that did not specifically require counseling, a good argument can be made that the course of the servicemember's military career would have been different had adequate counseling been forthcoming. Good counseling is a matter of good leadership and good personnel management. A follower should not be punished for poor leadership.

[42] AD 77-11678 (insufficient time in Retraining Center); AD 78-00922 (insufficient time after confinement); ND 78-00444 (discharged while still in confinement). *See* § 12.7.5 *supra*. The ADRB SOP provides:

> Rehabilitation (other than for drugs). Cases are often seen in which the basis for discharge was failure of rehabilitation. This is frequently seen in administrative separation by the Retraining Brigade, (Correctional Training Facility) at Ft. Riley, Kansas. Whenever the commander has determined that correctional training or other rehabilitation is appropriate, he has clearly indicated that the offender deserves another chance. Having done so, clear evidence is required that the offender did, in fact, fail all proper and reasonable efforts at rehabilitation before an administrative separation with a UD is appropriate. While it is legally correct to use a few very minor infractions, together with all prior offenses, to attempt to justify a UD for failure of rehabilitation, serious questions must be asked as to the equity of such action. Board members must satisfy themselves that the separation was the justified course of action.

ADRB SOP, Annex F-1, para. 3.R., 44 Fed. Reg. 25,072 (Apr. 27, 1979).

[43] *See* § 12.4 *supra* (federal case law). The ADRB SOP states:

> Inequity may exist when it cannot be discerned from the military record and other evidence considered by the ADRB in reviews involving applicants separated for the reasons listed in (a) to (h) below, that the conduct upon which the separation was based had an adverse impact on the quality of the individual's service or on the state of discipline within the organization of which the individual was a member.
>
> (a) Conviction by civil authorities.
>
> (b) Frequent involvement of a discreditable nature with civil authorities.
>
> (c) Sexual perversion.
>
> (d) Drug addiction, habituation or the unauthorized use of possession of drugs (including chemicals) except when that use/possession was the basis for criminal charge for which the individual requested discharge in lieu of trial.
>
> (e) An established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments or civil courts concerning support of dependents.
>
> (g) Unsanitary habits.
>
> (h) Fraudulent enlistment.

ADRB SOP, Annex F-1, para. 2.C.(1), 44 Fed. Reg. 25,070 (Apr. 27, 1979).

[44] *See* AD 77-10173; AD 78-04427; MD 78-03540.

[45] 32 C.F.R. § 70.6(c)(3)(ii)(A)-(D); DRB Index Parts G-I.

[46] The ADRB SOP provides the following discussion of "outside pressures":

> Application of Changing Social Mores. The panel must appreciate the relationship between society at large and the society of the Army. It is not always true that the change in mores of the nation will at some time be reflected in the code of the Army. Nonetheless, that there is an impact upon the members of the Army in the area of societal change is true. It is also true that this impact may have influenced soldiers to an extent where there was honest conflict in their minds between conformance within the Army and the conformance within their peer group and society at large. The fact that this conflict existed did not give a soldier license to violate military standards, but it may have produced a situation in which a commander may have failed to understand and compensate for this

22.5.1 AGE AND MATURITY

A veteran's age upon entrance into active duty, his/her age at commission of the offense(s), and age at discharge can all be relevant factors relating to ability to perform. In addition, Boards attempt to assess the veteran's relative maturity, an equally important factor. The Boards usually assume that young or immature servicemembers cannot exercise the same judgment as older peers, and that youthful error can be at least a partially mitigating factor.[47] Rarely, however, are age and immaturity the sole factors resulting in an upgrade.

22.5.2 APTITUDE AND EDUCATION

Boards do not expect persons with little training or limited mental ability to perform certain duties or exhibit behavior patterns at the same level as others. Such status, however, is not always a sufficient excuse for inadequate behavior, particularly willful misconduct.[48]

A servicemember's personnel file contains a record of educational level and aptitude scores.[49] While it is not possible to quantify educational level and aptitude scores that are likely to be found mitigating,[50] a few generalizations can be made:

- Category IV and V mental groups are low;
- AFQT scores below 50 are below average; and
- Servicemembers with a large red or black letter "M" on their induction or enlistment record were part of a 1960s lowered standards program called Project 100,000.[51]

22.5.3 DEPRIVED BACKGROUND

Socio-economic background and family structure are scrutinized by a Review Board to determine whether the applicant had a deprived background. This factor is closely related to lack of capacity based on age, maturity, education, and aptitude.[52] The Board considers the potential effect of such factors on a servicemember's:

- Stability under pressure;
- General mental health;
- Perceptions of right and wrong;
- Ability to accept authority;
- Capacity for teamwork; and
- Ability to seek assistance with personal problems.

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[46] (continued)

> conflict. No parameters can be drawn for the panel in this regard, but the panel must understand that precipitous action may have occurred in the commander/commanded relationship when, instead, understanding may have been a more appropriate alternative. The extent to which the panel considers this area is again a function of judgment. But of particular importance is the requirement that the panel distinguish between deliberate violation of military standards as opposed to unintentional failure to comply because of honest confusion.

ADRB SOP, Annex F-1, para. 3.D., 44 Fed. Reg. 25,070 (Apr. 27, 1979).

[47] *See* DRB Index category A93.02; AC 77-05387; AD 7X-00412; AC 77-07402; AC 78-03782; AC 78-00669; AC 78-01278; AD 7X-00154; AC 80-00234. *See also* note 48 *infra*.

[48] The ADRB SOP states:

> Capability to Comprehend. Members must give consideration to the "person" of the individual involved and determine whether that individual was capable of comprehending the actions leading to separation and the impact of unfavorable separation on his future life. This does not mean that the simple absence of formal education by itself is cause to consider that an individual is not capable of comprehending administrative procedures applied against him or towards him under Army regulations. Even the uneducated and the undereducated can be made to understand, if the approach taken by those who are more sophisticated is that at the individual's level of comprehension. Members cannot always reconstruct the totality of the circumstances under which the applicant was handled, but based on experience we can reconstruct the basics of the environment in which the action occurred. Whether or not absence of understanding became prejudicial from the standpoint of separation action or characterization of discharge is a factor for consideration when looking at the case.
>
> Members must satisfy themselves that personnel responsible for procedurally processing the individual were oriented towards enabling comprehension by the individual. If it can be concluded that the opposite pertained either deliberately or as a by product of environment, then consideration can be given to granting relief.

ADRB SOP, Annex F-1, para. 3.T., 44 Fed. Reg. 25,072-73 (Apr. 27, 1979).

[49] *See* Ch. 7 *supra* (analysis of personnel records).

[50] *See* DRB Index category A93.04. Cases relating to aptitude include: AC 77-02666, AD 77-07159, AD 77-09676, AC 73-02466, AD 77-07159, AD 77-09676, AC 78-02440, AC 78-03421, AC 78-04876, AC 77-06842, AC 78-04880, AD 78-02784. Cases relating to education included: AC 78-02438, AD 7X-00412, AC 78-02440.

[51] *See* DRB Index category A93.28. The unpopularity of the Vietnam War and the numerous exemptions available for middle class people made the Administration look elsewhere for manpower. DoD reduced its physical and mental requirements for induction, securing men from the socially, educationally, and economically deprived sectors of society. The most significant manifestation of this policy was Project 100,000, which called for the induction of 100,000 "new standards" (category IV or "cat fours," men who were previously considered physically or mentally unfit for service) personnel each year.

Many Project 100,000 men were killed or wounded. Many others returned to civilian life with Other Than Honorable Discharges, which only reinforced the problems facing them in civilian life. The Armed Forces were not enthusiastic when Secretary McNamara assigned them Project 100,000, essentially a social welfare and rehabilitation program. While in the service, Project 100,000 men saw disproportionate amounts of combat. Moreover, in Vietnam and back at home, they were often unable to cope with military life and personal problems. This led to a heightened frequency of conflicts with military authorities. Project 100,000 men who proved unsuitable for military service after special rehabilitation programs (provided by the military) should have been discharged from the service under honorable conditions and provided with manpower training in civilian society. However, many Project 100,000 men "got lost" in the military and were discharged, for various reasons and offenses, by commanders who failed to take their special physical and mental limitations into account. The special civilian manpower training was never funded and the Project 100,000 dischargees (often with Other Than Honorable Discharges) were left without effective readjustment assistance.

The Review Boards generally perceive that Project 100,000 members were programmed to fail even though many completed their service honorably. *See* generally P. STARR, THE DISCARDED ARMY: VETERANS AFTER VIETNAM 184-87, 190-97 (1973).

[52] *See* DRB Index category A93.06; AC 77-05387; AD 7X-00412; AD 7X-001544; AD 78-01006; AC 78-04880. *See also* note 51 *supra*; note 83 *infra*; § 22.5.6 *infra*.

22.5.4 MARITAL, FAMILY, AND OTHER PERSONAL PROBLEMS

The Boards recognize[53] that certain offenses, such as AWOLs, may be caused by a servicemember's genuine compulsion to be with his/her family in time of need. Personal problems can sometimes become so difficult that normal behavior patterns are disrupted. Such problems are normally not defenses to criminal acts (*e.g.,* AWOLs), but would clearly be considered relevant at the sentencing portion of a court-martial. Consequently, they are relevant in all bad discharge cases.[54] However, many personal problems could have been resolved,[55] and an applicant will have to explain why (s)he did not seek:

- Assistance from superiors;[56]
- Formal application for a hardship discharge or compassionate reassignment;[57]
- Special leave; or
- Militarily-supplied medical, spiritual, or legal assistance.

While it is recognized that the chain of command was sometimes unresponsive, and that many Vietnam-era servicemembers might have put family before service (in time of an unpopular war),[58] the applicant should be prepared to demonstrate or explain the extent of his/her problem and his/her reasons for failing to gain redress through the chain of command or through other formal military procedures.

22.5.5 FINANCIAL PROBLEMS

Financial problems are considered a separate category among mitigating factors,[59] but are treated like other personal problems. If a financial problem arose through no fault of the servicemember, it will usually be found, in combination with other factors, to warrant an upgrade.[60] However, a Board will normally expect the servicemember to attempt to deal reasonably, within his/her capabilities, with such problems. Accordingly, it may inquire whether the servicemember:

- Sought assistance through the chain of command;
- Sought free legal assistance from the JAG office;
- Sought a compassionate reassignment or a hardship discharge; or
- Sought advance pay or emergency leave.

Letters from creditors to commanders often precipitated command hostility toward servicemembers, even though regulations since the mid-1960s have usually stated that a commander's only duty to an indebted servicemember is to inform him/her of the necessity to obey court orders and to assist with financial planning to pay off debts the law required. If a problem became burdensome to the command, discharge proceedings for "financial irresponsibility"[61] or "dishonorable failure to pay just debts"[62] could be instituted.

22.5.6 RACIAL, RELIGIOUS, CULTURAL, OR SEX DISCRIMINATION

Boards rarely rely on explicit findings of improper discrimination, but they are cognizant that such problems have existed. Actual discrimination is hard to prove and is rarely a matter of record.[63] The history

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[53] *See* DRB Index categories A93.08, A93.10. *See* AD 78-02123 (father committed suicide); AD 77-06518 (father deserted family); AD 77-06766 (mother ill and compassionate reassignment had been denied); AD 77-09439 (wife left for another man; son critically ill); AD 77-07369 (overweight and unable to work); AC 68-02043 (need to support family); AD 77-07817 (home lost in flood); AD 77-09869 (harassment by other military personnel); AC 66-00136 (had C & B disorder and was eneuretic). *See also* AD 79-07261; AD 79-07466; AD 80-01025; AD 79-06261; AD 79-07305; AD 79-07348; AD 79-07411; AD 79-07554; AD 79-07559; AD 79-08315; FD 79-00533; FD 79-01400; FD 79-00376; ND 78-01522; ND 78-01033.

Marital problems: AD 7X-01186; AD 7X-03505; AC 78-04132; AC 71-03201; AC 73-02466.

Family problems: MD 77-03510; AC 76-00564; AC 77-06681; AC 77-07393; AC 78-01602; AC 72-02267; AC 78-00669; AC 77-01308.

Other personal problems: AC 61-01513; AC 68-02043; AD 7X-00154; AD 78-00641; AD 77-09934; AD 77-09661; AD 77-05456; AD 77-11580.

[54] The ADRB SOP provides:

> Outside Pressures. This is a difficult area to enunciate since regularity procedures have accommodated outside pressures that made it difficult for a soldier to concentrate exclusively on military duties. Hardship discharge and compassionate reassignment provisions were available to soldiers that had need of such assistance. However, in some cases the pressure of the Vietnam era, as most wartime, was sufficiently traumatic as to make it administratively difficult for soldiers to avail themselves of these provisions. Also, the junior leadership of the Army may not have been completely aware of the means by which they should have assisted soldiers to avail themselves of these provisions. This coupled with the perception on the part of many soldiers that the burden of wartime conflict is unequally borne, may have led some to mistakenly assume that the choice between family and service left them no choice at all but that of the family. Again as in other areas, the panel must establish to its own satisfaction whether or not violations were deliberate, without regard to any other methods for solution, or whether they were unintentional because of frustration at being unable to effectively apply any other alternative solution.

ADRB SOP, Annex F-1, para. 3.G., 44 Fed. Reg. 25,071 (Apr. 27, 1979).

[55] *Id.*

[56] *Id.*

[57] *See id.*; DRB Index categories A99.12, A99.04; § 12.6.2.2 *supra* AD 77-06766; AD 7X-19467; AD 80-00993.

[58] *See* note 54 *supra.*

[59] See DRB Index category A93.12.

[60] The following DRB/BCMR cases were upgraded because of the applicants' financial problems while in service: AC 78-00333; AD 77-11744; AC 62-00969; AD 79-04795; AD 79-05839; AD 79-07305; AD 79-07593; AD 79-7927; FD 79-01062; FD 79-01386; MD 79-00268.

[61] *See* § 16.11 *supra.*

[62] *See* § 17.7 *supra.*

[63] 32 C.F.R. § 70.6(c)(3)(ii)(D) provides: "This includes unauthorized acts as documented by records or other evidence." *See* DRB Index categories A93.14, A93.16. The DRB SOP provides:

> Institutional Discrimination. The panel must recognize that the application of discipline may not have been uniform throughout the entire spectrum of the Army for similar individuals committing similar types of offenses. The panel must also recognize that the "tolerance level" of commanders, at different installations, in different periods of time, and theaters of operation varied and punishment may not have been equally applied. The panel must attempt to accord uniformity in its review of cases. The panel may give

of blacks[64] in the Armed Forces is discussed in detail here, although citation to history is unlikely to persuade a Board that discrimination *did* occur. A general reference to the prevailing conditions, however, might lead the Board to give credence to the testimony of an applicant.

Many senior military personnel find fault with some of the conclusions stated in the reports discussed below, but most are sensitive to the plight of minorities in the armed forces, particularly prior to the late 1960s.

22.5.6.1 History and Problems of Blacks in the U.S. Armed Forces[65]

Black soldiers were a part of the American military even before the Revolutionary War.[66] Near the end of the Revolutionary War the all-black company first appeared. From then until the end of World War II, segregated military units were the rule. During this period, black troops served in every war, in proportions equivalent to the black population of the country. In 1948, President Truman ordered military segregation stopped:

> It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.[67]

President Truman's order established a presidential committee to investigate race relations in the armed forces, to confer with the Secretaries of the services, and to recommend a new policy. The report,[68] which was issued in 1950, suggested that the 1948 order desegregating the armed forces was not being implemented enthusiastically. By 1950, the Marine Corps had not been desegregated at all and the other services were just taking the initial steps.

The report revealed great resistance to integration in the Army. For two years after the order was promulgated, the Army continued to have segregated units, and, in particular, maintained quotas limiting the number of blacks in any unit. In March of 1950, the Army eliminated its quota system.

The 1950 report was not concerned with segregation and discrimination in general, but with the initial step, equality of treatment. At the time of the report's issuance, segregation was in force in much of the country.

In 1962, President Kennedy established the President's Committee on Equal Opportunity in the Armed Forces, which in 1963-64 issued two reports. The initial report dealt with problems of black servicemembers stationed within the United States; the final report dealt with problems of black servicemembers stationed overseas. These reports showed that discrimination in the military was a continuing problem. The first report[69] stated:

> Negro military personnel and their families are daily suffering humiliation and degradation in communities near the bases at which they are compelled to serve, and a vigorous, new program of action is needed to relieve the situation. In addition, remaining problems of equality of treatment and opportunity, both service-wide and at particular bases, call for correction.[69a]

Statistics showed that little progress had occurred since the 1948 order. At the end of 1962, less than one-fourth of one percent of the officers in the Navy and the Marine Corps were black. Other statistics were somewhat higher, although (except in the case of lower-ranking enlisted members of the Army) the figures did not approach the percentage of blacks in the overall population.

Problems of on-base recreational facilities were discussed at length:

> One of the principal sources of difficulty arises in connection with the operation of on-base Service and NCO Clubs. . . . At some bases, due to pressures brought by white personnel or other factors, forms of segregated Service clubs have developed in practice. . . . Commanding officers have permitted this condition to be imposed by the wishes of a

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[63] (continued)

> consideration to the possibility that unintentional discrimination could have been a factor in the awarding of a discharge. This institutional discrimination could have resulted because of race, type of unit, mission of the unit, involvement or noninvolvement in combat operations, time and length of relationship between the commander and the members of the unit, and other variables inherent in a military structure. It is incumbent upon the panel to reconstruct the events so as to determine when, how, and if to give consideration to the aspect of institutional discrimination.

ADRB SOP, Annex F-1, para. 3.C., 44 Fed. Reg. 25,070 (Apr. 27, 1979).

[64] Relatively little published information is available concerning similar problems of Hispanics, Native Americans, Puerto Ricans, and other ethnic minorities; however, Boards generally realize that stereotyping occurs as easily in the armed forces as in society at large.

[65] This section was adapted from a brief prepared by William Schaap of Washington, D.C.

[66] Blacks and whites alike were subject to the Massachusetts Bay Colony military training bill of 1652, perhaps the first selective service law in North America. Blacks fought in the French and Indian War; and in the Revolutionary War, blacks such as Crispus Attucks (who died in the Boston Massacre) and Peter Salem (who fought at Lexington, Concord, and Bunker Hill) were noted for their heroism. *See generally* ARMY SERVICES FORCES MANUAL M 5: LEADERSHIP AND THE NEGRO SOLDIER ch. 8 The Negro Soldier in American History (Oct. 1944).

[67] Exec. Order No. 9,981, 13 Fed Reg. 4,313 (July 26, 1948).

[68] REPORT TO THE PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, FREEDOM TO SERVE: EQUALITY OF TREATMENT AND OPPORTUNITY IN THE ARMED FORCES (1958).

[69] PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, INITIAL REPORT: EQUALITY OF TREATMENT AND OPPORTUNITY FOR NEGRO MILITARY PERSONNEL STATIONED WITHIN THE UNITED STATES (June 13, 1963) *reprinted in* 109 Cong. Rec. 14,359 (1963). The chairman of this committee, Gerhard Gesell, was the subject of vicious verbal attacks by members of congressional Armed Services committees following the issuance of this report.

[69a] *Id.* at 10-11.

> minority of white personnel. . . . At some Service clubs, it is customary for the command, through professional or volunteer hostesses, to arrange for girls to come to the base for a dance or other entertainment. Although such Service clubs are used by whites and Negroes alike, there are instances when too few or no Negro girls are brought to the base, thus creating unnecessary tensions. There is also evidence that on occasion civilian hostesses have imported onto the base from the civilian community attitudes which are inconsistent with Department of Defense policy.[69b]

Numerous other instances of command-authorized segregation were noted, including segregated MP units, with black MPs not sent into white areas. Instances were noted involving the removal of black servicemembers from military bands and choruses when they were scheduled to perform in civilian communities. It was apparently common practice for base commanders to attend, as speakers or in other semi-official capacities, segregated community activities. Segregated busing facilities were still used by the military in 1963, resulting in strange practices: "In a number of instances, buses, while required to integrate during the period the bus is on base property, enforced a segregated pattern of seating immediately upon leaving the installation."[69c]

Off-base segregation was much more serious and pervasive. Segregated schools and segregating patterns in housing were common. These conditions were found in both the North and the South. The report described typical local community treatment of black personnel:

> Usually the Negro officer or servicemember has few friends in the community where he is sent. He and his family must build a new life, but many doors are closed outside the Negro section of town. Drug stores, restaurants and bars may refuse to serve him. Bowling alleys, golf courses, theatres, hotels and sections of department stores may exclude him. Transportation may be segregated. Churches many deny him admission. Throughout his period of service at the particular base he is in many ways set apart and denied the general freedom of the community available to his white counterpart.
>
> Many of these Negro military personnel are well-educated, specially skilled and accustomed to home communities relatively free from discrimination. All of them have enjoyed the relative freedom from distinctions drawn on the basis of color which prevails on military bases. To all Negroes these community conditions are a constant affront and a constant reminder that the society they are prepared to defend is a society that deprecates their right to full participation as citizens. This should not be.[69d]

The Committee's Final Report[70] was published in 1964 and dealt extensively with discrimination against black servicemembers stationed overseas. It found that segregation in foreign clubs, bars, restaurants, and other public places catering primarily to lower ranking enlisted personnel was widespread and that in many instances the discriminatory practices had come about because of pressure from white American military personnel and their dependents.[71] The report also noted that attempted sit-ins had taken place in Bamberg, Germany and in various Japanese cities and that many black servicemembers had been disciplined by the military for disturbances resulting from attempts to break the color barrier in public establishments. These disciplinary actions tended to discourage blacks from challenging the status quo.[71a]

In April 1972, after widespread publicity about racial tension in the Armed Forces, Secretary of Defense Melvin Laird commissioned the Task Force on the Administration of Military Justice in the Armed Forces. Their four-volume report[72] once again investigated and discussed at length the broad issue of racism in the Armed Forces. The Task Force, chaired by Lieutenant General C. E. Hutchins, Jr., First Army Commander, and Nathaniel R. Jones, General Counsel of the NAACP, concluded that "the military system does discriminate against its members on the basis of race and ethnic background."[72a] It found systemic discrimination in the military justice and administrative discharge systems.

Detailed statistical studies revealed that blacks received all forms of military punishment — incident reports, Article 15 nonjudicial punishments, pretrial confinement, courts-martial, confinement at hard labor, and administrative discharges — in numbers vastly disproportionate to their numbers in the services. When statistical information was available, it confirmed that the disparities remained even when educational levels and aptitudes were similar. "The disparity," the Task Force noted, "cannot be explained by aptitude or lack of education."[72b] The primary reason for these disparities, the Task Force concluded, was racism:

> The overall problem of racial discrimination in the military and the effect of that problem on military justice is not a Negro problem, a Mexican-American problem or a Puerto Rican or a white problem. It is

69b *Id.* at 34-35.
69c *Id.* at 39-40.
69d *Id.* at 48.
[70] PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, FINAL REPORT: MILITARY PERSONNEL STATIONED OVERSEAS AND MEMBERSHIPS AND PARTICIPATION IN THE NATIONAL GUARD (Nov. 1964).
[71] *Id.* at 1-11.
[71a] *Id.*
[72] OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS (EQUAL OPPORTUNITY), REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES (Nov. 30, 1972) [hereinafter cited as 1972 TASK FORCE REPORT].
[72a] 1 1972 TASK FORCE REPORT 17.
[72b] *Id.* at 23.

> the problem of a racist society. To view it as other than what it is will be a mistake of serious proportions.[72c]

In 1972, the Task Force found many problems that had been previously detected. For example, "[t]he racial segregation of off-base housing is a persistent problem which has not been dealt with satisfactorily by existing military practices . . . base commanders, especially overseas, are not effectively coping with the problem of segregated housing."[72d]

Off-base recreation facilities continued to be a prime source of trouble: "Off-base recreational and leisure facilities, such as clubs and bars continue to be closed to minority servicemen, especially blacks, in many areas. This form of racial discrimination seems to be more prevalent overseas."[72e]

Indeed, the Task Force observed that whites-only bars tended naturally to lead to blacks-only bars. "Some black men, for so long forced to patronize black-only establishments, have come to feel comfortable in them. They are resisting desegregation on the grounds that command concern comes pretty late in the day . . . ."[72f] Minority servicemembers who exhibited hair styles and other symbols of pride or solidarity common in the early 1970s encountered problems in military service. One practice (East African in origin) was called "dapping"; it consisted of slapping and grasping hands in a complicated greeting symbolic of racial solidarity. The practice was evidently so irritating to some whites, including some commanders, that dapping was forbidden in certain locations, notably mess lines, on the grounds that it slowed activity in those locations. The Task Force stated that specifically prohibiting dapping in mess lines, rather than generally prohibiting slowing up mess lines, was an example of intentional discrimination.[73]

The Task Force also concluded that selective, discriminatory punishment was a reality, noting that "the black or Spanish-speaking enlisted man is often singled out for punishment by white authority figures where his white counterpart is not. There is enough evidence of intentional discrimination by individuals to convince the Task Force that such selective punishment is in many cases racially motivated."[73a]

Since the Task Force report was issued, there have been other analyses of the black servicemember's military experience.[74] Such analyses have generally concluded that black servicemembers suffer from underemployment as their counterparts do in civilian life. The following major complaints continued into the mid-1970s:

- Disproportionate assignment to soft core or low skilled occupations (*e.g.*, Combat Arms or Supply), partially as a result of the cultural bias of the Armed Forces Qualification tests used to determine career fields;
- Disproportionate service in low pay-grade positions which produced fewer promotions; and
- Continued problems with discrimination in off-post housing.

22.5.6.2 Symbols of Cultural Identity

The Task Force concluded that commanders often did not understand attempts to enhance racial pride and brotherhood, which were not intended as direct threats to discipline. The Vietnam War and the atmosphere of the 1960s and early 1970s, however, were not conducive to calm, sympathetic, or reasoned discussion.[75] Common causes of trouble were:

- The issue of whether Afro haircuts conformed to haircut regulations;[76]
- Facial hair;[77]
- Jewelry, walking sticks, and other symbols of black solidarity that conflicted with uniform regulations;[78]
- Dapping, and other greetings or expressions of brotherhood;[79]
- The mere associating of groups of blacks;[80] and
- Conflicts over the types of music played in clubs for enlisted personnel.

[72c] *Id.* at 39.
[72d] *Id.* at 59.
[72e] *Id.* at 61.
[72f] *Id.*
[73] A similar restriction angered Hispanic servicemembers. Some commanders forbade the speaking of Spanish on base. The Task Force concluded that: "there is no acceptable reason for prohibiting the use of languages other than English among men and women who speak them." *Id.*
[73a] *Id.* at 63.
[74] *See* D. CORTRIGHT, SOLDIERS IN REVOLT, ch. 11 (1975); Nordlie, Sevilla, Edmonds & White, A Research Report on a Study of Racial Factors in the Army's Justice and Discharge Systems (rev. ed. Mar. 1980) (prepared for DAPE-HRR, Pentagon, Room 2D 727, Washington, D.C. 20310). The latter study concluded that racial problems in the Army resulted from the frustration, bitterness, and feelings of hopelessness of black servicemembers, which were caused by "cultural interaction between members of different races and between the Army and the civilian culture. . . ." *Id., abstract* at 2.
[75] *See, e.g.,* Addlestone & Sherer, *Battleground: Race in Viet Nam,* 293 CIVIL LIBERTIES (Feb. 1973).
[76] Some Afros were permitted in the early 1970s, but the regulations were often unclear and could lead to such incidents as an NCO using a ruler to measure the height of an Afro.
[77] The facial hair issue took on a racial dimension because black men are particularly susceptible to a painful skin condition that is irritated by shaving. The condition, Pseudofolliculitis barbae (PFB), more commonly known as "razor bumps," is caused by the tips of kinky facial hair penetrating into the skin and causing an inflammatory reaction. The best way to cure PFB is to stop shaving, which conflicted with the contemporaneous military requirement of a clean-shaven appearance.

Military physicians would often issue shaving profiles exempting servicemembers from shaving. *See* § 7.4.5 *supra*. Some commanders ignored such profiles, strictly interpreted their limitations, made obtaining them difficult, or suspected servicemembers of taking advantage of the situation. *See* Alexander, *Pseudofolliculitis Barbae in the Military: A Medical, Administrative and Social Problem*, 66 J. NAT'L MED. A. 459 (Nov. 1974).

The Court of Military Appeals has held that an order to shave that is contrary to a properly issued profile is illegal and need not be obeyed. United States v. Jenkins, 22 C.M.A. 364, 47 C.M.R. 120, 1 MIL. L. REP. 2288 (1973).

More information about PFB can be obtained from PFB Project, 1707 N St. NW, Suite 300, Washington, D.C. 20036; (202) 737-3341.
[78] In Vietnam, black soldiers often wore bracelets or crosses woven out of shoelaces, sometimes from dead comrades.
[79] *See* § 22.5.6.1 *supra*.
[80] Such groups would occasionally be the object of command suspicion and would be broken up in a manner that led to bad feelings or more overt trouble between blacks and whites.

22.5.6.3 Case Approaches

The Boards recognize that some NCOs and commanders have shown low tolerance for public expressions of racial or cultural identity.[81] They also recognize that young servicemembers cannot be oblivious to what is happening in the outside world.[82] Therefore, an upgrade[83] is possible when insensitive command action amounted to racial or religious discrimination. Discrimination may be inferred through:

- A finding that a Project 100,000 inductee from a ghetto should never have been expected to conform to military discipline in time to meet the demands of most commands;[84]
- A finding that racial attitudes in the local area may have affected the servicemember's ability to perform even if discrimination was only imagined by him/her;[85]
- A pattern of assignments to menial work below the servicemember's abilities; or
- A recitation of events that conforms with the (then) commonly held perception of prevailing racial conditions.

Actual discrimination is very difficult to prove, and testimony raising racial issues must be handled carefully when only inferences support the conclusion. Attention to detail is important. It is counterproductive to argue that "statistics show blacks were discriminated against" or that "the military was racist towards me." An applicant must be specific, saying, for example, "Sgt X was a racist; he was so insensitive that he kept a Confederate flag on his desk."

22.5.6.4 Sex Discrimination

Until recent years, the military officially discriminated against women[86] through:

- Higher entrance requirements;[87]
- Higher entrance ages;[88]
- Automatic discharge upon marriage or pregnancy;[89] and
- Stringent requirements that unmarried people not be allowed to enlist if they had dependent children (a policy that disqualified women much more frequently than it did men).

Formerly, except in cases involving homosexuality, women generally received higher discharges than men when discharged for the same reasons.[89a] In recent years, however, bad discharges have been issued with increased regularity to women. The following arguments may be used by female servicemembers who are seeking upgrades in discharge:

- Sexual harrassment contributed to the servicemember's inability to function;
- The recent change in the pregnancy rule was not honored in spirit; and
- The servicemember's commander or associates treated the servicemember in a patronizing or hostile manner because of her gender.[90]

22.5.7 MEDICAL AND PHYSICAL CONSIDERATIONS

Having a disability or other permanent medical condition while in service can result in:

- A medical discharge if the disease or injury existed prior to service and would have disqualified the servicemember from service;[91]
- A disability retirement separation with a pension or lump-sum payment if the disease or injury was service-connected.[92]

A DRB cannot change a bad reason for discharge to either of the above reasons.[93] But it can upgrade the character of discharge if it believes that the medical condition should have led to discharge or retirement. If the applicant has a good case for a change to a disability retirement, (s)he should consider applying to the BCMR.[94]

Discharge regulations usually required processing for a medical problem if the alternative was discharge for unsuitability. If a discharge for misconduct, unfitness, or court-martial was pending, the discharge authority had discretion to process the servicemember through medical or other administrative channels.[95]

Normal upgrade cases do not involve medical problems serious enough to warrant medical discharges or disability retirement. Most cases involve medical or physical conditions that contributed to servicemembers' ability to perform duties adequately.

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[81] *See* note 63 *supra*.

[82] *See* note 46 *supra*.

[83] *See* ND 78-02672 (UD changed to HD because applicant's discharge was motivated by CO's racial discrimination). *See also* AD 79-09593; FD 79-01473; AD 78-01089; AD 79-07187; FD 79-01470; MC 78-01964 (religious discrimination); AD 77-05463 (cultural factors within Navajo Nation); AC 72-04062A (raised on Indian reservation).

[84] *See* notes 51 & 74 *supra*; § 22.5.3 *supra*.

[85] *See* AD 78-01089.

[86] Unofficial discrimination against women in the military has been based on the widely-held view that women should not be in the military in the first place, or should not be there on equal terms with men. Information concerning the role and difficulties of women in the armed forces is available through the American Veterans' Committee, 1346 Connecticut Ave., N.W., Washington, D.C. 20036.

[87] *See* Ch. 7 *supra*. These requirements were dropped by the Army in 1979.

[88] *Id.*

[89] *See* DRB Index category A22.00; AD 77-10158. Automatic processing of discharges for pregnancy ceased in 1975. From 1973 to 1975, discharge was automatic unless a waiver was granted. Issuing discharges based on marriage was stopped much earlier.

[89a] This pattern of discriminatory protectiveness culminated in the Supreme Court's approval of male only draft registration. *Goldberg v. Rosker*, 101 S. Ct. 2646, 9 MIL. L. REP. 2607 (1981).

[90] The GAO recently found problems with jobs assigned to female servicemembers. *See* GOVERNMENT ACCOUNTING OFFICE, JOB OPPORTUNITIES FOR WOMEN IN THE MILITARY: PROGRESS AND PROBLEMS, Report No. B-157371 (May 11, 1976).

[91] *See* § 12.6.2.3 *supra*.

[92] *See* § 27.4 *infra* (service connected disability benefits can be granted by the VA even though there has been no disability retirement). *See also* BCMR Index categories 108.00, 145.00.

[93] ADRB SOP, Annex L-1, 44 Fed. Reg. 25,061 (Apr. 27, 1979).

[94] *See* BCMR Index categories 108.00, 145.00.

[95] *See* § 12.5.4 *supra* (consequences of the failure of the service to conduct the required medical examination prior to discharge); DRB Index category A99.14; BCMR Index category 145.

DRBs will consider these limitations to be mitigating, but will be concerned if:[96]

- There was no attempt to bring the condition to the attention of the command;
- There is no evidence in the applicant's service records, and particularly in his/her medical records, to support the claim;
- The condition was a minor one which the servicemember could be expected to handle;
- There is no connection between the condition and the offenses;
- There was no attempt to secure a medical profile exempting the servicemember from certain duties.

Testimony by the applicant or other evidence may thus be very important in such a case.

22.5.8 DRUG AND ALCOHOL PROBLEMS[97]

Boards tend to view misconduct, especially minor offenses, more sympathetically when misconduct results at least in part from drug or alcohol dependency or (in the case of younger servicemembers) drug or alcohol use in response to peer pressure.[98] It is unwise, however, to rely solely on a claim of inebriation in attempting to mitigate misconduct.

22.5.9 PSYCHIATRIC, EMOTIONAL, OR OTHER MENTAL PROBLEMS

Boards recognize that psychiatric problems, even situational maladjustment, can contribute to misbehavior. Consequently, such problems should have a mitigating effect because they are beyond the servicemember's control.[99] Psychiatric problems are treated very much like other incapacitating problems.[100] The following types of evidence can help support an upgrade:

- Clear, contemporaneous evidence of psychiatric disorders;
- Diagnosis of a character and behavior (personality) disorder constituting grounds for an unsuitability discharge and seemingly the cause of minor offenses leading to an applicant's discharge;[101] and
- Postdischarge psychiatric history, with supporting statements.

22.5.10 MATTERS OF CONSCIENCE

"Matters of conscience" is infrequently relied upon by Review Boards as a reason to upgrade.[102] For example, opposition to the Vietnam War as a matter of conscience, no matter how sincere, is unlikely to result in an upgrade. The category is generally reserved for:

- Pre-1962 sincere conscientious objectors (COs) who were unable to take advantage of the first DoD directive permitting the discharge of conscientious objectors;[103] and
- Sincere COs who were improperly inducted,[104] were denied a discharge,[105] were given misinformation about the application process,[106] had their applications hindered,[107] or did not know about the application process.

Sincere opposition to participation in all wars seems to be the key factor. Membership in one of the so-called peace churches, while not legally required, is also helpful. Close scrutiny of an applicant's testimony in such a case can be expected.

22.5.11 GENERAL INAPTITUDE (WOULD BUT COULDN'T)

Military commanders look at a nonperforming servicemember to determine whether the misconduct or nonperformance was volitional or involuntary, asking: "Is it a case of could but wouldn't or would but couldn't?" The former usually results in a discharge for unfitness or misconduct and the latter in a discharge for unsuitability.[108]

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[96] *See* DRB Index category 93.22; AD 7X-01539; AD 7X-11157; AD 77-02098; AD 77-10461; *cf.* AC 79-02900 (DD for refusal to submit to surgery to cure disqualifying condition upgraded to HD, in part because SM feared surgery).

[97] *See* Chs. 13 (alcohol), 15 (drugs) *supra.*

[98] *See* DRB Index categories A93.18, A93.20.

[99] *See* DRB Index category A93.24; BCMR Index category 105.02.

[100] AD 77-07417; AC 77-02666; AC 77-02967; AC 77-04619; AC 78-00663; AC 78-01645; AD 77-02254; AC 77-04781; AD 78-00999; AC 78-01602; AC 78-02440; AC 78-04876; AD 7X-00412; AC 77-06842; AC 77-07402; AC 78-03782; AC 78-00669; *cf.* MD 77-03706 (fear of physical abuse).

[101] *See* §§ 17.3, 17.4.1 *supra;* § 22.5.11 *infra*; DRB Index category A94.02 (would but couldn't perform).

[102] *See* DRB Index category A93.26.

[103] AD 77-11974 (discussed at § 12.6.2.1 *supra*).

[104] *See* AD 7X-10481.

[105] *See* § 12.6.2.1 *supra*; DRB Index category A99.02.

[106] *See* § 12.6.2.1.4 at note 345 *supra.*

[107] *See* § 12.6.2.1.4 *supra*.

[108] *See* Chs. 16 (unsuitability), 17 (unfitness/misconduct) *supra*; DRB Index category A94.04. The ADRB SOP provides:

> Character and Behavior versus Habits and Traits. Often the line of demarcation between separation for character and behavior disorders (honorable type discharge) and separation for habits and traits (usually under other than honorable conditions) is not clearly discernible. Many times the decision to board as "unfit" versus "unsuitable" was more influenced by external circumstances than it was by the character and personality of the individual being separated. The panel in considering whether or not the proper method was used in separating the individual from the service must examine the cause/effect relationship, the individual's behavioral capabilities, and his behavioral pattern. In essence, the panel must ascertain whether or not the infractions of discipline were acts of commission or of omission. A key is to decide whether or not the individual was simply incapable of proper performance. Coupled with this, must be a determination as to the nature of the offense and the time/space circumstances under which the offense was committed.
>
> Would but Couldn't; Could but Wouldn't. This area of consideration relates very closely to the preceding paragraph. Some individuals are error prone, others clearly were mistakes of the procurement process and should never have been inducted or enlisted into the Army. These individuals could properly be called victims of the trauma associated with attempting to meet critical personnel requirements during RVN within the political, economic, and social

Boards not only look for the generally inept servicemember, but also focus on whether the servicemember had a character and behavior (personality) disorder, a prime reason for discharge for unsuitability.[109] Such an affliction often renders a person incapable of functioning and also leads the person to manifest traits that cause others to dislike him/her.[110] Diagnosis of a character and behavior disorder should not be presented without being linked to the acts of misconduct. Frequently these diagnoses are psychiatric catch-alls or the devices of sympathetic psychiatrists to assist servicemembers who wanted to be discharged. Review Boards do not accept medical diagnoses without examining each case from the commander's point of view.[111]

22.5.12 VIETNAM WAR SYNDROME AND POSTTRAUMATIC WAR NEUROSIS

About 1975, Review Boards began to recognize a phenomenon known as Post-Vietnam Syndrome (PVS).[112] PVS was generally a syndrome of situational maladaptability brought on by such factors as:

- Immediate, solitary return from Asia to the United States;
- No welcome upon return;
- Distaste for what seemed to be a pointless war unsupported by the public;
- The shock of strict stateside discipline under the command of "lifers," following prolonged exposure to the relatively undisciplined and surreal order of military life in Vietnam;
- Culture shock;
- A sense of pointlessness completing the remaining usually short period of service; and
- The fresh memory of highly stressful situations (particularly in the case of combat veterans).

While Review Boards recognize the effects on a veteran of the "return to the world,"[113] they do not consider it to be as strong a mitigating factor as mental health professionals would (DSM-III recognizes the Post-Traumatic Stress Disorder (PTSD)).[114] The Army DRB SOP[115] provides:

> Vietnam Syndrome. The panel may recognize that during the Vietnam era, young, easily influenced, and immature individuals may have been misled by the dissension in American society over Vietnam involvement. This susceptibility could possibly have been heightened upon their return from service in Vietnam, particularly when their ability to comprehend the purpose for their service in Vietnam was eroded by their inability to find understanding for such service among their peer group in civilian life. The panel may, subject to its own judgment, give consideration to the possibility that this element of confusion may have caused some ex-servicemen to express their uncertainty by infractions of discipline. When personnel of this type then elected to sever their relationship with the

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[108] (continued)

> constraints that detracted from efficient operation. It is inevitable that some would have had difficulty with the military system. Key to consideration of their cases is the determination as to whether or not they were sincerely trying to conform versus whether or not there was deliberate intent not to conform. The panel may grant relief if, in its opinion, there was intent but no ability to be a good soldier.

ADRB SOP, Annex F-1, paras. 3.H., 3.I., 44 Fed. Reg. 25,071 (Apr. 27, 1979).

See AD 78-00843; AD 7X-03505; AD 78-02784 ("ability marginal"); FD 80-00916 ("ill equipped"); AD 77-11241 ("inability to adapt").

[109] *See* § 16.7 *supra*.

[110] The ADRB SOP provides:

> Personality Disorder. Individuals who suffer from a personality disorder frequently are incapable and/or unwilling to conform to the standards necessary in a military organization. These individuals are often afflicted with and manifest characterological and behavioral traits which make them socially offensive and/or the objects of irritation, ridicule and/or anger. Under those circumstances, it is at times difficult for a clear perception to be gained whether or not the individual concerned is acting in a manner over which he/she has no control and is more a victim of his/her situation than a perpetrator. Individuals who truly have a character and behavior disorder (used interchangeably with personality disorder) should not be unjustly penalized for their affliction although they clearly must be separated.
>
> (1) A determination as to whether or not an individual is properly classified as a character and behavior disorder is a function of two different spheres of expertise. On one hand, the medical sphere offers expert evaluation establishing whether or not the individual concerned has a personality disorder. On the other hand, there is the commander's evaluation which involves an area of expertise that centers around certain intangibles of leadership culminating in a judgment whether or not the individual concerned is capable of complying with soldierly standards. It is the interplay between these two spheres of expertise, each of which must be mutually supporting that makes a final determination possible.
>
> (2) Individuals who suffer from situational maladjustment or some form of stress and fatigue, such as combat fatigue or other similar situational syndromes, may appear to support the test of personality disorder but may, in fact, not be so afflicted. Care must be taken to insure that such individuals are not improperly categorized. The determination in this regard is heavily dependent upon the specific duty environment and circumstances that existed at the time the problem or problems which led to the soldier's separation manifested themselves.
>
> (3) Certain prerequisites of processing must be evaluated by the panel to insure proper consideration of a C & B case. Under the policy in effect now, a psychiatric evaluation is mandatory. Equally important, though not mandatory, is a clear rendition of the perception of the commander of the problems faced by the individual. Absent these, panels must give serious consideration to the granting of relief. In this regard, relief can be interpreted as granting a fully honorable discharge.

ADRB SOP, Annex F-1, para. 3.V., 44 Fed. Reg. 25,073 (Apr. 27, 1979).

[111] *Id.*

[112] *See* DRB Index category A94.14.

[113] In other wars, terms of service were indefinite or longer than at present, return was by ship with a group that went and stayed together, and there was popular support for returning veterans. *See* AD 7X-04550; AC 77-02967 (emotionally worn out soldier); AD 77-10336; AD 78-02784; AD 79-03055A (suffering from PTSD during AWOLs).

[114] *See* C. FIGLEY, STRESS DISORDERS AMONG VIETNAM VETERANS (1978); C. FIGLEY & S. LEVENTMAN, STRANGERS AT HOME (1980). *See* § 27.6.5 *infra*.

[115] ADRB SOP, Annex F-1, para. 3.B., 44 Fed. Reg. 25,070 (Apr. 27, 1979). *See also Id.*, para. 1.D., 44 Fed. Reg. 25,068 (Apr. 27, 1979).

> Army as opposed to accepting punishment or rehabilitation, the panel may conclude, if otherwise justified, that this might be due to ideological pressures. Care must be taken by the panel to insure that the Vietnam Syndrome is, indeed a factor in the case as opposed to cases wherein the individual was simply dissatisfied with military life and under any other circumstances would be a recalcitrant or noneffective soldier.

Veterans of other wars, of course, did not return home in perfect mental health. While their reentry was less stressful than that of Vietnam veterans, many suffered from combat shock or a posttraumatic war neurosis which may have affected their behavior.

22.5.13 ARBITRARY AND CAPRICIOUS COMMAND ACTIONS

This reason for finding an inequity[116] appears to be a redundant category. The Boards, however, seem to use this reason as a handle to find abuse of discretion in matters such as:

- Denial of a compassionate reassignment;[117]
- Refusal to permit an opportunity to be rehabilitated after a conviction;[118]
- Inappropriate discharge processing;[119]
- Occurrence of an impropriety which the Board viewed in equity terms;[120] and
- Failure to give a case individualized scrutiny (processing it instead by rote).[121]

The category "Arbitrary and Capricious Command Actions" was probably intended to cover only findings of abuse of discretion in decisions adversely affecting servicemembers; in practice, however, it is often used by DRBs to describe improprieties in the discharge process. The result of this might be an upgrade from a UD only to a GD instead of to an HD because in upgrades based on impropriety, quality of overall service is not as significant a factor as it is in upgrades based on inequities.[122]

22.6 AGGRAVATING FACTORS

While aggravating factors are not specifically mentioned in any of the DRB rules or guidance published by the Boards, certain factors diminish the impact of or outweigh mitigating factors unless otherwise dealt with or explained. There are defenses to some aggravating factors, however. The most common aggravating factors are:

- The servicemember did not want to complete his/her term of service;
- The servicemember commited offenses involving violence, drug sale, or threats to the command structure, or offenses close to combat;
- No attempt was made to invoke the assistance of the chain of command to resolve problems;
- The servicemember had a better-than-average capacity to cope as evidenced by age, education, test scores, and demonstrated ability to perform; or
- The servicemember failed to complete alternative service under the Ford Clemency Program.[123]

22.6.1 WHEN THE SERVICEMEMBER WANTED TO BE DISCHARGED

While desire to serve is always a positive factor, there is a distinction between wanting to get out because of real personal problems and wanting to get out for selfish reasons by manipulating the discharge process.[124] The latter might be inferred if the servicemembers waived all rights and accepted the worst discharge possible, or requested a discharge in lieu of court-martial when the court-martial sentence would have been minimal.

Common explanations are:[125]

- Long or illegal confinement in harsh confinement facilities;
- Coercion;
- Assignment to work details or other meaningless jobs pending discharge processing (detail work is sometimes assigned to persons convicted and sentenced to hard labor without confinement, an improper way to treat servicemembers pending trial or discharge action);

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[116] 32 C.F.R. § 70.6(c)(3)(ii)(C); DRB Index category A94.12.

[117] AD 77-06776.

[118] *See* ND 78-00444; AD 78-00922; AD 77-11678.

[119] *See* AD 77-11871.

[120] *See* AD 7X-22557 (hearing not convened despite servicemember's request for one); AD 77-10383.

[121] The ADRB SOP provides:

> Arbitrary and Capricious Administrative or Command Action. It is sometimes very difficult when reviewing the official military records to separate the fair from the unfair. Compliance with both the spirit and intent of the regulation is a necessary prerequisite to a fair and equitable processing of administrative or command action. Too frequently, it is clear from the timing, the presence or absence of comments, and other facts that the administrative processing was simply "by rote" or accomplished in such a way as to be prejudicial to the opportunity for fair consideration. The circumstances rarely lend themselves to clear perception since it is in their nature that they are concealed simply because of the appearance of "normality." It is incumbent upon board members to insure that arbitrary and capricious action has not been the net result of simple "by rote" processing of administrative separation documents. Furthermore, it is incumbent upon board members to insure that arbitrary and capricious action has not been the basis of determining that the discharge is to be awarded and, more importantly, determining the character of that discharge. When in the opinion of a board member it is demonstrably clear that arbitrary and capricious determination is in fact a circumstance of the administrative and command action, then relief must be given serious consideration.

ADRB SOP, Annex F-1, para. 3.L., 44 Fed. Reg. 25,071-72 (Apr. 27, 1979).

[122] *See* § 12.5.1.3 *supra* (HDs resulting from findings of impropriety).

[123] *See* § 23.4 *infra*.

[124] The ADRB SOP implies that a servicemember's desire to be discharged is in no way binding on a DRB. ADRB SOP, Annex F-1, para. 1.C., 44 Fed. Reg. 25,068 (Apr. 27, 1979).

[125] *See generally* § 12.5.5 *supra* (waiver of rights).

- Lapse of a long period of time in the discharge process during which the servicemember loses all hope;
- Bad advice from lawyers, commanders, or stockade personnel (*e.g.*, that a UD would automatically become a GD in six months, that it would be easy to change the servicemember's type of discharge, or that the servicemember was going to receive the same character of discharge whether (s)he fought it or not);[126]
- Lack of concern or time on the part of the JAG counsel;[127]
- Failure of command to supply the servicemember with any motivation to rehabilitate or to contest a discharge (*e.g.*, where success would result in his/her being returned to same unit);
- Court-martial, which carries a federal conviction, was wrongly represented to the servicemember to be worse than a UD; and
- Failure of the chain of command to recognize problems.[128]

22.6.2 OTHER COMMON DEFENSES

Other, more generally applicable approaches to the problem of aggravating factors are:

- Rehabilitation attempts were a failure or were not properly undertaken;[129]
- Command failure to respond to or be receptive to requests for assistance;[130]
- Ignorance of command channels or of the possibility of official remedy for problems;
- New psychiatric evidence; and
- Command channels were themselves the problem.

[126] DRBs are aware that some personnel control facilities were very crowded; thus, they tend to believe applicants who claim to have received inadequate advice. The Fort Dix PCF was at one time known as "the meat grinder."

[127] Former JAGs, contacted by letter, have noted excessive case loads (350 cases in one year, for example).

[128] *See* ADRB SOP, Annex F-1, para. 3.G., 44 Fed. Reg. 25,071 (Apr. 27, 1979).

[129] *Cf.* ADRB SOP, Annex F-1, para. 3.R., 44 Fed. Reg. 25,072 (1979); § 12.5.2 *supra*.

[130] *See* note 128 *supra*.

APPENDIX 22A
DRB EQUITY RULES AND INDEX CATEGORIES

A. DRB Equity Rules

32 C.F.R. § 70.6(c) provides:

> (c) Equity. A discharge shall be deemed to be equitable unless:
>
> (1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that:
>
> (i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and
>
> (ii) There 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;
>
> (2) At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member; or
>
> (3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's Service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this subparagraph and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:
>
> (i) Quality of service, as evidenced by factors such as:
>
> - Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative).
> - Awards and decorations. Letters of commendation or reprimand. Combat service. Wounds received in action. Records of promotions and demotions. Levels of responsibility at which the applicant served.
> - Other acts of merit that may not have resulted in a formal recognition through an award or commendation.
> - Length of service during the service period which is the subject of the discharge review.
> - Prior military service and type of discharge received or outstanding post-service conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review.
> - Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in Military Service records.
> - Records of periods of unauthorized absence.
> - Records relating to a discharge in lieu of court-martial.
>
> (ii) Capability to serve, as evidenced by factors such as:
>
> - Total Capabilities. This includes an evaluation of matters such as age, educational level, and aptitude scores. Consideration may also be given to whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to the military service.
> - Family/Personal Problems. This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

- Arbitrary or Capricious Actions. This includes actions by individuals in authority which constitute a clear abuse of such authority and which, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.
- Discrimination. This includes unauthorized acts as documented by records or other evidence.

B. Relevant DRB Index Categories

Part F — (A92.00) Quality of Service
(A92.01/02) Conduct and Efficiency Ratings
(A92.03/04) Awards and Decorations
(A92.05/06) Letters of Commendation
(A92.07/08) Combat Service
(A92.09/10) Wounds Received in Action
(A92.11/12) Record of Promotions
(A92.13/14) Rank/Responsibility Level at Which SM Served
(A92.15/16) Other Acts of Merit
(A92.17/18) Date and Period of Service Which Is Subject of DRB Review
(A92.19/20) Prior (Honorable) Military Service
(A92.21/22) Post Service Conduct (Good Citizenship)
(A92.23/24) Record of Non-Judicial Punishment [indicates isolated/minor offenses]
(A92.25/26) Record of Courts-Martial Convictions [indicates isolated/minor offenses]
(A92.27/28) Record of Conviction(s) by Civil Authorities While in Service and Part of Service Record [indicates isolated/minor offenses]
(A92.29/30) Record of Unauthorized Absences [indicates isolated/minor offenses]
(A92.31/32) Other
Part G — (A93.00) Capability to Serve (Factors Which Could Impair Ability to Serve)
(A93.01/02) Age and Maturity
(A93.03/04) Aptitude (Scores) and Education
(A93.05/06) Deprived Background
(A93.07/08) Marital/Family Problems
(A93.09/10) Personal Problems
(A93.11/12) Financial Problems
(A93.13/14) Discrimination: Religious
(A93.15/16) Discrimination: Racial
(A93.17/18) Drugs
(A93.19/20) Alcohol
(A93.21/22) Medical/Physical
(A93.23/24) Psychiatric/Psychological Problems (May Include Situational Maladjustments)
(A93.25/26) Matters of Conscience
(A93.27/28) Waiver of Moral Standards for Enlistment
(A93.29/30) Other
Part H — (A94.00) Other Equitable Considerations
(A94.01/02) Severity of Punishment (Civil or Military): Current Standards
(A94.03/04) Inaptitude ("Would but Couldn't")
(A94.05/06) Too Harsh: At Issuance, Discharge Inconsistent with Standards of Discipline
(A94.07/08) Discharge in Lieu of Court-Martial: Although a Punitive Discharge Was Authorized, an Other Than Honorable Discharge Was Too Harsh Under the Circumstances
(A94.09/10) Multiple Minor Offenses (Multiplicity)
(A94.11/12) Arbitrary and Capricious Command Actions That Constitute a Clear Abuse of Authority, and Which, Although Not Amounting to Prejudicial or Legal Error May Have Contributed to the Decision to Discharge or the Characterization of Service
(A94.13/14) Vietnam War Syndrome
(A94.15/16) Received Clemency Discharge

(A94.17/18) Completed Alternate Service or Excused Therefrom
(A94.19/20) Failed to Complete Alternative Service but Reasonable Explanation
(A94.39/40) Other
(A95.00)
(A96.00)
(A97.00)
(A98.00)

OTHER CONSIDERATIONS

Part I — (A99.00) Administrative Actions Indirectly Related to Discharge Process
(A99.01/02) Application for Conscientious Objector (CO) Status
(A99.03/04) Application for Hardship Discharge
(A99.05/06) Improper Enlistment
(A99.07/08) Improper Induction
(A99.09/10) Enlistment Option Not Satisfied or Waived
(A99.11/12) Application for Compassionate Reassignment
(A99.13/14) Evaluation /Consideration for Physical Disability Discharge
(A99.15/16) Other

APPENDIX 22B
DRB/BCMR DECISIONS

A. CASE LISTS

Copies of cases cited in supporting briefs should accompany the briefs. Copies are free from the following address: DA Military Review, Boards Agency, ATTN: SDBA (Reading Room), 1E520 The Pentagon, Washington, D.C. 20310.

1. ARMY BCMR

AC 61-01513; AC 68-02043; AC 71-03201; AC 72-03206; AC 73-02466; AC 76-00564; AC 77-01308; AC 77-02666; AC 77-02967; AC 77-04619; AC 77-04781; AC 77-05387; AC 77-06681; AC 77-06842; AC 77-07393; AC 77-07402; AC 78-01645; AC 78-00333; AC 78-00663; AC 78-00669; AC 78-01278; AC 78-01602; AC 78-01645; AC 78-02228; AC 78-02483; AC 78-02440; AC 78-03308; AC 78-03379; AC 78-03421; AC 78-03782; AC 78-04132; AC 78-04411; AC 78-04876; AC 78-04880; AC 79-02900.

2. ARMY DRB

AD 7X-00412; AD 7X-01186; AD 7X-01539; AD 7X-01544; AD 7X-03782; AD 7X-04550; AD 7X-04882; AD 7X-05110; AD 7X-05278; AD 7X-08118; AD 7X-10461; AD 7X-10481; AD 7X-11062; AD 7X-11960; AD 7X-14813A; AD 7X-16593A; AD 7X-19467; AD 7X-22557; AD 77-02254; AD 77-04006; AD 7X-04052; AD 7X-04550; AD 77-05456; AD 77-05463; AD 77-06560; AD 77-06766; AD 77-07009; AD 77-07032; AD 77-07159; AD 77-08431; AD 77-09046; AD 77-09469; AD 77-09676; AD 77-10048; AD 77-10158; AD 77-10173; AD 77-10336; AD 77-10383; AD 77-10702; AD 77-10809; AD 77-11241; AD 77-11580; AD 77-11678; AD 77-11744; AD 77-11871; AD 78-00359; AD 78-00491; AD 78-00642; AD 78-00649; AD 78-00843; AD 78-00922; AD 78-01089; AD 78-01519; AD 78-01779; AD 78-02123; AD 78-02784; AD 78-03509; AD 78-04427; AD 79-01298; AD 79-01817; AD 78-04795; AD 79-05052; AD 79-05839; AD 79-06522; AD 79-07187; AD 79-07305; AD 79-07593; AD 79-07594; AD 79-07927; AD 79-08315; AD 79-09593; AD 80-00283; AD 80-00993.

3. NAVY BCNR

NC 77-03378; NC 78-03522.

4. NAVY DRB

ND 77-02414; ND 77-02579; ND 78-00183; ND 78-00444; ND 78-01033; ND 78-01522; ND 78-02672.

5. MARINE DRB

MD 78-01964; MD 7X-02234; MD 77-03212; MD 77-03496; MD 77-03510; MD 77-03706; MD 78-00862; MD 78-01131; MD 78-03540; MD 79-02481.

6. AIR FORCE DRB

FD 78-00631; FD 79-00376; FD 79-00533; FD 79-00840; FD 79-01062; FD 79-01386; FD 79-01400; FD 79-01470; FD 80-00151; FD 80-00916.

B. DIGEST OF CASES RELIED UPON

1. ARMY BCMR

AC 61-01513 (BCD from GCM for 22-day AWOL upgraded to GD because of applicant's prior honorable service and personal problems).

AC 68-02043 (BCD from GCM for 210 days AWOL upgraded to GD because of applicant's prior honorable discharge and personal problems (need to support wife and children)).

AC 71-03201 (DD from GCM for 285-day AWOL upgraded to GD because of good prior service record and marital problems; married pregnant fiancee while AWOL and she had trouble with pregnancy).

AC 72-03206 (UD for misconduct upgraded to GD because of applicant's low AFQT scores, no lost time, and only 3 months remaining until ETS).

AC 73-02466 (BCD from GCM for 355 days AWOL upgraded to GD because of applicant's low intelligence, marital problems (married twice without divorce), and because of general unsuitability for service).

AC 76-00564 (DD from GCM for 170-day AWOL upgraded to GD because of applicant's prior honorable service and family problems (mother's and wife's health)).

AC 77-01308 (1952 DD from GCM for desertion (over 400 days AWOL) upgraded to GD because applicant's AWOL was based on father's medical problems and inability to work, and because of applicant's intention to return, age, deprived background, low intelligence, and 40 months of satisfactory service including combat in Korea).

AD 77-02098 (1971 UD/GOS upgraded to GD because AWOL time partially included the time in the hospital).

AC 77-02967 (DD from GCM for desertion upgraded to GD because applicant was "emotionally worn out" soldier).

AC 77-04619 (DD from GCM for 180-day AWOL upgraded to GD because of applicant's psychological trauma, good combat service, and present status as respectable community member).

AC 77-04781 (BCD from GCM for larceny upgraded to GD because of applicant's emotional stress, 2 years of excellent service (no prior disciplinary actions), and cooperation with authorities, and because over 22 years had passed since the offense).

AC 77-05387 (DD from GCM for aggravated assault upgraded to GD because applicant was young and immature, which led to affiliation with "bad crowd").

AC 77-06681 (BCD from GCM for 19-day AWOL upgraded to GD because of applicant's good prior service and family problem in relocating wife and children).

AC 77-06842 (DD from GCM for desertion upgraded to GD because of applicant's low intelligence and because 50 years had passed since discharge).

AC 77-07393 (BCD from GCM for 605-day AWOL upgraded to GD because of family problem (wife's epilepsy)).

AC 77-07402 (BCD from GCM for 240-day AWOL upgraded to GD because applicant was too young, had emotional and family problems (problems with brother-in-law), and had applied for hardship discharge).

AC 78-01645 (BCD from GCM for 33-day AWOL upgraded to GD because of applicant's emotional instability and overall good record).

AC 78-00333 (BCD for 25-day AWOL upgraded to GD because of applicant's prior good service, illness, and heavy debts).

AC 78-00663 (1954 BCD upgraded to GD because AWOLs (27 days and 1 month, 14 days) only violated military rules and larceny involved a relatively small amount of property; consideration of Korean service and of personality problems severe enough that recommendation was made that SM be administratively separated).

AC 78-00669 (DD from GCM for desertion upgraded to GD because applicant was immature, had inadequate personality, and was too young to cope with service).

AC 78-01278 (BCD from GCM for 174-day AWOL upgraded to GD because of applicant's immaturity and family problems (stepfather was ill and 5 children needed support)).

AC 78-01602 (BCD from GCM for 113-day AWOL upgraded to GD because applicant had personality disorder and mother was ill).

AC 78-01645 (BCD (1947) upgraded to GD; SM had two prior periods of honorable service, awarded Purple Heart and combat infantryman badge; Board considered BCD unduly harsh and felt SM should have been separated for unsuitability after first AWOL).

AC 78-02228 (DD from GCM for 1-day AWOL and DOLO upgraded to GD because of applicant's one year, six months of credible service, low intellectual status, and latent schizophrenia).

AC 78-02438 (BCD from GCM for 16-day AWOL upgraded to GD because of applicant's low level of education and personality disorder).

AC 78-02440 (DD from GCM for 308-day AWOL upgraded to GD because of applicant's one year, ten months honorable service, illiteracy, and mental deficiency).

AC 78-03308 (DD for 10-day AWOL upgraded to GD because of applicant's overall good record, chronic alcoholism, and present membership in AA).

AC 78-03379 (BCD from GCM for 28-day AWOL upgraded because of applicant's use of alcohol and prior good record).

AC 78-03421 (BCD from GCM for 31-day AWOL upgraded to GD because applicant received Purple Heart and combat infantryman badge, had low intelligence, and had family problems (wife was sick during pregnancy)).

AC 78-03782 (BCD from GCM for disrespect to captain upgraded to GD because of applicant's immaturity, character and behavior disorder, and age at time of incident).

AC 78-04132 (BCD from GCM for 115-day AWOL upgraded to GD because of applicant's prior good service and domestic pressure (wife wanted a divorce and abortion)).

AC 78-04411 (DD from GCM for 380-day AWOL upgraded to GD because of applicant's two Purple Hearts, WWII service, and low intelligence).

AC 78-04876 (DD from GCM for 240-day AWOL upgraded to GD because of applicant's service awards, low intelligence, and insanity).

AC 78-04880 (DD from GCM for 24-day AWOL and breaking arrest upgraded to GD because applicant did not fully recover from wounds in Korea and had deprived background (parents died when he was very young)).

AC 79-02900 (DD from GCM for refusal to submit to surgery upgraded to HD; complained of urinary problems during induction physical; after completing basic training, SM was diagnosed as having bladder stone; removal required surgery, which SM refused; record was good enough that SM had been considered for promotion to staff sergeant).

2. ARMY DRB

AD 7X-00412 (UD for AWOL upgraded to GD because of SM's age, family problems (broken home and alcoholic mother), emotional instability, educational background, and 12 months credible service).

AD 7X-01186 (UD for frequent incidents of a discredible nature upgraded to HD because of applicant's marital problems).

AD 7X-01539 (UD for AWOL upgraded to GD because of applicant's medical problem — incurable skin disease called lupus).

AD 7X-01544 (1973 UD upgraded to GD (in 1977) and affirmed; acts of indiscipline numerous, but minor in nature, applicant's problems with dyslexia contributed to acts of indiscipline).

AD 7X-03782 (UD for frequent incidents of a discredible nature upgraded to GD because of the applicant's personal problems (deprived background, alcohol abuse, and immaturity)).

AD 7X-04550 (UD for conduct triable by court-martial upgraded to HD because of applicant's overall good record, RVN syndrome, Purple Heart, and Bronze Star).

AD 7X-04882 (UD for shirking upgraded to HD because of applicant's marital problems (unfaithful wife) and inability to solve problems through military channels).

AD 7X-05110 (UD/misconduct upgraded to GD; applicant testified that recruiter had promised him training as mechanic; Board accepted this testimony as rationale for applicant's disenchantment with service following nonfulfillment of the promise).

AD 7X-05278 (UD/GOS upgraded to GD; applicant should not have been inducted, having spent 9 months in a mental hospital prior to induction; he had continual problems stemming from his inability to adjust or learn basic skills).

AD 7X-08118 (UD/shirking upgraded to GD; applicant was erroneously inducted after repeated attempts to secure 3A classification as being married and a father; half of applicant's bad time occurred after determination that induction was erroneous).

AD 77-10461 (1958 GD for unsuitability/apathy upgraded to HD because of poor home life and psychiatric care).

AD 7X-10481 (UD for AWOLs upgraded to GD because of erroneous induction; applicant was conscientious objector at time of induction, but error on original DD Form 47 failed to note applicant's CO status).

AD 7X-11062 (UD (5 Art. 15s, 1 SPCM, 2 lost days — discharge for frequent incidents) upgraded to GD; offenses were minor; evidence of good citizenship since discharge).

AD 7X-11960 (GD/misconduct upgraded to HD; because of possible improper recruiting influence surrounding act of fraudulent entry; applicant's attempt to enlist had been denied because of extensive juvenile record; upon receiving Selective Service notice classifying him 1A, applicant returned to recruiting office; after conversation with recruiter in which record was discussed, applicant was permitted to enlist).

AD 7X-14813A (UD upgraded to GD based on record of family and personal problems which Board believed was factor in applicant's infractions).

AD 7X-16593A (UD/GOS upgraded to HD because SM's "severe family problems . . . served to mitigate the seriousness of the offenses for which he requested a separation"; SM had gone AWOL to care for his family after attempts to be reclassified 3A or to qualify for hardship discharge after being inducted were frustrated).

AD 7X-19467 (UD (1973) not upgraded even though SM had applied for hardship discharge; SM went AWOL for 955 days).

AD 7X-22557 (UD for frequent incidents of a discredible nature (5 Art. 15s) upgraded to HD because applicant requested ADB to hear his case but board never convened).

AD 77-02254 (UD/GOS for 43-day AWOL upgraded to HD because of applicant's medical problem (schizophrenic reaction and chronic paranoia)).

AD 77-04006 (UD/GOS upgraded to GD; applicant may not have qualified for induction because of history of psychiatric treatment and drug addiction; Board implied that case would have been decided on propriety grounds, had issue been advanced).

AD 77-04052 (UD/GOS for AWOL upgraded to GD because of applicant's marital problems, medical problems, and credible testimony).

*AD 7X-04550 (1970 UD upgraded to HD; SM received decorations, wounds in action, and HD from previous tour; record of satisfactory military service prior to discharge; age, general aptitude, length of service, and personal problems may have contributed to acts leading to discharge).

AD 77-05456 (UD for frequent incidents (4 periods of AWOL of 57 days) upgraded to GD because of family problems (death of young child) and prior HD).

AD 77-05463 (UD/GOS (1,011-day AWOL) upgraded to GD; applicant had received CD; conduct mitigated by ethnic factors within Navajo Nation).

AD 77-06560 (UD/GOS upgraded to GD because of applicant's age, general aptitude, length of service, and education; applicant had entered service on waiver of normally applicable entrance standards and possible personal problems may have contributed to acts leading to discharge).

AD 77-06766 (UD/GOS (1,921-day AWOL) upgraded to HD; applicant had excellent service record and personal problems (mother was ill); compassionate reassignment had been denied because there was no vacancy at requested post).

AD 77-07009 (BCD for 47-day AWOL from SPCM upgraded to GD because of applicant's mental stress).

AD 77-07032 (UD/GOS to GD; applicant may have misunderstood that overseas service would be possibility when he enlisted; when he received orders for Germany, he tried to have them changed, then went AWOL).

AD 77-07159 (UD/civil conviction upgraded to GD, because of applicant's prior HD; marginal mental capacity, and hard drug use; excellent efficiency and conduct outweighed one error).

AD 77-08341 (UD/GOS upgraded to GD; applicant's AFQT score (10) did not meet the minimum standard at time of entry; Board failed to grant full relief because applicant's scores were tenuously related to AWOL leading to discharge).

AD 77-09046 (UD/GOS (110-day AWOL) upgraded; Army Recruiting Command directed that applicant's moral waiver for civil offenses not be approved, but DD Form 47 reflected that waiver *was* granted; record silent concerning any action taken by applicant to secure release from active duty due to erroneous induction).

AD 77-09369 (UD/unfitness upgraded to HD; witness's testimony corroborated applicant's contention regarding recruiter's guarantee of electronics training; enlistment contract did not support testimony; applicant attempted while in service to rectify apparent mistake, then went AWOL to obtain discharge).

AD 77-09676 (UD/GOS (65-day AWOL) upgraded to HD because of applicant's good service record, low mental category, and serious injury in service).

AD 77-10048 (GD/C&B disorder upgraded to HD because applicant was incapable to serve based on immaturity, mental aptitude, and NP diagnosis; upgrade based on "Whole Man Concept").

AD 77-10158 (GD/pregnancy upgraded to HD; applicant had been erroneously enlisted; no waiver of dependency had been executed).

AD 77-10173 (UD upgraded to GD, in part because intermediate commander had recommended a GD).

AD 77-10336 (Clemency Discharge for 1,897-day AWOL upgraded to GD because of applicant's excellent service record and RVN Syndrome).

AD 77-10383 (UD/GOS upgraded to HD because applicant was drug user and command "mishandled" discharge procedures).

AD 77-10702 (GD at ETS upgraded to HD; applicant's record "was not so lacking as to deny him a fully honorable discharge"; Board stressed considerable period of time elapsed since discharge (40 years) and gave applicant benefit of doubt despite destroyed records).

AD 77-10809 (UD for frequent involvement upgraded to HD because applicant's disciplinary record was limited to Art. 15 offenses and because of applicant's difficulty in school, reading difficulty, aptitude problem, and credible service time).

AD 77-11241 (GD/C&B Disorder upgraded to HD because of applicant's physical and mental problems).

AD 77-11580 (UD/frequent incidents upgraded to GD because of applicant's family problems (drunk mother unable to care for family) and desire to continue service and complete training).

AD 77-11678 (UD upgraded to GD because SM was not given sufficient time to prove himself after being sent to retraining brigade after an SPCM for assault; record also included 3 Art. 15s, 1 SPCM, and 43 days lost).

AD 77-11744 (UD/GOS (137-day AWOL) upgraded to HD because of applicant's good prior service record, marital problems, and financial problems).

AD 77-11871 (UD/unfitness (frequent incidents — DOLO and absence from place of duty) upgraded to HD because of applicant's 5 years of excellent service, medals, and because CO took "arbitrary" action).

AD 78-00359 (UD/GOS (120-day AWOL) upgraded to GD because applicant's wife left him, applicant used drugs, and his 2½ years good service outweighed AWOL).

AD 78-00491 (UD/GOS upgraded to HD because applicant's recruiter promised him no overseas duty, but he was sent to Germany).

AD 78-00642 (UD/GOS for possession of marijuana and amphetamines upgraded because of applicant's excellent service).

AD 78-00649 (UD/misconduct upgraded to HD; applicant was erroneously inducted, having previously failed induction for physical reasons).

AD 78-00843 (UD for unfitness/habits and traits of character upgraded to HD because of applicant's inability to adapt to Army and complete service; record included 56 days lost time and 2 GCMs).

AD 78-00922 (applicant's UD/unfitness (frequent incidents — 1 Art. 15, 1 GCM for auto theft, and 324 days lost time) upgraded to HD; sentenced to confinement, applicant requested transfer citing 600-332 para. 8e, requiring sealing of confinement records upon restoration of a prisoner from the USDB; transfer denied and applicant not given sufficient opportunity to improve before discharge action initiated).

AD 78-01089 (UD (frequent incidents — 1 SCM, 1 SPCM, and 186 days lost time) upgraded to GD because surrounding racial prejudice in deep South may have mitigated applicant's ability to serve (Board rejected institutional racism issue); SM was 17 years old at time of enlistment by waiver and had 3 years high school, flat feet, and passive-aggressive personality).

AD 78-01519 (UD/civil conviction upgraded to HD; applicant was improperly inducted after informing military authorities of a pending criminal charge).

AD 78-01779 (UD/GOS (61-day AWOL) upgraded to HD because terms of applicant's enlistment contract were not honored by Army).

AD 78-02123 (UD/GOS upgraded to HD because applicant would have received trainee discharge under today's standards and because of personal problems (father committed suicide)).

AD 78-02784 (UD/GOS (1,752-day AWOL) upgraded to GD because of applicant's good service during tour in Vietnam where he obtained rank of E4, RVN Syndrome due to unexplained change in duty assignments, marginal aptitude and ability at induction (applicant was Project 100,000 member), and evidence that he was being processed for separation prior to his AWOL).

AD 78-03509 (GD/unsuitability upgraded to HD; applicant was mentally deficient and should never have been inducted; inducted in 1951, he had AFQT of 19, recognized at the time as a mental deficiency severely curtailing ability to serve).

AD 78-04427 (UD upgraded to GD, in part because intermediate commander recommended a GD).

AD 79-01298 (GD/unsuitability upgraded to HD; 4 SPCMs and 1 SCM balanced by applicant's two Purple Hearts, 5 Battle Stars, combat in Korea, and length of service).

AD 79-01817 (UD/GOS (33-day AWOL) upgraded to GD; applicant enlisted with recognized low mental aptitude score (28) and limited capability; processing for an unsuitability discharge had begun prior to his AWOL).

AD 78-04795 (1978 UOTHC upgraded to GD; financial problems and procedural error in discharge prejudiced applicant's discharge).

AD 79-05052 (1975 UD for frequent incidents upgraded to GD; SM had not received assignment requested and had concerns about cross training; age at time of enlistment mitigated his record of AWOL).

AD 79-05839 (1973 UD upgraded to GD; SM would not have been given BCD if he had faced SPCM for AWOL; financial and family problems made discharge too harsh).

AD 79-06522 (applicant's UD/misconduct upgraded to GD; applicant was erroneously enlisted; 2 months after being discharged for unsuitability and being found medically disqualified for reenlistment, applicant was permitted to reenlist).

AD 79-07187 (1953 UD upgraded to HD; evidence of racial discrimination; prior service satisfactory).

AD 79-07305 (1958 UD upgraded to HD because of applicant's prior honorable service and because his personal and financial problems impaired his capacity to serve).

AD 79-07593 (1972 UD upgraded to GD; applicant served in Vietnam and had two medals; problems with loss of financial record forcing him to survive on partial pay mitigated acts of indiscipline).

AD 79-07594 (1978 UOTHC upgraded to GD; SM had been excellent radar crewman; in first year and 8 months of service, he had only 6 days lost time, and two charges were result of provocation).

AD 79-7927 (1960 UD upgraded to GD because of applicant's financial problems and relatively minor nature of offenses).

AD 79-08315 (1947 UD upgraded to GD; SM had alcohol abuse problems and family problems, and had served in wartime with prior HD).

AD 79-09593 (Blue Discharge upgraded to HD due to prejudice and language problems, good overall conduct and efficiency ratings, and exemplary postservice conduct).

AD 80-00283 (UD/fraudulent enlistment upgraded to GD; applicant had disclosed two civil convictions at induction; third conviction and series of arrests were discovered following CID investigation launched in response to applicant's expressions of personal opinion concerning problems of blacks; "possibility of prejudice in Board proceedings" was based on inconsistent adverse testimony during initial discharge proceedings, not resolved despite opportunity to question witness further).

AD 80-00993 (1974 UD upgraded to GD; applicant had family problems; Board was unable to determine if applicant's request for compassionate reassignment was disapproved).

3. NAVY BCMR

NC 77-03378 (BCD upgraded to GD/unsuitability because of applicant's illiteracy (second grade education) and borderline intelligence (IQ 74).

NC 78-03522 (GD/unsuitability upgraded to HD because applicant who had enlisted in Navy in 1952 with AFQT score of 36 was unsuited to military life).

4. NAVY DRB

ND 77-02414 (UD/misconduct (AWOLs) upgraded to GD because of applicant's good postservice conduct).

ND 77-02579 (UD/misconduct (AWOLs) upgraded to GD because of applicant's good conduct and efficiency marks and postservice conduct).

ND 78-00183 (UD/GOS upgraded; discharge too harsh in view of mitigating factors: unstable background, immaturity, personal problems, educational level at entry, meritorious promotion at end of boot camp, and no other military or civilian offenses; unsuspended BCD would not have issued from CM).

ND 78-00444 (UD upgraded to GD because applicant was discharged while serving sentence from SPCM and thus was deprived of rehabilitative effects of confinement).

ND 78-01033 (1977 UD upgraded to HD; applicant had documented family hardship, recognized by his commander; overall record of service, prior to applicant's request for hardship discharge, did not support undesirable characterization).

ND 78-01522 (1975 BCD for AWOL upgraded to GD/COG; discharge too harsh in view of SM's prior service, severe family and personal problems, and status as first-time offender).

ND 78-02672 (UD/unfitness upgraded to HD; applicant had been charged by CO with stirring up racial unrest; absence of evidence led Board to conclude that CO was motivated by racism).

5. MARINE DRB

MD 78-01964 (1953 BCD upgraded to GD because of years of honorable service, excellent combat record (numerous decorations), limited intelligence, third-grade education, and apparent alcohol abuse, as well as number of years he had to suffer with BCD).

MD 7X-02234 (1970 GD/unsuitability (C & B) after only three months service with no marks upgraded to HD because "extraordinary relief" was warranted by "exemplary post-service citizenship").

MD 77-03212 (1974 UD/misconduct upgraded to GD because of applicant's prior honorable service, good marks, records of promotion, and because discharge was too harsh).

MD 77-03496 (1975 UD/GOS upgraded to HD because GOS was too harsh under circumstances; applicant had received wounds in action, had good marks, and had made an application for a hardship discharge).

MD 77-03510 (UD/GOS (AWOL) upgraded to HD because of applicant's family problems (health of child)).

MD 77-03706 (UD/GOS (29-day AWOL) upgraded to HD because of applicant's fear of physical abuse).

MD 78-00862 (1976 UD/GOS (assault and DOLO) upgraded to GD because of applicant's postservice conduct, good marks, and acts of merit).

MD 78-01131 (1977 UD/frequent involvement upgraded to GD because of applicant's letter of commendation).

MD 78-03540 (GD/COG (erroneous enlistment) upgraded to HD; applicant had revealed extensive criminal record and probation status to recruiter before enlistment; routine security investigation revealed additional arrests and convictions, after which applicant was discharged despite drill instructor's recommendation of retention).

MD 79-02481 (GD/COG (erroneous enlistment) upgraded to HD; case fell under MARCORSEPMAN § 6002.00 (requiring HDs for recruits administratively discharged prior to completion of recruit training), applicant was suffering from hernia at time of enlistment, but refused to undergo surgery after diagnosis by military physicians).

6. AIR FORCE DRB

FD 78-00631 (UD upgraded to HD because recruiter should have identified applicant's youth (14 at time of enlistment) or requested verification of applicant's age).

FD 79-00376 (1954 UD for series of infractions upgraded because of SM's family problems, personality disorder produced by family background, and minorness of incidents for which discharged).

FD 79-00533 (UD upgraded to HD because of SM's age and education; immaturity evidenced by gambling debts and threats by debtors; offense for which SM was discharged was only major offense and, given civilian record, appeared aberrational).

FD 79-00840 (UD/unfitness upgraded to HD; applicant was erroneously enlisted after being medically discharged from the Coast Guard for mental illness; recruiters were aware of prior discharge, but failed to investigate details).

FD 79-01062 (1960 UD upgraded to GD; SM had financial difficulties and marital problems which contributed to AWOLs).

FD 79-01386 (1955 UD changed to GD because of financial problems and inability to develop proficiency and leadership required of Sgt.).

FD 79-01400 (1957 UD upgraded to HD; SM suffered from alcoholism due to personal problems and had excellent service record).

FD 79-01470 (1971 UD upgraded to GD; fraudulent enlistment motivated by sincere attempt to clear record; good postservice conduct; misconduct may have been response to perceived bad situation (Board rejected contention of racial prejudice)).

FD 80-00151 (1950 UD for unfitness (habits and traits) upgraded to HD because postservice conduct showed theft of watch to be aberration on otherwise unmarred record).

FD 80-00916 (1956 UD/unfitness upgraded to GD; applicant "ill-equipped" to adapt to service; AFQT of 10 and lack of education caused difficulty in adapting to AF discipline).

CHAPTER 23
SPECIAL VIETNAM-ERA REVIEW PROGRAMS ("AMNESTY")

23.1 INTRODUCTION

An estimated one million people faced legal jeopardy because of their conduct related to evasion of, or failure to complete, military service during the Vietnam era.[1] That fact, the unpopular nature of the war, and the unprecedented volume of lawful and unlawful evasion of military service prompted an unusually vocal public demand for an amnesty or a special program to deal with such people. After most previous American wars, there had been some form of amnesty or clemency for military absentees (so-called deserters) and civilian violators.[2] Following World War II, the problem of bad discharges was faced for the first time. Veterans organizations fought hard for creation of the Discharge Review Boards (DRBs) and Boards for the Correction of Military Records (BCMRs) to provide for review of bad discharges; there was, however, no popular movement to deal with such issues on anything but a case-by-case basis.

The Vietnam era produced proportionately fewer bad paper veterans than World War II did, but the general unpopularity of the Vietnam War caused many of its veterans to join antiwar and amnesty movements. These movements called for the inclusion of bad paper veterans in any amnesty proposals[3] and asserted that a type of de facto clemency had begun in 1971, when the direct troop involvement in Southeast Asia was winding down. After 1971, it was argued, most absent servicemembers could, with little difficulty, receive an Undesirable Discharge (UD) in lieu of court-martial for AWOL.[4]

On September 16, 1974, President Gerald Ford announced the Ford Clemency Program (FCP), which provided Selective Service violators and military absentees the opportunity to turn themselves in, take an oath of allegiance, and agree to perform alternative service in exchange for a dismissal of the charges. The Clemency Discharge (CD) replaced the UD upon completion of the alternative service in the case of military absentees.

A Presidential Clemency Board (PCB) was established to hear the appeals of veterans with UDs, Bad Conduct Discharges (BCDs), or Dishonorable Discharges (DDs) for absence-related offenses. Upon the completion of alternative service, these discharges could be "upgraded" to CDs. Most veterans were advised by attorneys and counseling groups not to

[1] *See* L. BASKIR & W. STRAUSS, CHANCE AND CIRCUMSTANCE 4, 217-19 (1978). Authored by two former officials of the Presidential Clemency Board, this book provides excellent data on Vietnam-era draft-age men and shows how accidents and social class played the significant role in determining who did and did not serve. *Id.* at 9. Although the book tends to patronize bad paper veterans and misses the real significance in the different nature of the Vietnam War, it is nonetheless an excellent resource.

[2] *See* PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT 345 (1975) (Gov't Printing Office stock no. 040-000-00339-8) ($3.50) [hereinafter cited as PCB REPORT]. *See also* L. BASKIR & W. STRAUSS, *supra* note 1, at 214. As a practical matter, desertion was almost never proven in the late Vietnam era. *See generally* Gallant, *Article 85 and Appellate Review — A Precursor to the Changing Attitude Toward Desertion*, [Nov. 1974] ARMY LAW. 7, DA Pam. 27-50-23.

[3] *See generally* Ch. 1 *supra*.

[4] L. BASKIR & W. STRAUSS, *supra* note 1, at 213, 216.

apply to the PCB because a true upgrade could be obtained from a DRB or BCMR. On January 19, 1977, President Ford directed that persons who had applied to the PCB *and* who had been decorated for valor or wounded in combat would have their cases reviewed by the Department of Defense (DoD) and be given a General Discharge (GD), absent "compelling reasons to the contrary."[4a]

On April 5, 1977, DoD announced the establishment of the Special Discharge Review Program (SDRP).[4b] This program permitted Vietnam-era recipients of GDs and UDs to apply to the appropriate DRB using a simplified application procedure. Cases would be reviewed on the basis of the applicant's military records to determine whether (s)he fit into automatic upgrading criteria or whether (s)he would be upgraded utilizing lenient mitigating criteria, absent "compelling circumstances to the contrary."

The program was broader than the FCP because it was not limited to discharges resulting from absence-related offenses, but was narrower because BCDs and DDs were not included. Military absentees were permitted to return and receive UDs for unfitness by reason of "prolonged absence." These cases would then be sent to DRBs for review using the SDRP criteria.

President Carter's unconditional pardoning of Selective Service violators and the institution of the SDRP met with adverse congressional reaction and led to the enactment of legislation that effectively precluded any future special programs. Public Law 95-126[4c] prohibited granting veterans benefits to any veteran who had a less than honorable discharge (*i.e.*, discharge below Honorable (HD) or GD) upgraded under any program with automatic upgrading criteria. In addition, future VA benefits were not permitted unless an upgrade was by a DRB, on a case-by-case basis, using published, uniform standards "historically consistent with criteria for determining honorable service."

Furthermore, any UD upgraded under the January 19, 1977, Ford Directive or the SDRP had to be "re-reviewed" under the newly adopted uniform standards to determine whether it would have been upgraded under regular DRB review.[4d] If the answer was no, the veteran kept the upgraded discharge but was not eligible for veterans benefits unless the VA determined that the veteran was otherwise eligible. In cases involving upgrades of UDs resulting from AWOLs of over 180 days, further VA review was required to determine whether "compelling circumstances" warranted the allowance of veterans benefits. A BCMR upgrade would automatically make a veteran eligible for benefits in all cases.[5] Under limited circumstances some veterans can still receive a review under the more lenient SDRP criteria.[5a]

[4a] *See* 4 MIL L. REP. 6017, 6036 (1976).
[4b] *See* 42 Fed. Reg. 21,308 (1977) (SDRP plan).
[4c] 91 Stat. 1106 (1977) (codified at 38 U.S.C. § 3103(e)).
[4d] Under limited circumstances, some veterans can still receive a review under the more lenient SDRP standards. *See* § 23.3.4 *infra*.
[5] *See* Ch. 26 *infra* (discusses these VA issues in detail).
[5a] *See* § 23.3.4 *infra*.

23.2 THE FORD CLEMENCY PROGRAM

23.2.1 INTRODUCTION AND OVERVIEW

Three classes of veterans or servicemembers were affected by the Ford Clemency Program (FCP), which was in effect from September 16, 1974, to March 31, 1975:[6]

- Military absentees who returned and received UDs in exchange for agreeing to perform alternative service[7] to earn Clemency Discharges (CDs);
- Veterans with UDs, BCDs, and DDs who applied to the Presidential Clemency Board (PCB) and were either given CDs and a pardon or had the receipt of them conditioned on the performance of alternative service; and
- Applicants to the PCB who were affected by the January 19, 1977, directive of President Ford to DoD that veterans who had been wounded in combat or decorated for valor be given GDs, absent "compelling circumstances to the contrary."

Neither the VA nor DoD considers a recipient of a CD to be entitled to any benefits denied by reason of the original discharge.[8] The CD is viewed as merely another form of UD. The CD is generally less stigmatizing than a DD, yet there is no other benefit flowing directly from the receipt of a CD.[9] The presidential pardon that accompanied a CD upgrading a BCD or DD had the effect of removing certain civil disabilities resulting from a court-martial conviction or DD.[10]

The FCP was boycotted by many groups for two reasons:[11]

- It was felt that a CD was of no value (except, perhaps, for a person who had a BCD or DD from a general court-martial) and that veterans counselors could better use their time helping people apply to the DRBs or BCMRs; and
- Most military absentees could return to selected military installations and receive UDs, in lieu of court-martial, without going through the FCP procedures.

[6] *See* 2 MIL L. REP. 1057, 4505, 6506 (1974) (documents and other information relating to this program). Selective Service Act violators are not discussed in this manual.
[7] Alternative service is a term of art usually referring to arduous, low-paying public service jobs required of persons exempted by the Selective Service System from military service as conscientious objectors.
[8] OFFICE OF DEP'T CHIEF OF STAFF FOR PERSONNEL, DEP'T OF THE ARMY, DEP'T OF DEFENSE IMPLEMENTATION OF PRESIDENTIAL PROCLAMATION 4313 PRESIDENT'S CLEMENCY PROGRAM AFTER ACTION REPORT at 9 (Oct. 1975) [hereinafter cited as DoD AFTER ACTION RE-
[9] The DD is held in universal opprobrium. It has been said of the Bad Conduct Discharge, "that at least people understand bad conduct." Effron, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L.L. REV. 227, 270-71 (1974).
[10] *See* § 20.7 *supra* (presidential pardons); D. ADDLESTONE, S. HEWMAN & F. GROSS, THE RIGHTS OF VETERANS ch. 3 (1978). 18 U.S.C. app. § 1202(a)(2) prohibits the possession of firearms by a person with a DD.
[11] L. BASKIR & W. STRAUSS, *supra* note 1, at 213.

23.2.2 MILITARY ABSENTEES AND PENDING CASES

The FCP permitted military absentees who left between August 4, 1964, and March 28, 1973, to return to Ft. Benjamin Harrison, Indiana, for discharge processing. All absentees were eligible, except those with other non-absence-related charges pending. If absentees did not desire to proceed to trial, they were permitted to request and receive UDs in lieu of courts-martial, using procedures similar to those governing discharges for the good of the service (GOS). An absentee would take the following steps:[12]

- Contact his/her branch of service to determine eligibility;
- Return to custody for transportation to the Joint Clemency Processing Center;
- Consult with a military lawyer (provided free); and
- Submit a written statement with a request for discharge.

At this point, the Joint Alternative Service Board would review the request and statement (without a hearing), and assign a term of alternative service which the servicemember had to complete satisfactorily before (s)he could exchange the UD for a CD.[13] No appeal of the assigned period of service (almost always close to the maximum of 24 months) was permitted, and almost all servicemembers were awarded UDs. After notification as to the character of discharge provisionally awarded (assuming it was a UD), the absentee would:

- Sign a broad oath of allegiance and promise to perform alternative service;[14] and
- Report to the Selective Service Reconciliation Service for an alternative service assignment.

A lawsuit was instituted challenging these procedures and arguing that many returning absentees had legitimate defenses to the charges (*e.g.*, that they were wrongfully denied prior applications for conscientious objector discharges).[15] One federal judge ordered an FCP applicant released on a writ of habeas corpus for similar reasons.[16]

The challenge to the FCP procedures was unsuccessful in court. However, the periods of alternative service being assigned began to decrease in length, and in some cases, serious consideration was given to awarding better discharges when servicemembers presented sympathetic cases or showed other reasons for separation.[17]

DoD preferred eliminating a large number of the current absentees from the rolls without the expense of thousands of courts-martial.[18] Ironically, once a discharge was executed, the military no longer retained jurisdiction over the servicemember to enforce the alternative service agreement, absent an allegation that the agreement was entered into in bad faith, which would constitute fraudulent procurement of a discharge.[19]

Approximately 5,500 absentees were processed through the FCP, and others turned themselves in at installations where normal GOS discharges were easy to obtain.[20] Most of these servicemembers failed to complete alternative service (resulting in retention of UDs),[21] which is viewed as an aggravating factor by DRBs and BCMRs.[22]

Persons with pending courts-martial for absence-related offenses when the FCP was instituted were permitted to be processed under that program. Others with pending appellate review of convictions were released from prison and permitted to apply; still others who had completed appellate review were released and permitted to apply to the PCB.

23.2.3 PRESIDENTIAL CLEMENCY BOARD (PCB) APPLICANTS

Veterans who had been discharged between August 4, 1964, and March 28, 1973, and who had UDs, BCDs, or DDs for absence-related offenses were permitted to apply to the PCB for CDs and pardons. The PCB had its own set of criteria and procedures which were more lenient than those used to adjudicate the cases of the returning absentees.[23] The PCB members were civilians and the majority of its staff tended to be pro-relief. Consequently, short terms of alternative serivce, compared with those issued under the absentee part of the FCP, were decided upon for those who sought to earn CDs and pardons.[24]

Of approximately 100,000 eligible applicants, less than 15% applied to the PCB despite relatively extensive advertising and outreach.[25] The PCB offered very little to applicants; therefore large numbers never completed their applications for alternative service.[26]

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[12] 2 MIL. L. REP. 4505 (1974).

[13] Many returnees were also counseled by the National Council of Churches-funded Clemency Information Center. Their files are held by CCCO, 2208 South Street, Philadelphia, Pa. 19146 (a private counseling agency).

[14] This provision kept many true conscientious objectors from participating in the FCP.

[15] Vincent v. Schlesinger, 388 F. Supp. 370, 3 MIL. L. REP. 2134 (D.D.C. 1975), *remanded to determine mootness sub nom.* Vincent v. Brown, 590 F.2d 1137, 6 MIL. L. REP. 2455 (D.C. Cir. 1978) (later dismissed by unpublished order to allow plaintiff to exhaust administrative remedies; denial of equal protection was also alleged because PCB applicants were processed under more lenient standards).

[16] Norr v. Schlesinger, 3 MIL. L. REP. 2556 (S.D. Ind. 1975).

[17] DOD AFTER ACTION REPORT, *supra* note 8, at 19. Less than 1% received GDs or HDs. Some military lawyers estimated many more were eligible. L. BASKIR & W. STRAUSS, *supra* note 1, at 223.

[18] L. BASKIR & W. STRAUSS, *supra* note 8, at 16.

[19] Art. 83, U.C.M.J., 10 U.S.C. § 883. This loophole immediately became public and returnees were regularly advised that the agreement to perform alternative service was unenforceable.

[20] Originally, 12,500 absentees were thought to be eligible at the beginning of the FCP, including 600 already in custody and several hundred aliens who had returned to their homes. Revised figures brought the total down to 10,115; 5,555 participated and 848 were processed through normal procedures. DOD AFTER ACTION REPORT, *supra* note 8, at 17.

[21] THE CLEMENCY PROGRAM OF 1974, GAO REPORT NO. B-183498 at 45 (FPCD-76-64, Jan. 7, 1977) [hereinafter cited as GAO REPORT]. *See also* L. BASKIR & W. STRAUSS, *supra* note 1, at ch. 6.

[22] *See* § 23.4 *infra*; DRB Index categories A94.16, A94.18, A94.20.

[23] 2 C.F.R. Part 100 (1975), 2 MIL. L. REP. 4505 (1974).

[24] *See* PCB REPORT, *supra* note 2, at xxiii. A critique of the staff by some PCB members appears in the GAO REPORT, *supra* note 21, at 75.

[25] GAO REPORT, *supra* note 21, at xiii; L. BASKIR & W. STRAUSS, *supra* note 1, at ch. 6.

[26] *See* note 21 *supra*.

Most veterans with meritorious cases, who received any counseling, applied to the appropriate DRB or BCMR, where a real upgrade could be obtained. Replacing a UD with a CD did not affect a denial of VA benefits. Similarly, a pardon probably has no effect; where the discharge accompanying a court-martial verdict was a BCD or DD, the pardon provides the same benefit it would carry following a criminal conviction. The CD is probably an improvement on a DD, but may not be any more favorable than a BCD.[27]

When the original discharge was issued by a general court-martial, a CD does not change any disqualifications that the court-martial imposed, such as inability to apply to a DRB[28] or automatic VA preclusion from benefits.

23.2.4 FINAL FORD DIRECTIVE REGARDING UPGRADES

On his final day in office, January 19, 1977, President Ford signed a directive ordering that persons who had applied to the PCB and who had been wounded in combat or received decorations for valor receive upgrades to GDs absent "compelling reasons to the contrary."[29]

The phrase "compelling reasons" was defined by the Secretary of Defense as "narrowly limited to cases where the discharge was a direct or indirect result of violent conduct."[30] Earlier, the Army had issued a broader definition, but the Navy and Air Force had issued no separate guidelines.[31]

The Ford directive left many ambiguities, such as:

- Literally read, a mere application to the PCB, without completion of alternative service, was the only requirement;
- It was not clear whether service in Laos or Cambodia was included; and
- The terms "wound," "combat," and "decorations" were never defined.

It is arguable that anyone processed through the absentee program at Ft. Benjamin Harrison meets the FCP application criterion. It is also arguable that anyone who applied but did not complete an application to the PCB should have been processed under this program. Proof of a person's application can be obtained from the Office of the Pardon Attorney.[32]

23.3 THE 1977 SPECIAL DISCHARGE REVIEW PROGRAM

23.3.1 INTRODUCTION AND OVERVIEW

In his first week in office, President Carter issued a blanket pardon for all persons with pending Selective Service Act violations or those who could possibly be so charged (on charges, *e.g.*, of refusal or failure to register, and induction refusal). In late March 1977, DoD announced that persons with GDs and UDs (and some persons with CDs) issued between August 4, 1964, and March 28, 1973, could apply for a simplified review of their discharges by October 4, 1977, under the liberalized standards established by the Special Discharge Review Program (SDRP),[33] which lasted from April to September 1977.

The SDRP standards and procedures are relevant in only a few cases; accordingly, only a brief discussion of the program is provided here.[34] The SDRP was broader than the FCP in some respects but narrower in others:

- GDs were included but BCDs and DDs were not;
- The SDRP was not restricted to absence-related offenses making approximately 432,000 veterans eligible; and
- An actual upgrade in discharge, which carried veterans benefits, could result from the SDRP.

23.3.2 DESCRIPTION OF THE SDRP

The SDRP effectively incorporated the most liberal practices of the DRBs and simplified the processing procedures, but was by no means an amnesty. It was intended to favor the processing of large numbers of cases expeditiously. Moreover, it was based on the belief that the net benefit to society would be greater with quick upgrades for the deserving, even though a few undeserving cases slipped through. The alternative to the SDRP was to make eligible applicants wait years for expensive case-by-case processing.

As under the FCP, absentees who began their absence during the 1964-1973 period could contact DoD to determine whether they were eligible, and turn themselves in for processing at centralized locations. They would then be processed for discharge with UDs for misconduct/prolonged absence. Unlike under the FCP, an oath of allegiance or alternative service was not required. The case would then be referred to the appropriate DRB for further review under the SDRP.

The application procedures for persons already discharged were relatively simple. To start the application process, a veteran merely called a toll-free number which provided the necessary information. A follow-up letter was sent explaining the program and offering the veteran an opportunity to submit further evidence. Applicants with cases already pending at the DRB were notified that they would have their ap-

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[27] *Compare* PCB REPORT, *supra* note 24, at 276 (self-serving description of the meaning of a CD) *with* L. BASKIR & W. STRAUSS, *supra* note 1, at 221 (Baskir and Strauss were both high PCB officials).

[28] 43 Fed. Reg. 13,566 (March 31, 1978).

[29] 4 MIL. L. REP. 6017, 6036 (1976).

[30] *Id.*

[31] *Id.*

[32] Office of the Pardon Attorney, United States Department of Justice, Suite 280, 1 Park West Bldg., 5550 Friendship Blvd., Bethesda, Md. 20014.

[33] President Carter rejected the advice of many of his younger advisers to grant sweeping upgrades. L. BASKIR & W. STRAUSS, *supra* note 1, at 230.

[34] *See Practice Manual on the Department of Defense Special Discharge Review Program for Vietnam-era Veterans*, 4 MIL. L. REP. 6017 (1976) (complete description of the SDRP). Reprints are available from the Veterans Education Project, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036, for $3.50 prepaid.

plications processed under the SDRP, unless they objected.[35]

The SDRP envisioned a two-level review at the DRBs:

- A review of the applicant's service records to determine whether one of the enumerated "special considerations" existed which would result in an automatic upgrade and whether "mitigating factors" existed which would warrant an upgrade. The automatic criteria applied to UDs only.
- If an HD did not result from the record review, the veteran was notified that (s)he could request a personal appearance hearing (*de novo* review) either in Washington or at a regional location. If the veteran still retained a UD at this stage, (s)he would be assigned an active duty military attorney free of charge.

Automatic upgrading could result if any one of the following conditions was present:

- A decoration for valor or merit;
- A wound received in action;
- A successfully completed tour of duty in Southeast Asia or the Western Pacific in support of the Vietnam War;
- Successful completion of alternative service (or excuse therefrom) and a CD replacing a UD under the FCP (usually referred to as Presidential Proclamation 4313 by the DRBs);
- An HD from a previous tour of military service; or
- A record of satisfactory active military service for 24 months prior to discharge.

Mitigating factors were:

- Age, apitude, and length of service at time of discharge;
- Educational level at time of discharge;
- Deprived background;
- That actions which led to discharge were motivated by conscience;
- That presence in military resulted from waiver of normally applicable enlistment or entrance standards;
- Personal problems contributing to acts which resulted in discharge;
- Record of good citizenship since discharge; and
- Drug or alcohol abuse contributing to discharge.

The SDRP plan specified that both sets of factors would only be used in reviewing UDs. GDs were to be reviewed bearing in mind "the President's desire that discharges be re-examined in a spirit of compassion."[35a]

The SDRP plan specifically precluded automatic upgrading if the discharge was based on:

- Desertion or absence in or from the combat zone;
- An act of violence or violent conduct;
- Cowardice or misbehavior before the enemy; or
- An act that would be subject to criminal prosecution if it had taken place in a civilian environment.

The SDRP came under heated attack by many members of Congress. Congress reduced DoD's ability to advertise the program and made widely publicized threats to cut off veterans benefits for successful applicants. Because of the uncertainty over the value of an SDRP upgrade and general confusion about the program, only 10% of the eligible veterans applied; of those, there were approximately 20,000 upgrades. Other veterans sought review under non-SDRP criteria. The program expired as originally planned, on October 4, 1977, almost simultaneously with the enactment of legislation affecting not only SDRP applicants but also all future DRB applicants.

23.3.3 PUBLIC LAW 95-126

Public Law 95-126[36] required that all future discharge upgrading of anything less than a GD be conducted using published, uniform standards and procedures, if a veteran were to receive veterans benefits. All UDs and CDs upgraded to HDs of GDs under the two 1977 programs were to be reviewed again (re-reviewed), using the published criteria when they became available. In the interim, there was to be a six-month grace period for persons receiving veterans benefits as a result of the 1977 upgrade.[37]

In late March 1978, the DRBs completed the record re-reviews for those receiving VA benefits and completed the other reviews by June. Fifty percent of the UDs that had been upgraded were "not affirmed." These veterans kept the upgraded discharge, but eligibility for benefits had to be established through some other method. A nonaffirmation after record review entitled a veteran to a personal appearance hearing, without appointed DoD counsel, at which (s)he could contest the validity of the nonaffirmance. Fifty percent of the nonaffirmance decisions were reversed when personal apperance hearings were held, but only about five percent of those eligible requested such a hearing.

23.3.4 CURRENT RELEVANCE OF THE SDRP

The SDRP is currently relevant for two general classes of people:

- Veterans processed under the SDRP who are now seeking a further upgrade and/or veterans benefits;[38] and
- Veterans who applied to the SDRP, did not re-

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[35] The BCMRs were eager to unburden their heavy backlogs and also sent many of their cases to the DRBs.

[35a] SDRP Plan, para. 4(b)(4), 42 Fed. Reg. 21,308 (1977), 4 MIL. L. REP. 6048 (1976).

[36] 91 Stat. 1106 (1977) (38 U.S.C. § 3103 (e)). *See* Ch. 26 *infra* (VA considerations); *see also* § 9.1.3.3 *supra* (description of statute).

[37] A lawsuit successfully challenged the failure of the VA to process applications for increased benefits and failure to process applications two weeks before the statute became law and resulted in $177,000 in back benefits being awarded to the class. McArty v. Cleland, 6 MIL. L. REP. 2344 (N.D. Cal. 1978); *F. Proceedings,* 7 MIL. L. REP. 2522 (1979). *See* Ch. 26 *infra*; 7-8 Discharge Upgrading Newsletter 1 (July-Aug. 1980) (discussion of *McArty*).

[38] *See* Ch. 26 *infra* (problems associated with obtaining VA benefits after upgrade of a UD under the SDRP).

ceive an upgrade to HD, and who wish to utilize the liberalized criteria under the SDRP to seek an upgrade despite the VA benefits eligibility problems that would be created.[39]

Even if an SDRP personal appearance hearing took place, a new DRB review is possible if the veteran has not had a personal appearance hearing after March 31, 1978, and if (s)he is still within the statute of limitations.[40]

In August and November 1978, court orders were obtained affecting some SDRP applicants.[41] The orders were issued because some DRBs were not consistently preparing proper statements of findings, conclusions, and reasons (decisions) and because the index of DRB cases was inadequate. Applicants thus were not receiving proper notice, upon which they could make the decision to seek personal appearance hearings after denial of HDs. All DRB applicants from April 1, to August 23, 1978, were sent letters offering them an opportunity for new hearings. As a result, some veterans can still have their applications reviewed utilizing SDRP criteria. Because these court orders covered a period of time when the Boards had to process regular applications, SDRP applicants, SDRP hearings, Public Law 95-126 rereviews, and Public Law 95-126 hearings, applying court orders to individual cases can be quite complex. The following entitlements generally exist:

- SDRP applicants who did not receive HDs, who never applied for a personal appearance hearing under the SDRP, and whose decisional documents[41a] lack a complete explanation for full upgrade denial,[41b] are entitled to hearings at which SDRP criteria are used (and in some instances to DoD-provided lawyer/counsel); and
- Applicants affected by Public Law 95-126 rereview of cases, when record review did not provide complete statements of grounds for denial and when no subsequent personal appearance hearings were held, are entitled to hearings on the issue of nonaffirmance.

23.4 CONSEQUENCES OF FAILURE TO COMPLETE ALTERNATIVE SERVICE UNDER THE FCP

Failure to complete the term of alternative service under the FCP is viewed by the Boards as an aggravating factor. However, such failure can be explained[42] in several ways:

- Hostility to the Program prompted some states and trade and labor unions to make it very difficult for persons to obtain acceptable public service jobs;
- It was often impossible to find a job acceptable to the Selective Service System (SSS) because many employers wouldn't hire "deserters";
- Completing the service involved financial hardship to the applicant's family;
- Applicant was willing but unable to work;
- Applicant was advised by military attorney that service completion was not necessary;
- SSS improperly refused credit for proper job or time spent searching for a job; or
- Administrative error was responsible for applicant's failure to receive a CD.

23.5 SPECIAL PROGRAMS CHECKLIST

The following checklist is designed to help determine whether a case could have been (or was) processed under a special program and whether any special considerations arise as a result. This chart is merely meant to provide general guidance. It does, however, provide information concerning peculiar cases about which not all relevant factors could be included.

Note that any upgrade by a BCMR after any of these programs is likely to make the veteran automatically eligible for VA benefits.[43]

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[39] There are no adverse VA consequences to the veteran if the original discharge was a GD or if there was an affirmed upgrade to GD. The SDRP had no criteria for distinguishing when an upgrade was to be to a full HD.

[40] *See* § 9.2.16 *supra*.

[41] *See* Ch. 11 *supra*; § 9.1.3.5 *supra*.

[41a] Usually DD Form 2067 used before August 23, 1977.

[41b] For example, utilizing language like "overall record of service" without specifying what the record of service was.

[42] *See* DRB Index category A94.20. The SSS disliked these people and made no real attempts to help them find work. *See Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, on the Presidential Clemency Program and Related Legislation*, 94th Cong., 1st Sess. (1975); L. BASKIR & W. STRAUSS, *supra* note 1, at ch. 6; GAO REPORT, *supra* note 21, at 36-45. Reference to Selective Service case law concerning defenses for failure of a conscientious objector to perform alternative service might also be helpful. *See generally Selective Service Law Reporter* and *Military Law Reporter*.

[43] *See* 38 C.F.R. § 3.12(e); Ch. 26 *infra*.

DATE WENT AWOL OR RECEIVED DISCHARGE	DATE RETURNED TO MILITARY CONTROL OR HAD DISCHARGE REVIEWED	TYPE DISCHARGE ORIGINALLY RECEIVED	TYPE DISCHARGE ON CHARGE IF ANY	REASON FOR DISCHARGE	PROGRAM	POSSIBILITY FOR CURRENT REVIEW UNDER SPECIAL PROGRAM CRITERIA	VA CONSEQUENCE	REMANDS AND CROSS-REFERENCE IF ANY
Aug. 4, 1964-Mar. 28, 1973 (AWOL).	Returned to military Sept. 16, 1974-Mar. 31, 1975 or already in jail or pending trial (later discharge review also a possibility).	UD (Between Sept. 16, 1974 and about Apr. 5, 1975 at Ft. Benjamin Harrison, Ind.).	CD. If GD or HD, probably later received an SDRP or regular review.	Absence-related discharge for the good of the service.	FCP (absentee program).	Very minor unless wounded in action or decorated for valor or later applied to SDRP.	UD or CD treated the same.	Failure to complete alternative service harms chance for upgrade when applies to DRB or BCMR with retained UD.
Aug. 4, 1964-Mar. 28, 1973 (discharge).	Sept. 16, 1974-Mar. 31, 1975 (applied to PCB). Actual review by PCB may have been later.	UD, BCD, or DD.	CD.	Court-martial or administrative absence-related offense.	FCP (case reviewed by PCB).	None unless eligible below or applied to SDRP.	Same as above but CD replacing GCM discharge never eligible absent insanity.	Same as above and if wounded in combat or decorated for valor, see next listing.
Same as above.	Same as above and possibility some absentees returning to Ft. Benjamin Harrison.	Same as above and maybe CD in 1975-76.	HD, GD, or no change.	Same as above.	FCP, Jan. 1977 directive to DoD concerning FCP applicants wounded in combat or decorated for valor.	Possible if PCB and successor, the Pardon Attorney, failed to refer case to DoD.	Pub. L. No. 95-126 required a re-review in 1978 to establish eligibility. If 180-day AWOL, a further VA review required.	A further re-review might be possible if hearing held at DRB after March 31, 1978.
Aug. 4, 1964-Mar. 28, 1973 (AWOL).	Returned to military Apr. 4, 1977-Oct. 4, 1977, or already in jail pending trial; case then referred to DRB for 1977-78 review.	UD (between Apr. 4-Oct. 10, 1977).	UD, GD, or no change.	Absence-related discharge for misconduct/prolonged absence.	SDRP (absentee program and then referred to DRB after return). Prefix of Army and Navy DRB decision will be "7X."	If affected by court order discussed in § 23.3.4, must not have had a personal appearance hearing after Aug. 23, 1977. SDRP decision usually on DD Form 2067. Most often occurred in Army before Aug. 23, 1977. Would have received letter from DRB as a result of court order.	Likely not eligible unless Pub. L. No. 95-126 re-review affirms upgrade. 180-day AWOLs present special problems. A "V" at the end of the case number on a DRB decision indicates it was re-reviewed. The text will indicate the results.	If no personal appearance hearing at DRB after March 31, 1978, can receive one if otherwise within statute of limitations (usually 15 years; *see* Ch. 9 *supra*). Even if beyond statute of limitations, some cases may be affected by court order discussed in § 23.3.4 *supra*. There are also cases in which Pub. L. No. 95-126 record review resulted in an inadequate decisional document (most often Navy and Marine cases) and in those situations the case may be reviewed again. Ch. 26 *infra* discusses the complex VA problems many of these veterans face.
Aug. 4, 1964-Mar. 28, 1973 (discharged — does not include transfer with GD to reserves).	Apr. 4, 1977-Oct. 4, 1977 (applied to SDRP or had pending application transferred from BCMR or regular DRB). Actual DRB review may have been after Oct. 4, 1977.	GD, UD, or CD replacing only a UD.	GD, HD, or no change.	Administrative for any reason. Never from a court-martial unless BCD or DD previously changed by a Secretary under Art. 74(b), U.C.M.J., but not if changed by PCB.	SDRP (applied to SDRP after discharge or returning absentee's case referred to DRB after discharge). Prefix of DRB decisions will be "7X."	Same as above.	Same as above.	Same as above.

KEY

GD — General Discharge
UD — Undesirable Discharge
CD — Clemency Discharge
HD — Honorable Discharge
BCD — Bad Conduct Discharge
DD — Dishonorable Discharge
FCP — Ford Clemency Program
PCB — Presidential Clemency Board
SDRP — Special Discharge Review Program

APPENDIX 23A
RESOURCE LIST

FORD CLEMENCY PROGRAM DOCUMENTS

Presidential Proclamation No. 4313, 49 Fed. Reg. 33, 293 (1974), 2 MIL. L. REP. 4505 (1974).

Exec. Order No. 11,803, 39 Fed. Reg. 33,297 (1974), 2 MIL. L. REP. 4502 (1974).

Exec. Order No. 11,804, 39 Fed. Reg. 33,299 (1974), 2 MIL. L. REP. 4501 (1974).

Secretary of Defense Memorandum Implementing Presidential Proclamation 4313, September 17, 1974, 2 MIL. L. REP. 4505 (1974).

Selective Service System Reconciliation Service Regulations, 2 C.F.R. Part 200 (1974), 2 MIL. L. REP. 4512 (1974).

Presidential Clemency Board Procedures, 2 C.F.R. Part 100 (1974), 2 MIL. L. REP. 4515, 4526 (1974).

January 19, 1977, Presidential Directive to the Secretary of Defense, 4 MIL. L. REP. 6017, 6036 (1976).

SPECIAL DISCHARGE REVIEW PROGRAM DOCUMENTS

DoD Plan for Review of Discharges of Certain Vietnam Era Personnel, 42 Fed. Reg. 21,308 (1977), 4 MIL. L. REP. 6046 (1976).

Practice Manual on the Department of Defense Special Discharge Review Program for Vietnam-Era Veterans, 4 MIL. L. REP. 6017 (1976).

B. Stichman, Analysis of Effect of 1978 Court Orders on Special Program Cases and Public Law 95-126 Reviews (Nov. 1978) (available from Veterans Education Project, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036, $4.00 prepaid).

Addlestone & Snyder, *Effect of Public Law 95-126 on the SDRP and the Discharge Review Boards,* 6 MIL. L. REP. 6001 (1978) (includes list of implementing regulations).

[Author's Note: Other documents and text may be found in the Bibliography *infra*, and in 2 MIL. L. REP. 4505 *et seq*.]

CHAPTER 24
FEDERAL COURT LITIGATION

24.1 INTRODUCTION

The military makes two decisions when it decides to separate personnel: the decision to terminate military service and the decision as to the appropriate character of discharge. A servicemember can challenge either or both of these decisions in federal court. A federal court challenge must distinguish between these two decisions, however, because rules governing jurisdiction, exhaustion of administrative remedies, and statutes of limitations are different for each.

It is possible that a veteran prematurely separated with a less than honorable discharge can prove that both the decision to separate prematurely and the characterization of the discharge were improperly made. If this is the case, and the veteran seeks a direct remedy (such as reinstatement and back pay) for the illegal separation, the rules governing challenges to premature discharge apply. If, however, the veteran seeks only an upgrade in discharge, and challenges the decision to separate prematurely only to bolster the argument that the discharge should be recharacterized, the rules governing challenges to character of discharge apply. A veteran planning to challenge a decision to separate prematurely should consider litigating in federal court rather than applying to a Discharge Review Board (DRB) or a Board for Correction of Military Records (BCMR).

[1] *See, e.g.*, VanderMolen v. Stetson 571 F.2d 617, 5 MIL. L. REP. 2398 (D.C. Cir. 1977); Cruz-Casado v. United States, 553 F.2d 672, 676, 5 MIL. L. REP. 2053 (Ct. Cl. 1977). Reinstatement can be made retroactive; relief can thus be based on the legal fiction that the veteran constructively served in the military from the date of the illegal discharge to the date the court orders reinstatement. When reinstatement is not made retroactive, the court excludes considerations of constructive service. *See generally* Dilley v. Alexander, 627 F.2d 407, 8 MIL. L. REP. 2324 (D.C. Cir. 1980) (on motion for clarification).

24.2 CHALLENGING THE DECISION TO DISCHARGE PREMATURELY

24.2.1 AVAILABLE RELIEF

A veteran challenging the military's decision to separate him/her from service prematurely can seek the following relief in federal court:

- Reinstatement into military service;[1]
- Monetary damages,[2] such as back pay from

[2] In his/her federal court complaint, the veteran should request all pay, allowances, compensation, enrollments, and other pecuniary benefits from the date of the illegal separation. *See* 10 U.S.C. § 1552(a). In addition to the base pay, monetary damages could include quarters allowances, accrued leave, harzardous duty pay, clothing allowance, re-enlistment bonuses, the value of lost post exchange and commissary privileges, and reimbursement for medical and dental expenses (including health insurance premiums) actually incurred by the veteran and his/her dependents during the period following the unlawful separation. The general principle in ordering relief in illegal discharge cases — that the military must restore all benefits that the veteran would have received in the absence of illegality — is tempered by the requirement that the relief be definitely ascertained and reduced to a sum certain. *See Dilley*, 627 F.2d at 414. Pursuant to these principles, courts normally approve reimbursement for quarters allowances and medical or dental expenses that would have been covered by the military had the veteran been serving in the military at the time of their expense. *Id. See, e.g.*, Gearinger v. United States, 412 F.2d 862 (Ct. Cl. 1969); Garner v. United States, 161 Ct. Cl. 73 (1963). On the other hand, reimburse-

the date of the illegal separation, minus appropriate offsets;[3]
- Other benefits of service, such as active duty credit for retirement purposes;[4] and
- Removal of references to the illegal separation from military records.[5]

24.2.2 STANDARDS OF REVIEW FOR A CHALLENGE TO A DECISION TO DISCHARGE PREMATURELY

The standards of review used by the United States Court of Claims and other federal courts in reviewing challenges to decisions to discharge prematurely are the same as those set forth in the Administrative Procedure Act.[5a] Reviewing courts may invalidate a separation from military service on grounds that it is:
- Arbitrary, capricious, or an abuse of discretion;[6]
- Accomplished in violation of substantive or procedural military regulations;[7] or
- Accomplished in violation of a constitutional right or statutory authority.[8]

24.2.3 JUDICIAL REVIEW IN THE COURT OF CLAIMS

Jurisdiction in the Court of Claims depends upon the petitioner having a monetary claim against the United States.[9] The Court of Claims has authority to order almost complete relief in a challenge to a decision to discharge a servicemember prematurely.[10] For example, in addition to monetary relief, it can order correction of military service records, including a correction to reflect an upgrade in discharge, restoration to duty, and reinstatement of retirement status.[11]

There are several advantages to litigating in the Court of Claims. First, the court does not require that a veteran have previously exhausted his/her administrative remedies at a BCMR. Unlike the rule in federal district court, the rule in the Court of Claims is that exhaustion of remedies at the BCMR is permissive, rather than mandatory.[12] Bypassing the Review Boards is often advantageous because they tend to ignore legal violations upon which most federal court challenges to decisions to discharge prematurely are based.

Another advantage of the Court of Claims is that it generally provides the right to *de novo* review in military pay cases.[13] This means that if, for example, the veteran first sought relief at a Review Board, the veteran may still be able to present new evidence at a Court of Claims trial in support of an argument that the Board's decision was not based on substantial evidence or was arbitrary and capricious.[14] In contrast, federal district courts do not allow *de novo* trials in military pay cases.

The two major obstacles to review of the merits of a claim in the Court of Claims are the statute of limitations and laches. The court's statute of limitations is six years;[15] it begins to run on the date of discharge in a case challenging a decision to dis-

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[2] (continued)
ment for post exchange and commissary privileges and hazardous duty pay are not normally allowed on the ground that they are too speculative in amount. *See Dilley*, 627 F.2d at 414; Comp. Gen. Op. B-195558 (Dec. 14, 1979) (unpublished), 8 MIL. L. REP. 2066 (1979).

[3] The gross civilian earnings of the veteran during the period of the illegal separation are usually set off against the monetary recovery, although the government may not recover amounts in excess of its liability to the veteran. *See Dilley*, 627 F.2d at 414-15; Cunningham v. United States, 549 F.2d 753, 5 MIL. L. REP. 2056 (Ct. Cl. 1977); Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977); Yee v. United States, 512 F.2d 1383, 1389, 3 MIL. L. REP. 2189, 2196 (Ct. Cl. 1975). The gross civilian earnings are established without regard to state or federal taxes paid by the veteran. Comp. Gen. Op. B-195558 (Dec. 14, 1979) (unpublished), 8 MIL. L. REP. 2066, 2067 (1979).

Any readjustment pay received by the veteran will be recouped by the government if the veteran is restored to active duty. 56 Comp. Gen. 587. However, Veterans Administration disability benefits, and possibly educational benefits, received by the veteran during the period of unlawful separation are not usually set off against the veteran's recovery on the ground that they would have been available to the veteran even if the veteran had remained in the service. *See Cunningham*, 549 F.2d 753.

[4] *See Dilley*, 627 F.2d at 407.

[5] *Id.*; *VanderMolen*, 571 F.2d 617. A servicemember can also seek a pre-discharge injunction preventing premature separation. *See* § 25.2.5 *infra*.

[5a] 5 U.S.C. § 706(2).

[6] *See, e.g.*, Matlovich v. Secretary of the Air Force, 591 F.2d 852, 6 MIL. L. REP. 2569 (D.C. Cir. 1978). If the veteran applied to the BCMR before seeking federal court review, the court can also grant relief on the ground that the BCMR's decision to deny relief was arbitrary and capricious or unsupported by substantial evidence. *See* Glosser & Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 AM. U.L. REV. 391, 409-10 (1973) (and cases cited therein).

[7] *See, e.g., VanderMolen*, 571 F.2d 617.

[8] *See, e.g.*, benShalom v. Secretary of the Army, 489 F. Supp. 946, 8 MIL.L. REP. 2338 (E.D. Wis. 1980).

[9] 28 U.S.C. § 1491 provides, in pertinent part, that:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

[10] The Court of Claims has not decided whether nonmonetary relief such as an upgrade in discharge can be awarded if the appropriate amount of offset (such as civilian earnings) exceeds the amount of back pay the veteran could otherwise claim. The veteran might be able to establish a monetary claim in this situation based on the accrued leave forfeited as a result of a derogatory discharge.

[11] Prior to 1972, the Court of Claims only had authority to order money judgments. Pub. L. No. 92-415, 88 Stat. 652 amended 28 U.S.C. § 1491 to give the court authority to grant equitable relief "as an incident of and collateral to any such [money] judgment. . . ." *See generally* Marchetta, *Equitable Relief in the United States Court of Claims Under Public Law 92-415*, 23 AM. U.L. REV. 465 (1973).

[12] Ramsey v. United States, 215 Ct. Cl. 1042 (1978); Mathis v. United States, 391 F.2d 938 (Ct. Cl. 1968) *aff'd on rehearing*, 421 F.2d 703 (Ct. Cl. 1970). *See* § 28.3.1 *infra*. *See generally* Glosser & Rosenberg, *supra* note 6, at 411-16. A BCMR has power to grant full relief in a challenge to a decision to separate prematurely.

[13] Glosser & Rosenberg, *supra* note 6, at 417-23.

[14] *Id.* at 418.

[15] 28 U.S.C. § 2501.

charge prematurely.[16] Because application to a DRB or BCMR is permissive rather than mandatory, such an application does not toll the six-year statute of limitations.[17]

Even if a claim is filed within six years of the date of discharge, however, the Court of Claims may dismiss a military pay case by applying the doctrine of laches. In the Court of Claims, this doctrine operates as a bar to recovery when a plaintiff has unreasonably and inexcusably delayed in filing his/her claim and the government has been prejudiced by the delay.[18] Delays ranging from fourteen months to four years have been deemed sufficient to raise the doctrine.[19] Time spent exhausting administrative remedies is not counted by the Court of Claims as part of the delay period for purposes of laches.[20]

A veteran who has a less than honorable discharge may benefit from applying to a DRB before seeking review in the Court of Claims, even though the DRB cannot grant monetary relief. A DRB finding that the veteran was "improperly" (*i.e.*, illegally) discharged puts the government at a disadvantage in defending the legality of the decision to discharge in a subsequent proceeding in the Court of Claims.

The greatest disadvantage to litigating in the Court of Claims is that the court normally sits only in Washington, D.C.[20a]

24.2.4 JUDICIAL REVIEW IN FEDERAL DISTRICT COURT

Veterans challenging decisions by the military to discharge them prematurely can also seek relief in federal district court. The major differences between judicial reviews in federal district court and in the Court of Claims involve:

- The amount of monetary damages that may be awarded;
- The need (or not) to exhaust administrative remedies; and
- The geographic location and venue of the courts.

Three statutes provide district courts with subject matter jurisdiction over challenges to the military's decision to discharge prematurely.[21] In some cases, however, complete relief cannot be obtained in district court because it is statutorily precluded from granting monetary damages in excess of $10,000.[22] In a case in which the damages alleged exceed $10,000, the district court may retain jurisdiction only if the veteran waives damages in excess of $10,000.[23]

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[16] *Ramsey*, 215 Ct. Cl. 1042, 391 F.2d 938. The one exception to the rule that the six-year statute of limitations begins to run on the date of discharge involves the Court of Claims' "half a loaf" doctrine: (1) if a veteran seeks a correction of records from a BCMR (including back pay), and (2) if the BCMR grants relief because the veteran's premature discharge was invalid, but (3) the BCMR does not grant the full monetary claim that should flow from a determination that the veteran was invalidly discharged, then (4) the statute of limitations begins to run from the date of the BCMR decision. Wiggins v. United States, No. 71-80C (Ct. Cl. Dec. 5, 1980). *See* Jones v. United States, No. 40-80C (Ct. Cl. Oct. 3, 1980); Denton v. United States, 204 Ct. Cl. 188 (1974), *cert. denied*, 421 U.S. 963 (1975); Debow v. United States, 434 F.2d 1333 (Ct. Cl. 1970), *cert. denied*, 404 U.S. 846 (1971). The rationale for this doctrine is that an administrative body which decides that relief on a claim is proper should not illegally or arbitrarily limit that relief. The doctrine thus allows litigation in the Court of Claims that, absent BCMR action, would be barred by the statute of limitations.

[17] Kirby v. United States, 201 Ct. Cl. 527, 531, 1 MIL. L. REP. 2387 (1973); Dayley v. United States, 169 Ct. Cl. 305, 309 (1965); Friedman v. United States, 159 Ct. Cl. 1, 21, 25 (1962).

[18] *See* Steuer v. United States, 207 Ct. Cl. 282, 3 MIL. L. REP. 2401 (1975); Brundage v. United States, 504 F.2d 1382, 2 MIL. L. REP. 2605 (Ct. Cl. 1974), *cert. denied*, 421 U.S. 998 (1975); Cason v. United States, 1171 F.2d 1225, 207 Ct. Cl. 282, 1 MIL. L. REP. 2016 (1973). It is relatively easy for the government to prove that it has been prejudiced by the delay. Prejudice can be proved by showing that memories of witnesses have dimmed, that relevant documents or other types of evidence have been lost, or that the government would be paying two people to do the same job if the plaintiff were to prevail. *But see* Rifkin v. United States, 209 Ct. Cl. 566, 4 MIL. L. REP. 2602 (1976), *cert. denied*, 429 U.S. 1098 (1977); *Carter*, 213 Ct. Cl. 727. A plaintiff's poverty, lack of education, or ignorance of rights has been accepted as an excusable basis for delay. *See* Powell v. Zuckert, 366 F.2d 634, 637-38 (D.C. Cir. 1966); Eurley v. Wilson, 239 F.2d 957 (D.C. Cir. 1956); *Steuer*, 207 Ct. Cl. 282.

[19] Alpert v. United States, 161 Ct. Cl. 810, 820-21 (1963). *See also Carter*, 213 Ct. Cl. 727.

[20] The Court of Claims has stated, "[w]e think that in military cases it would be improper and erroneous for us to apply laches in a way that would spur the commencement of suit as soon as discharges become final, before the results of seeking administrative review are known." *Cason*, 471 F.2d at 1229. Veterans who want to protect themselves against laches while they pursue administrative remedies should file petitions with the Court of Claims immediately and move to stay proceedings pending DRB or BCMR consideration. *See generally* Glosser & Rosenberg, *supra* note 6, at 414-16.

[20a] *See* App. 24A *infra* (sample Court of Claims petition, used in an actual case).

[21] 28 U.S.C. §§ 1331(a), 1346(a), 1361. Section 1331 has been found to "confer jurisdiction on federal courts to review agency action. . . ." Califano v. Sanders, 430 U.S. 99, 105 (1977). Since 1976, the only § 1331(a) jurisdictional requirement has been that the controversy must arise under federal law. A claim that a discharge is arbitrary and capricious, an abuse of discretion, in violation of a regulation or statute or constitutional provision, or unsupported by substantial evidence can arise under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, or other federal law. *See* Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33, 62-63 (1973).

Section 1346(a) provides that:

> (a) the district courts shall have original jurisdiction concurrent with the Court of Claims, of:
>
> . . . .
>
> (2) Any . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Section 1361, which provides jurisdiction for relief in the nature of mandamus, has been relied upon by some courts in claiming jurisdiction over lawsuits challenging discharges. *See* Carter v. Seamans, 411 F.2d 767, 2 SEL. SERV. L. REP. 3081 (5th Cir. 1969); Rew v. Ward, 402 F. Supp. 331, 3 MIL. L. REP. 2393 (D.N.M. 1975); Beller v. Middendorf, No. 75-2747, 4 MIL. L. REP. 2218 (N.D. Cal. 1975), *rev'd on other grounds*, 632 F.2d 788 (9th Cir. 1980); Dowler v. Schlesinger, 384 F. Supp. 39, 2 MIL. L. REP. 2525 (D. Md. 1974).

[22] *See* 28 U.S.C. § 1346(a).

[23] *See VanderMolen*, 571 F.2d 617; Sutcliffe Storage & Warehouse Co., Inc., v. United States, 162 F.2d 849, 853 (1st Cir. 1947); United States v. Johnson, 153 F.2d 846, 848 (9th Cir. 1946); Hill v. United States, 40 F. 441, 442-43 (C.C.D. Mass. 1889); Wolak v. United States, 366 F. Supp. 1106, 1110 (D. Conn. 1973); Brown v. United States, 365 F. Supp. 328, 357, 1 MIL. L. REP. 2505 (E.D. Pa. 1973), *aff'd in part and rev'd in part on other grounds*, 508 F.2d 618, 2 MIL. L. REP. 2658 (3d Cir. 1974), *cert. denied*, 422 U.S. 1027 (1975); Armstrong & Armstrong, Inc. v. United States, 356 F. Supp. 514, 521 (E.D. Wash. 1973), *aff'd*, 514 F.2d 402 (9th Cir. 1975); Perry v. United States, 308 F. Supp. 245, 247 (D. Colo. 1970), *aff'd*, 442 F.2d 353 (10th Cir. 1971);

Unlike the Court of Claims, district courts generally require that veterans exhaust their administrative remedies at the BCMRs.[24] As in the Court of Claims, a six-year statute of limitations applies in district court.[25] Whether the six years begin to run from the date of discharge or from the date administrative remedies are exhausted has not been settled.[26]

Unlike actions in the Court of Claims, district court actions challenging premature discharges need not be brought in Washington, D.C. Normally, the Secretary of the appropriate military service is the only defendant necessary in such a lawsuit. Since the Secretaries officially reside in Washington, D.C., venue always is available there.[27] However, venue also lies both where the veteran was discharged and where the veteran currently resides.[28]

24.2.5 INJUNCTION PREVENTING AN IMMINENT DISCHARGE

When a servicemember is subject to a discharge proceeding that could result in an unlawful separation, (s)he can seek a temporary restraining order or preliminary injunction in federal district court. Such injunctions, however, are rarely granted.[29]

In order to obtain a temporary injunction preventing discharge, a servicemember must prevail under a four-pronged test:

- The servicemember is likely to prevail on the merits of the lawsuit;
- The servicemember will suffer irreparable injury if (s)he is discharged;
- An injunction preventing the discharge would not harm the military; and
- The public interest favors granting an injunction preventing the discharge.[30]

Most servicemembers fail to obtain a temporary injunction because they are unable to show that, without such relief, they would be irreparably injured.[31] The Supreme Court has stated that, in general, for temporary injunctions restraining a discharge of a federal government employee, "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a [temporary injunction] are not enough" to meet the requirement that the injury be irreparable.[32]

24.3 CHALLENGING THE CHARACTER OF DISCHARGE

Most of the principles governing federal court review of challenges to decisions to discharge prematurely also govern federal court challenges to the character of discharges received. Both types of cases can be heard in district court,[33] the same standards of judicial review apply to both,[34] and the same venue principles apply.[34a]

There are differences in jurisdiction between the Court of Claims and the district courts, however. Most importantly, the Court of Claims has no jurisdiction over cases strictly limited to character of discharge because no monetary claim is involved.[34b] Other differences exist in application of the exhaustion of administrative remedies doctrine[34c] and of the statute of limitations.[34d]

24.3.1 COMMON OBSTACLES TO JUDICIAL REVIEW

24.3.1.1 Exhaustion of Administrative Remedies

Federal district courts generally have required veterans to exhaust administrative remedies in mili-

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[23] (continued)
Rivoli Trucking Corp. v. United States, 221 F. Supp. 532, 533 (S.D.N.Y. 1963). *But see* Pioneer Gen-E-Motor Corp. v. Department of the Army, 135 F. Supp. 871, 872 (N.D. Ill. 1955); Thompson Foundry & Machine Co. v. United States, 67 F. Supp. 121, 122 (M.D. Ga. 1946).

[24] *See, e.g.*, Seepe v. Department of the Navy, 518 F.2d 760, 3 MIL. L. REP. 2169 (6th Cir. 1975); Champagne v. Schlesinger, 506 F.2d 979, 2 MIL. L. REP. 2692 (7th Cir. 1974); Hodges v. Callaway, 499 F.2d 417, 2 MIL. L. REP. 2487 (5th Cir. 1974); Nelson v. Miller, 373 F.2d 474 (3d Cir. 1967), *cert. denied*, 387 U.S. 924 (1967); Sohm v. Fowler, 365 F.2d 915 (D.C. Cir. 1966). In a few cases, exhaustion of remedies before the BCMR and/or DRB has been avoided. *See Rew*, 402 F. Supp. 331. *Cf.* Committee for GI Rights v. Callaway, 518 F.2d 466, 3 MIL. L. REP. 2523 (D.C. Cir. 1975); Matlovich v. Secretary of the Air Force, 414 F. Supp. 690, 4 MIL. L. REP. 2208 (D.D.C. 1976).

The federal courts differ as to whether the failure to exhaust administrative remedies is a jurisdictional defect or a matter within judicial discretion. In Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978), a district court decision, which had dismissed a claim for habeas corpus relief (discharge from the Army for erroneous enlistment) and damages for lack of jurisdiction due to plaintiffs' failure to exhaust their administrative remedies before the Army BCMR, was reversed. The Court of Appeals noted that the cases in the circuits were in direct conflict as to whether the failure to exhaust administrative remedies necessarily deprived the reviewing court of jurisdiction.

See Hayes v. Secretary of Defense, 515 F.2d 668, 3 MIL. L. REP. 2345 (D.C. Cir. 1975); Horn v. Schlesinger, 514 F.2d 549, 3 MIL. L. REP. 213 (8th Cir. 1975); Bard v. Seamans, 507 F.2d 765, 2 MIL. L. REP. 2675 (10th Cir. 1974); *Champagne*, 506 F.2d at 982); Ludlum v. Resor, 507 F.2d 398, 2 MIL. L. REP. 2680 (1st Cir. 1974); *Hodges*, 499 F.2d at 421, 423-24; United States *ex rel.* Tobias v. Laird, 413 F.2d 936, 949 (9th Cir. 1969); *Nelson*, 373 F.2d 474; *Sohm*, 365 F.2d 915.

[25] *See* 28 U.S.C. § 2401.

[26] *See* § 24.3.1.2 *infra*.

[27] *See* 28 U.S.C. § 1391(e).

[28] *Id.*

[29] *See, e.g.*, Simmons v. Secretary of the Army, 495 F. Supp. 173, 8 MIL. L. REP. 1049 (D. Md. 1980).

[30] *See* Sampson v. Murray, 415 U.S. 61 (1973); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

[31] *See, e.g., Simmons*, 495 F. Supp. 173.

[32] *Sampson*, 415 U.S. at 90.

[33] 28 U.S.C. §§ 1331(a), 1361.

[34] *See* note 21 *supra*; § 24.2.2 *supra* (standards of judicial review provided by a district court to a challenge to the character of discharge). *See, e.g.*, Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972) (DRB decision held to be arbitrary and capricious); Harmon v. Brucker, 355 U.S. 579 (1958); Kennedy v. Secretary of the Navy, 401 F.2d 990 (D.C. Cir. 1968); Wood v. Secretary of Defense, 496 F. Supp. 192, 8 MIL. L. REP. 2454 (D. D.C. 1980); Stapp v. Resor, 314 F. Supp. 475 (S.D.N.Y. 1970) (character of discharge decisions invalid because in excess of statutory authority); Bland v. Connally, 293 F.2d 852 (1961).

[34a] *See* § 24.2.4 *supra*.

[34b] Money benefits, such as accrued leave, that are tied to the character of a veteran's discharge may supply a money claim upon which jurisdiction in the Court of Claims can be based. *See* Comp. Gen. Op. B-185145 (Jan. 21, 1976) (unpublished), 4 MIL. L. REP. 2131 (stating that mustering out pay and accrued leave may become due following discharge recharacterization). *See* § 28.3.1 *infra*. A legal error relating solely to the characterization of a discharge may thus support Court of Claims jurisdiction.

[34c] Veterans may be able to convince a district court not to require exhaustion of administrative remedies available from the DRBs and BCMRs. *See* § 24.3.1.1 *infra*.

[34d] *See* § 24.3.1.2 *infra*.

tary discharge cases. In most cases involving this issue, however, veterans had applied only to BCMRs because DRBs were not authorized to grant the desired remedy. It is in consequence not settled whether a veteran must exhaust both the DRB and the BCMR of his/her service before being allowed to challenge the character of discharge in federal district court.

If an upgrade is warranted because of an error of law (a violation of a regulation, statute, or constitutional provision), there is good reason to wish to bypass the Review Boards. While such errors are frequently grounds for federal court-ordered upgrades, they are rarely found to warrant upgrades by the Boards. It is unlikely, in view of the case law supporting the requirement of exhaustion of administrative remedies in this area, that a federal district court will agree to hear a challenge to the character of a discharge that has not previously been challenged either at a DRB or at a BCMR. Once a veteran has sought upgrade at a DRB,[35] however, (s)he may present the following arguments at federal district court as to why BCMR review ought not to have to be exhausted before the court will hear his/her case:

- DRBs are the primary discharge review agency; their sole task is to review applications for recharacterization of discharge. In contrast, BCMRs review a variety of cases, only a small portion of which involve discharge review.
- DRBs operate under detailed and uniform discharge review standards,[35a] while BCMRs operate under no discharge review standards.
- BCMR decisions in discharge review cases may take up to three years to be rendered.[36]
- Unlike DRBs, BCMRs normally do not provide applicants the opportunity for personal hearings.[37]
- The BCMR is unlikely to add anything useful to the record before the district court, which already includes the DRB's findings and reasons.
- If an error of law is alleged, it can be argued that a federal court has the expertise to review this claim while a BCMR does not. Therefore, since agency expertise is the rationale for the exhaustion of remedies doctrine, the federal court should not require the servicemember to exhaust BCMR remedies.

Another strategy for getting into federal district court without going through BCMR review is to style the action a challenge to the legal sufficiency of the denial of a complete upgrade by the DRB. The court may conclude that relief on this issue is unavailable at the BCMR because discharge review standards differ at the two Boards.

In one case,[38] a court of appeals ruled that thousands of Army veterans need not exhaust their remedies at either DRBs or BCMRs in order to obtain an upgrade in discharge in federal court. Other veterans may not be able to rely on this case, however, because it was a class action, in which the named plaintiff had already exhausted his administrative remedies at the DRB and the BCMR.

24.3.1.2 Statute of Limitations

For years, the government did not raise the statute of limitations as a defense in lawsuits brought in federal court to upgrade discharges. Accordingly, federal courts frequently have reviewed the merits of cases challenging the character of discharges, despite their being brought many years after the statute of limitations had run.[39]

Recently, however, the government has begun to assert in federal court that the federal statute of limitations[39a] bars a lawsuit seeking a change in the character of discharge if it is brought more than six years after the date of discharge. If this position is accepted by the courts, it will completely bar judicial review of millions of less than honorable discharges and of tens of thousands of DRB and BCMR decisions on applications for upgrades submitted more than six years after the original discharges were issued.[39b]

Three courts have ruled on the statute of limitations issue. In 1978, the U.S. Court of Appeals for the District of Columbia ruled that the statute of limitations and the doctrine of laches do not apply to a lawsuit brought solely to upgrade a less than honorable discharge because such a suit is not for damages, but for "corrective action," making it analogous to actions for habeas corpus or for relief from collateral consequences of criminal convictions (actions free from time bars).[40] In addition, the court found that a corrective action accrues continually as

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[35] If the veteran has been denied relief by the DRB prior to, but not after March 31, 1978, when the DoD uniform discharge review standards and procedures were first promulgated, the military will probably argue in federal court that the veteran should be required to apply to the DRB again so that a review under the "new" uniform discharge review standards can be made before a federal court rules on the merits of the case. A counterargument to this position is that when the "new" standards were promulgated, DoD stated that they were "historical[ly] consistent with the criteria for honorable service" used in the past. *See* 43 Fed. Reg. 13,565 (Mar. 31, 1978).

[35a] *See* 32 C.F.R. Part 70.

[36] *See Rew*, 402 F. Supp. at 336 ("as of 1974 the average length of time from when an applicant first requests her military records until she receives consideration by the BCMR is one to two years").

[37] *See* § 9.4.9; Rolles v. Civil Service Comm'n., 512 F.2d 1319, 1326 n.19, 3 MIL. L.REP. 2103, 2106 (D.C. Cir. 1975).

[38] Giles v. Secretary of the Army, 627 F.2d 545, 8 MIL. L. REP. 2318 (D.C. Cir. 1980). *See also Committee for GI Rights*, 518 F.2d at 474 (a non-discharge upgrade class action lawsuit in which the class members were not required to exhaust the BCMRs).

[39] *See, e.g.*, Peppers v. Army, 479 F.2d 79, 1 MIL. L. REP. 2264 (4th Cir. 1973) (review on merits even though case was brought 28 years after date of discharge); *Kennedy*, 401 F.2d 990 (relief granted on merits even though case was brought more than 13 years after date of discharge); Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967) (review on merits even though case was brought 14 years after date of discharge); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) (relief granted on merits even though case was brought 17 years after date of discharge). *See also* Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971) (servicemember discharged in 1944); Owings v. Secretary of the Air Force, 447 F.2d 1245 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 926 (1972).

[39a] 28 U.S.C. § 2401(a).

[39b] Applications to DRBs may be made up to 15 years from date of discharge; there is no time limitation on applications to BCMRs.

[40] *See* Baxter v. Claytor, No. 77-1984 (D.C. Cir. Dec. 19, 1978). This decision was never reported since it was vacated shortly thereafter.

long as the merits of the discharge designation remain unchallenged. On rehearing, the court expressly avoided resolving the statute of limitations issue.[40a]

A district court recently held that the six-year statute of limitations "does not apply to actions such as this seeking only declaratory and injunctive relief to correct less than fully honorable discharge certificates."[41] The court stated in the alternative that if the statute of limitations did apply, a veteran's claims would not accrue until the DRB or BCMR denied an upgrade to fully honorable.[42]

A second district court held that a veteran who sought judicial review within six years of a BCMR decision denying him relief, but more than six years after the date of discharge, was not barred from federal court review by the statute of limitations because the cause of action did not accrue until the BCMR denied relief.[43]

24.3.1.3 Cases in Which DRBs or BCMRs Failed to Explain Their Decisions Denying Relief

Another possible obstacle to federal court review of the merits of a lawsuit seeking a discharge upgrade is a DRB's (or BCMR's) failure to state findings and reasons for its denial of an upgrade. The Supreme Court has emphasized as fundamental the principle that an administrative agency must clearly disclose the grounds upon which it acts in order for courts to review its decisions effectively.[44] In numerous cases involving judicial review of DRB or BCMR decisions, courts have had to remand to the Boards for clarification of inadequately explained findings and reasons for rejecting upgrade applications.[45] When cases have raised legal issues that could be resolved without resort to DRB or BCMR findings and reasons, however, courts often have ruled on these issues before remanding.[46]

One way to avoid the necessity of a remand is to use the administrative complaint procedure to obtain a statement of findings and reasons from the Review Board to which application for upgrade was made.[47] Although this procedure technically applies only to DRB decisions rendered after April 1, 1977, a complaint concerning a BCMR decision may be heard.

An advantage to using the administrative complaint procedure is that the Board may not know that the case is going to be reviewed by a federal court, and so may not amend its findings and reasons with an eye to insulating them from courtroom attack. Quite the opposite signal is sent to a Board when a court remands for a more complete statement of findings and reasons, since the court usually retains jurisdiction over the case.

24.3.2 PLEADINGS

To obtain injunctive relief requiring the military to upgrade a discharge, a veteran should allege in his/her complaint[47a] and prove in court proceedings the injury caused by the less than honorable discharge. The military will usually not contest the injury involved. It is helpful to inform the court of the gravity of the stigma of a derogatory discharge, however, because it will help influence the court to scrutinize closely the veteran's claims.[47b] An upgrade of a BCD or DD is not the same as expungement of the court-martial conviction which led to the sentence of a derogatory discharge.[47c]

24.4 CLASS ACTIONS

In 1980, federal courts for the first time approved class action claims against military discharge characterization procedures, rejecting the military's argument that discharge upgrading should only occur on a case-by-case basis upon recommendation of a Review Board.

The district court in *Giles v. Secretary of the Army*[48] ordered the Army to identify and upgrade automatically to Honorable Discharges (HDs) the discharges of over 6,000 veterans separated from service on evidence derived at least in part from compelled urinalyses, in violation of the Uniform Code of Military Justice. The district court's decision was affirmed by the court of appeals, with slight modifications to the class relief.[49]

The district court in *Wood v. Secretary of Defense*[50] ordered the military services either to upgrade automatically to an HD the discharge of each member of a class of veterans (whose less than honorable discharges were issued for conduct that occurred while they were in the inactive reserves) or to determine whether proper grounds existed for the discharge issued to each. This class-wide relief was granted because the DoD directive on which the discharges were based was found to exceed the military's authority.

[40a] 652 F.2d 181 (D.C. Cir. 1981).

[41] Wood v. Secretary of Defense, 496 F. Supp. 192, 197-98, 8 MIL. L. REP. 2454-59 (D.D.C. 1980).

[42] *Id.*

[43] Mulvaney v. Stetson, 470 F. Supp. 725, 729, 7 MIL. L. REP. 2366, 2368 (N.D. Ill. 1979).

[44] *See* S.E.C. v. Chenery Corp., 318 U.S. 80, 94 (1943); Burlington Truck Lines v. United States, 371 U.S. 156, 167-68 (1962); FPC v. Texaco, Inc., 417 U.S. 380, 396 (1974).

[45] *See, e.g.*, Roelofs v. Secretary of the Air Force, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980); Matlovich v. Secretary of the Air Force, 591 F.2d 852, 6 MIL. L. REP. 2569 (D.C. Cir. 1978); *Van Bourg*, 388 F.2d 557; Davis v. Brucker, 275 F.2d 181 (D.C. Cir. 1960); Olenick v. Brucker, 273 F.2d 819 (D.C. Cir. 1959); Martin v. Secretary of the Army, 455 F. Supp. 634, 5 MIL. L. REP. 2412 (D.D.C. 1977).

Occasionally, a federal court faced with the task of reviewing a DRB or BCMR decision that lacked findings and reasons for its holdings has, instead of remanding the case, reviewed the Board's decision without giving it the deference normally accorded to a military agency determination. *See, e.g.*, Werner v. United States, 642 F.2d 404, 9 MIL. L. REP. 2311 (Ct. Cl. 1981); Beckham v. United States, 392 F.2d 619 (Ct. Cl. 1968).

[46] *See, e.g., Roelofs*, 628 F.2d 594; *Martin*, 455 F. Supp. 634.

[47] *See* § 11.5.1 *supra*.

[47a] *See* App. 24B *infra* (sample federal district court complaint in a challenge to the character of discharge).

[47b] *See* App. 24C *infra* (sample pleading to demonstrate the injury of a derogatory discharge).

[47c] *See* Ch. 20 *supra* (expungement of court-martial convictions).

[48] 84 F.R.D. 374, 475 F. Supp. 595, 7 MIL. L. REP. 2524 (D.D.C. 1979).

[49] *Giles*, 627 F.2d 554.

[50] Wood v. Secretary of Defense, 496 F. Supp. 192, 8 MIL. L. REP. 2454 (D.D.C. 1980).

APPENDIX 24A
SAMPLE COURT OF CLAIMS PETITION

IN THE
UNITED STATES COURT OF CLAIMS

JOHN DOE,
Petitioner

No.

v.

PETITION

THE UNITED STATES,
Defendant

The above-named plaintiff respectfully represents that:

1. The jurisdiction of the court is predicated on 28 U.S. Code § 1491 and the fifth amendment of the United States Constitution.

Plaintiff

2. The plaintiff is a citizen of the United States. His Post Office address is: _____.

Facts

3. Plaintiff joined the United States Army on June 13, 1967. He received an Honorable Discharge on June 21, 1970 and began his second enlistment on June 19, 1972.

4. During his second enlistment, plaintiff was stationed at Walter Reed Hospital, Washington, D.C., where he served as a medical specialist. During this assignment, plaintiff established himself as a highly qualified technician and was recognized as such by members of the medical profession and his co-workers. He received numerous letters of commendation from the doctors, nurses, and patients with whom he worked praising him for his clinical expertise and his commitment to patient care. Plaintiff's excellent reputation was reflected in his Enlisted Efficiency Report from Walter Reed which indicated outstanding performance in most categories and a recommendation that he be promoted ahead of his peers.

5. In March 1975, plaintiff was Honorably Discharged and re-enlisted for a term of six years to run to March 20, 1981.

6. In July 1975, he received orders to report to Germany for a permanent change of station. Plaintiff was transferred to an infantry unit in Aschaffenburg, Germany, and assigned the position of company aidman.

7. On July 16, 1976, plaintiff returned from leave in the United States, and was charged with AWOL for allegedly being twenty-three days late. It was also alleged that he was in possession of a small amount of marijuana.

8. On August 5, 1976, plaintiff was charged with possession, transfer, and sale of heroin. Although a subsequent confession by another soldier established that plaintiff was totally uninvolved in any such incident, he was given an Undesirable Discharge and separated from the Army on November 3, 1976.

9. The wrongful charge against plaintiff resulted from the activities of Pvt. John Doe, who was a defendant in another case involving illegal sale and possession of narcotics. Pvt. Doe was promised leniency from the Criminal Investigation Division (CID) at Aschaffenburg in return for information which would lead to the arrest of others involved in the trafficking of narcotics. On August 3, 1976,

CID began to pressure Pvt. Doe, notifying him that unless he provided information soon, he would be sent to prison. Pvt. Doe selected plaintiff to be the victim of a scheme in which it would be made to appear that plaintiff was selling narcotics.

10. On August 5, 1976, Pvt. Doe was given 70 dollars in marked money for a controlled heroin exchange. At noon, he gave plaintiff the money with the explanation that it was for the repayment of an old debt. Pvt. Doe then gave the CID some of his own heroin as evidence that a sale had taken place. On August 7, 1976, Pvt. Doe was flown to the United States and separated from the Army.

11. On August 16, 1976, a hearing was conducted pursuant to Article 32(b) of the Uniform Code of Military Justice (U.C.M.J.), to investigate the charges against the plaintiff. Plaintiff's Army counsel negligently failed to request that Pvt. Doe, the central witness, be present. The hearing resulted in a recommendation that the case be referred for a general court-martial.

12. On October 13, 1976, Pvt. Doe, in a telephone conversation from the United States, informed plaintiff's Army Counsel that the heroin charges against plaintiff were completely false. Instead of informing plaintiff of Doe's confession, counsel advised plaintiff to submit a request for a discharge pursuant to Chapter 10, Army Regulation 635-200.

13. Plaintiff was not advised that the heroin charge might be dismissed, nor was he informed that the remaining minor charges could be disposed of by means other than court-martial or discharge. On October 13, 1976, plaintiff submitted his request for a discharge pursuant to Chapter 10, Army Regulation 635-200, without being advised of the information obtained by his appointed military counsel.

14. When plaintiff learned of Doe's confession, he attempted to withdraw his request for a discharge. Both plaintiff's company commander and his Army counsel advised him that his case was closed and nothing more could be done. Plaintiff's attempts to see the battalion commander on this matter were denied.

15. On October 19, 1976, plaintiff's discharge was approved. Plaintiff was reduced from Specialist, E-5, to Private, E-1, and on November 3, 1976, given an Undesirable Discharge.

Plaintiff's Discharge Has Been Upgraded

16. On August 10, 1978, plaintiff appeared before the Army Discharge Review Board for a recharacterization of his discharge. On August 29, 1978, the board, by unanimous decision, upgraded plaintiff's discharge to Honorable. The board stated in its findings that there was sufficient evidence to conclude that plaintiff's rights during discharge proceedings had not been properly protected. The board also found that failure to allow plaintiff to confer with a higher authority rendered questionable the propriety of his administrative separation.

17. For the twenty-one months between the time plaintiff was discharged and the time plaintiff's discharge was upgraded to Honorable, plaintiff was denied veterans' benefits and unemployment compensation, and was branded as unworthy of employment by potential employers. By virtue of his improper discharge, plaintiff also lost five years of military pay and all benefits incident thereto, including, but not limited to, health care for himself and his daughter, life insurance, quarters allowance, rations pay, and accumulated leave pay. He was also denied access to his own clothes and personal property which have been in Army storage since plaintiff's tour in Germany.

Claim Not Assigned

18. Plaintiff is the sole owner of the claim herein set forth on his behalf and no part of any such claim has been assigned or transferred.

Basis for Claim

19. The above described conduct of the defendant was illegal in the following respects:

(a) Plaintiff was denied due process of law by ineffective assistance of counsel;

(b) Approval of plaintiff's Chapter 10 discharge violated Army Regulation 635-200 Para. 10-26 in that it was not voluntary;

(c) Approval of plaintiff's Chapter 10 request was illegal in light of plaintiff's innocence of the drug charge and the fact that the remaining charges against him did not merit a discharge;
(d) Refusal to allow plaintiff to withdraw his request for a discharge was unlawful and was an abuse of discretion.

WHEREFORE, the plaintiff demands judgment against the United States as follows:

(a) For all pay and allowances together with all benefits plaintiff may have been deprived of as a result of his discharge, from the date of discharge to the date of judgment, including but not limited to reimbursement for medical insurance necessitated by cessation of coverage of him and his family; quarters allowance; ration allowance; accumulated leave pay; reimbursement for clothes and personal property illegally withheld by Army storage; and PX and commissary allowances;
(b) Promotion to the grade of E-6 and reinstatement into the Army;
(c) For such other and further relief as the court may find to be just and proper.

Respectfully submitted,

APPENDIX 24B
SAMPLE FEDERAL DISTRICT COURT COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE
[Plaintiff's Address]

Plaintiff

v.

Civil Action No.

SECRETARY OF THE ARMY
The Pentagon
Room 3E 718
Washington, D.C. 20310
(202) 695-3211

Defendant

COMPLAINT FOR MANDATORY DECLARATORY AND INJUNCTIVE RELIEF

Preliminary Statement

Plaintiff seeks declaratory and injunctive relief from a less than fully Honorable Discharge issued by defendant based in whole or in part upon evidence of drug use which was compelled from plaintiff by orders to provide urine samples. Plaintiff challenges his character of discharge on the ground that it violates Article 31 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 831, and seeks an order requiring defendant to recharacterize his discharge to Honorable.

In the event that Article 31 of the U.C.M.J. does not render invalid defendant's issuance of a less than honorable discharge, plaintiff, in the alternative, challenges the validity of his less than honorable discharge on the ground that he was discharged without observance of procedures required by Army regulations.

Jurisdiction

1. This cause of action arises under Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831, the fifth amendment to the United States Constitution, and section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2). Jurisdiction of this court is provided by 28 U.S.C. § 1331(a), and 28 U.S.C. § 1361. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201, 2202. There is presently an actual controversy between the parties in which a declaration of rights is sought and needed. Venue is properly in this court by virtue of 28 U.S.C. § 1391(e).

Parties

2. Plaintiff in this action, John Doe, is a former private in the United States Army. He is a citizen of the United States of America, and currently resides at _____.

3. Defendant Secretary of the Army is sued here in his official capacity. His official place of business is Room 3E-718 of the Pentagon, Washington, D.C. 20310. Defendant is responsible for and has the authority necessary to conduct all affairs of the Department of the Army, including the governance of the separation of all military personnel from the United States Army. 10 U.S.C. § 3012 (1962). He is empowered to act through a board of civilians to change any military record of a member or former member of the Army whenever necessary to correct an error or to remove an

injustice. 10 U.S.C. § 1552. Pursuant to 10 U.S.C. § 1553, he has established a Discharge Review Board to reconsider the character of a servicemember's discharge from the Army, subject to further review by him.

The Circumstances Leading To Plaintiff's Less Than Honorable Discharge

4. When he was 23 years old, plaintiff applied for enlistment in the United States Army. As part of the application, he submitted to a pre-enlistment medical examination conducted at the Armed Forces Examination Station at Richmond, Virginia on June 28, 1973. During this examination, plaintiff revealed to the attending physician that "he shot heroin daily for six months . . . [but] that he hadn't shot since February 1971." Despite this fact, the physician still found that plaintiff was qualified for enlistment.

5. Plaintiff also revealed his prior drug use to a second examining physician on July 21, 1972. This physician, a psychiatrist, found that:

> This 23 year old enlistee has used heroin in the past, but never regularly. He wants to enlist to improve his education and to help support his aging parents. In my judgment, he is not drug addicted or dependent. . . .

Plaintiff was recommended for enlistment by this Army physician as well.

6. On November 27, 1971, plaintiff was accepted for a three-year term of enlistment. Immediately thereafter, he underwent two weeks of basic training at Fort Meyer, Virginia, which was followed by nine weeks of communications training at Fort Smith, Arkansas. On May 18, 1973, plaintiff was given his first duty assignment at the United States Army Headquarters and Troop Command in Thailand, a region in which addictive drugs are readily available.

7. Between October 29 and December 26, 1973, plaintiff was compelled to render a urine sample on twenty separate occasions as part of defendant's Alcohol and Drug Abuse Prevention and Control Program. Ten such tests bore positive results indicating drug use.

8. On the 23rd, 28th, and 30th of November, 1973, plaintiff refused to obey orders which required him to report for a urinalysis as part of the program referred to in paragraph 7.

9. Plaintiff was never advised on any of the occasions referred to in paragraphs 7 and 8 that Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831, authorized him to refuse to submit to urinalysis, since the results of those tests could be used to support a General Discharge from military service.

10. On January 10, 1974, plaintiff's commanding officer prepared a report to initiate administrative proceedings to separate plaintiff for drug abuse under Chapter 13 of Army Regulation 635-200, ¶ 13-5(a)(3)(b). As part of his recommendations to the discharge authority, the commanding officer requested a waiver of a rehabilitative transfer to another military unit as would otherwise be required under Chapter 13 of Army Regulation 635-200, ¶¶ 13-8, 13-9. This request was never approved by the discharge authority, the only party with the power to authorize a waiver.

11. On February 22, 1974, plaintiff was administratively separated from the Army for drug abuse with a General Discharge in accordance with the report referred to in paragraph 10. At no time prior to his discharge was plaintiff ever provided a rehabilitative transfer.

12. On March 11, 1975, plaintiff applied to the Army Discharge Review Board (DRB) seeking a recharacterization of his discharge to Honorable. He was accompanied by counsel at a hearing on September 19, 1975, and presented his claim for an upgrade as set forth in this complaint.

13. On December 9, 1975, defendant notified plaintiff that his application for an upgrade had been denied by the DRB.

14. Thereafter, plaintiff applied to the Army Board for Correction of Military Records (BCMR), again seeking a recharacterization of his discharge to Honorable. In a written brief, plaintiff set forth his claim for an upgrade as he had in his appearance before the DRB.

15. On December 10, 1976, the BCMR denied plaintiff's application for an upgrade.

Injury

16. Plaintiff has suffered and continues to suffer serious and irreparable injury because his less than honorable discharge stigmatizes him, adversely affects his reputation and standing in the community, causes him embarrassment and loss of self-esteem, engenders substantial prejudice against him, and impairs his social and economic opportunities in civilian life.

17. Plaintiff is without an adequate remedy at law.

First Claim

18. By issuing plaintiff a less than honorable administrative discharge based in whole or in part upon evidence developed by or as a direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers, defendant violated plaintiff's rights guaranteed by Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831.

Second Claim

19. In issuing plaintiff a less than honorable discharge without affording him a rehabilitative transfer and without observance of procedures required by Army Regulation 635-200, ¶¶ 13-8, 13-9, defendant violated the due process clause of the fifth amendment.

Third Claim

19. In refusing to recharacterize plaintiff's discharge to Honorable upon application to the Army Discharge Review Board and Board for Correction of Military Records, defendant's actions were "unlawful" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2), in that they were arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, and contrary to plaintiff's constitutional and statutory rights.

Prayer For Relief

WHEREFORE, plaintiff prays this court grant the following relief:

(1) Declare that by issuing plaintiff a less than honorable administrative discharge based in whole or in part upon evidence developed by or as a direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers, defendant violated plaintiff's rights guaranteed by Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831;

(2) Declare, in the alternative, that this court concludes that defendant did not violate the rights of plaintiff guaranteed by Article 31 of the Uniform Code of Military Justice, that defendant violated plaintiff's right to a rehabilitative transfer and to procedures guaranteed by Army Regulations;

(3) Direct, by issuance of an injunction, that defendant recharacterize to Honorable the discharge of plaintiff; and

(4) Grant such other and further relief as the court may deem proper.

APPENDIX 24C
SAMPLE PLEADING DISCUSSING INJURY TO VETERANS OF LESS THAN HONORABLE DISCHARGES

Part I: General and Undesirable Discharges

Courts have widely recognized that servicemembers issued less than honorable discharges are denied valuable civil rights. *See Harmon v. Brucker*, 137 F. Supp. 475, 487 (D.D.C. 1956), *aff'd*, 100 U.S. App. D.C. 190, 243 F.2d 613 (D.C. Cir. 1957), *rev'd on other grounds*, 355 U.S. 579 (1958); *Bernstein v. Herron*, 136 F. Supp. 493, 496 (S.D.N.Y. 1956); *United States ex rel. Roberson v. Keating*, 121 F. Supp. 477, 479 (N.D. Ill. 1949). While it is true that a General Discharge does not preclude plaintiff from federal veterans' benefits, the recipient of a General Discharge cannot receive veterans' benefits provided by some states. *See, e.g.*, Tex. Educ. Code Ann. § 54.203(e) (Vernon 1972 & Supp. 1977) (exempting only honorably discharged veterans from tuition and fees at state institutions of higher education); Tex. Rev. Civ. Stat. art. 4413(31) (Vernon 1976) (providing employment preferences only to honorably discharged veterans); *Schustack v. Herren*, 234 F.2d 134, 135 n.2 (2d Cir. 1956) (New York); Ohio Laws 1955-56 at 830-31 (1955); Maryland Ann. Code art. 96 1/2, § 1(c) (1964).

More importantly, those with General Discharges are severely stigmatized in the civilian community in that they suffer loss of reputation and an inability to obtain gainful employment. This fact is supported by statistical surveys[1] and has been widely recognized by legal scholars[2] and veterans groups.[3] The courts have consistently concluded that:

> 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.
>
> * * * *
>
> . . . any discharge characterized as less than honorable will result in serious injury. It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment. [footnotes omitted].[4]

The military itself has long recognized that General and Undesirable Discharges impose a severe stigma. For example, since at least 1966, the form established by the Secretary to warn servicemembers against whom administrative separation proceedings have been initiated states:

> I understand that I may expect to encounter substantial prejudice in civilian life in the event a general discharge under honorable conditions is issued to me. (I further understand that, as the result of issuance of an undesirable discharge under conditions other than honorable, . . . I may expect to encounter substantial prejudice in civilian life.)[5]

Indeed, the military services conceded the severity of the stigma of any less than honorable discharge in a lawsuit involving veterans with Bad Conduct, Undesirable, and General Discharges. In the words of the Secretaries of Defense, Army, Navy, and Air Force:

> It is well recognized that persons with less than Honorable Discharges are stig-

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[1] Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 16-21 (1973); PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT at 403-9 (1975); *Hearings on the Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. at 313-30 (1962) (1962 Hearings) (testimony of Rep. Doyle (Cal.)).

[2] *See, e.g.*, Everett, *Military Administrative Discharges: The Pendulum Swings*, 1966 DUKE L.J. 41, 44-45, *Joint Hearings on Bills to Improve the Administration of Justice in the Armed Forces Before the Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess. at 300 (1966) (1966 Hearings) (testimony of Senior Judge Ferguson of the U.S. Court of Military Appeals, stating that "the impact of a general or undesirable discharge is the same as that of a punitive discharge . . . it frequently marks the accused for the balance of his life, denies him job opportunities otherwise available . . . no matter how exemplary his subsequent conduct may be. . . ."); Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L. REV. 227, 228-333 (1974); Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33, 34-35, 43 (1974).

[3] *See, e.g., Joint Hearings on Bills to Improve the Administration of Justice in the Armed Forces Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess. 178 (testimony of John Finn, American Legion 1962 Hearings at 365-66 (testimony of Francis Stover, Veterans of Foreign Wars); *Hearings on H.R. 1108 Before Special Subcomm. on Military Discharges of the House Comm. on Armed Services*, 85th Cong., 1st Sess. 2482 (1957) (testimony of American Legion official) ("Employers are looking down their noses today at general discharges. . . .").

[4] Bland v. Connally, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961); *see also* Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961); Van Bourg v. Nitze, 388 F.2d 557, 559 n.1 (D.C. Cir. 1967); Kauffman v. Secretary of the Air Force, 415 F.2d 991, 995 (D.C. Cir. 1969); Giles v. Secretary of the Army, 627 F.2d 554, 557 n.9 (D.C. Cir. 1980) (stating that "a general discharge carries with it a stigma with many harmful features of an undesirable discharge. Not only is a person's reputation injured and jeopardized, but employment opportunities are restricted, both in the public and private sector."); Stapp v. Resor, 314 F. Supp. 475, 478 (S.D.N.Y. 1970); Sofranoff v. United States, 165 Ct. Cl. 470, 478 (1968) ("Since the vast majority of discharges from the armed forces are honorable, the issuance of any other type of discharge stigmatizes the ex-serviceman. It robs him of his good name. It injures his economic and social potential as a member of the general community."); Crawford v. Davis, 247 F. Supp. 943, 946 (E.D. Pa. 1966), *cert. denied*, 383 U.S. 921 (1966); Unglesby v. Zimny, 250 F. Supp. 714, 716 (N.D. Cal. 1965).

[5] Figure 13-1, ¶ 6 to Army Regulation 635-200, Chapter 13 (Dec. 15, 1973); *see also* Air Force Manual 39-12, ¶ 1-22(a) (Oct. 21, 1970) (stating that "a general discharge has been found to be a definite disadvantage to an airman seeking civilian employment.").

matized in the civilian community in that they suffer loss of reputation and difficulty in obtaining gainful employment. The unmistakable social stigma greatly limits the opportunities for both public and private civilian employment and robs the veteran of his good name.[6]

Part II: Bad Conduct and Dishonorable Discharges

One unique (and severe) sanction imposable by court-martial is a Bad Conduct or Dishonorable Discharge. When Congress, enacting the U.C.M.J., authorized these two types of discharges, it was aware that they would severely stigmatize the servicemember in civilian society.[7] Accordingly, Congress reserved imposition of such a severe stigma for only serious proscribed conduct and only when stringent procedural safeguards are used.[8]

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[6] Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, filed August 11, 1979 in Veterans Education Project v. Secretary of the Air Force, et al., Civ. No. 79-0210 (D.D.C.) ("VEP") at 5. In VEP, plaintiffs sought under the Freedom of Information Act, 5 U.S.C. § 552, the names and addresses of hundreds of thousands of veterans with Bad Conduct, Undesirable, and General Discharges who are allegedly unaware of their right to apply to a Discharge Review Board for an upgrade in discharge. Plaintiff Veterans Education Project seeks these records for the purposes of mailing these veterans information concerning their right to apply for a DRB review.

[7] "It is certain that a bad-conduct discharge will be a stain on a man's record throughout life and will seriously affect both his opportunities to obtain employment and his chances for advancement. [It is] a stigma and . . . a handicap. . . ." *Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services*, (1949 House Hearings), 81st Cong., 1st Sess. 649 (1949); *see also* 1949 House Hearings at 657, 702, 969; *Hearings on S. 857 and H.R. 4080 Before the Subcomm. of the Senate Comm. on Armed Services*, (1949 Senate Hearings) 81st Cong., 1st Sess. 209 (1949) ("a bad-conduct discharge can cripple a man's life, and do him irreparable harm"); *Hearings on S. 857 and H.R. 4080 Before the Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 297 (1949).

The nature of the punishment of a Bad Conduct Discharge does not include loss of federal veterans' benefits. The loss of such benefits is not a necessary consequence of a Bad Conduct Discharge issued by sentence of a special court-martial. When a veteran is issued such a discharge, or an Undesirable Discharge, the decision whether to grant veterans' benefits is a discretionary one made by the Veterans Administration. *See* Comment, *supra* note 2, at 278 n.213, 303-04.

[8] *See* Comment, *supra* note 2, at 280 n.223, 288-99.

APPENDIX 24D
LIST OF SELECTED FEDERAL COURT CASES INVOLVING MILITARY ADMINISTRATIVE DISCHARGES

This appendix provides a list of selected federal court cases which involve or are related to issues that are commonly litigated in a challenge to a military separation or character of discharge decision. This list is far from exhaustive. Some cases are included not because of the principle issues raised in the litigation, but because of other important issues involved.

1. Due Process Generally

Conn v. United States, 180 Ct. Cl. 178, 376 F.2d 878 (1967) (Undesirable Discharge based on *ex parte* investigative report and unsworn statements violated due process; letter and spirit of regulations must be followed to afford due process).

Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972) (general discussion of due process).

Cole v. United States, 171 Ct. Cl. 178 (1965) (command interference and general arbitrary and capricious behavior).

Dunmar v. Ailes, 230 F. Supp. 87 (D.D.C. 1964), *aff'd*, 348 F.2d 51 (D.C. Cir. 1965) (minimum standard of fundamental fairness applied to discharge of cadet).

Carter v. United States, 206 Ct. Cl. 61,509 F.2d 1150 (1975), *modified*, 207 Ct. Cl. 316, 518 F.2d 1199 (1975), *cert. denied*, 423 U.S. 1076 (due process required before issuance of any discharge below HD).

Midgett v. United States, 603 F.2d 835 (Ct. Cl. 1979) (strict conformity to law and full due process protection required before derogatory characterization of discharge can be given).

VanderMolen v. Stetson, 571 F.2d 617 (D.C. Cir. 1977) (discharge authority's violation of procedural separation rights and AF regulations invalidated discharge).

Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960) (violations of due process invalidated discharge).

2. Right to Notice and a Hearing

Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963) (hearing prior to UD not required where subsequent hearing held and no prejudice shown).

Peppers v. Army, 479 F.2d 79 (4th Cir. 1973) (due process violations at predischarge hearing remedied by a proper hearing after discharge).

Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960) (notice and hearing required).

Keef v. United States, 195 Ct. Cl. 454 (1968) (stigmatizing discharge requires hearing).

Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) (*en banc*) (less than honorable discharge requires hearing).

3. Right to Confront Witnesses

Gamage v. Zuckert, 265 F. Supp. 357 (D.D.C. 1966) (admission of *ex parte* written statements without opportunity to cross-examine fatal to fair hearing), *rev'd on other grounds sub nom.* Brown v. Gamage, 377 F.2d 154 (D.C. Cir. 1967) (knowing failure of plaintiff to request presence of adverse witnesses or to seek to take depositions fatal to claim of no opportunity for cross-examination).

Unglesby v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965) (plaintiff's failure to request voluntary presence of adverse witnesses or seek written statements fatal to claim of no opportunity for cross-examination where plaintiff had notice of evidence to be used against him).

Denton v. Secretary, 483 F.2d 21, 1 MIL. L. REP. 2253 (9th Cir. 1973), *aff'g* Denton v. Seamans, 315 F. Supp. 279 (N.D. Cal. 1970) (where lack of opportunity to cross-examine related to one of five allegations supporting discharge, court "might well" have reversed if that allegation had been sole basis for discharge).

Wilson v. Secretary, 417 F.2d 297 (3d Cir. 1969) (voluntary election not to appear at hearing did not violate due process where election was written and plaintiff was represented by counsel).

Courtney v. Secretary, 267 F. Supp. 305 (C.D. Cal. 1967) (general discussion).

Waller v. United States, 198 Ct. Cl. 908, 461 F.2d 273 (1972) (affidavit submitted without personal appearance of witness not a fatal defect where procedure conformed to AF rules, plaintiff declined to request personal appearance of affiant, and affidavit merely corroborated plaintiff's written admission of conduct).

Cason v. United States, 200 Ct. Cl. 424, 471 F.2d 1225 (1973) (failure of Navy to try to produce adverse witness, who was in the area and whose presence was requested, disregarded procedural rights).

Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961) (Navy lacked authority to discharge reservist for subversive activities without affording opportunity to confront witnesses).

Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961) (plaintiff could not be discharged for making derogatory statements about the Army while on active duty without being afforded an opportunity to confront witnesses).

Bray v. United States, 207 Ct. Cl. 60,515 F.2d 1383 (1975) (use of written statement by adverse witness without explanation or justification and without attempt to secure deposition fatal to validity of hearing, particularly since AF violated regulation requiring that witnesses not be reassigned until case closed or until their presence no longer required).

4. Search and Seizure

Committee for GI Rights v. Callaway, 370 F. Supp. 934 (D.D.C. 1974), *rev'd on other grounds*, 518 F.2d 466 (D.C. Cir. 1975) (illegally seized evidence cannot be relied on as basis for any discharge below HD).

Crawford v. Davis, 249 F. Supp. 943 (E.D. Pa.), *cert. denied*, 383 U.S. 921 (1966) (evidence seized illegally cannot be used in administrative proceeding, but confession standing on its own admissible even though it may have grown out of illegal search; probable cause based on testimony from informant requires some indication of informant's reliability).

Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966) (civilian employee's discharge could not be based on evidence seized in violation of Constitution).

5. Coercion or Duress

Middleton v. United States, 170 Ct. Cl. 36 (1965) (acceptance of any discharge below an HD under threat of court-martial invalid where court-martial prohibited by Navy regulations).

Leone v. United States, 204 Ct. Cl. 334 (1974) (general discussion of coercion in civilian pay case; unpleasant choice is not coercive *per se*).

Neal v. United States, 177 Ct. Cl. 937 (1966) (Navy's offer of a less than honorable discharge in lieu of court-martial invalid where Navy knew it lacked evidence necessary to prosecute).

McGuchen v. United States, 187 Ct. Cl. 284, 407 F.2d 1349 (1969) (coercion explained).

Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961) (resignation in lieu of filing misconduct charges against civilian employee was coercive where employee had to make immediate choice in superior's office).

Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972) (Army violated standard of substantial fairness by ignoring stress under which plaintiff was operating).

6. Evidence Generally

Story v. Secretary, 2 MIL. L. REP. 2237 (D. Ariz. 1974) (admission of damaging hearsay and irrelevant psychiatric statement was prejudicial error).

Crawford v. Davis, 249 F. Supp. 943 (E.D. Pa.), *cert. denied*, 383 U.S. 931 (1966) (cumulative error).

Denton v. Secretary, 483 F.2d 31, 1 MIL. L. REP. 2253 (9th Cir. 1973) (affirming lower court which upheld discharge; court suggested one count relating to discharge was invalid because it was based on unsworn hearsay).

Carter v. United States, 509 F.2d 1150 (Ct. Cl. 1975), *modified*, 518 F.2d 1119 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1076 (AF cannot shift its burden of proof in administrative hearing leading to discharge below HD through "show cause" procedure).

Grimm v. Brown, 291 F. Supp. 1011 (N.D. Cal. 1968), *aff'd*, 449 F.2d 654 (9th Cir. 1971) (failure to provide unclassified summary of classified report as required by regulations voided discharge where classified report was relied upon as one basis for discharge).

Murray v. United States, 154 Ct. Cl. 185 (1961) (evidence of homosexual activity used as basis for discharge below HD must be from current enlistment).

Olenick v. Brucker, 273 F.2d 819 (D.C. Cir. 1959) (record must demonstrate affirmatively that Secretary complied with regulations).

Davis v. Brucker, 275 F.2d 181 (D.C. Cir. 1960) (same result as *Olenick*).

7. Counsel

Gastall v. Resor, 334 F. Supp. 271 (D. Mass. 1971) (discharge below HD invalid because Army failed to provide adequate counsel as required by its own regulations).

Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 206 (1947) (discharge below HD based on court-martial invalid where right to counsel was denied).

Carter v. United States, 213 Ct. Cl. 727 (1977) (disloyal and injurious conduct by counsel invalidates discharge below HD).

Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) (Dishonorable Discharge ordered by court-martial invalid where right to counsel denied at trial and BCMR had duty to treat court-martial as void in considering applicant's request for correction of records).

Angle v. Laird, 429 F.2d 892 (10th Cir. 1970) (general discussion of effective counsel).

8. Basis in Fact/Inadequate Administrative Record

Jacobowitz v. United States, 191 Ct. Cl. 444, 424 F.2d 555 (1970) (uncorroborated hearsay not sufficient to support agency findings).

Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972) (no basis in fact not to upgrade).

Martin v. Secretary, 455 F. Supp. 634 (D.D.C. 1977) (Discharge Review Board must provide reasons for its decision).

9. Jurisdiction

Henderson v. United States, 175 Ct. Cl. 690, *cert. denied*, 386 U.S. 1016 (1967) (improperly constituted board rendered decision invalid even though findings and recommendations were sustainable).

Kicher v. United States, 184 Ct. Cl. 402, 396 F.2d 454 (1968) (same result as *Henderson*).

Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979) (actions of improperly constituted selection boards for reserve officers not valid).

10. BCMR Procedures

Haber v. United States, 200 Ct. Cl. 749 (1973) (staff of BCMR cannot deny rehearing request when accompanied by new evidence).

Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974) (Secretary cannot overule BCMR arbitrarily and must base such decision on explicitly stated policy or record and evidence available to Board).

Proper v. United States, 139 Ct. Cl. 511, 154 F. Supp. 317 (1957) (Secretary overlooked weight of

evidence relied upon by majority of Board in denying BCMR recommendation; improper military interference with civilian board also occurred).

11. Employment Discrimination

Thompson v. Gallagher, 489 F.2d 443, 1 MIL. L. REP. 2624 (5th Cir. 1973) (city couldn't discharge employee solely on basis of other than honorable discharge).

Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975) (fire department could not use nature of discharge as basis for awarding bonus points absent evidence showing job relatedness).

Rios v. Dillman, 494 F.2d 329 (5th Cir. 1974) (veteran's preference only for Honorable Discharges is acceptable).

CHAPTER 25
THE PRIVACY ACT

25.1 INTRODUCTION

A veteran seeking a discharge upgrade ordinarily must apply to a Discharge Review Board or a Board for Correction of Military Records for a discharge review. A recent and largely untested statute, the Privacy Act of 1974 [hereafter Act or Privacy Act], provides another avenue for upgrading discharges which both increases the likelihood of an upgrade in many cases and avoids the necessity of applying to a DRB or BCMR.

The Act[1] provides, among other things, that an individual has the right to have certain agency records amended to remove or change portions which are not "accurate, relevant, timely, or complete."[2] For some types of cases, veterans can validly claim that the character of their discharge is not "accurate" and must therefore be amended under the Act to reflect a less derogatory character of discharge. In the alternative, a veteran can greatly improve the chances for an upgrade at a DRB or BCMR by using the Privacy Act first to amend factually erroneous information and opinions based thereon in the veteran's military record.

25.2 AMENDMENT OF MILITARY RECORDS BY USING THE PRIVACY ACT

There has been little case law thus far delineating the types of information in military records that can be amended through use of the Privacy Act. Theoretically, the Act can be used to amend the discretionary, judgmental types of decisions made by the military concerning a servicemember, such as character of discharge, efficiency ratings, and conclusions by a selection or promotion board. The military, however, takes the view that the Privacy Act only allows amendment of factual matters. The military's position follows:

> The Privacy Act amendment provision permits an individual to request *factual* amendments in his records which are maintained in a system of records. It does not ordinarily permit correction of judgmental decisions such as efficiency reports, selection and promotion board reports. These judgmental decisions should be challenged at the Board for the Correction of Military or Naval Records which by statute, 10 U.S.C. 1552, is authorized to make these determinations. While factual amendments may be sought under both the Privacy Act and the Board for Correction of Military or Naval Records, corrections other than factual matters ordinarily fall outside of the provisions of the Privacy Act and are in the purview of the Board for Correction of Military or Naval Records. If a factual matter is corrected under the Privacy Act procedures, any subsequent judgmental decisions that may have been affected by the factual correction, if contested, should be considered by the Board for Correction of Military or Naval Records.[3]

Although the Army has argued that the Privacy Act's amendment provisions apply only to purely factual misrepresentations,[4] the military and the courts have interpreted the Act to allow amendment of conclusions not supported by facts. One such case involves John C. McEnearney, Jr. McEnearney received a General Discharge at the end of his term of enlistment with the Navy because he only had a 1.0 rating in his final rating period. Regulations authorize a 1.0

[1] 5 U.S.C. § 552a.
[2] 5 U.S.C. § 552a(d)(2).
[3] Determination of Department of Defense Privacy Board Decision Memorandum 76-1 (March 12, 1976) (emphasis in original).
[4] R.R. v. Department of the Army, 482 F. Supp. 770, 8 MIL. L. REP. 2257 (D.D.C. 1980).

mark for servicemembers who have a court-martial conviction on their record. Soon after his discharge, McEnearney filed a Privacy Act request with the Navy to amend his character of discharge, contending that: (1) his court-martial conviction had been reversed on appeal; (2) his 1.0 rating was therefore rendered "inaccurate" because regulations no longer authorized it; and (3) his General Discharge was "inaccurate" because the 1.0 rating on which it was based was "inaccurate." Without discussion, the Navy promptly granted his request *in toto*, changing his rating and the character of his discharge to Honorable.[5]

In *R.R. v. Department of the Army*,[6] the district court held that even medical opinions in a veteran's military record can be amended through use of the Privacy Act. In that case, the veteran injured his knee and was hospitalized in an Army hospital one month after his 1951 induction. The veteran was then treated by a psychiatrist who recommended that he be discharged by reason of a pre-existing mental condition that was neither caused by nor aggravated during his service. This conclusion was adopted by the medical board.[7]

Nearly three decades later, the same veteran sought disability benefits from the Veterans Administration. In order to qualify for such benefits, the veteran had to prove that his disability was caused by or aggravated during military service. The 1951 psychiatrist's diagnosis and the medical board's conclusion would ordinarily hinder a claim for service-connected disability benefits.

In an attempt to overcome this obstacle, the veteran filed a request pursuant to the Privacy Act to amend both the factual information in his record, upon which the psychiatrist based his recommendation, and the medical diagnostic conclusion itself. The veteran had previously added to his official files new evidence which contradicted many of the facts upon which the 1951 medical diagnosis was based. The Army Privacy Board concluded that the original records accurately showed what had happened at the time, and refused to amend the factual portions of the record. In addition, the Privacy Board held that correction of errors in medical judgment was not appropriate under the Privacy Act.

The veteran took his case to the district court. The court rejected the Army's restrictive view of the Privacy Act, holding that the veteran could seek amendment of both inaccurate biographical data and unsupported medical diagnostic conclusions relating to his 1951 hospitalization. It held that an agency may not refuse a request to revise or expunge prior professional judgments once all the facts underlying such judgments have been thoroughly discredited.[8]

After concluding that the original medical opinion was based at least in part on factually erroneous statements, the court nevertheless ruled that no amendment should be ordered. The Army doctor apparently did not rely exclusively on the now discredited facts when he rendered his opinion. It is conceivable, the court stated, that based on other facts and in light of then accepted medical principles, the doctor might still have reached the same medical opinion. Considering that: (1) the matter concerned professional judgment; (2) the factual predicates of the opinion in question were diverse; (3) the opinion was formulated in good faith; and (4) it was based on observations made nearly 30 years ago, the court concluded that the challenged medical judgments were not "so thoroughly discredited as to justify their deletion or contradiction in the record."[9]

This opinion makes evident that with respect to matters of judgment, as opposed to matters of fact, the plaintiff has to present a very persuasive case in order to obtain an amendment of records. This is especially true of matters over which the military has a great deal of discretion. For example, it would appear to be difficult to amend successfully a commanding officer's conclusion that a servicemember was a "rehabilitative failure" on the ground that the conclusion was inaccurate within the meaning of the Act.

The Privacy Act should probably be used in a case in which the chances for a discharge upgrade would be significantly improved if certain critical military records were amended, and the veteran could produce persuasive evidence that the requested amendment is necessary in order to make the record accurate. When the character of discharge is improper because of a legal error, which would require the DRB or BCMR to upgrade, the Privacy Act should be used to request an amendment of the character of discharge, without resorting to the DRB or BCMR.[10]

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[5] Case on file with the National Veterans Law Center. The Court of Appeals for the District of Columbia expressly approved the *McEnearney* case and endorsed a broad reading of the Privacy Act in Baxter v. Claytor, No. 77-1984, slip op. at 25 n.40 (D.C. Cir. Dec. 19, 1978), stating:

> The Navy corrected the general discharge of John C. McEnearney, Jr., when he submitted a Privacy Act claim that his discharge certificate designation was based on a conviction found to be invalid. . . . We find the Navy's interpretation of this provision to be correct. To take as an example a past case, Homcy v. Resor, 147 U.S. App. D.C. 277, 455 F.2d 1345 (1971), it would be senseless to consider Homcy's record to have been "accurate" when it designated his distinguished military career as dishonorable based on an invalid court-martial whose conclusions were the result of command influence.

The entire opinion in this case was later vacated, however, and on reissuance did not mention the Privacy Act ____ F.2d ____, 9 MIL. L. REP. 2644 (1981).

[6] 482 F. Supp. 770.

[7] *Id.* at 772.

[8] *Id.* at 774. Other federal courts have implicitly accepted this proposition. *See* White v. Civil Service Commission, 589 F.2d 713 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 830 (1979); Turner v. Department of the Army, 447 F. Supp. 1207, 1213 (D.D.C. 1978), *aff'd mem.*, 593 F.2d 1392 (D.C. Cir. 1979). *But see* Blevins v. Plummer, 613 F.2d 767 (9th Cir. 1980) (holding that the Privacy Act only allows for amendment of errors of fact, not errors of judgment).

[9] *Supra* note 6, at 775.

[10] The Privacy Act was used successfully to challenge the entire character of discharge in Maness v. Department of the Army, No. 77-2164 (D.D.C. May 25, 1978). In that case, the plaintiff claimed that his General Discharge was "inaccurate" because he met the objective standards of AR 635-200, Para. 1-9d(2) for an Honorable Discharge. From 1955 to 1975, the regulation provided that an Army servicemember separated at expiration of the normal term of service "will" receive an Honorable Discharge if (s)he: (1) has conduct ratings of at least "Good;" (2) has efficiency ratings of at least "Fair;"

25.3 ADVANTAGES OF USING THE PRIVACY ACT

The availability of the Privacy Act to amend military records has significant advantages over the discharge upgrade process provided by the DRBs and the BCMRs:

- Determination of a Privacy Act administrative request occurs relatively quickly;[11]
- If the administrative request is denied, the veteran has a right to *de novo* review by a federal district court (this is a much more favorable standard of review for a veteran than the "arbitrary and capricious" standard applied by federal courts to a DRB or BCMR decision denying relief);[12]
- If the administrative request is denied, and the veteran substantially prevails in federal court, the plaintiff may recover reasonable attorneys' fees (in contrast, if a DRB or BCMR decision is overturned in federal court, an award of attorneys' fees to the veteran is not generally authorized).[13]

25.4 PROCEDURES FOR AMENDING RECORDS

The process set forth in the Privacy Act for obtaining an amendment of records is similar to the process set forth in the Freedom of Information Act,[14] for obtaining disclosure of agency records. The first step is to make an administrative request for an amendment of records. If that request is denied, an administrative appeal is necessary.[15] If the appeal is denied, then a lawsuit can be filed in federal district court seeking a court order requiring that the requested amendments be made.

25.4.1 FILING AN ADMINISTRATIVE REQUEST AND ADMINISTRATIVE APPEAL

A request for an amendment of military records should state the portions of the record that the individual wants to have changed, and the reasons why the change should be made. This can be either a simple statement of belief that the record incorrectly reflects the facts, or a detailed rebuttal of the information contained in the record. Both the envelope and the request itself should be labeled "PRIVACY ACT REQUEST," and it is advisable to mail the request by certified mail, return receipt requested.[16]

The agency must send a written acknowledgment of a request to amend records within ten days of its receipt. Then the agency must "promptly" make the requested amendment of records or provide a formal written denial of the request.[17] The denial must include a statement of reasons, an explanation of the right to an administrative appeal, and the address to which appeals should be sent.[18]

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[10] (continued)

and (3) has not been convicted more than once by a special court-martial.

Maness' record fulfilled these objective criteria (although he did have a general court-martial conviction reversed on appeal). The Army denied his administrative Privacy Act requests for an amendment of the records. After the Privacy Act lawsuit was filed, however, the Army agreed to recharacterize his discharge as Honorable and expunge all references to the fact that he had ever received a less than Honorable Discharge.

In the settlement papers, the Army expressly denied that the Privacy Act applied to the change of records in the Maness case. It did, however, agree to pay the plaintiff attorneys' fees for litigating the lawsuit, and the Privacy Act appears to be the only authority for such an award.

[11] *See* §§ 25.4.1, 25.4.2 *infra*.

[12] That *de novo* review is available, however, does not necessarily mean that the court will order amendment of records if a preponderance of the evidence before the court favors the veteran's version of the facts. In *R.R. v. Department of the Army*, 482 F. Supp. 770 (D.D.C. 1980), the court stated:

> On occasion accuracy is achieved only by allowing a disputed question of fact or judgment previously recorded to remain in the record, qualifiifed by subsequent data. On the other hand, it may be necessary to eliminate clear mistakes of fact or irresponsible judgment from an individual's file so as not to prejudice prospects for a fair determination of his rights or benefits. [482 F. Supp. at 773].

[13] As of October 1, 1981, attorneys' fees will be authorized for some federal court lawsuits challenging a DRB or BCMR decision to deny an upgrade in discharge. The Equal Access to Justice Act, Pub. L. No. 96-481 (Oct. 24, 1980), provides that attorneys' fees shall be paid by the federal government in civil actions other than tort claims and 5 U.S.C. § 554 adversary proceedings, if: 1) the government is a party; (2) the government does not prevail; and (3) it cannot establish that its position was "substantially justified." Although it is arguable whether a DRB proceeding is a 5 U.S.C. § 554 proceeding, it is certainly not an adversarial proceeding, which is defined by the Act as one in which the position of the government is represented by counsel or otherwise.

[14] 5 U.S.C. § 552.

[15] *See* Appendix 25.1 (sample request).

[16] Former Army servicemembers should file requests for amendments of records at one of the following addresses.

For reserve and retired personnel not on active duty, write to: Commander, U.S. Army Reserve Components, Personnel And Administration Center, 9700 Page Boulevard, St. Louis, Missouri 63132.

For enlisted personnel discharged or deceased prior to November 1912 or for officers discharged or deceased prior to July 1917, write to: Director of Military Archives, Office of National Archives, NARS, GSA, Washington, D.C. 20408.

For Army veterans who do not fit into one of the two above categories (the two above categories do not include most Army veterans) write to: Director, National Personnel Records Center, GSA, 9700 Page Boulevard, St. Louis, Missouri 63132.

Former Navy servicemembers who wish to request an amendment of records should write to: Commander, Naval Military Personnel Command, Code 06P, Washington, D.C. 20370.

Former Marine Corps servicemembers who wish to request an amendment of records should write to: Commandant, Marine Corps, Headquarters, U.S. Marine Corps, Code MSRB, Washington, D.C. 20830.

Former Air Force servicemembers who wish to request an amendment of records should write to: National Personnel Records Center, GSA, Military Personnel Records, 9700 Page Boulevard, St. Louis, Missouri 63132.

Before filing a Privacy Act request for amendment of records, the regulations of the military department concerning this provision should be reviewed. *See* 32 C.F.R. § 505.2 (Army regulations governing Privacy Act requests for access to or amendment of individual records); 32 C.F.R. § 701.106 (Navy/Marine Corps regulations); 32 C.F.R. § 806b.14 (Air Force regulations). *See* App. 25A *infra* (example of a Privacy Act request).

[17] 5 U.S.C. § 552a(d)(2)(B).

[18] The address to which an administrative appeal of a denied Privacy Act request for amendment of records should be sent follows.

Army appeals should be sent to: Department of the Army Privacy Review Board, Hq/DA, Washington, D.C. 20310.

Navy appeals should be sent to: Judge Advocate General (Code

The agency usually sets a time limit within which to file an appeal from an administrative denial of a request for amendment of records. Once an appeal is filed, it must be processed and decided within 30 days, unless extended with notice of good cause. If the appeal is denied, the requestor has the right to file a statement, which should be concise, setting forth the reasons why the requestor disagrees with the refusal of the agency to amend the records. This statement must be kept permanently in the individual's records. The agency must also notify the individual of his/her right to judicial review of the denial of the request.[19]

25.4.2 FEDERAL COURT REVIEW OF A DENIAL OF A REQUEST TO AMEND RECORDS

The Privacy Act gives an individual whose request for amendment of records has been denied the right to a *de novo* review in a federal district court.[20] The court has the power to order the agency to make the requested amendment of records and to delete inaccurate information.[21] Money damages can only be awarded in certain cases.[22]

Proper venue exists where the veteran-plaintiff resides or has a principal place of business, or where the records are situated, or in the District of Columbia.[23] The proper defendant is the agency itself, as well as the head of the agency.[24] The complaint must be filed within two years of the denial of an amendment request by the appeal authority.[25] The plaintiff bears the burden of proof.[26]

As part of discovery, the plaintiff-veteran may want to learn how the agency has decided similar requests for amendment of records in the past. If the plaintiff substantially prevails, the court may award reasonable attorneys' fees and costs to the plaintiff.[27]

25.4.3 CHALLENGING THE FAILURE TO MAINTAIN RECORDS ACCURATELY

In order to qualify for an award of monetary damages under the Privacy Act, a plaintiff must show:

- That the agency failed to maintain records sufficiently accurate to assure fairness to the individual in the determination;[28]
- That this failure had an "adverse effect" on the individual;[29] and
- That the agency action or omission was "in a manner which was intentional or willful."[30]

If a plaintiff succeeds in meeting these three criteria, the plaintiff may recover his/her actual damages or a minimum of $1,000, along with the costs of the action together with reasonable attorneys' fees.[31] Although it may be difficult to win a case challenging the failure to maintain records accurately, this cause of action should be joined with a complaint challenging denial of a request to amend records. A court may be willing to order civil damages if it finds that the request to amend records was improperly denied.

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[18] (continued)

14L), Department of the Navy, 200 Stovall Street, Alexandria, Virginia 22332.

Marine Corps appeals should be sent to: Commandant, Marine Corps, Headquarters, U.S. Marine Corps, Code JA, Washington, D.C. 20380.

Air Force appeals should be mailed to: Secretary of the Air Force (SAF/AA), Washington, D.C. 20330.

Occasionally, when the military agency believes that the request for amendment of records is not a request covered by the Privacy Act (for example, when the request is for an amendment of "judgmental matters"), the military agency will refer the requestor to the BCMR, but will fail to mention either the right to an administrative appeal or the address to which appeals may be sent. If this occurs, one course of action is to go directly to federal court. If this is done, however, the agency may assert the defense that the veteran did not appeal the denial of the Privacy Act request to the appeal authority. Since exhaustion of an administrative appeal is required by the Act as a prerequisite to federal court jurisdiction, courts may well force the requestor to exhaust an administrative appeal. *See* Harper v. Kobelinski, 589 F.2d 721 (D.C. Cir. 1978). Therefore, even if the military agency does not refer to a right to appeal, the veteran should file an administrative appeal.

[19] 5 U.S.C. § 552a(d)(3).

[20] 5 U.S.C. §§ 552a(g)(1)(A), 552a(g)(2)(A).

[21] *Id.*

[22] *See* § 25.4.3 *infra*.

[23] 5 U.S.C. § 552a(g)(5).

[24] *See, e.g.,* Nemetz v. Department of the Treasury, 446 F. Supp. 102 (M.D. Ill. 1978); Rowe v. Tennessee, 431 F. Supp. 1257, 1264 (E.D. Tenn. 1977).

[25] *See* 5 U.S.C. § 552a(g)(5).

[26] *See* Mervin v. FTC, 591 F.2d 821, 827 (D.C. Cir. 1978). *See* App. 25B *infra* (example of a Privacy Act complaint).

[27] *See* 5 U.S.C. § 552a(g)(3)(B).

[28] *See* 5 U.S.C. § 552a(e)(5).

[29] *See* 5 U.S.C. § 552a(g)(1)(D). The Court of Appeals for the Tenth Circuit has held that injury to an individual's feelings qualifies as an "adverse effect" within the meaning of the Privacy Act. *See* Parks v. IRS, 618 F.2d 677 (10th Cir. 1980).

[30] *See* 5 U.S.C. § 552a(g)(4).

[31] *Id.*

APPENDIX 25A
SAMPLE PRIVACY ACT REQUEST

Re: Social Security No. _____
Privacy Act Request for Amendment of Records

Dear Sir or Ms.:

Pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a, and 32 C.F.R. § 505.2, I hereby request that you amend the military records of _____ to reflect accurately the fully honorable character of his military service. Mr. _____' military records inaccurately state that the character of his service was "under honorable conditions." I attach a copy of Mr. _____' authorization for me to make this request on his behalf. [*See* Exhibit 1]

Army regulations governing the characterization of a member's service state that

> A member's service will be characterized as honorable by the commanding officer authorized to take such action or higher authority when a member is eligible for or subject to separation and it has been determined that he merits an honorable discharge under the following standards:
>
> (a) Has conduct ratings of at least "Good."
> (b) Has efficiency ratings of at least "Fair."
> (c) Has not been convicted by a general court-martial.
> (d) Has not been convicted more than once by a special court-martial.

[*See* AR 635-200, Para. 1-9d(2), at Exhibit 2]

Each and every rating that Mr. _____ received during his service with the Army was excellent (two ratings in conduct and three ratings in efficiency). [*See* Exhibit 3] Mr. _____ does not have any convictions by general or special courts-martial. Thus, by its own regulations, the Army must characterize Mr. _____' military service as honorable.

The source of the inaccurate characterization of Mr. _____' military service may be simple clerical error or oversight. Mr. _____ had a general court-martial conviction which was set aside on April 19, 1974. [*See* Exhibit 4] It may well be that the person who was responsible for characterizing Mr. _____' military service considered said conviction because he or she was not aware that it had been set aside. Whatever the reason, however, it is clear that the conviction should not have been considered. It had been set aside, and Mr. _____' regulatory right to a fully honorable service characterization had been ordered restored.

The Privacy Act enables an individual such as Mr. _____ to request amendment of any information in an agency's system of records which he believes is not "accurate, relevant, timely, or complete." [5 U.S.C. § 552a(d)(2)] Characterization of Mr. _____' military service as "under honorable conditions" is inaccurate under AR 635-200, Para. 1-9d(2). Therefore, I request on Mr. _____' behalf that you amend your records to reflect a fully-honorable service characterization.

In compliance with both the letter and spirit of the Privacy Act, I trust that you will take immediate and complete action to correct this inaccurate entry in Mr. _____' military records. In the unlikely event that you refuse to comply with this request in whole or in part, I expect prompt notification of the reasons for the refusal and the procedures established by the Army for Mr. _____ to request a review of the refusal. [5 U.S.C. § 552a(d)(2)(B)(ii)] If you have any questions, do not hesitate to contact me.

Thanking you in advance for your expected speed and courtesy in this matter, I am,

Sincerely yours,

APPENDIX 25B
SAMPLE PRIVACY ACT COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

Plaintiff

v.

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

DEPARTMENT OF THE ARMY
The Pentagon
Washington, D.C. 20310
(202) 545-6700

Defendant

Jurisdiction

1. This is an action under the Privacy Act, 5 U.S.C. § 552a, for a declaratory judgment that the records of defendant agency which reflect the character of plaintiff's military service as "general under honorable conditions" are inaccurate and for an order compelling the defendant agency to amend each such record to reflect that the accurate character of plaintiff's military service is "honorable."

2. This court has jurisdiction over this action pursuant to 5 U.S.C. § 552a(g)(1) and venue over this action pursuant to 5 U.S.C. § 552a(g)(5).

Parties

3. Plaintiff _____ is a former member of the United States Army who entered service in August 1970 and was discharged after four years of service. During his four years of service, plaintiff served 15 months in Viet Nam, for which he earned a Viet Nam Service Medal, Republic of Viet Nam Campaign Medal, and Republic of Viet Nam Cross of Gallantry.

4. Defendant DEPARTMENT OF THE ARMY is an agency which maintains a system of records containing information pertaining to plaintiff.

Facts Underlying Plaintiff's Cause of Action

5. When a servicemember is discharged from employment with defendant agency, the agency issues the servicemember a discharge certificate which characterizes the quality of service the individual rendered during the period of service completed. For enlisted personnel discharged at expiration of term of service, defendant issues either an "honorable" discharge or a "general" discharge "under honorable conditions."

6. When plaintiff was separated at expiration of his term of service, he was issued a "general" discharge "under honorable conditons."

7. Those military servicemembers who are issued "general" discharges are stigmatized, their social and economic opportunities in civilian life are impaired, and they encounter substantial prejudice in civilian life by virtue of such less than honorable discharge.

8. Army Regulation ("AR") 635-200, para. 1-9d(2) governed the type of discharge defendant should have issued plaintiff and states that:

> A member's service will be characterized as honorable by the commanding officer authorized to take such action or higher authority when a member is

eligible for or subject to separation and it has been determined that he merits an honorable discharge under the following standards:

(a) Has conduct ratings of at least "Good."
(b) Has efficiency ratings of at least "Fair."
(c) Has not been convicted by a general court-martial.
(d) Has not been convicted more than once by a special court-martial.

9. During his service in the military, plaintiff had conduct ratings of at least "Good," had efficiency ratings of at least "Fair," had not been convicted by a general court-martial (other than one reversed on appeal), and had not been convicted more than once by a special court-martial.

10. By letter dated May 26, 1977, addressed to The Department of the Army Discharge Review Board, Office of the Secretary of the Army (a copy of which is attached hereto as Exhibit A), plaintiff requested that defendant amend his military records pursuant to the Privacy Act to reflect the character of his service as "honorable," rather than as "general," which plaintiff asserted was inaccurate as a result of AR 635-200, para. 1-9d(2).

11. Plaintiff did not receive a response to this request and, by letter dated June 28, 1977, addressed to _____ (a copy of which is attached hereto as Exhibit B), plaintiff reiterated his May 26, 1977 Privacy Act request.

12. By letter dated July 20, 1977 (a copy of which is attached hereto as Exhibit C), plaintiff's request was denied.

13. By letter dated August 15, 1977, addressed to the Department of the Army Privacy Review Board (a copy of which is attached hereto as Exhibit D), plaintiff appealed the initial denial of his request.

14. By letter dated October 7, 1977 (a copy of which is attached hereto as Exhibit E), plaintiff's request was finally denied.

15. Plaintiff has exhausted the administrative remedies required by the Privacy Act, 5 U.S.C. § 552a.

16. The Privacy Act does not require plaintiff to exhaust administrative remedies that may be available to amend his records pursuant to other statutes.

Cause of Action

17. Defendant's failure to amend plaintiff's military records as requested violates the Privacy Act, 5 U.S.C. § 552a(d).

Prayer for Relief

WHEREFORE, plaintiff prays the Court grant the following relief:

(1) Issue a declaratory judgment that plaintiff's "general" discharge "under honorable conditions" is inaccurate;
(2) Order defendant to amend all of its records containing information pertaining to the character of plaintiff's service to reflect that the character of plaintiff's service is "honorable";
(3) Award to plaintiff reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. § 552a(g)(2)(B); and
(4) Grant such other and further relief as may be just and equitable.

Respectfully submitted,

CHAPTER 26
ENTITLEMENT TO
VETERANS ADMINISTRATION BENEFITS

26.1 INTRODUCTION

While in some cases veterans with less than honorable discharges are not precluded from Veterans Administration (VA) benefits,[1] in others they are not eligible despite the possession of Honorable Discharges (HDs) because of the reason for discharge. The VA can determine eligibility prior to an upgrade; however, in no case does the VA upgrade a discharge.

[1] *See* Ch. 27 *infra.* (discussion of VA benefit programs and claims procedures); App. 26A *infra.* (chart showing eligibility status based on character of discharge).

The VA unofficially views the question of eligibility[2] for benefits as an issue to be resolved by the military on the basis of the character of discharge awarded;[3] it therefore prefers that eligibility be established through the DRB or BCMR process. VA rules and procedures concerning character of discharge are important, however, because:

- It is possible to get a favorable VA adjudication of eligibility despite a less than honorable discharge;
- In some circumstances, other benefit-awarding agencies request the VA to make "character of discharge determinations";[4]
- Tactical considerations in fixing eligibility dates or maximizing benefit income may be served by applying for a VA adjudication;
- Benefit eligibility rules may affect a veteran's decision to apply to a Discharge Review Board (DRB) or to a Board for Correction of Military Records (BCMR); and
- Rules governing eligibility for time-limited VA benefits may allow the VA to find that benefit eligibility expired in a certain case because the veteran was "not prevented"[5] from receiving VA benefits by the character of his/her discharge.

VA eligibility is based on a determination of whether an applicant is statutorily barred from benefits due to the reason for his/her discharge[6] and whether (s)he meets the definition of a veteran: one who was discharged "under conditions other than dishonorable."[7] The VA regulations interpreting this phrase list a series of regulatory bars[8] and leave a great deal of discretion to the VA rating boards. The eligibility determination is further complicated by a 1977 change in law,[9] enacted in part to deny benefits to veterans who received upgrades under two 1977 special DoD upgrade programs,[10] altering several important VA rules relating to character of discharge.

Some VA employees are hostile to holders or former holders of bad discharges and may not scrutinize important but often subtle, eligibility criteria.

26.2 GENERAL RULES AND PROBLEM AREA CHECKLISTS

VA rules relating to less than honorable discharges and upgraded discharges often appear to have no internal logic. The general rules and checklists that follow are intended to identify problems that may be encountered and points that should be considered.

26.2.1 GENERAL RULES

These general rules should be reviewed before analyzing a VA eligibility problem or filing for an upgrade if the veteran's interest is primarily in the receipt of VA benefits:[11]

- A holder of an HD or General Discharge (GD), even if it is the result of an upgrade, is automatically eligible for benefits, absent a reason for discharge that statutorily bars benefits;
- A holder of a Bad Conduct (BCD) or Dishonorable Discharge (DD) issued by a general court-martial (GCM) is ineligible for benefits;
- A holder of an Undesirable Discharge (UD) or a BCD issued by a special court-martial (SPCM) must receive a favorable character of discharge determination from the VA in order to establish eligibility;
- The eligibility for benefits of a holder of a Clemency Discharge (CD) is governed by the rule applicable to the original discharge that the CD replaced;

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[2] For purposes of this and the following chapter, "eligibility" refers to the general qualification of a veteran for benefits while "entitlement" refers to the particular benefits for which an applicant has applied. In the case of a spouse or dependent, the veteran through whom a benefit is claimed must have been "eligible" or the claimant will not be "entitled" to receive the benefits sought. The term "veteran" is used herein to include persons whose claims are based upon another person's eligibility.

[3] The legislative history of the VA's authority to adjudicate the quality of a veteran's service for purpose of receiving benefits clearly shows that the Administrator of the VA must exercise this authority in a uniform fashion, and with a view to correcting hardships. Prior to the Servicemens Readjustment Act (SRA) of 1944, Pub. L. No. 78-346, 58 Stat. 284, there was no general standard of eligibility for veterans benefits based upon the character of a person's discharge or release from active service. Some laws required an HD, some required a discharge "under honorable conditions," others provided certain benefits for persons not "dishonorably discharged," and still others allowed compensation for certain injuries without regard to character of discharge. Section 1503 of the 1944 SRA established a general prerequisite of a discharge or release "under conditions other than dishonorable," which remains in effect. 38 U.S.C. § 101(2). The implementing regulatory provisions have, since 1944, included "moral turpitude" and "willful and persistent misconduct" as standards for an administrative determination that a discharge or release was or was not "under conditions other than dishonorable". Perhaps the VA's low rate of favorable adjudications concerning character of discharge reflects a practice of interpreting these phrases under 1944 standards, unlike the Review Boards' application of current standards in adjudicating discharges. Adoption of one of the two approaches by both the VA and the Review Boards would create a less costly and duplicative adjudicatory process; however, it can be argued that the two agencies have different objectives controlling their adjudications.

See generally Eligibility for Veterans' Benefits Pursuant to Discharge Upgrading: Hearings Before the Comm. on Veterans' Affairs United States Senate, 95th Cong., 1st Sess.; CONFERENCE REPORT ON SERVICEMENS READJUSTMENT ACT, H. R. REP. NO. 1624, 78th Cong., 2d Sess. (June 12, 1944); S. REP. NO. 755, 78th Cong., 2d. Sess. (March 18, 1944) (Report on S. 1767); H. R. REP. NO. 1418, 78th Cong. 2d. Sess. (May 5, 1944) (Report on S. 1767) 90 CONG. REC. 3136-37 (daily ed. March 24, 1944); VETERANS' BENEFITS IN THE UNITED STATES (1965); and Staff Report No. XII, Reports to the President by President's Commission on Veterans' Pensions. DISCHARGE REQUIREMENTS FOR VETERANS' BENEFITS (Sept. 12, 1956).

[4] *See* 38 C.F.R. § 3.12. The most common situation involves unemployment compensation. *See* § 28.4.1 *infra*.

[5] *See* note 125 *infra*.

[6] 38 U.S.C. § 3103 (a).

[7] 38 U.S.C. § 101(2). This does not refer to the Dishonorable Discharge. The similarity in terminology is often confusing to veterans.

[8] 38 C.F.R. § 3.12. *See* § 26.3.4 *infra*.

[9] Pub. L. No. 95-126, 91 Stat. 1106 (Oct. 8, 1977) [hereinafter referred to as "Pub. L. No. 95-126"].

[10] These were the programs based on the President's directive of January 19, 1977 and the DoD Special Discharge Review Program (SDRP) of April 5, 1977. *See* Ch. 23 *supra* (discussion of special upgrade program cases); § 26.4 *infra*.

[11] *See* §§ 26.3-26.6.3 *infra* (qualifications to these rules).

- A holder of a voided enlistment may be ineligible for benefits;
- A veteran given an early discharge in order to reenlist, but whose second period of service ended with a UD, BCD, or DD, is eligible based on the period of honorable service;
- The characterization of active duty service governs when a veteran receives a UD while completing any inactive duty obligation;
- There is a specific statutory bar to benefits, despite an HD or GD, for veterans discharged as conscientious objectors who refused orders, veterans discharged as a result of GCMs, deserters, aliens who requested discharge in time of hostilities, veterans discharged with UDs for AWOLs of at least 180 days (absent "compelling circumstances" or favorable VA adjudications which occurred prior to 1977), and officers who resigned for the good of the service (to avoid court-martial);[12]
- There is a specific regulatory bar to benefits for veterans discharged in lieu of GCMs, or with UDs and BCDs (from SPCMs) if issued for mutiny, spying, offenses involving moral turpitude, homosexual acts committed under aggravating circumstances, or as a result of willful and persistent misconduct;[13]
- In cases in which the VA has determined that no statutory bar to benefits exists or that "compelling circumstances" exist to overcome the bar for 180-day or longer AWOLs, the VA must still determine whether or not a regulatory bar exists unless the character of service is HD or GD;
- An upgrade by a BCMR to HD or GD renders a veteran automatically eligible for benefits, regardless of the reason for, and original character of, discharge;
- An upgrade to HD or GD by a DRB prior to October 8, 1977, except as part of one of the two 1977 special programs or in the case of discharge issued through a GCM, renders a veteran automatically eligible for benefits, even if the discharge was for a reason that is a statutory bar;
- An upgrade to HD or GD by a DRB after October 8, 1977, does not remove a statutory bar to benefits but does remove a regulatory bar;
- An upgrade under one of the two 1977 special programs does not confer eligibility absent a second favorable review by a DRB or a favorable character of discharge determination by the VA;[14]
- Eligibility can be established in any case if the VA finds that the veteran was insane at the time of the offense(s);
- While the VA has the power to determine eligibility in all cases, it is much less likely to engage in close scrutiny of the discharge process than is a DRB or BCMR, and is much more likely to interpret its own regulatory guidelines narrowly;
- Once a veteran becomes eligible for benefits as a result of an upgrade, time periods for using them run from the date of the upgrade, unless the benefits in question are governed by a general statutory time limit; however, a successful VA adjudication not based on an upgrade or some other records correction does not give additional time to use benefits that began to run from the date of discharge, unless the adjudication resulted from a new rule governing the eligibility in question ("liberalizing legislation"); and
- Limited retroactive payments are possible if an upgrade or favorable VA adjudication occurs after an initial denial (based on character of discharge) by the VA.

26.2.2 PROBLEM AREA CHECKLISTS

The following checklists address potential tactical considerations, provide some guidance on choice of forums, and highlight cases in which receipt of VA benefits is likely.

26.2.2.1 Situations in Which Favorable VA Adjudications Are Likely Despite Character of or Reason for Discharge

- UD was received and now medical benefits are sought for injuries incurred "in line of duty" (absent discharge for a reason named in a statute barring benefits).[15]
- UD was received from reserves after Honorable or General separation from active duty.[16]
- Any character of or reason for discharge that bars benefits was received, but prior period of service was honorably completed.[17]
- Any character of or reason for discharge that bars benefits was received, but insanity existed.[18]
- Any reason for discharge was received, but character of discharge was upgraded to HD or GD by a BCMR.[19]
- UD or BCD (from SPCM) was received for "non-aggravated" homosexual acts.[20]
- UD or BCD (from SPCM) was received for minor and isolated offenses, for AWOL(s) based on "compelling circumstances," or for venereal disease.[21]
- UD or BCD (from SPCM) (whether upgraded or not) was received as result of AWOL of more than 180 days *if* VA finds "compelling circumstances" for the AWOL.[22]

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[12] *See* § 26.3.3 *infra*; 38 U.S.C. § 3103(a); 38 C.F.R. § 3.12(c).
[13] *See* § 26.3.4 *infra;* 38 U.S.C. § 101(2); 38 C.F.R. § 3.12(d).
[14] *See* § 26.4 *infra;* Ch. 23 *supra;* 38 U.S.C. § 3103(e).
[15] *See* § 26.3.2.3 *infra;* 38 C.F.R. § 3.360 (effective since 1977).
[16] *See* § 26.3.2.2 *infra.*
[17] *See* § 26.3.2.4 *infra*; 38 U.S.C. § 101(18); 38 C.F.R. § 3.13(c) (effective since 1977).
[18] *See* § 26.3.2.1 *infra;* 38 U.S.C. § 3103(b); 38 C.F.R. § 3.12(b).
[19] *See* § 26.3.3 *infra;* 38 C.F.R. § 3.12(e).
[20] *See* § 26.3.4.6 *infra*; 38 C.F.R. § 3.12(d)(5) (effective since 1980).
[21] *See* § 26.3.4.5 *infra;* 38 C.F.R. § 3.12(d)(4).
[22] *See* § 26.3.3.6 *infra;* 38 C.F.R. § 3.12(c)(6) (effective since 1977).

26.2.2.2 Choice of Forum

The desirability of a particular forum depends upon whether the veteran is primarily interested in benefits or in an upgrade and upon the prevailing policies and processing times in the appropriate service and VA regional office.[23] While it is possible to apply to a DRB or BCMR and to the VA (and sometimes to all three) simultaneously, the logistics of getting sets of records to different agencies on schedule and other issues should first be considered:

- Is the veteran currently enrolled in an educational program for which (s)he would receive benefits upon a favorable adjudication?
- What are the rules concerning when the time period (delimiting date) for the use of educational benefits begins to run?[24]
- Would it be beneficial to lose a VA character of discharge determination in order to fix the eligibility date after an upgrade?[25]
- In a statutory bar case where the veteran is primarily interested in an upgrade, a DRB personal appearance hearing is more likely to result in relief than a BCMR record review is; however, it may be difficult later to persuade the BCMR to remove the bar to benefits once the veteran has an HD.[26]
- Must some action be taken to reopen a VA claim or to delay a pending claim to maximize retroactive payments when an upgrade occurs?[27]
- Do pre-October 8, 1977, adjudications by the VA or DRB affect the case?[28]

26.3 ADJUDICATION OF STATUTORY AND REGULATORY BARS

26.3.1 GENERAL PROCEDURES

The VA must determine whether a bar to benefits exists when a veteran seeking adjudication of his/her rights to VA benefits appears to have been discharged for one of the reasons for which there is a statutory bar to benefits.[29] Additionally, the VA must determine whether the holder of a UD or BCD (from an SPCM) meets the statutory definition of a veteran, *i.e.*, one who was discharged "under conditions other than dishonorable."[30]

Prior to October 8, 1977, an upgrade by any Review Board removed both statutory and regulatory bars and was binding on the VA.[31] An upgrade to HD or GD by a DRB after that date can only remove a regulatory bar; an upgrade to HD or GD by a BCMR or a favorable determination by the VA at any time can remove any bar. Upgrades that occurred during one of the two special programs in 1977 and the period when Pub. L. No. 95-126 came into effect often create confusing situations which may have been mishandled by the VA.[32]

The VA notifies a veteran before a character of discharge determination is made in his/her case. The initial notice specifies the applicable criteria, procedural rights including a hearing, the effects of an adverse determination, and appeal rights.[33] Character of discharge decisions made at VA Regional Offices are not indexed or otherwise available for research. The Board of Veterans Appeals (BVA) began to index these decisions in 1977.[34]

Normally the VA requires the appropriate military service to produce a copy of the veteran's separation document (DD 214) before benefits are paid. Because it often did not receive such documentation until several months after an upgrade, the VA, in 1980, agreed to accept DRB or BCMR decisional documents as proof of character of service.[35]

26.3.2 GENERAL EXCEPTIONS

26.3.2.1 Insanity

Insanity at the time of the offense(s) causing the discharge creates an exception to both statutory and regulatory bars.[36] The burden is on the claimant to

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[23] *See* § 27.5 *infra* (VA adjudication procedures). The DRBs and BCMRs place little significance on VA determinations of ineligibility; however, the VA places great significance on Review Board findings of fact.

[24] Normally, the ten year period to use these benefits runs from the day of the upgrade; however, when new rules make eligible a veteran previously barred, the ten year period runs from the date of the change in rule. Two examples are the 1977 rule change relating to benefits for the honorable period of service in a situation in which a reenlistment ended with a discharge barring benefits and the 1980 rule change relating to UDs and BCDs (from SPCMs) for homosexual acts. *See* § 26.6 *infra*.

[25] *See* note 135 *infra*.

[26] This most often occurs in the cases of officers who resigned for the good of the service. *See* § 26.3.3.4 *infra*.

38 U.S.C. § 3103(e) speaks vaguely of "the action of" a BCMR as removing a statutory bar; however, the VA has determined that a BCMR upgrade to HD or GD without a change in reason for discharge is sufficient to remove a statutory bar. 38 C.F.R. § 3.12(e). The effect of a DRB upgrade *and* a change of reason for discharge in a statutory bar situation is not stated anywhere; however, removal of the bar in such a case is unlikely.

[27] *See* § 26.6.1.2 *infra*.

[28] *See* 38 C.F.R. §§ 3.12(c)(6), (f); § 26.4 *infra*.

[29] 38 U.S.C. § 3103(a).

[30] 38 U.S.C. § 101(2). *See* note 3 *supra*.

[31] 38 C.F.R. § 3.12(f). The legislative history of Pub. L. No. 95-126, however, indicates that this was probably not the original intent of Congress and that there was confusion in this regard prior to the clarification contained in Pub. L. No. 95-126. See *Eligibility for Veterans' Benefits Pursuant to Discharge Upgrading: Hearings Before the Comm. on Veterans' Affairs, United States Senate,* 95th Cong., 1st Sess., app. D, at 9.

[32] This was the experience of the authors and many veterans counselors with whom they were in contact. *See* Ch. 23 *supra* (discussion of identification of these cases); § 26.4 *infra*.

[33] *See* § 27.5 *infra* (discussion of VA claims adjudication); Dept. of Veterans Benefits Manual M21-1 [hereinafter cited as M21-1], ¶ 14.02, Sep. 11, 1979 (notification procedures).

[34] This index is available free of charge in microfiche (48x, vertical configuration) from Appellate Index and Retrieval Staff, BVA (01C1), Washington, D.C. 20420. The decisions indexed therein were not researched for purposes of this manual.

[35] *See* 45 Fed. Reg. 72,654 (1980) (amending 38 C.F.R. § 3.203); VA Regulation [hereinafter cited as VAR] § 1203, Transmittal Sheet 678, Oct. 28, 1980.

[36] 38 U.S.C. § 3103(b); 38 C.F.R. § 3.12(b). VA regulations offer no definition of insanity for these purposes. An enlistment contract signed by a person while insane does not result in eligibility based on that enlistment. 38 C.F.R. § 3.14(b).

establish insanity.[37] Postdischarge evidence of psychiatric disorders, if available, should be presented. The VA generally assumes that the military determination of sanity was correct. New evidence, however, might convince the VA that a military determination was made cursorily, under pressure, by an unqualified examiner, or with the principle aim of eliminating a troublemaker.

26.3.2.2 Discharge from Reserves

Servicemembers who serve less than six years on active duty and who are honorably separated become members of the reserve forces until a total of six years active and inactive service is accumulated, at which time they are discharged. Normally, a veteran performs no duties in the reserves unless (s)he chooses to attend active reserve drills for pay. Every service claims authority to issue a GD or UD at the end of a veteran's six years of composite service, despite the character of the veteran's active duty separation, based on occurrences, such as a civilian court conviction, taking place while the veteran was a reservist.[38] The VA considers only the period of active duty in determining VA eligibility.[39] This rule should also apply to veterans who receive bad discharges from the active reserves, if their terms of active duty were long enough to establish entitlement to a benefit program.

26.3.2.3 VA Medical Care for Veterans With UDs

Since October 8, 1977, all veterans with UDs have been eligible for VA medical care and related benefits to treat any disability incurred or aggravated "in line of duty" during active service, provided that no statutory bar exists.[40]

Even if the character of discharge determination as to a regulatory bar is unfavorable, a veteran's file should be marked "For Medical Care Eligibility Under Chapter 17, Title 38, U.S.C. (PL 95-126)" and (s)he should be notified of potential benefits.[41] All veterans with UDs who served in Vietnam, for example, who are not statutorily barred from benefits, should be eligible for Agent Orange testing[42] and for the psychological readjustment program for Vietnam veterans.[43]

26.3.2.4 Early Discharges to Reenlist (Conditional Discharges)

Enlisted servicemembers who decide to reenlist prior to completion of their initial periods of service are often given early HDs on the condition that they immediately reenlist.[44] Prior to October 8, 1977, the VA considered such HDs to be merely conditional discharges; eligibility for benefits was determined by adjudicating the final discharge received, despite the fact that a veteran might have successfully completed many years of service. This rule was changed by legislation in 1977.[45]

Current VA published regulations appear to limit this change to formal reenlistments;[46] however, unpublished directives provide for broader application.[47] It is important to screen a veteran's file to determine whether the change is applicable, because benefits might be immediately available and because, if a DRB or BCMR does not upgrade the veteran's final discharge, the ten years within which VA educational benefits must be used run from October 8, 1977.[48]

VA regulations do not specify how to measure conduct in determining whether or not a veteran was eligible for an HD or GD at the originally scheduled separation date.[49] It is clear, however, that Congress intended to reward veterans who served honorably for the number of days constituting their period of initially obligated service even if, in subsequent periods of service, they were discharged for reasons

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[37] M21-1, ¶ 14.05, Jan. 29, 1976 permits the adjudicator to raise the issue when "the evidence indicates the possible existence of insanity". The VA must obtain all relevant service and postservice medical records as well as complete transcripts of any relevant court-martial or board proceedings.

[38] A servicemember is "separated" if a reserve obligation exists and "discharged" at the end of the obligation. *See* § 12.4 *supra* (discussion of limitations on authority of military services in this regard).

[39] Letter from VA General Counsel, Guy H. McMichael III, to National Military Discharge Project (Jan. 16, 1978). The policy is not published; thus, a veteran denied relief by a VA regional office in one of these cases may be able to argue successfully that the time during which (s)he should be eligible to use certain benefits should run from the date of any successful subsequent adjudication.

[40] Pub. L. No. 95-126, § 2; 38 C.F.R. § 3.360.

[41] Dept. of Veterans Benefits Circular [hereinafter cited as DVB Cir.] 20-78-18, ¶ 14, Mar. 24, 1978.

[42] *See* § 27.6.3 *infra*.

[43] *See* § 27.6.5 *infra*.

[44] These decisions are frequently prompted by a promise of a cash bonus or a desirable assignment.

[45] 38 U.S.C. § 101(18). Prior to 1977, relief could be sought at a BCMR. *See* AC 78-61461; AC 78-01519; AC 78-01517 (correction of records to show "complete and unconditional separation" at time of HD).

[46] 38 C.F.R. § 3.13(c).

[47] Program Guide [hereinafter cited as PG] 21-1, § G-1, change 263, Aug. 15, 1978.

[48] DVB Cir. 20-78-18, ¶ 15 b.(3), Mar. 24, 1978. If there is an upgrade of the last discharge, the ten-year delimiting date will begin to run from the date of the upgrade, if this provides the most favorable delimiting date; however, in no event can the delimiting date begin to run before October 8, 1977. *Id.* at ¶¶ 13b., 15e.(2).

Compensation and pension claims are governed by DVB Cir. 20-78-18, ¶ 13c. and M21-1, ¶ 14.01 i(3), Sep. 11, 1979. The originally scheduled discharge date, as certified by the service department, and all "presumptive periods" and other issues that relate to date of discharge are measured from that point. Where there was a previous disallowance of a claim, a retroactive payment of up to one year's benefits is possible. *See* § 26.6.1 *infra*.

[49] The only guidance provided by VA regulations is that

> [C]onsideration will be given to whether the veteran rendered faithful and meritorious service throughout the period of active duty for which he/she was obligated at the time of induction or enlistment. When the veteran has had several enlistments, the period to be considered will begin with the initial enlistment or induction and end with the date given by the service department as the completion date for the last full enlistment. DVB Cir. 20-78-18, ¶ 13 b., Mar. 24, 1978.

See also M21-1, ¶ 14.01 i(2).

There is no further explanation given for "faithful and meritorious service"; however, acts for which discharge proceedings were not initiated should not be sufficient to preclude eligibility. These acts, even if considered, together with acts occurring subsequent to the conditional discharge date, to be the basis of a disqualifying discharge, should not preclude eligibility because alone they would not have prevented an HD or GD on the critical date.

that statutorily bar benefits. As long as no offense was committed within the initial period of obligated service that would have led to a disqualifying discharge, the veteran should be eligible for benefits under the 1977 conditional discharge rule.[50]

26.3.2.5 Clemency Discharges and Secretarial Upgrades Under Article 74(b), U.C.M.J.

CDs were issued as a result of the 1974-75 Ford Clemency Program (FCP) for Vietnam-era absentees.[51] CDs replaced about 7,000 UDs, BCDs, and DDs. The receipt of a CD has no effect on VA benefit eligibility, and the original discharge or the action of a subsequent Review Board governs the VA's view of the character of discharge.[52]

The Secretary of each service may replace a BCD or DD with an administrative discharge for good cause.[53] This action removes the statutory bar to benefits based on a GCM conviction.[54] If the Secretarial upgrade is only to a UD, the VA must still determine whether or not a regulatory bar exists.

26.3.3 STATUTORY BARS TO BENEFITS

26.3.3.1 Introduction

Despite language in VA regulations concerning the binding nature of an HD or GD,[55] veterans discharged for a reason that falls within one of the statutory bars to benefits may be denied benefits no matter what character of discharge they have.

A statutory bar to benefits is difficult to remove, absent an upgrade by a BCMR or proof of insanity at the time of the offense leading to discharge. This is because such bars are almost always based on a reason for discharge that is clear from the record; factual development usually cannot change this, except in the case of the 180-day AWOL bar. In a case involving a statutory bar, resort to a BCMR, rather than a DRB, is desirable if VA benefits are the veteran's primary concern. It is unlikely that a DRB upgrade and change of reason for discharge can remove a statutory bar; however, DRB findings of fact might help persuade the VA that a bar does not exist.

26.3.3.2 Conscientious Objectors

A veteran discharged "as a conscientious objector (CO) who refused to perform military duty, wear the uniform, or comply with lawful order[s] of competent military authorities" is barred from VA benefits.[56] In practice, most veterans administratively discharged by reason of conscientious objection are not affected by this provision because most COs who were subject to the statutory bar were not administratively discharged, but punitively discharged by court-martial.[57] Persons found to be sincere COs are discharged administratively with HDs or GDs.[58]

VA regulations offer no guidance on what facts must be proved to support this bar or who shoulders the burden of proof. An applicant may want to argue that:

- The bar must be construed strictly;[59]
- A wrongful refusal to process or grant a CO application renders any subsequent orders illegal;[60]

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[50] M21-1, ¶ 14.01i. The following example appears at DVB Cir. 20-78-18, ¶ 13 b., Mar. 24, 1978:

Entered On Or Reenlisted On:	Term Of Enlistment:	Scheduled Discharge Date:
9-16-60	2 years	9-15-62
4-1-62	4 years	3-31-66
10-1-65	4 years	9-30-69

> The veteran, who had never been eligible for complete separation, was discharged 6/17/68 with an "other than honorable" discharge. . . . The veteran was absent without leave from 8/6/67 to 4/23/68 (more than 180 consecutive days) without compelling reasons. If, prior to 3/31/66, however, the veteran served faithfully and meritoriously, the character of discharge determination would conclude that although the 180-day bar under VAR 1012(C) applied to the discharge on 6/17/68, the veteran had honest, faithful and meritorious service from 9/16/60 through 3/31/66 and eligibility for VA purposes is established for that period under 38 USC 101 (18) and Public Law 95-126.

[51] *See* § 23.2 *supra*.

[52] 43 Fed. Reg. 15,153, cl. 1 (Apr. 11, 1978); M21-1, ¶ 14.01 f. The DRB jurisdictional rule is similar. 43 Fed. Reg. 13,566, cl. 3 (Mar. 31, 1978). Some CDs replacing GCM discharges appear to have been upgraded by DRBs pursuant to the FCP's January 19, 1977, directive (*see* § 23.2.4 *supra*). *See, e.g.*, MD 77-02252. The DRBs have no jurisdiction over discharges issued as a result of GCMs; therefore, VA benefits might be denied in such cases. 38 C.F.R. § 3.12(f).

CDs upgraded to HDs or GDs under the other 1977 special program are governed by the rule governing special program upgrades. *See* § 26.4 *infra*; 38 C.F.R. § 3.12(h).

[53] Art. 74(b), U.C.M.J., 10 U.S.C. § 874(b). *See* § 20.4.4 *supra*.

[54] Such an upgrade by a Secretary gives a DRB jurisdiction even if the original discharge was issued by a GCM. 43 Fed. Reg. 13,566, cl. 3 (Mar. 31, 1978). It should also remove the statutory bar attached to GCM convictions because the Secretary is acting under Congress's delegated authority analogously to the way (s)he acts in approving a BCMR upgrade that removes a statutory bar. The fact of congressional delegation is the important factor, not what office takes the action. There is, however, a contrary result in the situation of presidential issuance of a CD. *See* note 52 *supra*.

[55] 38 C.F.R. § 3.12(a) provides:

> If the veteran did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Veterans Administration as to character of discharge.

Prior to October 8, 1977, any upgrade, except under the 1977 special programs, removed a statutory bar. 38 C.F.R. § 3.12(f).

[56] 38 U.S.C. § 3103(a); 38 C.F.R. § 3.12(c)(1). This bar was created prior to the existence of regulations for obtaining in-service CO status. Would-be COs, before then, had to resort to the self-help described in the statute. Reynolds v. Dukakis, 441 F. Supp. 646, 5 MIL. L. REP. 2421 (D. Mass. 1977) (state statutory scheme denying state benefits to those honorably discharged as COs impermissibly conflicts with federal law). *But see* Johnson v. Robison, 415 U.S. 361, 2 MIL. L. REP. 2285 (1974) (not denial of equal protection to deny VA benefits to certain COs who performed alternative service instead of military service).

[57] COs, however, cannot be forced to perform duties inconsistent with their asserted beliefs while their applications for CO status or discharge are pending. *See* § 12.6.2.1 *supra* (discussion of CO procedures and law of conscientious objection).

[58] *Id.* Ironically, it would appear that veterans with HDs who fall within this bar are worse off than those with lesser discharges because the latter might have the bar removed by BCMR upgrades.

[59] VA regulations require that claimants be given the benefit of every doubt. 38 C.F.R. § 3.102. The BVA, in Docket No. 75-00489, May 21, 1975, ruled that two AWOL periods did not constitute a "refus[al] to perform military duties" by an honorably discharged conscientious objector.

[60] *See* § 12.6.2.1 *supra*.

- The orders (s)he refused were otherwise illegal;[61] or
- The applicant's possession of an HD or GD should place the burden on the VA to demonstrate the applicability of the bar.

26.3.3.3 Sentence of a General Court-Martial

Discharge by reason of a sentence of a GCM is a bar to benefits.[62] Absent a BCMR or Art. 74(b) upgrade, the only way to remove the bar is to prove insanity at the time of the offense leading to discharge.

In some cases, service Secretaries granted clemency prior to discharge, after appellate review of GCMs, by changing BCDs or DDs to UDs.[63] In these cases, the UDs should be adjudicated using regulatory bar standards.[64]

26.3.3.4 Resignation by an Officer

An officer who resigns "for the good of the service" (GOS)[65] is barred from benefits. The normal case involves resignation to escape trial by GCM and receipt of an Other Than Honorable Discharge (the officer's equivalent of a UD). This frequently occurred in homosexuality cases, particularly in the Navy and prior to 1970.

Since October 8, 1977, GOS-discharged officers have been barred despite having received an HD or GD or a DRB upgrade from a UD. Such veterans should seriously consider applying for BCMR review if they are concerned about VA benefits. An upgrade without a change in reason for discharge by a BCMR establishes a veteran's eligibility; however, if an HD is already possessed by the veteran (as a result, for example, of a DRB upgrade), the BCMR might have to change the reason for discharge in order to accomplish this result. Any application to a BCMR bypassing the DRB should clearly state that the applicant need not exhaust the DRB because the relief sought cannot be obtained from it.[66]

26.3.3.5 Deserters

A veteran discharged "as a deserter" is barred from VA benefits.[67] This bar applies only to veterans actually convicted of desertion by a court-martial;[68] it should not apply to veterans whose records reflect administrative determinations of desertion or GOS discharges in lieu of court-martial for desertion.

26.3.3.6 Aliens During Period of Hostilities

A veteran discharged "as an alien during a period of hostilities, where it is affirmatively shown that the veteran requested his or her release," is barred from VA benefits.[69] Military records must show that the veteran requested a discharge;[70] if they do not, the bar does not apply.[71]

26.3.3.7 AWOL of 180 Days

Since 1977, any veteran discharged with a UD, BCD, or DD for a continuous AWOL of at least 180 days duration has been barred from VA benefits, unless "compelling circumstances to warrant the prolonged absence" are demonstrated.[72] This bar applies in cases in which

- Upgrades under one of the two 1977 special programs took place even if the upgrades were "affirmed" by DRBs; and
- Eligibility was not established by "regular" upgrades or favorable character of discharge determinations prior to October 8, 1977.[73]

The bar applies even if part of the prolonged AWOL occurred after the servicemember's normal date of separation.[74] It does not apply if the actual reason for discharge was a reason other than the AWOL[75] or if part of the AWOL time was spent in "imprisonment or confinement."[76]

VA regulations[77] list three factors that are to be considered in determining whether compelling circumstances exist:

> (i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of

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[61] *See* note 57 *supra*.

[62] 38 U.S.C. § 3103(a); 38 C.F.R. § 3.12(c)(2). GCM sentences can include BCDs or DDs in the case of enlisted personnel, Dismissals in the case of officers.

[63] Art. 74(a), U.C.M.J., 10 U.S.C. § 874(a).

[64] *See* note 54 *supra*.

[65] 38 U.S.C. § 3103(a); 38 C.F.R. § 3.12(c)(3).

[66] One practitioner suggests that, after a DRB upgrade to HD, the applicant ask the BCMR to change the reason and authority on grounds that under current standards there would be a resignation in lieu of administrative action instead of court-martial. The application should make clear that VA benefits are sought. *See* FC 80-02821 (successful use of this approach). *But see* AC 78-04732 (after DRB had upgraded to HD, BCMR removed bar that was based on 180-day AWOL by finding "compelling circumstances" and ordering "correction of records to show that he was honorably discharged").

It is not likely that a DRB change of reason for discharge and an upgrade would remove the bar.

[67] 38 U.S.C. § 3103(a); 38 C.F.R. § 3.12(c)(4).

[68] VA regulations are silent in this regard; therefore, the term should be confined to its normal statutory meaning. *See* Art. 85, U.C.M.J., 10 U.S.C. § 885. The additional 1977 bar based on 180-day AWOLs dealt

[68] (continued)

with lengthy absences that did not result in convictions for desertion.

[69] 38 U.S.C. § 3103(a); 38 C.F.R. § 3.12(c)(5).

[70] Aliens may choose to return to their homelands rather than serve in the armed forces.

[71] 38 U.S.C. § 3103(c); M21-1, ¶14.01b(2) Sep. 11,1979. *See also* 38 C.F.R. § 3.7(b) (upgrades prior to 1957). This provision appears to be obsolete in light of 38 C.F.R. § 3.12(e)-(g).

[72] 38 C.F.R. § 3.12(c)(6).

[73] When the President signed Pub. L. No. 95-126 into law, he questioned the constitutionality of the retroactive application of the new bar.

[74] *See* 43 Fed. Reg. 15,153, cl. 1 (Apr. 11, 1978).

[75] 43 Fed. Reg. 15,152, cl. 3 (Apr. 11, 1978).

[76] M21-1, ¶ 14.01b(3), Sep. 11, 1979. This appears to reject official military AWOL time which normally includes civilian confinement after a conviction.

[77] 38 C.F.R. §§ 3.12(c)(6)(i)-(iii). Where compelling circumstances have been found but no upgrade has been granted, the VA must make a determination as to whether a regulatory bar exists; however, a finding of compelling circumstances will "ordinarily . . . favor a finding that service was under conditions other than dishonorable," PG 21-1, § A-16, ¶ 2 change 261. It will also ordinarily favor a finding that the period of AWOL does not constitute "willful and persistent misconduct," a regulatory bar. DVB Cir. 20-78-18, ¶12c., Mar. 24,1978.

All VA Regional Office determinations in these cases were automatically reviewed by the VA Central Office until January 10, 1980, to assure uniform application of the standard.

such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

An applicant interested in eligibility for VA benefits should consider seeking a Review Board decision prior to applying to the VA. Review Boards generally have a lower threshold for "compelling circumstances" than the VA does, and the VA is likely (though not bound) to defer to Board findings of fact.[78] The time delay and inconclusiveness of favorable DRB decisions, the impersonalness and generally lower upgrade rate of some BCMRs (where personal hearings are rare), and the stringent standard of "compelling circumstances" at the VA are negative factors to be considered. Simultaneous applications are permitted.[79]

A survey[80] of VA adjudications in the first year the bar on benefits for veterans with prolonged AWOLs was in effect found that the VA would consider any form of evidence submitted.[81] Examples of types of evidence accepted to prove compelling circumstances include:

- The military record;
- Statements made at the time of discharge by the veteran or anyone else explaining why (s)he went AWOL;
- Doctor's reports made after the AWOL;
- Statements from superiors;
- Documented attempts by the veteran to obtain leave or reassignment;
- Decisions of the DRB; and
- The claimant's statements at the hearing.

The following reasons, listed according to the frequency with which the VA cites them, have been found, alone or in combination with other factors, to constitute compelling circumstances:

- Family obligations or financial problems;
- Service in Vietnam;
- Honest, faithful, and meritorious service;
- Citations or medals in Vietnam;
- Age and education;
- Character of service;
- Combat injuries;
- Reenlistment;
- Immaturity;
- Drug or alcohol problems;
- Service overseas;
- Inability to adjust after Vietnam;
- Mental condition;
- Excellent conduct reports;
- Lack of treatment;
- Late receipt of pay;
- Lost records; and
- Mistaken belief that service had ended.

Most veterans receiving favorable determinations served in Vietnam. This factor is weighed very heavily, but is not alone sufficient to warrant a favorable finding.

In the cases surveyed,[82] the likelihood of success improved with:

- The invocation of the requirement to give the benefit of doubt to the veteran;[83]
- The number of positive factors alleged;
- The specificity of problems alleged; and
- The absence of evidence of persistent misconduct or inadequate motivation.

The compelling circumstances test remains subjective. For example, petty family problems cannot reach compelling levels, but there is no set standard of how serious family problems must be before compelling circumstances will be found. The VA looks to all the circumstances surrounding the AWOL; the veteran's background is a prominent consideration. Two people who give the same reason for going AWOL and have equal records may be treated differently if they differ in respects unrelated to military performance. The older and more mature of the two people for example may be held to a higher standard in justifying his/her AWOL.[84]

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[78] *See* 43 Fed. Reg. 15,153, cl. 1 (Apr. 11,1978).

[79] Pub. L. No. 95-126, § 1.

[80] *See* Adler, *Analysis of VA's Application of "Compelling Circumstances" Rule,* 5 DISCHARGE UPGRADING NEWSLETTER 3 (March-April, 1980).

[81] The VA is inconsistent in how much weight it gives the veteran's unsubstantiated testimony. In one case, the finding was based solely on the veteran's statement that he went AWOL because his father was an alcoholic and that he was concerned about his parents. In another case, the veteran stated that his reasons for going AWOL were due to his marital difficulties and drug abuse which began in Vietnam. The VA did not find compelling circumstances in the latter case because no record could be found to substantiate the veteran's claim.

[82] *Id.* at 4.

[83] 38 C.F.R. § 3.102.

[84] *See* Ch. 22 *supra* (discussion of general equity approach).

A legal defense to AWOL is the final means of establishing compelling circumstances.[85] Legal defenses include:

- Improper denial of a request for discharge for hardship, conscientious objection, or medical reasons;[86]
- Mistake of fact;[87]
- Physical or mental incapacity to serve;[88]
- Lack of evidence to prove the AWOL beyond a reasonable doubt;[89]
- Legal termination of the offense before 180 days elapsed, as a result of some official inaction;[90]
- Lack of jurisdiction over the servicemember.[91]

The most complex cases are those in which veterans discharged as a result of 180-day AWOLs received upgrades from UDs under one of the two 1977 special programs. Subsequent legislation[92] disallowed benefits following such upgrades, absent both favorable re-review ("P.L. 95-126 re-reviews") and removal of the newly-legislated bar by a BCMR or the VA.[93]

26.3.4 REGULATORY BARS TO BENEFITS

26.3.4.1 Introduction

The statutory definition of a veteran as a former servicemember discharged "under conditions other than dishonorable" is refined in VA regulations.[94] The term "dishonorable" has nothing to do with the DD. Regulatory bars are removed by an upgrade of a UD, CD, BCD, or DD to HD or GD by any Review Board or by a favorable VA adjudication of an UD, CD (other than one replacing a GCM discharge), or BCD (from a SPCM).

The VA favorably adjudicates only about ten percent of these cases; thus, the Review Boards are normally the preferred forums.

26.3.4.2 Acceptance of a UD to Avoid a GCM

Enlisted servicemembers were not permitted to utilize the GOS to escape trial by court-martial in significant numbers until the late 1960s, and many of these cases were processed rapidly as servicemembers returning from AWOLs piled up in military confinement facilities.[95] A regulatory bar exists if the court-martial avoided was a GCM,[96] but it is often difficult to discern from the records what kind of court-martial was contemplated. The following arguments may be used:

- Any doubt should be resolved in favor or the veteran;[97]
- The offense was minor and of a type that at most would be referred to an SPCM;
- The charges were never formally referred to a GCM;[98]
- There was merely a recommendation of a GCM by a low level commander, without any necessary GCM prerequisites being initiated (*e.g.*, no Article 32 investigation was held or no Article 32 investigating officer was appointed);[99]
- The file contains recommendations for non-GCM disposition or the charge sheets show a referral to an SPCM or SCM; and
- The GOS procedures were legally defective.[100]

26.3.4.3 Mutiny or Spying

People guilty of mutiny or spying are almost always barred from benefits by reason of their GCM convictions, but on the rare occasions when such servicemembers are not convicted by GCMs, a regulatory bar is applicable.[101] If no conviction occurs at all, the logical argument is that only a conviction can brand one with such an infamous offense.[102]

26.3.4.4 Offenses Involving Moral Turpitude

Servicemembers are barred from benefits if discharged for "an offense involving moral turpitude," which is only clarified as: "includ[ing], generally, conviction of a felony."[103] The following methods are helpful to servicemembers discharged for this reason:

- Arguing that "offense" means an actual conviction or at least an acknowledgement of guilt;
- Proving innocence or evidencing guilt of only a lesser offense;
- Applying the law of the state where the offense occurred, if it provides a favorable definition of moral turpitude or felony;[104]
- Arguing that purely military offenses or non-common law offenses, not involving violence or dishonestry, do not involve moral turpitude;

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[85] *See* Ch. 4 *supra* (discussion of court-martial procedures).
[86] *See* § 12.6.2 *supra*.
[87] Forbes v. Laird, 340 F. Supp. 193 (E.D. Wis. 1972); United States v. Davis, 22 C.M.A. 241, 46 C.M.R. 241, 1 MIL. L. REP. 2191 (1973); United States v. Hale, 20 C.M.A. 150, 42 C.M.R. 342 (1970); United States v. Moore, 44 C.M.R. 496 (A.C.M.R. 1971).
[88] United States v. Williams, 23 C.M.A. 223, 49 C.M.R. 12, 2 MIL. L. REP. 2456 (1974).
[89] *See Manual for Courts-Martial* (1969 rev. ed.), ¶ 165; United States v. Mahan, 1 M.J. 303, 4 MIL. L. REP. 2065 (C.M.A. 1977).
[90] United States v. Simmons, 3 M.J. 398, 5 MIL. L. REP. 2264 (C.M.A. 1977); United States v. Ward, 48 C.M.R. 554, 2 MIL. L. REP. 2098 (A.C.M.R. 1974).
[91] *See* §§ 12.6, 20.6.1 *supra*.
[92] Pub. L. No. 95-126.
[93] *See* Ch. 23 *supra* (discussion of special upgrade cases); § 26.4 *infra* (same).
[94] 38 U.S.C. § 101(2); 38 C.F.R. § 3.12(d). *See also* § 26.5 *infra* (discussion of special rules in fraudulent enlistment cases).
[95] *See* Ch. 19 *supra* (discussion of GOS cases).
[96] 38 C.F.R. § 3.12(d)(1).
[97] 38 C.F.R. § 3.102.
[98] *See* Ch. 4 *supra* (discussion of court-martial procedures).
[99] *Id.*
[100] *See* § 19.2 *supra*.
[101] 38 C.F.R. § 3.12(d)(2).
[102] However, the VA will most likely determine the facts itself, using its own standard to weigh the evidence. *Cf.* M21-1, ¶ 12.11, Jan. 29, 1976 (acquittal of homicide charges not binding on VA).
[103] 38 C.F.R. § 3.12(d)(3).
[104] A felony is defined in military law as "any offense of a civil nature punishable under the authority of the [U.S.M.J.] by death or by confinement for a term exceeding one year . . . ." *Manual for Courts-Martial* (1969 rev. ed.), ¶ 213f(6). Moral turpitude is defined as a court-martial offense with a potential sentence of a DD or confinement for over one year, a federal offense with potential confinement of over one year, and any other offense similar to a U.S. Code offense punishable as a felony or characterized by the jurisdiction as a felony. *Id.* at ¶ 153b(2)(b).

- Noting that offense involving homosexuality are governed by separate standards and arguing that other offense involving sexual misconduct should be governed by similar liberalized standards.[105]

26.3.4.5 Willful and Persistent Misconduct

> [A] discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct [is a regulatory bar to benefits]. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.[106]

Willful misconduct is elsewhere defined in VA regulations as:

> an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the [VA] unless it is patently inconsistent with the facts and the requirements of laws administered by the [VA].
>
> (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.
>
> (2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.[107]

VA adjudications do not involve as deep a probing into the facts underlying discharge actions as do those at the Review Boards; however, some of the approaches are similar.[108] The following factors are normally considered to be aggravating:

- A pattern of misconduct;
- A lack of motivation or of attempts to improve conduct and/or efficiency;
- Failure to bring personal problems to the attention of the command;
- AWOLs of more than a few days; and
- An attempt to get out of military service.

A veteran may combat the aggravating impact of these factors with a showing:

- Of "compelling circumstances" for any period of AWOL;[109]
- Of serious and documented psychiatric or family problems;
- Of an impropriety in the discharge process;
- That the misconduct was minor in nature or was isolated and not representative of the veteran's quality of service; and
- That the conduct was accidental or disease-induced, such as a discharge for venereal disease.

26.3.4.6 Homosexual Acts

Prior to December 31, 1979, the commission of homosexual acts was almost automatically a regulatory bar to benefits. On that date, VA regulations were made to conform to the current military policies, thus obviating the practical necessity for a veteran discharged with a UD for homosexual acts first to seek an upgrade in order to obtain VA benefits. The new provision provides:

> Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.[110]

The provision included the examples in order to make clear to regional offices that "aggravating circumstances" meant serious misconduct.[111]

Upon requesting adjudication under the new rule, veterans denied benefits under the old rule should receive an extension of the delimiting date for using educational benefits.[112]

26.4 SPECIAL UPGRADE PROGRAM CASES

Congress enacted legislation in 1977[113] precluding the payment of VA benefits on the basis of a DRB upgrade of an UD or BCD pursuant to:

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[105] *See* § 26.3.4.6 *infra*.

[106] 38 C.F.R. § 3.12(d)(4).

[107] 38 C.F.R. § 3.1(n). Voluntary intoxication does not remove willfulness in compensation claim cases, but a different result may be possible when the claimant is an alcoholic. M21-1, ¶ 14.04 c, Jan. 29, 1976.

[108] *See* § Ch. 22 *supra* (discussion of general equitable arguments).

[109] The VA determined that the new statutory bar relating to 180-day AWOLs that included this exception was "liberalizing legislation." All cases finding willful and persistent misconduct based in whole or in part on periods of AWOL prior to October 8, 1977, therefore, can be readjudicated with consideration given to the standards contained in 38 C.F.R. § 3.12(c)(6). *See* DVB Cir. 20-78-18, ¶ 12c., Mar. 24, 1978. *See also* note 77 *supra*.

[110] 38 C.F.R. § 3.12(d)(5). M21-1, ¶ 14.01 d(6), Sep. 11, 1979, still lists the old rule. VAR 1012 was amended by Transmittal Sheet No. 666, Dec. 31, 1979.

[111] 45 Fed. Reg. 2,318 (Jan. 11, 1980).

[112] *See* § 26.6.1.4 *infra*; note 146 *infra*. The revision of 38 C.F.R. § 21.1042 (delimiting dates) appearing at 45 Fed. Reg. 59,311 (Sep. 9, 1980) deals only with liberalized changes to 38 C.F.R. § 3.12 necessitated by Pub. L. No. 95-126. It would be illogical for a different result to occur when the character of discharge regulations were not changed because of a statute; however, an upgrade may be the safest way to trigger an extension of the delimiting date until § 21.1042 is amended specifically to deal with this issue. The VA indicated that it would eventually do so. 45 Fed. Reg. 2,318 (Jan. 11, 1980). *Cf.* Transmittal Sheet No. 666 (referring to 38 C.F.R. § 3.114(a) for reopened claims).

[113] Pub. L. No. 95-126. *See* Ch. 23 *supra* (discussion of special programs). No GDs upgraded to HDs were affected by Pub. L. No. 95-126.

- The President's directive of January 19, 1977;[114]
- The DoD Special Discharge Review Program (SDRP) of April 5, 1977;[115] and
- Any discharge review program not subjecting cases to individual review, utilizing published standards which are historically consistent in determining honorable service, and applicable to all persons given UDs.[116]

The HDs and GDs replacing the UDs upgraded under the SDRP, and the UDs, BCDs, and DDs upgraded under the January 19, 1977 program were reviewed again (under a procedure known as "P.L. 95-126 re-reviews") by the DRBs to determine whether they would qualify for upgrades under the standards published pursuant to the new legislation.[117] Upgrades were not taken away, but a bar to benefits was created affecting all cases in which a review affirming "uniform standards," a "P.L. 95-126 upgrade,"[118] or a favorable VA character of discharge adjudication did not occur. A re-review affirming an upgrade in character of discharge, however, did not serve to remove any other statutory bar based on a reason for discharge.[119]

Benefits being received by veterans pursuant to special program upgrades were cut off by April 7, 1978.[120] Some veterans were improperly denied requests for increased benefits between October 8, 1977, and April 7, 1978, and some had their pending applications for benefits improperly ignored.[121]

26.5 VOID ENLISTMENTS

If there was a finding of a fraudulent or otherwise void enlistment[122] or if a court-martial determined that the military was without jurisdiction to try the servicemember because of recruiting irregularities,[123] a discharge may or may not be characterized and may reflect no creditable service. In some of these instances, the VA will deny benefits.[124]

The general rules governing these cases are:

- If the veteran holds a characterized discharge with creditable service, the VA may not conclude that a void enlistment should have resulted;[125]
- Benefits are available if an enlistment was voided, but the accompanying UD was "under conditions other than dishonorable";[126]
- Benefits are not available if the enlistment was voided because the person did not have the capacity to enter into the enlistment contract or because the enlistment was prohibited by statute;[127]
- Benefits are available if the enlistment was voided because of minority or misrepresentation as to age, unless the release was under dishonorable conditions;[128]
- An HD or GD binds the VA to a finding of a discharge under other than dishonorable conditions;[129]
- If benefits are awarded, they are based on the period of service from entry to discharge;[130]
- The VA is not bound by the military's finding of a felony conviction for purposes of voiding an enlistment;[131] and
- A BCMR will characterize a discharge that was improperly left uncharacterized by the issuing service subsequent to a court-martial's finding of no jurisdiction.[132]

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[114] 38 C.F.R. § 3.12(h)(1). *See* § 23.2.4 *supra*. There will normally be a reference in the veteran's file to Presidential Proclamation 4313.

Upgrades to CDs issued under the 1974-75 part of this presidential program are unaffected by this rule. A CD does not alter the character of the original discharge for purposes of VA benefits.

[115] 38 C.F.R. § 3.12(h)(2). *See* § 23.3 *supra*.

[116] 38 C.F.R. §§ 3.12(g)(1)-(2), .12(h)(3). *See* §§ 9.1.3.3, 9.1.3.4 *supra*.

[117] *See* § 23.3.3 *supra*.

[118] *Id.*

[119] 38 C.F.R. § 3.12(f). The cases involving 180-day AWOLs were particularly confusing to many uncounseled applicants who were faced with a seemingly endless series of reviews by different agencies. *See generally* DVB Cir. 20-78-18, Mar. 24, 1978 (included the opportunity for a new SDRP review). *See* § 23.3.4 *supra*.

[120] 38 C.F.R. §§ 3.12(i), (j).

[121] *See* note 152 *infra*.

[122] *See* § 18.6 *supra* (discussion of voided discharges).

[123] *See* § 12.6.3.5 *supra* (improper enlistments); § 18.2.4 *supra* (recruiter connivance).

[124] 38 C.F.R. § 3.14.

[125] *Id. See also* Op. Gen. Counsel of V.A., 5-80 (Mar. 4, 1980).

[126] 38 C.F.R. § 3.14(a) provides:

> Where an enlistment is voided by the service department for reasons other than those stated in paragraph (b) of this section, service is valid from the date of entry upon active duty to the date of voidance by the service department. Benefits may not be paid, however, unless the discharge is held to have been under conditions other than dishonorable. Generally discharge for concealment of a physical or mental defect except incompetency or insanity which would have prevented enlistment will be held to be under dishonorable conditions.

See also note 127 *infra*.

[127] 38 C.F.R. § 3.14(b) provides:

> Where an enlistment is voided by the service department because the person did not have legal capacity to contract for a reason other than minority (as in the case of an insane person) or because the enlistment was prohibited by statute (a deserter or person convicted of a felony), benefits may not be paid based on that service even though a disability was incurred during such service. An undesirable discharge by reason of the fraudulent enlistment voids the enlistment from the beginning.

This has been held to include cases in which servicemembers successfully challenged court-martial jurisdiction based on recruiter misconduct or civilian judge-ordered enlistment as an alternative to confinement. OP. Gen. Counsel of V.A., 23-179 (June 21, 1979). This may constitute an (impermissible) irrebutable presumption of service under dishonorable conditions. *See* Smith, *VA Benefits for Persons Released from Military Service Under Catlow-Russo Defenses*, 5 DISCHARGE UPGRADING NEWSLETTER 7 (Feb. 1980). *See* § 12.6.3.5 *supra* (discussion of such enlistments).

[128] 38 C.F.R. § 3.14(c).

[129] 38 C.F.R. § 3.14(d).

[130] 38 C.F.R. § 3.14.

[131] Memorandum from General Counsel of VA to Chief Benefits Director in the case of VSD, (Mar. 29, 1979) (GD, with DD 214 showing no creditable service due to fraudulent enlistment, erroneously based on concealment of juvenile adjudication resulting in probation without conviction, which was not a felony conviction for purposes of 38 C.F.R. § 3.14(b)).

[132] *See* Ch. 18 *supra* at note 45 (voided discharges).

26.6 MISCELLANEOUS VA CLAIMS ISSUES

26.6.1 EFFECTIVE DATE OF ELIGIBILITY BASED ON UPGRADE

26.6.1.1 General Rule

When upgrading removes a disqualification from eligibility, the VA treats the date of upgrade application or the date of upgrade as the date of discharge for most purposes.[133] For example, the right to one full VA dental examination and treatment is available during the year following the upgrade and compensation and pension payments generally run from the date the application was received by the service department.[134]

The VA sometimes takes the position that, even before a veteran's discharge was upgraded, a favorable character of discharge determination would have been made and that the veteran was therefore not "prevented" from receiving benefits.[135] In such a case, the time limits for applying for some benefits may already have passed before the veteran sought the benefits pursuant to his/her upgrade. A veteran can avoid this by applying for VA benefits and going through a character of discharge determination and an appeal before seeking a Review Board upgrade.

In many instances, veterans with UDs were told by VA employees that they were not eligible for benefits, without formal claims being filed or recorded. A later finding of no prevention may be precluded if it can be shown that such an inquiry constituted an "informal claim."[136]

26.6.1.2 Compensation and Pension Claims

An upgrade normally does not result in retroactive payment of benefits to persons who have service-connected disabilities or are otherwise entitled to VA pensions.[137] If a veteran's previous application was rejected because of his/her character of discharge, back benefits will be paid to the date the disallowed claim was filed or the date the application for discharge upgrade was submitted, whichever is later, but in no event more than one year from the date of the reopening of the disallowed claim.[138]

The best strategy to maximize payments may be to file a VA claim simultaneously with an upgrade application and to keep the VA claim pending until the upgrade application is successful. Among the techniques for slowing down a VA adjudication are the following:

- Asking for personal hearings at the regional office and at the BVA;
- Failing to file a Notice of Disagreement with the VA's decision or delaying the Substantive Appeal until the time permitted to do so has almost expired; and
- Asking that the hearing, or consideration of the appeal, be delayed until final word is obtained from the Review Board.

An applicant requesting a delay under the above circumstances should point out that upgrading would produce "new and material evidence." By delaying the final VA decision until the veteran is most likely to be found eligible, the date of the original VA application (rather than the date of a reapplication) is preserved as the date to which benefits are retroactively granted.

26.6.1.3 Conditional Discharges

The 1977 change in law liberalizing the VA rule on conditional discharges[139] created the following changes in VA rules governing the effective date of awards in such cases:

- All compensation and pension issues relating to date of discharge or release were to run from the scheduled (*i.e.*, "conditional") discharge date certified to the VA by the military department;[140]
- For claimants who had not previously filed for VA benefits, payments were to be retroactive to October 8, 1977, or to the date provided by current regulations, whichever was later;[141]
- In cases involving previously denied claims, payment was to be retroactive to one year prior to reopening but in no event to a date earlier than October 8, 1977;[142] and
- The delimiting date for educational benefits was to run from October 8, 1977 or from the date of completion of obligated service, whichever was later.[143]

These rules remain in effect.

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[133] Most Review Boards will include the dates applications were received in the letters announcing upgrades.

[134] 38 U.S.C. § 3010(i).

[135] The Administrator of the VA has the power to determine that a veteran was prevented from receiving benefits. This determination can decide whether or not the time period ("delimiting date") for using educational benefits will be extended as a result of an upgrade. 38 U.S.C. § 1662(b). When an upgraded discharge is presented to the VA, a determination is made as to whether or not a favorable character of discharge determination would have been made under the standards prevailing at the time of discharge, had a claim been previously presented. DVB Cir. 20-77-34, ¶ 6b(3)(b)(1), Jun. 17, 1977. It is unclear how these standards are determined. A previous denial of a claim within ten years of discharge is conclusive on the issue of prevention. *Id. at* ¶ 6 b(3)(a).

[136] 38 C.F.R. § 21.1031 defines an informal claim as:

> Any communication from a veteran, an authorized representative or a Member of Congress indicating an intent to apply for educational assistance may be considered an informal claim. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be sent to the veteran for execution. If received within 1 year after the date it was sent to the veteran, it will be considered filed as of the date of receipt of the informal claim.
>
> The act of enrolling in an approved school does not in itself constitute an informal application.

[137] 38 U.S.C. § 3010(i).

[138] *Id. See also* 38 C.F.R. § 3.114(a).

[139] Pub. L. No. 95-126; 38 U.S.C. § 101(18).

[140] DVB Cir. 20-78-18, ¶ 13.c.(1), Mar. 24, 1978.

[141] *Id.* at ¶ 13.c.(2)(a).

[142] *Id.* at ¶ 13.c.(2)(b).

[143] *Id* at ¶ 15.b.(3). *See also* note 48 *supra*.

26.6.1.4 Educational Benefits

The 10-year period for utilizing educational benefits normally begins to run from the date of the upgrade of a disqualifying discharge.[144]

If no upgrade has occurred, but eligibility now exists because of a liberalized character of discharge rule, the following rules apply:

- Veterans with pre-October 8, 1977, discharges who were previously prevented from recovering benefits and who benefit from the compelling circumstances rule for AWOLs, but have no upgrade, have ten years of benefits eligibility from October 8, 1977;[145] and
- If the liberalized character of discharge rule is not the result of legislation (*e.g.,* the new rule concerning discharge for homosexual acts[146]), the delimiting date runs from the effective date of the change.

Retroactive payments are governed by the same rule used in compensation and pension cases.[146] Thus, the VA will not pay for educational expenditures long since made.

Some statutory limits on payment of educational benefits under the pre-1977 G.I. Bill may remain unaffected by an upgrade. Currently, all such benefits must have accrued as a result of service after January 31, 1955, and must be used by December 31, 1989.[148] An upgrade of a pre-1955 discharge creates no entitlement to educational benefits; however, VA regulations can be misleading as to other applicable time limitations.[149]

26.6.2 PENDING OR RUNNING CLAIMS AFFECTED BY END OF 1977 SPECIAL PROGRAMS

Veterans receiving benefits as a result of either of the two 1977 special upgrade programs were specifically affected by the legislation restricting such programs.[150] A grace period of a maximum of six months was permitted for persons receiving benefits, during which time mandated reviews of UD upgrades occurred.[151] The pending claims of some veterans were delayed under a VA directive set in force prior to the effective date of the legislation; veterans who were denied increased payments during the grace period are entitled to back benefits as a result of a lawsuit.[152]

26.6.3 OTHER BENEFIT PROGRAMS

Benefit programs dependent on character of discharge but administered by other agencies or by the states often are subject to non-VA rules or have no rules that deal with an upgraded discharge.[153] Sometimes there is an overlap; for example, the VA conducts character of discharge determinations for state unemployment agencies. Normal VA rules might not determine eligibility for these benefit programs.[154]

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[144] 38 U.S.C. § 1662(b); 38 C.F.R. § 21.1042(b). *See also* notes 135,140 *supra*.

The ten year period may be extended if medical problems deprived an applicant of the use of benefits. 38 C.F.R. § 21.1043; DVB Cir. 20-77-97, Jan. 6, 1978. Training must be medically unfeasible in the opinion of a physician and usually will not be found when an applicant was employed full time. M21-1, ¶ 47.17, Apr. 12, 1978.

Failure to process a request for educational benefits in a timely fashion violates 5 U.S.C. § 555(b) and possibly due process. Arnolds v. Veterans Administration, 407 F. Supp. 128, 9 MIL. L. REP. 2435 (N.D. Ill. 1981).

[145] DVB Cir. 20-78-18, ¶ 15.b.(2)(a), Mar. 24, 1978.

[146] When these regulations were enacted, the preamble in the Federal Register stated that the issue would be dealt with in an amendment to 38 C.F.R. § 21.1042. The subsequent amendment to this section does not specifically deal with the issue. 45 Fed. Reg. 59,311 (Sep. 9, 1980). Until this issue is clarified, establishing eligibility by means of an upgrade might more safely assure a prolonged period of time within which to use educational benefits. *But see* 38 C.F.R. § 21.4131(f) (commencing date of an award not to be earlier than the effective date of "liberalizing law and *administrative* issues" (emphasis added)). *See* notes 109, 112 *supra*.

[147] 38 C.F.R. § 21.4131(g); *see also* § 26.6.1.2 *supra*; note 137 *supra*.

[148] 38 U.S.C. §§ 1661, 1662.

[149] One example of a misleading regulation is the one fixing 1976 as the deadline for using benefits for all veterans whose service ended before 1966. 38 C.F.R. § 21.1042(c)(1). The upgrade rule of 38 U.S.C. § 1662(b) and 38 C.F.R. § 21.1042(b) prevails in these cases because the eligibility is based on the post-1966 upgrade.

[150] Pub. L. No. 95-126. *See* § 23.3.3 *supra*.

[151] 38 C.F.R. §§ 3.12(i), (j).

[152] A lawsuit successfully challenged the VA's failure to process applications for increased benefits during the grace period and its failure to process applications two weeks before the statute became law. The suit resulted in $177,000 in back benefits being awarded to the two classes of affected veterans. While the court only ruled on the entitlement of the class that was denied increased benefits, the final order covered both classes. McArty v. Cleland, 6 MIL. L. REP. 2344 (N.D. Cal. 1978) and *F. proceedings* 7 MIL. L. REP. 2522 (1979). *See* 7-8 DISCHARGE UPGRADING NEWSLETTER 1 (July-Aug. 1980) (discussion of *McArty*).

[153] *See* § 28.4 *infra*.

[154] The 180-day AWOL bar to benefits only applies to VA benefits; thus, an upgrade under a special program that was not affirmed would permit unemployment benefits even though a 180-day AWOL caused the original discharge. PG21-1, § A-16, change 261.

APPENDIX 26A
CHART SHOWING ELIGIBILITY STATUS BASED ON CHARACTER OF DISCHARGE

BENEFITS ADMINISTERED BY DoD	HD or GD	UD (DUOTHC)	BCD (SPCM)	DD or BCD (GCM)	U.S.C. CITATION
1. Payment for accrued leave	E	NE	NE	NE	37 U.S.C. § 501-504
2. Death gratuity (6 mos. pay)	E	E	E	NE	10 U.S.C. §§ 1475-1488
3. Transportation to home	E	E	E	E	37 U.S.C. § 404(a)
4. Transportation of dependents and household goods to home	E	NE[1]	NE[1]	NE[1]	37 U.S.C. § 406(h)
5. Wearing of military uniform	E	NE	NE	NE	10 U.S.C. §§ 771a, 772
6. Admission to Soldiers' Home	E	NE	NE	NE	24 U.S.C. §§ 49, 50
7. Burial in Nat'l Cemetery	E	NE	NE	NE	24 U.S.C. § 281
8. Headstone marker	E	NE	NE	NE	24 U.S.C. § 279A
BENEFITS ADMINISTERED BY VA[2]					
1. Dependence and indemnity compensation	E	TBD	TBD	NE	38 U.S.C. §§ 410-417
2. Compensation for service-connected disability or death	E	TBD	TBD	NE	38 U.S.C. §§ 310, 321, 331, 351
3. Pension for non-service-connected disability or death	E	TBD	TBD	NE	38 U.S.C. §§ 521, 541-544
4. Medal of honor roll pension	E	TBD	TBD	NE	38 U.S.C. §§ 560-562
5. Insurance	E	E	E	E	38 U.S.C. §§ 711, 773
6. Vocational rehabilitation (Disabled Veterans only)	E	TBD	TBD	NE	38 U.S.C. § 1502
7. Educational assistance (including flight training and apprentice training)	E	TBD	TBD	NE	38 U.S.C. §§ 1651-1687
8. War orphans' educational assistance	E	TBD	TBD	NE	38 U.S.C. §§ 1701-1766
9. Home and other loans	E	TBD	TBD	TBD	38 U.S.C. §§ 1802, 1818
10. Hospitalization and domicillary care	E	E or TBD[3]	TBD	NE	38 U.S.C. § 610
11. Medical and dental services	E	TBD	TBD	NE	38 U.S.C. § 612
12. Prosthetic appliances (Disabled Veterans only)	E	TBD	TBD	NE	38 U.S.C. § 613
13. Guide dogs and equipment for blindness (Disabled Veterans only)	E	TBD	TBD	NE	38 U.S.C. § 614
14. Special housing	E	TBD	TBD	NE	38 U.S.C. § 801
15. Automobiles (Disabled Veterans only)	E	TBD	TBD	NE	38 U.S.C. § 1901

BENEFITS ADMINISTERED BY VA[2]	HD or GD	UD (DUOTHC)	BCD (SPCM)	DD or BCD (GCM)	U.S.C. CITATION
16. Funeral and burial expenses	E	TBD	TBD	NE	38 U.S.C. § 902
17. Burial flag	E	TBD	TBD	NE	38 U.S.C. § 901
BENEFITS ADMINISTERED BY OTHER FEDERAL AGENCIES					
1. Preference for farm loans (Dept. of Agriculture)	E	E	E	NE	7 U.S.C. § 1983(e)
2. Preference for farm and other rural housing loans (Dept. of Agriculture)	E	E	E	NE	42 U.S.C. § 1477
3. Civil service retirement credit (Civil Service Commission)	E	NE	NE	NE	5 U.S.C. §§ 2108, 3309-3316, 3502, 3504
4. Civil service retirement credit (Civil Service Commission)	E	NE	NE	NE	5 U.S.C. § 8331, 8332
5. Reemployment rights (Dept. of Labor)	E	NE	NE	NE	50 U.S.C. App. § 459
6. Job counseling and employment placement (Dept. of Labor)	E	E	E	NE	38 U.S.C. §§ 20001, 2002
7. Unemployment compensation for ex-servicemen (Dept. of Labor)	E	TBD	TBD	NE	5 U.S.C. § 8521
8. Naturalization benefits (Dept. of Justice, Imm. & Naturalization Service)	E	NE	NE	NE	8 U.S.C. § 1439
9. Old age and disability insurance (Social Security Administration)	E	TBD	TBD	NE	45 U.S.C. § 417

[1] Dependents overseas may be returned to the United States.
[2] Assumes no statutory bar is applicable.
[3] Treatment of service-connected disabilities permitted.

E — Eligible
NE — Not eligible
TBD — To be determined by agency
DV — Eligibility depends on specific disability of veteran

CHAPTER 28
MISCELLANEOUS NON-VA BENEFITS RESULTING FROM UPGRADE OF LESS THAN HONORABLE DISCHARGES

28.1 INTRODUCTION AND OVERVIEW

Less than honorable discharges include the following: Undesirable Discharges (UDs), Blue Discharges (the name for UDs in the 1940s), Other Than Honorable Discharges (the present name for UDs), 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 payment, *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] No federal benefits are lost as a result of a GD. Recipients of UDs (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 eligible 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.

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 military[4] 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 held[11] 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]

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[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, Cellebrezze 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]

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

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[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, reenlisted 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).

[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

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] 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]

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[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).

[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).

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. Malko 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.

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 information[47] or that changed circumstances warrant a reduction of the sentence.[48] Presentence 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]

[46] *Cf.* notes 38, 39 *supra*.

[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.

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.)*

(Social Security No.)

PERIOD FOR WHICH ARREARS ARE BELIEVED TO BE DUE FROM THE U. S.
FROM:
TO:

FOR SERVICE IN
☐ ARMY ☐ MARINE CORPS
☐ NAVY ☐ COAST GUARD
☐ AIR FORCE

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

STATION	DATE

I hereby certify that I have not and will not pay any portion of this claim for these reasons:

SIGNATURE: SYMBOL NO:

ATTACH ALL AVAILABLE DOCUMENTARY EVIDENCE IN SUPPORT OF CLAIM AND MAIL TO

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.

DD FORM 1 SEP 58 827 S/N 0102-LF-008-2300

REPLACES EDITION OF 1 FEB 1955
WHICH MAY BE USED UNTIL EXHAUSTED
☆ U.S. Government Printing Office: 1974—603-619/3346 2-1

Form approved by
Comptroller General, U. S.
February 7, 1955

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 NUMBER | | | |

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

DATE OF BIRTH MONTH | DAY | YEAR

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

MR
MISS
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.

Department of Health, Education, and Welfare
Social Security Administration

Form SSA-L137 (9-79)

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.)

☆ U. S. Government Printing Office: 1978—311-288/7

FORM SSA-L137 (9-79) Page 2

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—Holtsville, NY 00501
New Mexico—Austin, TX 73301
New York
New York City and Counties of Nassau, Rockland, Suffolk and Westchester—Holtsville, 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—Philadelphia, PA 19255
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 924 080

Form 4506
(Rev. February 1978)

Department of the Treasury — Internal Revenue Service

Request for Copy of Tax Form

(Please read the instructions on the back of this form before you complete it.)

Name and address of taxpayer(s) as shown on tax form	Requester's telephone number	Document locator number *(if known)*
	Taxpayer's social security number	Kind of tax *(income, estate, excise, gift, etc.)*
Current address if different from above	Spouse's social security number	Tax form number
Mail copies to:	Employer identification number	Tax period ended
	Internal Revenue Service office where tax form was filed	
Do you want copies of all pages and attachments? ☐ Yes ☐ No	How many copies of each page requested do you want?	

If no, do you want copies of ☐ Page 1 only? ☐ Schedules only? ☐ Other?

If you check "Other," please specify what copies you want.

If you are requesting certification, please check here. ☐ *(See instructions on back.)*

Signature of taxpayer *(or requester)*	Signature of person attesting, if corporate return *(See instructions on back.)*	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,

CHAPTER 3
GLOSSARY AND MILITARY STRUCTURE

3.1 MILITARY TIME AND DATES

Military time is expressed in terms of a 24-hour clock always using four digits running from 0001 hours to 2400 hours. So, 1:30 A.M. becomes 0130 hours, noon is 1200 hours and 11:15 P.M. is 2315 hours. Sometimes there will be references to "Z time" or "Zulu time." This refers to Greenwich, England time which is often used as a base time for worldwide communications.

Military dates are expressed two ways:

- Day, first three letters of months, and last two digits of year — 24JAN41 (Jan. 24, 1941).
- Year, month, and day each represented by two digits but expressed as a six digit number — 410124 (Jan. 24, 1941).

3.2 GLOSSARY OF TERMS AND ABBREVIATIONS[1]

Numerous unfamiliar terms and abbreviations appear in military records and regulations and DRB and BCMR decisions. Many of these common terms, abbreviations, and acronyms are listed below with their definitions.

Often, abbreviations are connected. For example: CGFMFLANT means "Commanding General, Fleet Marine Force, Atlantic." Linking words (such as "the," "a," "and," and "of") are often omitted from sentences in military records. Thus, "Ann sqd Appln for Disch Up AFR 39-17 in lieu of Hearing before B/O," means "The Airman signed an application for a discharge under the provisions of Air Force Regulation 39, Chapter 17, in lieu of a Hearing before a Board of Officers."

[1] The authors relied heavily on the glossary contained in the *CCCO Military Counselor's Manual*. Information concerning CCCO literature is contained in the Bibliography of this manual. We also relied on another glossary prepared by John M. Arnold of the Illinois Legal Service Legislative Support Center.

A: Army.

AAFES: Army and Air Force Exchange Service (the PX).

AB: Airman Basic.

Abbr: Abbreviation.

ABCD: Awaiting Bad Conduct Discharge (BCD).

ABCMR: Army Board for Correction of Military Records (BCMR).

Abn: Airborne.

ABR: Army Board of Review (precursor of Court of Review).

Abs: Absent, Absentee, Absence.

Absent Without Leave: Any absence without proper authority from an appointed place of duty, unit, or organization (AWOL or UA).

Ac: All accessories of court-martial sentence.

Acc: Prefix to case numbers; Army cases before Board for Correction of Military Records.

Accountable Strength: The total number of personnel assigned to a unit, including those present for duty, absent from duty, or in transit.

ACDUTRA: Active Duty for Training: full-time military duty performed by reservists specifically for training purposes. The most common form is the 4 or 6 month initial period of duty to which enlisted reservists are ordered, but it also includes attendance at Service School, participation in small arms competition, summer camp, short tours of duty for special projects, and attendance at military conferences. A reservist is under the jurisdiction of the U.C.M.J. upon the issuance of his/her orders to report for active duty. 10 U.S.C. § 802.

ACMR: Army Court of Military Review (CMR).

ACS: Clerical speed.

Act, Activ: Active.

ACT: Advanced Combat Training.

Activation: (1) The transfer of any individual from a reserve status to active duty, especially pursuant to

a call or order. (2) The process by which an unsatisfactorily participating reservist is placed — entirely through military channels — in an active status. *See* 10 U.S.C. § 673a.

Active Duty: Any full time military duty (other than Active Duty for Training).

Active Duty for Training: See ACDUTRA.

Active Federal Service: Active duty other than that performed as a member of the Army National Guard or Air National Guard under state control.

Active National Guard: Those units and members of the Army and Air National Guards of the 50 states, Puerto Rico, and D.C. which are authorized to have equipment and to engage in regularly scheduled training activities not under federal control. See Inactive National Guard.

Active Status: The status of a reservist who is not on the Inactive Status List or in the retired reserve. (A reservist in an active status may be on active or inactive duty.)

Activity: (1) A unit, organization, or installation performing a function or mission — *e.g.,* a reception center, redistribution center, naval station, or naval shipyard. (2) A function or mission — *e.g.,* recruiting, or schooling.

AD: (1) Active Duty. (2) Prefix to case numbers, Army cases before Discharge Review Board.

ADB: Administrative Discharge Board: a board of experienced commissioned officers appointed to make findings of fact and to recommend retention or discharge. See Administrative Discharge.

Adjutant General: The officer in any unit having a general staff who is charged with the supervision of personnel records and management.

Adm: Admiral.

Administrative Discharge: The complete separation of a member for reasons other than punitive, such as expiration of term of service, convenience of the government, medical, hardship or dependency, unsuitability, unfitness, or misconduct. See ADB.

Administrative Discharge Board: See ADB.

Administrative Segregation: Segregation for purposes of control, safekeeping, to prevent injury to the prisoner or others, or for other purposes of safe administration.

Advanced Individual Training: A period after basic training, usually 8 or 9 weeks, during which instruction or drill relating to a soldier's military occupation or assignment is given (AIT).

ADRB: Army Discharge Review Board (DRB).

ADT: See Active Duty for Training.

ADY: Additional Duty.

AE: Armor-artillery and Engineering.

AEOP: Amend existing order pertaining to.

AF: Air Force.

AFB: Air Force Base.

AFBCMR: Air Force Board for Correction of Military Records (BCMR).

AFCMR: Air Force Court of Military Review (CMR).

AFDCB: Armed Forces Disciplinary Control Board: a board of officers which considers conditions having adverse effects on the discipline, health, morale, and welfare of armed forces personnel within its area of jurisdiction.

AFDRB: Air Force Discharge Review Board (DRB).

AFEES: Armed Forces Examining and Entrance Station: a military facility which conducts preinduction, induction, and enlistment examinations, and enlistment and induction ceremonies.

AFJROTC: Air Force Junior Reserve Officers' Training Corps (ROTC).

AFM: Air Force Manual.

AFMPC: Air Force Military Personnel Center.

AFQT: Armed Forces Qualifying Test (*e.g.,* I.Q. tests).

AFR: Air Force Regulation.

AFRC: Air Force Reserve Center.

AFRES: Air Force Reserve.

AFROTC: Air Force Reserve Officers' Training Corps (ROTC).

AFSC: Air Force Specialty Code (job code) or Air Force Systems Command.

AFSN: Air Force Service Number.

AFUS: See Armed Forces of the United States.

AG: See Adjutant General.

AGC: Adjutant General's Corps.

AGPERSCEN: U.S. Army Enlisted Personnel Support Center.

AI: Automotive Information.

Airman: Synonymous with "enlisted personnel" or "member"; includes enlisted members, men and women of any grade, in all components of the Air Force on active duty (AMN).

Airman First Class: A1C.

Air Reserve Personnel Center: Center which administers to Air Force Ready Reserve.

AIT: See Advanced Individual Training.

AKA: Also known as.

Allot: See Allotment.

Allotment: A specific portion of one's military pay which the Army is authorized to pay to another person or to an institution.

Alphameric: The combination of alphabetical and numerical characters, *e.g.,* part no. 13A42SK.

AM: Air Medal.

AMCROSS: American National Red Cross (ARC).

AMN: See Airman.

AMNR: Airman Recruit.

Annual Active Duty for Training: Summer camp, a period of not less than 14 days annually to which ready reservists are ordered. See Active Duty for Training.

AMOS: Additionally awarded military occupation specialty.

ANACDUTRA: See Annual Active Duty for Training.

ANG: Air National Guard.

ANGUS: Air National Guard of the United States.

A/O: Agent Orange: a toxic herbicide sprayed during the Vietnam War.

AOL: Absent Over Liberty; Absent Over Leave.

APA: Administrative Procedure Act.

APERS: Antipersonnel.

APDY: Appropriate Duty: duty which Air Force unit members perform instead of attending a scheduled Unit Training Assembly when absence is beyond their control, such as illness or other personal hardship.

APO: Army or Air Post Office.

App, Appd, Appreh: Apprehended.

Appl: Applicant.

Appln: Application.

Apprehension: The taking into custody of a person Manual for Courts-Martial (MCM).

Appropriate Duty: See APDY.

AQB: Army Qualification Battery.

AR: Army Regulation.

ARB: Army Retraining Brigade: where prisoners who might be restored are sent.

ARC: American Red Cross.

ARCOM: (1) Army Commendation Medal. (2) U.S. Army Reserve Command.

ARF: Air Reserve Forces.

Armed Forces of the United States: Collectively, all components of the Army, Navy, Air Force, Marine Corps, and Coast Guard (AFUS).

ARNG, ARNGUS: Army National Guard.

ARPC: Air Reserve Personnel Center.

Arr: Arrive; Arrived.

Arrest: The moral restraint of a person by an order, not imposed as punishment for an offense, directing him to remain within certain specified limits. It is imposed when the person's presence is required pending court-martial, but it is deemed unnecessary to confine him/her. (Manual for Courts-Martial (MCM) para. 18a.) See Confinement; Restriction.

Article 15 (Art. 15): Nonjudicial Punishment (NJP) pursuant to Article 15 of the Uniform Code of Military Justice (U.C.M.J.).

Article 32 Investigation: An inquiry, made under Article 32 of the U.C.M.J. as a prerequisite to a General Court-Martial, which weighs the truth of the charges, considers the form of the charges, and results in a recommendation as to whether the case should be referred to a General or Special or other court, whether charges should be dropped, or whether some other action should be taken. The accused is advised of the charges against him/her, allowed to be represented by military counsel or by civilian counsel at his/her own request, and has full opportunity to cross-examine witnesses. (Manual for Courts-Martial (MCM) paras. 30, 31, 33.)

Artillery: Projectile-firing weapons consisting of cannon or missile launchers on suitable carriages or mounts. The Army also uses the term artillery to include equipment, supplies, ammunition, and personnel involved in the use of cannon or missile launchers.

ARVN: Army of the Republic of South Vietnam.

AS: (1) Army Security; (2) apprentice seaman. See Administrative Segregation.

ASA: Army Security Agency.

ASA (M & MA): Assistant Secretary of the Army for Manpower and Reserve Affairs.

ASAP: As soon as possible.

Asg: Assign.

Asgd: Assigned.

Asgmt: Assignment.

AT: Annual Training.

ATA: Actual Time of Arrival.

ATD: Actual Time of Departure.

Auth: Authority; Authorized.

Authorized Strength: (1) The total of personnel spaces contained in current personnel authorization vouchers issued by a higher headquarters to a subordinate element. (2) The total number of personnel which a United States Reserve unit may have assigned in a paid drill status. See Accountable Strength.

Awd: Award; Awarded.

AWOL: See Absent Without Leave.

B: Base.

Bad Conduct Discharge: A formal punitive separation of an enlisted person from the military service under conditions other than honorable, issued by a General Court-Martial, or a Special Court-Martial in certain circumstances; it ranks below an Undesirable but above a Dishonorable Discharge. (Manual for Courts-Martial (MCM) paras. 76a, 127.)

BAQ: Basic Allowance for Quarters.

BAR: Browning Automatic Rifle.

BAS: Basic Allowance for Subsistence.

Basic Training: The initial period of drill and instruction in basic military subjects given to newly inducted and enlisted personnel (Boot camp — Navy) (BCT).

Basic Pay: Pay (other than allowance) based on grade and length of service.

Basic Pay Entry Date: The date, for purposes of accounting, on which one enters the armed forces.

Battalion: A unit composed of headquarters and two or more companies or batteries, either as part of a regiment and charged with only tactical functions, or as a separate unit and charged with both administrative and tactical functions (BN).

BCD: See Bad Conduct Discharge.

BCMR, or BCNR: Board for Correction of Military (or Naval) Records: an agency in the office of the Secretary of each service, consisting of not less than

three civilians empowered under 10 U.S.C. § 1552 to "correct an error or remove an injustice." It can review denials by the Discharge Review Board and discharges resulting from General Courts-Martial; it will accept cases only when application is made within three years of the alleged error and when all other administrative remedies have been exhausted.

BCT: Basic Combat Training. See Basic Training.

Bd: Board.

Bde: Brigade.

BEQ: Bachelor Enlisted Quarters.

BG: Brigadier General.

Bks: Barracks.

Blacklist: "An official counter-intelligence listing of actual or potential enemy collaborators, sympathizers, intelligence suspects, and other persons whose presence menaces the security of friendly forces." [AFM 11-1.]

Black Propaganda: "Propaganda which purports to emanate from a source other than the true one." [AFM 11-1.]

Bldg: Building.

Blood Chit: A small cloth chart depicting an American flag and a notation in several languages stating that anyone assisting the bearer to safety will be rewarded.

BMR: Board of Military Review.

BMT: Basic Military Training.

Bn: Battalion.

B/O: Board of Officers (Administrative Discharge Board).

BOQ: Bachelor Officer(s) Quarters.

Box: Slang for close confinement, usually disciplinary segregation.

BP: Base Pay.

BPED: Basic Pay Entry Date.

BPO: Base Post Office.

Brass: (1) Any metal attachment to the uniform, usually made of brass, such as a belt buckle or insignia. (2) Slang term to denote commissioned officer or higher ranking personnel.

Brig: A correctional facility for confinement of military prisoners under the jurisdiction of an installation commander (Navy and Marine Corps).

Brigade: A unit, usually smaller than a division, to which groups and/or battalions and smaller units are attached.

BSM: Bronze Star Medal.

Btry: Battery.

BTU: Basic Training Unit.

Buddy System: A plan which requires that two or more persons work and remain near each other in certain areas and on certain missions to give each other protection and assistance.

Bul, Bull: Bulletin.

BUMED: Bureau of Medicine and Surgery.

BUPERS: Bureau of Naval Personnel.

BUPERSINST: Bureau of Naval Personnel Instruction.

BUPERSMAN: Bureau of Naval Personnel Manual.

BUT: Basic Unit Training.

BVA: Board of Veterans Appeals.

B&W: Bread and Water.

BX: Base Exchange.

By Dir: By Direction of the Commanding Officer.

C&B: Character and Behavior disorders; grounds for unsuitability discharge.

C&E: Character and Efficiency Rating.

CA: Convening Authority: the official empowered to call together a court-martial. For General courts it may be the brigade commander or the port commander. For Special courts it may be the battalion commander or the above. In no case can it be the accuser. (Manual for Courts-Martial (MCM) para. 5 and 84a.)

Cadet: (1) A student at the U.S. Military Academy. (2) A person enrolled in any program of military studies, such as ROTC.

Call, Call-up: The procedure under 10 U.S.C. § 3500 by which the President brings all or part of the Army National Guard into active federal service.

CAP: Civil Air Patrol.

CAPT: Captain.

Captain's Mast: Nonjudicial punishment in the Navy (Art. 15 U.C.M.J.).

CAR: Combat Action Ribbon.

Cau: Caucasian.

CAU EOI: Caucasian Except as Otherwise Indicated.

CBPO: Consolidated Base Personnel Office: the single manager of base-level Air Force personnel systems for all units being serviced, whether on base, geographically separated from the CBPO, or centralized in one location for maximum economy, efficiency, and service.

CC: Civilian Court.

Cdr: Commander.

C-E: Communications-Electronics.

CFR: Code of Federal Regulations.

CG: Coast Guard.

CGBCMR: Coast Guard Board for Correction of Military Records (BCMR).

CGMR: Coast Guard Court of Military Review (CMR).

CGDRB: Coast Guard Discharge Review Board (DRB).

Ch: (1) Chaplain: an ordained minister, commissioned in the rank of Captain or above, who performs religious services and other ministry to military personnel. Although (s)he may not exercise command, (s)he has the authority to work in a supervisory or control capacity. (2) Chapter.

Chap. 10: Chapter 10: (1) Army discharge given in lieu of court-martial, usually resulting in an Unde-

sirable Discharge (UD). (2) A discharge for the good of the service.

CHACOM: Chain of Command Reporting System.

Chain of Command: The succession of commanding officers from a superior to a subordinate through which command is exercised. Also called command channel.

CHAMPUS: Civilian Health and Medical Program of the Uniformed Services.

Change of Station: A temporary or permanent transfer of duty to a new post.

Character Guidance: Mandatory training, normally conducted by a chaplain, for all military personnel on the "basic moral principles underlying individual responsibility."

Character Guidance Program: A program of military education and training in basic moral principles designated by the military to create an awareness of human dignity, individual responsibility, proper motivation, and the highest level of personal conduct through command use of discussions, conferences, personal example, and other appropriate means.

CHD: See Correctional Holding Detachment.

Chevron: A cloth device, usually worn on the sleeve, denoting grade, wound, enlisted service, or overseas service.

Chief of Staff: The senior or controlling member of a staff, who coordinates its work and is the chief assistant to the commander. In the Army and Marine Corps, the title is applied only to staff on a brigade or division level or higher. In lower units the corresponding title is Executive Officer.

CHINFO: Chief of Information (US NAVY).

Chit: A special request form used in the Navy and Marine Corps.

CHL: Confinement at Hard Labor.

CHNAVPERS: Chief of Naval Personnel.

ChPriDu: Change of Primary Duties.

CI: Classification Inventory.

CIC: Civilian Individual Counsel.

CID: Criminal Investigation Division (Army).

Cir: Circular: an official publication that usually contains information of a general but temporary nature.

Civ: Civilian.

Civil Affairs: Those phases of the activities of a commander which embrace the relationship between the military forces and the civil authorities and people in a friendly country or area, or occupied country or area, when military forces are present.

CL: Clerical.

Class II Reservist: The category to which Marine Corps reservists are assigned while in a drill pay status unit.

Class III Reservist: The category to which Marine Corps reservists are assigned in a non-drill status.

Class A School (Navy): Advanced training usually following basic training.

Class B School (Navy): Highest level of training in a certain specialty usually available to persons who reenlist.

Class C School (Navy): Advanced training given to selected graduates of Class A School.

Class D Allotment: Allotment pay authorized by an enlisted member for his/her dependents.

Class E Allotment: A deduction from pay authorized by military persons to be paid to institutions such as banks and insurance companies, or to individual creditors.

Class N Allotment: An authorized deduction from pay to cover premiums on national service life insurance.

Close Confinement: The confinement, under constant supervision, of prisoners separate from the main prisoner group in quarters especially designated by the commanding officer for that purpose. See Administrative Segregation; Disciplinary Segregation.

CM: Court-Martial: a military court empowered to try military personnel for offenses which have a bearing on military discipline. There are three levels of courts-martial: Summary, Special, and General. The procedures for courts-martial are contained in the Manual for Courts-Martial (MCM).

CMA: Court of Military Appeals: a court composed of three civilian judges appointed by the President and confirmed by the Senate, which exercises the appellate functions over the Armed Forces as to records of trial by courts-martial required by Arts. 67, 73 U.C.M.J. (Manual for Courts-Martial (MCM) para. 101.) See COMA.

CMC: Commandant, U.S. Marine Corps.

CMR: Court of Military Review.

CMSgt: Chief Master Sergeant.

CNAVRES: Chief of Naval Reserve.

CNET: Chief of Naval Education and Training.

Cnf, Cnfd: Confine; Confinement; Confined.

CNGB: Chief, National Guard Bureau.

CNO: Chief of Naval Operations.

CNP: Chief of Naval Personnel.

CO: (1) Company. (2) Commanding Officer. (3) Conscientious Objector or Objection.

Code, Code of Conduct: A five paragraph statement of principles to guide those facing capture as prisoners of war. Promulgated on August 17, 1955 as Executive Order 10631, it begins, "I am an American fighting man. I serve in the forces which guard my country and our way of life . . ." and goes on to state that a man will not surrender, but if captured he will continue to resist and try to escape and will give no information except name, rank, date of birth, and serial number, and will not aid the enemy in any way. 1-A-Os as well as 1-As are required to take code of conduct training during their basic training.

COG: Convenience of the Government: the general grounds for an administrative discharge given for reasons other than the member's failure to meet certain standards. Some of the grounds are general demobilization, erroneous induction or enlistment, national health, safety, or interest, consciencious objection, to permit immediate reenlistment, or to accept an appointment.

Col: Colonel.

COMA: See CMA; Court of Military Appeals (USCMA).

Combat Ready/Readiness: As applied to organizations or equipment, it means availability for combat operations; as applied to personnel, it means qualified to carry out combat operations in the unit to which they are assigned.

Comdr: Commander. See Cdr.

Comdt: Commandant.

Comm: Communications.

Command: The authority which a military commander lawfully exercises over subordinates by virtue of rank or assignment; an order given by a commander.

Commission: (1) To put in, or make ready for, service or use, as to commission. (2) A written order giving a person rank and authority as an officer in the Armed Forces. (3) The rank and authority given by such an order.

Commissioned Officer: Any person in the Armed Forces who holds grade and office under a commission issued by the President. In the Army, a person who has been appointed to the grade of 2 LT or higher is a commissioned officer. See Noncommissioned Officer; Warrant Officer.

COMNAR: Commander, Naval Air Reserve.

Company: The basic administrative and tactical unit in most arms and services of the Army. On the command level below a battalion and above a platoon, it is equivalent to a battery of artillery, and usually involves aobut 200 persons.

Company Clerk: An enlisted person, usually in the grade of E-4 who, though officially having only clerical duties, in actuality often is a key figure in the administration of a company.

Company Commander: The senior and commanding officer of a company. His/her endorsement is required on all requests for personnel action, and (s)he is authorized to issue punishment under Article 15.

Company Grade: Classification of those officers normally serving in a company, *i.e.* lieutenants and captains.

Company Officer: Any lieutenant or captain serving in a company.

Compassionate Reassignment: A special temporary assignment of a servicemember to a station near his/her home or dependent. It is made to alleviate hardship which cannot be resolved by emergency leave, but which is expected to be resolved within 12 months. Normally, it will not be granted unless the servicemember's presence is the only available means to alleviate the hardship or make necessary arrangements for so doing. When the hardship is expected to last more than 12 months, the member is advised to apply for a hardship discharge.

Component: A part of a whole, *e.g.*, the regular and the Reserve Army, the National Guard of the United States and the Army reserves. Inducted personnel are members of the Army of the United States without component.

COMR: Court of Military Review. See CMR.

Con: Conduct rating; Continental (United States).

CONARC: Continental Army Command.

Confinement: The physical restraint of a person. (Manual for Court-Martial (MCM)). See Arrest; Restriction.

Confinement Facility: A stockade, hospital, prisoners ward, rehabilitation training center, disciplinary barracks, or other place of confinement.

Confinement Officer: The correctional officer, appointed by the commander officer of a military installation, who is charged with the custody, administration, and treatment of prisoners.

Connex: Large metal shipping box often used as temporary jail.

Contract NROTC Program: That part of Senior NROTC in which the members are being educated for commissions as Reserve Officers in the Naval Service and whose educational expenses except for a monthly subsistence allowance are not subsidized by the Navy.

Control Group: An Army administrative group composed of Individual Ready Reservists who are for various reasons not required to participate in reserve training, and other reservists, such as the staff and faculty of the USAR school.

CONUS: Continental United States.

Convenience of the Government: See COG.

COPO: Chief of Personnel Operations.

CORB: Conscientious Objector Review Board.

Correctional Custody: The physical restraint of a person, imposed as a punishment under Article 15. Normally those in it are kept away from prisoners and persons awaiting trial and are made to perform both regular military duties and extra duties. (Manual for Courts-Martial (MCM) para. 131.)

Correctional Facilities: Places at which rehabilitation of prisoners is attempted, *e.g.*, brigs, rehabilitation training centers, disciplinary barracks, disciplinary training centers, hospital prisoners wards, and stockades. See Confinement Facility.

Correctional Holding Detachment: A holding area for servicemembers prior to court-martial or prior to entering a stockade. Less than jail but some restrictions on free movement.

Counsel, Couns: A lawyer within the meaning of U.C.M.J. art. 27(b)(1) unless appropriate authority certifies in the permanent record the nonavailability of a qualified lawyer and sets forth the qualifications of the substituted nonlawyer counsel.

Court-Martial: See CM.

Court of Military Appeals: See CMA; COMA.

Court of Military Review: See CMR.

CPL: Corporal.

CPO: Chief Petty Officer.

CPT: Captain (Army, Air Force, Marines).

CQ: Charge of Quarters.

Critical MOS: One in which there is a current or expected shortage of personnel. See Military Occupational Speciality.

CSC: Civil Service Commission.

CSP: College Scholarship Program.

Ct. Cl.: Court of Claims.

CTF: Correctional Training Facility. See Correctional Facility.

Ctr: Center.

CWO: Chief Warrant Officer.

Da: Day.

DA: Department of the Army.

DAF: Department of the Air Force.

Das: Days.

Date of Rank: The date on which an officer or enlisted person attained his/her current rank (DOR).

DB: Disciplinary Barracks: military correction facility for confinement, retraining, and restoration of prisoners to "honorable duty status" or return to civilian life. See Correctional Facility.

DC: Defense Counsel: an officer who, at no cost to the defendant, represents him/her in a Special or General Court-Martial. (S)he may be anyone of the accused's own choosing (as long as (s)he is readily available), but whenever the trial counsel is qualified as a lawyer, as in any General court and some Special courts, (s)he too must be a member of a bar; at least at the state level. (Manual for Courts-Martial (MCM) para. 6.) See Individual Counsel.

DD: (1) Department of Defense. (2) Dishonorable Discharge: a formal release from military service, without honor. It can only be given upon a conviction and sentence by a General Court-Martial (GCM). (Manual for Courts-Martial (MCM) paras. 76, 126.)

DD 214: Armed Forces of the U.S. Report of Transfer or Discharge.

Dec: Decorations.

DEP: Delayed Entry Program.

Dep: Dependent(s).

Dependency Discharge: The complete separation of a member (by means of an administrative discharge granted honorably or under honorable conditions) because his/her continued presence at home is the only means of eliminating or materially alleviating a situation of undue and genuine dependency which has arisen after his/her entry into active duty. Though often combined with a hardship situation, dependency can exist when the problem is not a financial one.

DEROS: Date of Expected Return from Overseas.

Deserter: (1) Any member of the Armed Forces who has been convicted of absenting himself/herself with the intent to remain away from his/her unit permanently or shirk important or hazardous duty. (2) More commonly, an administrative term used to designate a member who has been absent without authority for more than 29 days, but who has not been tried and legally adjudicated a deserter. (Manual for Courts-Martial (MCM) para. 164.)

Deserter Information Point: Focal point in each military service providing for the control, accounting, and dissemination of information concerning members administratively classified as deserters and, sometimes, those AWOL for less than 30 days.

Detachment: A battalion or similar unit which is removed from the immediate disciplinary control of a superior, so that its commanding officer is eligible to convene Special Courts Martial even though a superior officer exercises control in other matters (Det.). (Manual for Courts-Martial (MCM) para. 5.)

DF: Disposition Form: an almost blank sheet of paper used for, among other things, the first page of an application for personnel action such as discharge or reassignment; DA Form 2496.

DFC: Distinguished Flying Cross.

DFR: Dropped from roll: an administrative procedure which drops a member from strength accountability of the organization to which (s)he is assigned, but does not terminate his/her military status.

Dg: Diagnosis. See Dx.

DI: Drill Instructor.

DIGOPS: Digest of Opinions (at present out of print).

DIL: Disrespect in Language.

Dioxin: Toxic contaminant of Agent Orange, the most widely applied of the herbicides used in the Vietnam War.

DIP: See Deserter Information Point.

Dir: Directive.

Dis: Discharge.

Disaffected Person: A person who is alienated or estranged mentally from those in authority or who has a lack of loyalty for his/her government. (AFM 11-1.)

Disapr: Disapproved.

Disch, Discharge: The complete separation from all military status, active and reserve, terminated other than through death. Also applied to a document which effects the discharge, *i.e.,* a discharge certificate.

Discharge Review Board: Board which will on its own motion and on request review the type and nature of a discharge/dismissal or former member of respective departments. The five member board can change a discharge/dismissal or issue a new one, but it can't waive a discharge or review discharges which resulted from a general court-martial (Army, Coast Guard, Navy/Marine Corps, and Air Force).

Discip: Discipline.

Disciplinary Action: Any authorized measure, including court-martial and nonjudicial punishment, taken to punish acts of misconduct by military personnel.

Disciplinary Exercises: Exercises in military drills that are intended, not for physical development, but for training in alertness, promptness in carrying out orders, and morale. Disciplinary exercises include facings, the position of attention, hand salute, etc.

Disciplinary Segregation: The close confinement of prisoners as a disciplinary measure in accordance with regulations which provide a minimum of food and clothing (DS). See Administrative Segregation.

Disciplinary Training Center: A correctional facility in overseas territories used in periods of national emergency as a vehicle for rehabilitating prisoners to duty.

Discipline and Adjustment Board: A board of at least three officers appointed by the commanding officer of a correctional facility to consider infractions of rules and regulations, to recommend appropriate disciplinary action thereof, and to consider and assist in the solution of adjustment problems of prisoners referred to it by the commanding officer or other members of the staff.

Dismissal: The release, without honor, of an officer or cadet, by sentence of a court-martial or military commission. Equivalent to a DD. (Manual for Courts-Martial (MCM) para. 98.)

Div: Division.

DMZ: Demilitarized Zone.

DN: Department of the Navy.

DOA: Dead on Arrival.

DOB: Date of Birth.

DoD: Department of Defense.

DOE: Date of Enlistment.

DOJ: Department of Justice.

DOLC: Disobey Lawful Command.

DOLO: Disobey Lawful Order.

DoDPM: DoD Military Pay and Allowances Entitlements Manual.

DOPMA: Defense Office Personnel Management Act.

DOR: See Date of Rank.

DOS: Date of Separation.

Draftee: See Inductee.

DRB: See Discharge Review Board.

Drill: See Unit Training Assembly.

Drk: Drunk.

DROS: Date Returned from Overseas (DEROS).

Drug Abuser: One who has illegally, wrongfully, or improperly used any narcotic substance, marijuana, or dangerous drug; possessed, transferred, or sold the same.

DS: See Disciplinary Segregation.

DSC: Distinguished Service Cross.

DSM: Distinguished Service Medal.

Dstr: Deserter.

Dtd: Dated.

Du: Duty.

Dud: (1) An explosive which does not detonate; (2) slang for a soldier who does not perform well.

DUOCD: Discharge Under Honorable Conditions. See General Discharge.

DUOTHC: Discharge Under Other Than Honorable Conditions. See Undesirable Discharge.

Duty Officer: An officer detailed to be constantly available for call in emergencies during a specific period.

Duty Station: The military establishment or post to which an officer or enlisted person has been assigned for duty.

Duty Status: The standing of an officer or enlisted person when performing full military duty and entitled to receive full pay.

Dx: Diagnosis.

Dy: Duty.

EAD: (1) Extended Active Duty. (2) Entry on Active Duty.

EAOS: Expiration of Active Obligated Service. See EOAS.

Early Out: (1) Any release from active duty prior to the normal estimated termination of service (ETS). (2) Specifically, a release effected usually not more than 90 days prior to the normal ETS so that the member can attend or teach school, engage in seasonal employment, or become a police officer.

EAT: Earliest Arrival Time.

Ed: Education.

ED: Extra Duty.

EDP: Expeditious Discharge Program.

EDS: Estimated Date of Separation.

EEOA: Equal Employment Opportunity Act.

Eff: Effective.

EIOD: Equivalent Instruction or Duty.

EL: Electronic.

ELI: Electronic Information.

Elimination: The removal of an officer from commissioned or warrant status and from the active list because of substandard performance of duty or professional or moral dereliction.

EM: Enlisted Man (Men).

E&M: Extenuation and Mitigation (sentencing phase of court-martial).

Emergency Leave: Leave granted upon request of a serviceman when it is established that an unexpected personal emergency exists and priority travel between specified areas outside the continental U.S., or between two areas outside the continental U.S., is required. Leave granted from post or station within the continental U.S. even though prompted by an emergency is ordinary leave. See

Compassionate Reassignment.

ENL: Enlist.

Enld: Enlisted.

Enlmt: Enlistment.

Enlisted Person: Any enlistee or draftee, below the grade of officer or warrant officer; *i.e.,* in grades E-1 through E-9. See Enlistee; Draftee; Private; Specialist; Noncommissioned Officer.

Enlisted Specialist: An enlisted person in grade E-4 or higher who performs specific administrative or technical duties. Powers of leadership and command are subordinate to the administrative or technical requirements of the position.

Enlistee: An individual who voluntarily enrolls as a member of one of the Armed Forces. See Inductee; Enlisted Person.

Enlistment: The first voluntary enrollment in the military, as contrasted with induction.

Enlisted Option: The opportunity afforded a prospective enlistee to choose the duty and/or geographical area in which (s)he will be trained or to which (s)he will be assigned, providing military conditions permit.

Enr: Enroute.

Ens: Ensign.

E-1: The lowest enlisted grade; a buck private. (S)he is normally promoted to E-2 after 4 months of training, and then according to time in grade and merit. An enlisted person may be reduced to E-1 by sentence of a court-martial, or by administrative action, such as receipt of a less than honorable discharge. See Enlisted Person; Private.

EOA: Effective on or about.

EOAS: See EAOS.

EOD: Entry on Duty.

EOE: Expiration of Enlistment.

EOS: Expiration of Obligated Service.

EPD: Extra Police Duty, in the sense of clean-up work.

EPEB: Enlisted Personnel Evaluation Board.

EPTE: Existed Prior to Entry.

EPTS: Existed Prior to Service.

Equivalent Duty: Duty that may be authorized for Army unit members unable to attend a Unit Training Assembly (UTA).

Equivalent Instruction or Duty (EIOD): A period of instruction or duty intended to be the equivalent of a drill which has been or will be missed.

EQT: Equivalent Training.

ER: Efficiency Report.

Err: Erroneous.

ES: Eligible for Separation.

ETO: Expiration of Term of Obligation.

ETS: Expiration of Term of Service.

ETST: Electronic Technician Selection Test.

EW: Enlisted Woman (Women).

Ex, Exl: Excellent.

Executive Officer: A commissioned officer who is the chief assistant to the commander of a unit such as a company.

Fall In: The order given when it is required that troops place themselves in the proper position for a formation.

Fall Out: (1) The order given to release troops from formation or other formal grouping. (2) The order given to call troops from any other place or gathering, *e.g.,* fall out of the barracks and into formation.

FAPA: Forfeiture of All Pay and Allowances.

FAPD: Failure to Appear at Place of Duty.

Favorable Personnel Actions: These include: appointment, reappointment, enlistment, reenlistment; any entry onto active duty; most reassignments; promotion; issuance of awards, decorations, or commendations; attendance at service schools or civilian schools under military programs; unqualified resignation, discharge, or release; and retirement, continuance on an Army retired list.

FC: Prefix to case numbers; Air Force cases before Board for Correction of Military Records.

FD: Prefix to case numbers; Air Force cases before Discharge Review Board.

Field Bd: Administrative Discharge Board (ADB) for the Navy.

Field Grade Art. 15: Article 15 (nonjudicial) punishment (NJP) given by a field grade officer (Major or Lt. Commander) to which more severe punishments may attach.

Field Manual: A handbook which contains instructions, information, and reference material about military training and operations. It is the best source of information about military doctrine, tactics, and techniques.

FF: Forfeit; forfeiture.

FinAve: Final Average.

1Lt: First Lieutenant.

1Sg: First Sergeant.

Fiscal Year: The period beginning October 1 and ending September 30 of consecutive calendar years. Before 1976, the Fiscal years began on July 1, and ended on June 30. The fiscal year is designated by the calendar year in which it ends, *e.g.,* FY 70 is the fiscal year ending June 30, 1970.

Flagging Action: Controls initiated to suspend favorable personnel actions. See Favorable Personnel Actions.

Flt: Fleet.

Fm: From.

FMF: Fleet Marine Force.

FOLO: Fail to Obey Lawful Order.

FOP: Forfeiture of Pay.

Foreign National: Anyone who is not a citizen or national of the U.S.

Forf: Forfeiture (of pay).

Formation: A formal arrangement of a number of troops in a specified manner for a specific reason, such as taking roll-call, or for purposes of inspection.

FORSCOM: Forces Command.

Fort: A permanent post (distinguished from a camp which is a temporary installation).

FOUO: For official use only.

Foxhole: A small pit used for cover, usually for one or two people, and so constructed that an occupant can fire effectively from it.

FPO: Fleet Post Office.

Fr: From.

F. Supp.: Federal Supplement: a reporter containing case opinions from the United States District Courts.

F2d: Federal Reporter, Second Series: a reporter containing case opinions of the 11 United States Circuit Courts of Appeals, and the U.S. Court of Claims (Ct. Cl.).

FT: See Fort.

FTG: Fail to Go, an absence offense.

FTR: Fail to Return, an absence offense.

Full-time National Guard Training: Full-time training duty performed by members of the Army National Guard but under state control, under 32 U.S.C. §§ 316, 503-505.

Furtrans: Future Transfer.

FY: Fiscal Year.

FYI: For Your Information.

FYIG: For Your Information and Guidance.

GA: General of the Army.

GAO: General Accounting Office.

GAR: Garrison.

GC: General Counsel.

GCM: General Court-Martial; highest type of court-martial, consisting of not fewer than five members, not including the military judge, and having the power to try any offense punishable by the Uniform Code of Military Justice (U.C.M.J.). (Manual for Courts-Martial (MCM) esp. para. 2, 3, 14, 40.)

GCMA: General Court-Martial Convening Authority.

GCMdl: Good Conduct Medal.

GCMO: General Court Martial Order.

Gd: Guard.

GD: General Discharge: the final separation of an enlisted person under honorable conditions when his/her service has been satisfactory, but not sufficient for an Honorable Discharge.

Gen: General.

General Article: Article 134 of the U.C.M.J., which makes punishable all acts not specifically proscribed in any other article "when they amount to disorders or neglect to the prejudice of good order and discipline in the armed forces, or constitute non-capital crimes or offenses denounced by enactment of Congress or under authority of Congress." (Manual for Courts-Martial (MCM) para. 213.) If such conduct is specifically made punishable by another article of the U.C.M.J., it is charged as a violation of that article; otherwise it is charged as a violation of Article 134.

General Discharge: See GD.

General Orders: (1) Permanent instructions regarding policy or matters of administration, issued in order form, and applying to all members of a command, individuals, or small groups. (2) A series of permanent guard orders that govern the duties of a sentry on post.

GI: (1) Slang for any enlisted person, usually a soldier. (2) As a verb, to clean thoroughly, originally with a government issue brush, but now it may be by any manual method.

GI Party: Slang for the thorough cleaning of a barracks by all or many of its inhabitants, usually performed prior to an inspection.

GIT: General Information.

GM: General Maintenance.

GMS: General Military Subjects.

GndFor: Ground Forces.

GO: General Orders.

Good Time: (1) All days of duty which count toward the expiration of service, as opposed to bad time or lost time. (2) That period of time for "good behavior" subtracted from a sentence of confinement, usually 5 days per month.

GOS: Good of the Service.

GovAir: Government Air Transportation.

GPO: Government Printing Office.

GSgt: Gunnery Sergeant.

G-T: General Technical Army intelligence test.

Habeas Corpus Writ: Petition to a court based on alleged illegal detention in order to obtain a court order for release from custody.

HAF: Headquarters (HQ) Air Force.

Hardship Discharge: The complete separation (by means of an administrative discharge granted honorably or under honorable conditions) of a member because of a financial hardship of his/her dependents which has arisen or become materially aggravated since his/her entry into active duty. Before the separation can be effected, the GI must show that (s)he has taken all other reasonable means to lessen or eliminate the undue hardship, but that his/her discharge is the only remaining way of providing a solution. See Compassionate Reassignment; Emergency Leave.

HD: Honorable Discharge.

Hdsp: Hardship. See Hardship Discharge.

HE: Hearing Examiner.

Headquarters: The executive part of a branch of service which exercises directive and supervisory functions. Though primarily located in the Penta-

gon, it includes all dispersed agencies and personnel performing national headquarters functions, as distinguished from field or local functions, no matter where located.

HHC: Headquarters and Headquarters Company.

HHD: Headquarters and Headquarters Detachment.

Hon: Honorable (Discharge).

HQ: Headquarters.

HREC: Health Record.

IADT: Initial Active Duty for Training: the first period of active duty training for a reservist wherein recruit training and advanced individual training are accomplished, normally 4 to 6 months.

IATA: Is Amended to Add.

IATD: Is Amended to Delete.

IAW: In Accordance With.

IC: Individual Counsel: a civilian attorney retained by the defendant in a court-martial. (S)he may work with the defense counsel or not, according to his/her client's wishes. (Manual for Courts-Martial (MCM) para. 48.)

ICT: Individual Combat Training. See Basic Training.

IDT: Inactive Duty Training: training performed by a reserve member while not on active duty; regular drills, make-up drills.

IEO: Individual Evaluation Officer: one who consider the case of a servicemember being discharged for unsuitability (Navy, Marine, Air Force).

IG: Inspector General: an officer appointed to examine and report on any phase of activity that affects discipline, efficiency and economy.

IHCA: In Hands of Civilian Authorities.

IMC: Individual Military Counsel.

INACDUTRA: Inactive Duty Training. See IDT.

In: Infantry.

Inact: Inactive.

Inactive National Guard: National Guardsmen temporarily prevented from participation in training, but who continue to be in the Ready Reserve and subject to order to active duty in time of war or national emergency.

Inactive Status: Being officially connected with the military service but not actively serving in it.

Inactive Status List: Members of the Standby Reserve who are unable to participate in training but who are retained in the Reserve.

Individual Ready Reserve: Members of the Ready Reserve assigned to U.S. Army Reserve Annual Training or other Reinforcement Control Groups, who are not required to attend reserve meetings.

Ind: Inducted.

Induc: Inductee: an enlisted person who has been inducted into military service under the provisions of the Universal Military Training and Service Act or the Military Selective Service Act.

Inductee: See Induc.

Inf: See Infantry.

Infantry: A branch of the Army trained, equipped and organized to fight on foot; the front liner (slang: grunt).

Info: Information.

Information Officer: The staff officer responsible for the overall conduct of the information activities of a command, including public information, troop information, and community relations.

ING: Inactive National Guard.

INS: Immigration and Naturalization Service.

Insignia: Any of the distinctive devices worn on the uniform to show grade, organization, rating, and service.

Installation: All of the buildings, building equipment, and related property of a military facility.

Installation Parolee: A prisoner whose parole is limited to the installation on which the confinement facility is located.

Inst, Instr: See Instruction.

Instruction: A detailed implementation of branch regulations.

Involuntary Active Duty: A specified period of active duty performed by mandatory participants by reason of unsatisfactory participation at inactive duty training (drills).

ITR: Infantry Training Regiment.

JA: Judge Advocate.

JAG: Judge Advocate General. See TJAG.

JAGA: Opinions of the Judge Advocate General of the Army.

JAGC: See Judge Advocate General's Corps.

JAGMAN: Judge Advocate General Manual (Navy).

JAG Officer: A member of the Judge Advocate General's Corps.

JALS: Judge Advocate's Legal Service (Army Publication).

JANAF: Joint Army-Navy-Air Force.

JCS: Joint Chiefs of Staff: the staff within the DoD which consists of the chairman (the voteless presiding officer); the Chief of Staff, US Army; the Chief of Naval Operations; and the Chief of Staff of Air Force. The JCS is the principal military advisor to the President, the National Security Council, and the Secretary of Defense (AR 10-1).

Jd: Jurisdiction.

Jokebook: Slang for record of trial. (DUP)

JSCOM: Joint Service Commendation Medal.

Kd: Killed.

KIA: Killed in Action.

KP: Kitchen Police duties.

KSM: Korean Service Medal.

LA: Letter of Activation.

Lant: Atlantic.

LCDR: Lieutenant Commander.

LCPL: Lance Corporal.

LD: Line of Departure; Line of Duty.

Leave: An authorized absence from duty, which is provided as a vacation or to permit personal attention to non-military matters. See Emergency Leave.

Legal Assistance Officer: A commissioned officer of the JAGC who assists personnel and their dependents with their non-criminal personal legal problems. See JAG Officer.

Levy: A call, made on commands by HQ, for mandatory reassignment of a certain number of enlisted personnel in specified Military Occupational Specialties, grades, sometimes with special qualifications.

Liberty: Authorized absence of an officer or enlisted member from his/her place of duty not chargeable as leave.

LIO: Lesser Included Offense.

LO: Liaison Officer.

LOA: Leave of Absence.

LOM: Legion of Merit.

Lost Time: Any period of one day or more which does not count towards the expiration of the term of service. Also called bad time, it consists of those days on which the individual is unable to perform duty because of desertion, AWOL, confinement under sentence, pre-trial confinement (if the trial results in conviction), intemperate use of drugs or alcohol, or disease or injury resulting from the individual's own misconduct.

LT: Lieutenant.

LTC; LtCol: Lieutenant Colonel.

LTG; LtGen: Lieutenant General.

LTJG: Lieutenant (Junior Grade).

Lr, Ltr: Letter.

Lv: See Leave.

M-1, M-14, M-16: Various military rifles.

MA: Mechanical Aptitude.

MAF: Marine Amphibious Force.

MAJ: Major.

MAJCOM: Major Command.

MAJGEN: Major General.

Man: Manual.

Mandatory Participant: A reservist who is subject to the mandatory provision of 10 U.S.C. § 270; 48 drills and active duty for training not less than 14 days or active duty for training not more than 30 days during each year.

Manual for Courts-Martial: A handbook of several hundred pages which includes the Constitution, the U.C.M.J., and explanations thereof applicable to military affairs, along with sample forms and guides for trials and other matters (MCM).

MARCORB: Marine Corps Base.

MARCORMAN: Marine Corps Manual.

MARCORPROMAN: Marine Corps Promotion Manual.

MARCORSEPMAN: Marine Corps Separation and Retirement Manual.

MARDIV: Marine Division.

Marines: (As in 4th Marines) A Marine Corps Regiment.

Marks: Navy performance rating.

Mast: Meeting with commander concerning Article 15 (NJP) (Navy and Marines) (also called Captain's Mast).

MAW: Marine Air Wing.

Maximum Release Date: The day past which a sentenced prisoner cannot be held even if his good conduct time is taken away, *e.g.*, the 180th day of a 180 day sentence.

Maximum Security Institution: A disciplinary barracks constructed to hold "serious offenders" and designed to thwart attempted escapes. Its prisoners are normally quartered in cells, and most of the activities are conducted within the walls enclosing it.

MB: Medical Board: board of medical officers which makes the first evaluation of a servicemember whom the military doctor feels is possibly unfit for retention.

M/b: Manifested by.

Mbr: Member.

MC: Medical Corps; Marine Corps.

MCAS: Marine Corps Air Station.

MCB: Marine Corps Bulletin; Marine Corps Base.

MCM: See Manual for Courts-Martial.

MCO: Marine Corps Order.

MCR: Marine Corps Reserve.

MCRD: Marine Corps Recruit Depot.

MD: (1) Medical Doctor. (2) Prefix to case numbers, Marine Corps cases before the Discharge Review Board.

M-Day: Mobilization Day.

Mdl: Medal.

MDW: Military District of Washington (U.S. Army).

ME: Middle East.

MEDEVAC: Medical Evacuation (usually by air).

MEDEVAL: Medical Evaluation.

Medic: An enlisted specialist trained by the Army to perform paramedical jobs. Not an MD.

Medical Board: See MB.

Medium Security Institution: The disciplinary barracks or rehabilitation centers which hold "less serious offenders." It is usually enclosed by a fence or a wall, and prisoners are normally housed in barracks or dormitories, and are permitted, under guard, to perform duties outside its confines.

MedRec: Medical Record.

Men Cat: Mental Category.

Mental Hygiene: Short for Mental Hygiene Clinic, a

military out-patient facility under the control of the post surgeon and staffed by military personnel, which provides psychiatric counseling and evaluation for military personnel.

MG: Major General.

MH: Medal of Honor.

MHCS: Medical Hygiene Consultation Service.

MHD: Medical Holding Detachment.

MI: Middle Initial; Military Intelligence.

MIA: Missing in Action.

Military: In its broadest sense, that dealing with war on the affairs of war, whether by Army, Navy, Air Force, or Marines.

Military Courtesy: Those rules of conduct for military personnel required either by regulation or by tradition.

Military Discipline: "A state of individual and group training that creates a mental attitude resulting in correct conduct and automatic obedience to military law under all conditions. It is founded upon respect for and loyalty to properly constituted authority." (AR 600-20, para. 2.)

Military Intelligence: A basic branch and arm of the Army which is concerned with all aspects of surveillance, security, interrogation, espionage, and other matters of intelligence and counter-intelligence.

Military Judge: A Judge Advocate officer designated to perform duty as a member of the trial judiciary division. (S)he is responsible for acting as law officer for General Court-Martial cases within the circuit and maintaining a trial calendar and cooperating with the Staff Judge Advocate in his/her circuit (MJ).

Military Justice: The application of military law to persons accused of the commission of offenses under the U.C.M.J.

Mil. L. Rep., MLR: Military Law Reporter (private publication).

Mil. L. Rev.: Military Law Review (Army Publication).

Military Occupation Specialty: The type of work or duty for which an enlisted person is trained and qualified. A duty MOS is the one (s)he is actually performing. A primary MOS represents the highest significant job skill (s)he possesses, and secondary MOSs are those lesser job areas for which (s)he is qualified. Each MOS is represented by an alphameric symbol, *e.g.*, 11B10 is the code for light weapons infantry (MOS).

MILPERCEN: Military Personnel Records Center.

Milpers: Military personnel.

Military Personnel Records Jacket: A form kept in an individual's assigned unit, in which relevant statistics of his/her military career are noted and related documents are filed (MPRJ).

Military Police: Officers or enlistees charged with the enforcement of military law, orders and regulations. Their duties include: traffic control; crime prevention, investigation and reporting; apprehension of military absentees and escaped prisoners; custody, administration and treatment of military prisoners; providing security for military supplies, equipment and materiel, etc. MP jurisdiction is limited to persons subject to the U.C.M.J. and to such other persons as may be required to obey military law when so proclaimed by the President or other competent civilian authority. They provide support as above to combat zones, exercise control over prisoners of war and the indigenous civilians, and are required to fight as infantry when the situation requires. (MP, SP, Shore Patrol).

Military Training Company: A unit established at a disciplinary barracks to train prisoners for restoration to duty status.

Minimum Release Date: The date on which a prisoner will be released if (s)he is credited with all good conduct time to which (s)he is entitled, unless released sooner by the suspension or reduction of his/her sentence or by parole.

Misc, MISC: Misconduct.

Missing Movement: A court-martial offense (Article 87, U.C.M.J.) involving the failure to be transported via ship, aircraft, or even along with a unit on foot. Normally, the movement must be a major one not merely a short march, but a person can be found guilty whether (s)he misses it through design or through neglect. (Manual for Courts-Martial (MCM) para. 166.)

Mission: (1) The task together with the purpose, which clearly indicates the action to be taken and the reason therefore. (2) In common usage, especially when applied to lower military units, a duty assigned to an individual or unit; a task.

Mitigation of Sentence: The reduction of punishment imposed by courts-martial or other military tribunals in quantity or quality, the general nature of the punishment remaining the same.

MJ: See Military Judge.

Mj: Marijuana.

MLR: Military Law Reporter (private publication).

MM: Missing Movement (violation of Article 87 of the U.C.M.J.); Motor Maintenance.

Mobilization: (1) The act of ordering National Guard and Reserve units and any unassigned reservists to active duty under the authority contained in 10 U.S.C. § 672 or § 673. (2) The act of preparing for war or other emergencies by assembling and organizing national resources.

Modified Basic Training: Training given to conscientious objectors classified as 1-A-O by Selective Service. Now held at Ft. Sam Houston for a period of 6 weeks, its subjects and standards are similar to those of basic combat training, except that training with weapons is not required.

MON: Mongolian.

MOQ: Married Officer's Quarters.

Morning Report: A document on which the presence or absence of the members of a company or similar unit is recorded. The failure of a member to be

listed as present constitutes a *prima facie* case of AWOL.

Mos: Months.

MOS: See Military Occupational Specialty.

MP: See Military Police.

MPC: Military Police Corps.

MPR: Military Pay Record.

MPRJ: See Military Personnel Records Jacket (U.S. Army).

MPV: Military Pay Voucher.

MS: Military Science.

MSC: Medical Service Corps.

MSE: Mental Status Evaluation.

MSG, MSGT: Master Sergeant.

MSO: Military Service Organization.

MSSA: Military Selective Service Act.

MTC: Military Training Company; Medical Training Center.

Multiple Unit Training Assembly: A reserve "drill" which, because of its length, counts for more than one Unit Training Assembly (UTA): it lasts a weekend which counts for 4 UTAs (MUTA).

Muster: To gather for inspection, to assign duties, to drill, etc.

MUTA: See Multiple Unit Training Assembly.

MVA: Modern Volunteer Army.

N: Negro.

NA; N/A: Not Applicable.

NAC: National Agency Check (for security clearance).

NAD: Not on Active Duty.

NAM: Navy Achievement Medal.

NAS: Naval Air Station.

National Guard Bureau: A joint agency of the Army and Air Force which acts as a channel of communication between them and the states on all National Guard matters.

National Guard Regulation: Published rules which govern the National Guard when it is not in active federal service. An Army or Air Force Regulation applies to the Guard only when it or a Guard regulation so specifies, but when there is a conflict the Guard regulation rules until the Army or Air Force, as the case may be, resolves it.

National Policy: A broad course of action or statements of guidance adopted by the government at a national level in pursuit of national objectives.

NAVCOMPT: Office of the Comptroller (Navy).

NAVMAT: Office of Naval Material.

NC: Prefix to case numbers; Navy cases before the Board for Correction of Naval Records.

NCIC: National Crime Information Center.

NCMR: Naval Court of Military Review (CMR).

NCO: See Noncommissioned Officer.

NCOIC: Noncommissioned Officer in Charge.

ND: Prefix to case numbers, Navy cases before the Discharge Review Board.

NDRB: Naval Discharge Review Board (DRB).

NDSM: National Defense Service Medal.

NESEP: Navy Enlisted Scientific Education Program.

NFC: Not Favorably Considered.

NG: National Guard; Not Guilty.

NGB: National Guard Bureau.

NGR: National Guard Regulation.

NIS: Naval Investigative Service.

NJP: Nonjudicial Punishment: light punishment imposed under the provisions of Article 15, U.C.M.J., without trial, by an officer or any member of his/her command.

NLD: Not in Line of Duty.

NLF: National Liberation Front.

NLT: Not Later Than.

NOK: Next of Kin.

Noncombatant Training: Any training which is not concerned with the study, use, or handling of arms or weapons.

Noncommissioned Officer: An enlisted person in the rank of E5 through E9, not a specialist, whose authority to command is vested by virtue of his/her rank. Refusal to obey the order of a noncommissioned officer is a court-martial offense (Article 91) punishable by up to 6 months confinement and a Bad Conduct Discharge. (Manual for Courts-Martial (MCM) paras. 19,170.) See Enlisted Person; Sergeant.

Non-duty Status: Except for official absence pursuant to a pass, the non-availability of a member for such reasons as arrest, leave, sickness, confinement, or AWOL.

Non-pay Status: The standing of an enlisted person or an officer who, through his/her own fault or neglect, is unavailable for duty and thus not entitled to pay. AWOL and time lost because of illness due to one's own fault result in this status.

Note: Notice.

NP: Neuropsychiatric.

NPE: Neuropsychiatric Examination.

NPRC: National Personnel Records Center (Military Personnel Records) or MILPERCEN.

NPS: No Prior Service.

NT: Normal Tour.

NTE: Not to Exceed.

NUC: Naval Unit Citation.

O: Order.

O/A: On or About.

Obligated reserve action: An active status section of the Ready Reserve administered by the Air Reserve Personnel Center.

Obligor: A member of a reserve component who has a statutory obligation to serve a specified period of

time in the Reserve Components of the Armed Forces.

OCCH: Office, Chief of Chaplains.

Occs: Occasions.

OCMM: Office of Civilian Manpower Management (Navy).

OCS: Officer Candidate School.

OD: Officer of the Day.

OER: Officer Efficiency Report.

Off: See Officer.

Office Hours: Nonjudicial punishment (Article 15, U.C.M.J.) in the Marine Corps.

Officer: Any person holding a commission or warrant in one of the armed forces. To disobey a lawful order of an officer is a violation of Article 90 of the U.C.M.J. punishable by up to five years' confinement at hard labor, forfeiture of all pay and allowances and a Dishonorable Discharge, or, under certain circumstances, death.

OIC: Officer in Charge.

OJAG: Office of the Judge Advocate General.

OJT: See On the Job Training.

OLC: Oak Leaf Cluster.

Old Man: Slang for one's commanding officer. Never used to his face.

OMCR: Organized Marine Corps Reserve.

ONI: Office of Naval Intelligence.

On the Job Training: A process designed to impart knowledge and skills through actual performance of duties under competent supervision, in accordance with an approved, planned program.

OPNAV: Naval Operations.

OPO: Office of Personnel Operations.

OPT: Option, as in enlistment option.

Order: Any written, oral, or signalled communication which conveys instructions from a superior to a subordinate. In a broad sense the terms order and command are synonymous. An order, however, implies discretion as to the details of execution, whereas a command does not.

Orderly Room: The office of the company in which the business of the company is done.

Ordinary Leave: Authorized absence from assigned duty. Leave credit is accrued at the rate of 2½ calendar days for each month of active service. See Emergency Leave; Leave.

ORS: Obligated Reserve Section.

O/S: Overseas.

OSA: Office of the Secretary of the Army.

OSAF: Office of the Secretary of the Air Force.

OSD: Office of the Secretary of Defense.

OSI: Office of Special Investigations (Air Force).

OTIG: Office, the Inspector General.

OTJAG: Office, the Judge Advocate General.

OTPMB: Office, the Provost Marshall General.

OTS: Officer Training School.

OTSG: Office of the Surgeon General.

PA: Pattern Analysis.

Pac: Pacific.

PAL: Prisoner-at-large (not confined).

Pam: Pamphlet.

Para: Paragraph.

Parolee: (1) A prisoner who has been released from confinement prior to his/her minimum release date on condition that (s)he perform certain duties and/or behave within specific limits. (2) Usually, an installation parolee.

Pay Grade: The level of the rate of basic pay to which a member is entitled because of rank and seniority as established by the Career Compensation Act of 1949, as amended.

PCA: Permanent Change of Assignment.

PCF: See Personnel Control Facilities.

PCPT: Physical Combat Proficiency Test.

PCS: See Permanent Change of Station.

Pd: Period.

PDA: Permanent Duty Assignment.

PDAB: See Physical Disability Appeal Board.

PDY: Principal Duty.

PEB: Physical Evaluation Board.

PEBLO: Physical Evaluation Board Liaison Officer.

Perm: Permanent.

Permanent Change of Station: The reassignment of individuals or units from one permanent station to another, including the change from home to first station when called to active duty, or the change from last station to home in connection with retirement or relief from active duty.

Permanent Party: Nontransient personnel assigned to an organization for the purpose of serving its mission.

Permanent Station: The post to which a person is assigned for duty under orders which do not provide for the termination of the assignment.

Pers: See Personnel.

Personnel: Individuals required in either a military or civilian capacity to accomplish the assigned mission.

Personnel Control Facilities: Units charged with the control administration of personnel who, usually through AWOL, have been dropped from the rolls of their units. Most members assigned there are either facing court-martial or awaiting discharge (PCF).

Personnel Officer: Officer in charge of keeping an organization's personnel records. The assistant adjutant of the unit is often the personnel officer.

PETS: Prior to Expiration of Service.

PFC: Private First Class.

PF: Partial Forfeitures.

PH: Purple Heart for combat wounds.

PHS: Public Health Service.

Physical Disability Appeal Board: A board which reviews the records of lower boards and councils in evaluating a person for medical discharge.

Physical Evaluation Board: A board of officers which investigates the nature, cause, degree, and probable permanence of a disability, in order to make recommendations for retention, disability retirement, or separation.

Physical Profile Serial: An alphameric representation of the results of a complete medical examination, used to provide an overall estimate of an individual's physical and mental abilities to perform military duties (PULHES).

Physical Review Council: A council which reviews the proceedings and recommended findings of the Physical Evaluation Board in the evaluation procedure for a medical discharge.

PHYSQUAL: Physical qualification. A request for a report of physical examination to determine fitness for continued service or particular duties.

PIO: Public Information Officer.

PL: Public Law.

PL 95-126: A statute affecting Pres. Carter's Special Discharge Review Program, among other things. (Act of Oct. 8, 1977, Pub. L. No. 95-126).

Platoon, Plt: A group of about 50 men, under the control of a platoon leader (officer) and/or a platoon sergeant (NCO). Generally, there are four or five platoons in a company, and four squads in an infantry or basic training unit platoon.

PM: See Provost Marshal.

PMOS: Primary Military Occupational Specialty.

PMS: Professor of Military Science.

PO: Petty Officer (Navy noncommissioned officer).

POB: Place of Birth.

POD: See Port of Debarkation; Post Office Department; Place of Duty.

POE: See Port of Embarkation.

Police: As a verb, to clean out or clean up, *e.g.,* to police the area (for cigarette butts). Kitchen police, of course, clean up the kitchen.

Port Call: The date on which a person will leave the continental U.S. to be shipped overseas.

Port of Debarkation: A marine terminal at which troops, units, material, etc., are discharged from ships and watercraft. Ports of debarkation normally act as ports of embarkation on return passenger and cargo shipment.

Port of Embarkation: Marine terminal at which troops, units, military personnel, and material are loaded onto and/or unloaded from ships.

POS: Period of Service.

Poss: Possession.

PP: Physical Profile.

PRC: See Physical Review Council.

Prgs: Prognosis.

Pris: See Prisoner.

Priority Induction: The procedure used prior to 1973, whereby mandatory participants who failed to perform their required training satisfactorily could be certified to the Selective Service System for induction before other qualified personnel (DoD Directive 1215.13, change 1 cancellation, March 26, 1973).

Prisoner: (1) One who is deprived of liberty by being placed in confinement or custody. (2) Category of personnel transferred or dropped from the roles of their organization but carried in a prisoner status.

Prison Guard: An armed enlisted person in charge of a small group of medium-custody prisoners who are detailed to work outside the stockade.

Private: An enlisted person in grades E1, E2, or E3. Privates have no inherent enlisted command authority, but may be placed temporarily in charge of others of similar or lesser grades.

Pro & Con: Marine Corps Proficiency and Conduct Ratings.

Prob: Probation.

Proc: Processing.

Professor of Military Science: The academic and military title conferred on the senior commissioned officer assigned for duty with a ROTC unit. (S)he is the commanding officer of both regular Army personnel assigned to the unit and of the advanced ROTC cadets.

Proficiency Pay: Extra pay per month for personnel performing in certain Military Occupational Specialties, designed to provide incentive for reenlistment; often called pro pay.

Prom: Promotion.

Provost Court: A military tribunal of limited jurisdiction convened in occupied territory under military government and usually composed of one officer. (Manual for Courts-Martial (MCM) paras. 2, 12.)

Provost Marshall: The staff officer who supervises the military police in a command below Headquarters, and who advises the commander of military police matters.

PSG: Platoon Sergeant.

PSYCHEVA: Psychiatric Evaluation.

PT: Physical Training.

PTA: Pretrial Agreement.

PTIO: Pretrial Investigating Officer (Article 32 U.C.M.J.).

Public Affairs: Public information and community relations activities directed toward the general public.

Public Information: Information of a military nature, the release of which is considered desirable or nonobjectionable to the military.

PUC: Presidential Unit Citation.

PULHES: Physical profile series code.

Punishment Book: A record book kept by a company

or similar unit commander in which an account is given of all minor offenses committed by soldiers and the punishment imposed under Article 15 in each case.

Punitive Articles: Articles 77 through 134 of the U.C.M.J. in which military offenses are enumerated. (Chapter 28, Manual for Courts-Martial (MCM).)

Purple Heart: A decoration denoting the award of a citation certificate or wound chevron awarded for wounds received in action or as a direct result of an enemy act.

PVI: Private E-1.

PV2: Private E-2.

PVT: Private.

PX: Post Exchange.

QM: See Quartermaster.

QMP: Qualitative Management Program.

Quartermaster Corps: A basic service branch which deals with the supply and management of most Army equipment and is responsible for such services as laundry, bath, graves registration, food preparation, and clothing issue.

Quarters: The place or structure in which military personnel or their dependents are housed.

RA: Regular Army.

RADM: Rear Admiral.

Rank: The relative position or degree of precedence held by military personnel. It marks their station and confers eligibility to exercise command or authority.

RC: Radio Code.

Rcm: Recommend.

RCPAC: U.S. Army Reserve Components Personnel and Administrative Center.

Rdd: Reduced in rank.

RDT: Reserve Duty Training.

Ready Reserve: Units and members of the Reserve components who are liable for involuntary active duty in time of war or national emergency declared by Congress, proclaimed by the President, or when otherwise authorized by law.

Ready Reserve Strategic Army Forces: Reserve component devision forces which were selected for early mobilization and deployment. They usually received extra training, often in the form of weekday drills twice as long as the normal 2 hour period. This program was ended in August, 1969.

Reas: Reassigned.

Rec, Recmd: Recommend/recommended.

RECSTA: Receiving Station. See Reception Station.

Receptee: An individual received at a reception station for processing.

Reception Period: The initial portion of confinement devoted to the indoctrination and integration of newly arrived prisoners at correction installations. This period is used also for determining whether newly arrived prisoners have contagious diseases.

Reception Station: The first military activity to which a new enlisted or inducted person is sent, lasting three to ten days. While there, (s)he is tested and classified and receives innoculations, indoctrination, and clothing and is then sent on to basic training.

RE Code: Re-enlistment Code (found on DD 214, Item 15).

Rec'd: Received.

Reenl: See Re-enlistment.

Re-enlistment: Any second or subsequent voluntary enrollment in the Armed Forces.

Re-enlistment Bonus: Money paid to an enlisted person who re-enlists within a time limit of his/her Honorable Discharge.

Ref: Reference.

REFRADT: Released from Active Duty for Training.

Regiment, Regt: Administrative and tactical unit on a command level below division or brigade and above a battalion, usually commanded by a colonel.

Regular NROTC Program: Part of Senior Navy ROTC in which members are being educated for commissions as Regular officers in the Naval Service and whose educational expenses are largely subsidized by the Navy.

Regulations: A publication which sets out policies and prescribes administrative procedures. They are the service branch's enactment of the DoD directives, which in turn are based on statute and as such are binding both on the military as an agency and on the individual soldier.

Rehabilitation Training Center: A correctional facility used in periods of national emergency as a vehicle for rehabilitation and restoring prisoners to duty. The term covers oversears detention and rehabilitation centers, disciplinary training centers, and disciplinary training companies.

Rein: Reinforced.

Relief from Active Duty: Any separation which will result in the discharge, return, or transfer to a reserve component or retirement of an individual.

Replacement Stream Personnel: Unassigned enlisted personnel who are in transit to a replacement depot or batallion prior to reassignment to a permanent unit.

Res: See Reserve.

Rest: Restriction: a mild form of restraint.

RESAF: Reserve of the Air Force.

Reserve: (1) The portion of troops which is kept to the rear or withheld from action at the beginning of an engagement and is available for a decisive moment. (2) A member of a reserve component of the Armed Forces.

Reserve Component: The reserve forces: (1) the Army National Guard of the United States; (2) the Army Reserve; (3) the Naval Reserve; (4) the Marine Corps Reserve; (5) the Air National Guard of the

United States; (6) the Air Force Reserve; and (7) the Coast Guard Reserve. In each reserve component there are three reserve categories: a ready reserve; a stand-by reserve; and a retired reserve. Each reservist is placed in one of these categories. Currently there are about 1.6 million reservists.

Reserve Duty Training: Any training, instruction or duty (other than active duty or active duty training) performed with or without pay by members of the reserve components. (Defined as inactive duty training in 10 U.S.C. § 101 (31).)

Reserve Officer: A duly commissioned or warrant officer, male or female, of the reserve components.

Reserve Officers' Training Corps: The military training organization established in civilian institutions to provide military training and qualify selected students upon graduation for appointment as officers.

Resig: See Resignation.

Resignation: (1) The separation of an officer upon his own request. (2) In certain situations, the separation of an enlisted man upon his own request, such as in lieu of court-martial. In either case, if the member has not completed his term of service, the resignation normally will not be granted unless there are compelling circumstances (Resig).

Resistance Movement: An organized effort by some portion of the civil population of a country to resist the legally established government or an occupying power and to disrupt civil order and stability.

RESSDP: Marine Corps Reserve Standing Operating Procedures.

Rest and Recuperation: The release of individuals from combat or arduous duty for short periods of rest and recuperation. Commonly referred to as R & R.

Restriction: The moral restraint of an individual pursuant to Article 15 or the sentence of a court-martial. Under restriction which generally lasts for no more than two months, one may be restricted to the company, post, or some other area, and normally will be required to perform military duty. (Manual for Courts-Martial (MCM) paras. 126, 131.) See Administrative Restriction.

Retired Reserve: A group of individuals whose names are placed on the Retired Reserve list. Qualified members of the Retired Reserve may be ordered to active duty involuntarily in time of war or national emergency, but then only when it is determined by the Secretary of the Army that adequate numbers of qualified individuals in the required categories are not readily available from the Ready Reserve or inactive status in the Standby Reserves.

Reviewing Authority: The person or appellate agency who must approve and affirm the findings and sentence of a court-martial before the sentence may be carried out. (Manual for Courts-Martial (MCM) paras. 84, 100, 101.)

RFAD: See Relief from Active Duty.

RIF: Reduction in Force.

RIR: Reduction in Rank.

RLEG: Reduction to Lowest Enlisted Grade.

RMC: Returned to Military Control.

ROI: Reports of Investigation.

ROK: Republic of Korea (South).

ROTC: See Reserve Officers Training Corps.

RP: Reserve Personnel.

RPA: Reserve Personnel, Army.

RPSCTDY: Return to Proper Station upon Completion of Temporary Duty (TDY).

RPT: Report.

R & R: Rest and Recuperation from combat zone (in-country or out-of-country).

RRMP: Ready Reserve Mobilization Reenforcement Pool.

RTD: Return to Duty.

RTDA: Returned Absentees.

RTN: Return.

RTR: Recruit Training Regiment.

RVN: Republic of Vietnam (South).

RWBH: Records Will Be Hand-carried.

S: Surrender; surrendered.

SA: Secretary of the Army; Supervising Authority.

SAC: Strategic Air Command.

SAF: Secretary of the Air Force.

Satisfactory Participation: There are three factors constituting satisfactory participation: (1) attendance and completion of initial Active Duty for Training; (2) attendance at sheduled drills; no soldier will receive credit for attendance unless (s)he is wearing is prescribed uniform, presents a neat and soldierly appearance, and performs his/her assigned duties in a satisfactory manner; (3) attendance at and satisfactory completion of summer camp.

Sat: Satisfactory (a performance rating).

Sby: Standby.

SCM: See Summary Court-Martial.

SCMO: Summary Court-Martial Order.

Scol: School.

SD: Special Duty.

SDN: See Separation Designation Number.

SDRP: Special Discharge Review Program.

SEA: Southeast Asia.

SECDEF: Secretary of Defense.

SECNAV: Secretary of the Navy.

SECNAVINST: Secretary of the Navy Instruction.

Security Clearance: A certification by National Authority to indicate that a person has been investigated and is eligible for access to classified matter to the extent stated in the certification.

Seg: Short for segregation, usually administrative segregation. See Close Confinement.

Selected Reserve: Members of the Ready Reserve who are either (1) members of units who regularly drill and participate in annual training or who are on active duty for training; or (2) individuals who participate in regular drills and annual active duty for training on the same basis as members of Reserve units.

Selected Services: Units and individuals within the Ready Reserve which were designated by the respective services and approved by the Joint Chiefs of Staff as so essential to initial wartime missions as to require priority treatment and training over other reserves. This program ended on August 1, 1969, and the SRFs returned to normal reserve confinement.

Selective Service Number: A registration number assigned by the Selective Service System upon registration with a draft board.

Sent: Sentence; sentenced.

Sentenced Prisoner: A prisoner whose sentence to confinement has been carried out.

Sep: Separate.

Separation: An all-inclusive term which is applied to personnel actions resulting in release from active duty, including discharge, retirement, dismissal, resignation, or death.

Separation Designation Number (SDN): DoD-required code for uniformly identifying types of separation (Air Force).

Separation Program Number (SPN): DoD-required code for uniformly identifying types of separation (Navy and Marine Corps).

SEPROS: Separation Processing.

Sergeant: (1) Noncommissioned officer. (2) The title by which any noncommissioned officer is addressed. (3) The actual title of an NCO in grade E5.

Serv: Service.

Service Number: An alphameric symbol assigned to each individual in the military as a means of positive personal identification. Now superseded by the Social Security Account Number preceded by an abbreviation denoting the individual's component.

Service Obligation: An obligation incurred under the draft law by those men who enter military service for the first time while under 26 years of age. The obligation starts with induction, initial enlistment, or appointment, and lasts for either six or eight years active and reserve duty combined, depending upon time of entry and other factors.

Service Record: A form on which a record of military service is maintained for enlisted personnel. It is opened upon induction, enlistment, or reenlistment, and closed at separation; it is filed in Headquarters as a permanent record.

Service Uniform: The uniform prescribed by military regulations for wear by personnel on routine duty, as distinguished from dress, full dress, or work uniforms.

SFC: Sergeant First Class.

Sgd: Signed.

SGLI: Servicemen's Group Life Insurance.

SGM: Sergeant Major.

Sgt: See Sergeant.

SI: Special Intelligence.

Sick Call: (1) The daily assembly when all sick and injured, other than those in the hospital, report to a medical officer for examination. (2) The bugle call or signal for this assembly.

Sick Slip: A small form which must be filled out by the company clerk or some other person in the orderly room before an enlisted person can report to the dispensary or to the hospital. It states name, rank, serial number, and military address, and gives a brief description of the complaint. A servicemember will not be allowed to see a medic without it, except in combat.

SJA: See Staff Judge Advocate.

SLT: Second Lieutenant.

SM: Soldier's Medal.

SMOS: Secondary Military Occupational Specialty (MOS).

SMS: Senior Master Sergeant.

SN: Service Number.

SNR: Seaman Recruit.

SOFA: Status of Forces Agreement.

Soldiers' and Sailors' Civil Relief Act: A federal statute enacted to give civil and legal protection to members of the Armed Forces by suspending the enforcement of certain civil liabilities; Civil Relief Act (S&SCRA).

SOP: Standard Operating Procedure.

SP: Shore Patrol; Shore Police (Army); Shore Party. See Military Police.

SP, SPEC 4, 5, 6, 7: Specialist 4th, 5th, 6th, or 7th Class. See Specialist.

SPCM: See Special Court-Martial.

SPCMA: Special Court-Martial Convening Authority.

SPCMO: Special Court-Martial Order.

SPD: (1) Special Processing Detachment. (2) Separation Program Designator (post-1974 equivalent of SPN but which is not on separation document).

Special Court-Martial: A court-martial usually convened for nonfelonious or first offenses. It consists of a board of at least three officers, a law officer, and a trial counsel and defense counsel. It cannot try capital crimes or officers and can't impose more than a maximum sentence of six months confinement at hard labor, forfeiture of two-thirds pay for six months, and reduction to lowest grade (SCM or SPCM).

Special Orders: Orders affecting the status of individuals, for example, appointment, assignment, reassignment, detail, transfer, promotion, reduction, relief from active duty, discharge, retirement, and, for appointments of boards of officers, courts-martial, and courts of inquiry.

Special Training Company: A unit designed to train overweight and low-stamina recruits prior to BCT,

or in some cases, after it is determined during basic that the trainee would benefit from the combination of extensive physical conditioning preview and/or review of BCT subjects offered in such a company.

Specialist: An enlisted person in grades E4 through E7 who has acquired a certain degree of proficiency in an MOS. (S)he normally does not exercise command, though (s)he is granted the same privileges as noncommissioned officer of equal rank. Specialists above E4 may not be sentenced to confinement, hard labor, or reduction of more than one grade by Special Court-Martial.

SPD: Separation Program Designator (post-1974 equivalent of SPN but which is not on separation document).

SPN, SPIN: See Separation Program Number.

Sqd: See Squad.

Sqdn: Squadron.

Squad: The basic reporting unit in formation, about 10 men.

Squad leader: An enlisted person, usually in rank of E5, directly subordinate to a platoon sergeant and directly responsible for the appearance, location, and functioning of the half-dozen or ten servicemembers under him/her.

SR: Special Regulation.

SRB: Service Record Book.

SRF: Selected Reserve Force.

SSAN: Social Security Account Number.

S & SCRA: See Soldiers' & Sailors' Relief Act.

SSGT, SSG: Staff Sergeant.

SSM: Silver Star Medal.

SSS: Selective Service System.

SSVC: Selective Service.

Staff: A group of officers which assists the commander by providing him/her with information and making continuing studies for anticipatory planning, submitting recommendations as to plans and orders, translating decisions of the commander into orders, and providing for their dissemination and execution.

Staff Judge Advocate: An officer member on the staff of the commander who acts as the legal advisor to the commander, his/her staff, and subordinate commanders. Functions include supervising the administration of military justice or war crime matters within the command; supervision and administration of claims; furnishing legal assistance to military and civilian personnel and their dependents; preparation of opinions on questions of law pertaining to personnel actions, civil-military jurisdiction contracts, bonds, and other administrative instruments having legal implications; and all other legal matters (Manual for Courts-Martial (MCM) para. 85.)

Standard Detention Unit: Standard 48-cell unit designed and approved for use in military prison installations for segregation of prisoners as a disciplinary or protective measure.

Standby Reserve: Individuals who have either fulfilled their Ready Reserve training requirement, or are excused from such training and are transferred to an inactive status, usually for the balance of their service obligation. Such personnel are available for involuntary active duty in the expansion of the active army upon declaration of war or a national emergency. Their classification and call-up is governed by Selective Service under part 1690 of the SSS regulations.

Stby: Standby.

Stkd: See Stockade.

Stm 1/c, 2/c: Steward's Mate, 1st Class, 2nd Class, etc.

Stockade: A correctional facility used for the confinement of military prisoners and under the jurisdiction of an installation commander.

Subj: Subject (usually referring to a person).

SUMCM: See Summary Court-Martial.

Summary Court-Martial: Lowest of the three levels of courts-martial, consisting of one officer-member empowered to act as prosecutor and jury (Manual for Courts-Martial (MCM) para. 16.)

SUPSD: Supercede.

Supvn: Supervision.

Surgeon: Senior medical officer in charge of the medical detachment or unit of the military organization or station. Usually a staff officer, (s)he advises the commander on medical metters, *e.g.,* hospitalization, profiling, or retention of all personnel at that station.

Surr: Surrender, surrendered.

Susp, Suspd: Suspend; suspended.

Svd: Served.

Table of Organization and Equipment: A chart which prescribes the normal mission, organization, personnel, and equipment authorized for a military unit (TO&E).

TAC: Tactical Air Command.

TAD: Temporary Duty.

TAG: The Adjutant General.

TAGO: The Adjutant General's Office.

TAJAG: The Assistant Judge Advocate General.

TAMS: Total Active Military Service.

TC: Trial Counsel (prosecutor).

TDP: Trainee Discharge Program.

TDPFO: Temporary Duty Pending Further Orders.

TDRL: Temporary Disabled Retired List.

TDS: Temporary Duty Station.

TDY: Temporary Duty.

Temporary Disability Retired List: A roster of personnel relieved from active service because of permanent disability, the degree of which is not stabilized. They are required to undergo periodic medical examinations at intervals of 18 months or less, and are entitled to receive retired pay for five years if not sooner removed from the list.

Terminal: Military and commercial facilities used for loading, unloading, and in-transit handling of cargo or personnel.

TF: Total Forfeitures.

The Adjutant General: The military executive on the special staff of the Army, under the Deputy Chief of Staff for Personnel, who has responsibility for, among other things, the publication of regulations, maintenance and servicing of personnel records, personnel statistical and accounting system, records management, and office management programs.

The Adjutant General's Corps: A basic branch of the Army concerned with personnel and administrative matters, including personnel management activities, casualty and POW reporting, strength accounting, postal services, publication services, and records administration.

The Inspector General: A confidential representative of the Secretary and the Chief of Staff who inquires into and reports upon matters affecting the performance of mission, the state of discipline efficiency and economy of the forces.

The Judge Advocate General's Corps (TJAG): A special section of each branch of service, all of whose officers are lawyers, concerned with all phases of military and civilian law. Its members include trial and defense counsel, legal assistance officers, claims officers, Staff Judge Advocates, Law Officers, Military Judges, and other legal specialists.

The Surgeon General: A military executive on the special staff under the Deputy Chief of Staff for Personnel who is responsible for the management of health services, medical professional training, the establishment of general health, and Medical Fitness standards, etc.

TIG: See The Inspector General.

Time of War: A situation which, though not necessarily accompanied by a Congressional declaration of war, has all the military earmarks of wartime.

TIN: Trainee Identification Number (Air Force).

TJAG: See The Judge Advocate General.

TL: Team Leader.

TM: Technical Manual.

TMP: Table of Maximum Punishment (in the Manual for Courts-Martial (MCM)).

TOE: Table of Organization and Equipment; Term of Enlistment.

TOS: Term of Service.

Tour of Duty: A reassignment to a new station, usually for a short period of time. After the termination date, which is usually specified in orders, the person will return to his/her original station. In many cases (s)he will continue to be carried on the rolls of his/her original unit through his/her tour.

TPMG: The Provost Marshall General.

TR: Travel Request.

TRADOC: Training and Doctrine Command.

Trainee: Any enlisted person undergoing an initial period of training such as basic combat training (BCT) or advanced individual training (AIT).

Training Base: Any reception station, basic training activity, AIT activity, or Army service school.

Training Category: Alphabetical designations which classify reserves not on active duty according to their training status. This designation also corresponds with the "pay group" designation of the unit or individual.

Transfer: Relief from assignment in one component, branch, category, or administrative entity of an armed force or a component thereof and concurrent assignment to another component, branch, category, or administrative entity.

Transient: An individual awaiting orders, transport, etc., at a post or station.

Trial Counsel: The prosecuting attorney in a court-martial.

Trial Record: An individual's complete set of court-martial records, including charge sheets, convening authority orders, pleas, findings, disposition, and transcript of trial. In the Army verbatim transcripts are not kept of Summary or Special Courts-Martial, but they are kept in General Courts-Martial.

TRO: Temporary Restraining Order.

Troop: (1) A subordinate unit of the cavalry squad, equivalent to a company or battery, having both administrative and tactical functions. (2) Slang for individual soldier (trooper).

Troops: A collective term for uniformed military personnel (usually not applicable to Naval personnel afloat).

TSG: See The Surgeon General.

208, 212: Discharges for Army servicemembers pursuant to Army Regulations 635-208 or -212.

Twd(s): Toward; towards.

UA: Unauthorized Absence. See AWOL.

U.C.M.J.: Uniform Code of Military Justice: the code of laws governing the conduct of all persons in the armed forces or otherwise subject to military law.

UD: Undesirable Discharge: a grade of complete separation from military status granted under conditions other than honorable for unfitness, misconduct, homosexuality, or security reasons. It is given administratively and not by sentence of court-martial.

UHC: Under Honorable Conditions.

UIF: Unfavorable Information File.

UMTS: Universal Military Training & Service.

UN: United Nations.

Unclas: Unclassified.

Undes: Undesirable.

Unex: Unexecuted.

Unfitness: A condition requiring the administrative separation of an enlisted person. Normally it includes such things as "frequent incidents of a dis-

creditable nature with civil or military authorities;" sexual perversion; drug possession or abuse; an established pattern for shirking or for failing to pay just debts or contribute adequately to the support of dependents.

Unit: (1) Any military element whose structure is prescribed by competence authority, such as the table of organization and equipment (TO&E). (2) An organizational title of a subdivision of a group in a task force. (3) A standard or basic quantity into which an item of supply is divided, issued or used.

United States Armed Forces: The regular components (not reserves) of the Army, Navy, Marine Corps, Coast Guard, and Air Force.

Unk: Unknown.

Unq: Unqualified.

Unsat: Unsatisfactory participation: failure of Ready Reservist to fulfill individual obligation or an agreement to be a member of a unit of the Ready Reserve, or failure to meet the standards as prescribed by the Military Departments for attendance of training drills, attendance at active duty for training (ACDUTRA), for training advancement, or for performance of duty.

Unsuitability: A condition requiring the separation of an enlisted person. It includes "inaptitude"; character or behavior disorders; apathy, defective attitudes, inability to expend effort constructively; alcoholism; bed wetting; or homosexual tendencies. In order for a person to be discharged as unsuitable, it must be demonstrated clearly that it is unlikely that (s)he will develop sufficiently to participate in further military training and/or become a satisfactory soldier.

UO: Undelivered Orders.

UOTHC: Under Other Than Honorable Conditions, discharges classified as Undesirable, Bad Conduct, or Dishonorable.

UP: Under Provision of.

Upgrade: Change in the classification of a discharge.

USA: United States Army.

USAF: United States Air Force.

USAFA: United States Air Force Academy.

USAFI: United States Armed Forces Institute.

USAFR: United States Air Force Reserve.

USAR: United States Army Reserve.

USARB: United States Army Retraining Brigade.

USARC: United States Army Reserve Center.

USAREUR: United States Army, Europe.

USARPAC: United States Army, Pacific.

U.S.C.: United States Code.

U.S.C.A.: United States Code Annotated.

USCG: United States Coast Guard.

USCMA: United States Court of Military Appeals.

USDB: United States Disciplinary Barracks, Fort Leavenworth, Kansas.

USGLI: United States Government Life Insurance.

USMC: United States Marine Corps.

USMCR: United States Marine Corps Reserve.

USMCW: United States Marine Corps, Women.

USN: United States Navy.

USNR: United States Navy Reserve.

USPHS: United States Public Health Service.

UTA: Unit Training Assembly: any authorized drill, period of instruction, or other activity which active Ready Reservists are required to attend and for which they are paid. Normally at least 2 hours in length, a minimum of 48 UTA's are scheduled per year.

V: Valor.

VA: Veterans Administration.

VACO: Veterans Administration Central Office.

VARO: Veterans Administration Regional Office.

VADM: Vice Admiral.

VC: Viet Cong.

VCG: Vietnamese Cross of Gallantry.

VCM: Vietnam Campaign Medal.

VE: Verbal.

VFW: Veterans of Foreign Wars.

VIP: Very Important Person (high ranking visitor).

Vol: Volunteer.

VOL: Volunteer Officer.

VOLAR: Volunteer Army.

VRB: Variable Reenlistment Bonuses.

VSM: Vietnam Service Medal.

W: With.

WAC: See Women's Army Corps.

WAF: Women's Air Force.

War Crime: Violation by an individual or an organization of the accepted laws and customs of war.

Warrant Officer: A skilled technician certified to perform as an officer in a rank higher than that of any enlisted person but lower than a second lieutenant. (S)he is used to fill those positions which are too highly specialized to justify the use of a broadly-trained commissioned officer. Though entitled to the same privilege of military courtesy as a commissioned officer, (s)he is addressed as "Mr." rather than "Sir" (WO).

WAVES: Women Accepted for Volunteer Emergency Service (Women's Reserve Reserve, USNR).

WDOLO: Willful Disrespect of a Lawful Order.

WESTPAC: Western Pacific (during Vietnam War years, meant Vietnam itself).

WIA: Wounded in Action.

W/o or Wo: Without.

WO, WO1, WO2: See Warrant Officer; Warrant Officer One; Warrant Officer Two (different ranks).

W/OLC: With Oak Leaf Cluster device.

Women's Army Corps: A service of the Army composed of women volunteers, enlisted and appointed, who perform noncombatant duties in technical, strategic, administrative and logistical assignments. Army nurses are assigned to the Army Nurse Corps, a different special branch of the Army and part of the Army Medical Department.

Wpn: Weapon.

W/V: With Valor (V) device.

XO: Executive Officer.

YOB: Year of Birth.

YN: Yoeman.

Yoeman: Navy clerk (low ranking enlisted person).

Zero Week: The first 7 days or less of basic training, not counted as part of the 8-week basic training course, during which new assignees arrive and men are issued equipment and given further indoctrination and innoculations.

Z Time: Greenwich England time.

Zulu Time: Same.

3.3 RANK STRUCTURE AND CHAIN OF COMMAND[2]

3.3.1 ORGANIZATIONAL STRUCTURE (ARMY MODEL)

- President of the United States (Commander-in-Chief; U.S. Const. Art. II, § 2)
- Secretary of Defense
- Secretary of the Army
- Commander-in-Chief of Joint and Unified Commands (4 star)
- Commander-in-Chief of Designated Theater Commands (4 star)
- Commanding Generals of Numbered Armies (3 star)
- Commanding General of Army Corps (3 star)
- Commanding Generals of Divisions (2 star)

3.3.2 CHAIN OF COMMAND

3.3.2.1 United States Army

OFFICER	GRADE	COMMAND
General (4 star)	0-10	Army (A)
Lieutenant General (3 star)	0-9	Corps
Major General (2 star)	0-8	Division (DIV)
Brigadier General (1 star) or	0-7	Brigade or Group
Colonel	0-6	(BDE or GP)
Lieutenant Colonel	0-5	Battalion (BN)
Major or	0-4	Company or Battery
Captain	0-3	(CO or BTRY)
First Lieutenant or	0-2	Platoon
Second Lieutenant	0-1	(PLAT)
Warrant Officers		

NONCOMMISSIONED OFFICER (NCO): RANK	GRADE
Sergeant Major	E-9
First Sergeant	E-8
Sergeant First Class	E-7
Staff Sergeant (Specialist Six)	E-6
Sergeant (Specialist Five)	E-5
Corporal (Specialist Four)	E-4

ENLISTED PERSONNEL: RANK	GRADE
Private First Class	E-3
Private	E-1, E-2

3.3.2.2 United States Air Force

OFFICER	GRADE	COMMAND
General or	0-10	Air Force
Lieutenant General	0-9	(AF)
Major General	0-8	Division (DIV)
Brigadier General or	0-7	Wing (WG) or
Colonel	0-6	Group (GP)
Lieutenant Colonel,	0-5	Squadron
Major, or Captain	0-4, 0-3	(SQDR)
Captain or First or	0-2	Flight
Second Lieutenant	0-1	(FLT)
Warrant Officer		

NONCOMMISSIONED OFFICER (NCO): RANK	GRADE
Chief Master Sergeant	E-9
Senior Master Sergeant	E-8
Master Sergeant	E-7
Technical Sergeant	E-6
Staff Sergeant	E-5
Sergeant	E-4

ENLISTED PERSONNEL: RANK	GRADE
Airman First Class	E-3
Airman (Airman Second Class)	E-2
Airman Basic	E-1

3.3.2.3 United States Marine Corps

OFFICER	GRADE	COMMAND
Lieutenant General (3 star)	0-9	Marine Force (MAF)
Major General (2 star)	0-8	Division (DIV)
Colonel	0-6	Regiment (REGT)
Lieutenant Colonel	0-5	Battalion (BN)
Major or	0-4	Company (CO) or
Captain	0-3	Battery (BTRY)
First Lieutenant or	0-2	Platoon
Second Lieutenant	0-1	(PLAT)

NONCOMMISSIONED OFFICER (NCO:) RANK	GRADE
Sergeant Major	E-9
First Sergeant	E-8
Gunnery Sergeant	E-7
Staff Sergeant	E-6
Sergeant	E-5
Corporal	E-4

[2] The names of certain ranks have changed over the years. All the changes that have occurred have not been listed.

ENLISTED PERSONNEL: RANK	GRADE
Lance Corporal	E-3
Private First Class	E-2
Private	E-1

3.3.2.4 United State Navy

OFFICER	GRADE	COMMAND
Admiral or	0-10	Fleet
Vice Admiral	0-9	(FLT)
Rear Admiral	0-8	Task Force
Captain	0-6	Task Group or Unit
Captain	0-6	Flotilla
Captain	0-6	Division (DIV)
"Captain" (rank varies as to type ship)		Ship
Commander	0-5	Squadron (SQDR)
Lieutenant Commander	0-4	
Lieutenant	0-3	
Lieutenant Junior Grade	0-2	
Ensign	0-1	
Warrant Officer		

NON-COMMISSIONED OFFICER (NCO): RANK	GRADE
Master Chief Petty Officer	E-9
Senior Chief Petty Officer	E-8
Chief Petty Officer	E-7
Petty Officer First Class	E-6
Petty Officer Second Class	E-5
Petty Officer Third Class	E-4

ENLISTED PERSONNEL: RANK	GRADE
Seaman	E-3
Seaman Apprentice	E-2
Seaman Recruit	E-1

3.4 DECORATIONS LISTED IN ORDER OF PRECEDENCE

1. Medal of Honor (Est. 1862): Awarded only by President for wartime combat heroism (Wartime criteria applies to all personnel in times of formal declared war plus 1 year thereafter and to all personnel directly engaged in military operations when no formal war declared).

2. Distinguished Service Cross (Est. 1918): Awarded by Senior Army Commanders for wartime combat heroism.

3. Distinguished Service Medal (Est. 1918): Awarded by Secretary of the Army for wartime and peacetime achievement or service.

4. Silver Star (Est. 1918): Awarded by Senior Army Commanders for wartime combat heroism.

5. Legion of Merit (Est. 1942): Awarded by Commanders designated by Secretary of the Army for wartime achievement and service and by Secretary of the Army for peacetime achievement and service.

6. Distinguished Flying Cross (Est. 1926): Awarded by Senior Army Commanders during wartime and by Secretary of the Army during peacetime for combat or non-combat heroism and achievement or service.

7. Soldier's Medal (Est. 1926): Awarded by Senior Army Commanders for wartime noncombat heroism and by Secretary of the Army for peacetime non-combat heroism.

8. Bronze Star Medal (Est. 1944): Awarded by Senior Army Commanders for wartime combat heroism or for achievement or service.

9. Air Medal (Est. 1942): Awarded by Senior Army Commanders for wartime combat heroism or for achievement or service and by Secretary of the Army for peacetime combat heroism or for achievement or service.

10. Army Commendation Medal (Est. 1945): Awarded by Senior Army Commander for wartime noncombat heroism or for achievement or service by Secretary of the Army or by a Major General or higher for peacetime noncombat heroism or for achievement or service.

11. Purple Heart (Est. 1782; Revised 1932): Awarded by Major General for wartime wounds.

CHAPTER 4
THE MILITARY CRIMINAL AND ADMINISTRATIVE DISCHARGE SYSTEMS

4.1 DISTINCTIONS BETWEEN MILITARY CRIMINAL LAW AND THE ADMINISTRATIVE DISCHARGE SYSTEM

American military law has always had a statutory scheme governing the use of disciplinary actions against servicemembers who misbehave; the statutes generally regulate what types of discipline may be imposed, by whom, against what types of infractions, and by what procedures. Since 1892, methods have existed outside the statutory scheme for commanders to discharge administratively those whose presence in the service is no longer desirable. In addition to these discharges for cause, there have usually been methods for servicemembers to seek discharges themselves, for reasons such as family hardship.

The distinctions between the statutory and the administrative systems, and their interrelationship, are important because the two often work in tandem; actions under the statutory system may support a subsequent action for cause under the administrative system. The major distinctions are as follows:

- The statutory or criminal system is normally used to punish specific acts prohibited by statute or regulation. The administrative system is used to eliminate persons whose patterns of behavior or conduct render continued service unwarranted. Such persons usually receive a bad discharge.
- The criminal system provides greater procedural protection when a bad discharge can be adjudged than does the administrative system.
- The administrative system, with few exceptions, does not provide in-service appeals against decisions to discharge or against adverse characterizations on discharge.
- The administrative system, with its lax procedural safeguards and vague standards for discharge, has been susceptible to abuse and has often operated in a nonuniform manner when issuing bad discharges.
- The administrative system has been used with increasing frequency in recent years to issue bad discharges for specific acts of misconduct to avoid the cumbersome procedural safeguards contained in the U.C.M.J.[1]

[1] Shortly after the first 1959 DoD Directive on administrative discharges was promulgated, the House Committee on Armed Services reported the "development of an alarming trend in the administration of justice in the armed services. . . . As the punitive rate [of issuance of a Bad Conduct or Dishonorable Discharge] pursuant to sentences of courts-martial goes down, the administrative discharge rate goes up." H.R. REP. NO. 388, 86th Cong., 1st Sess. 11 (1959).

In the next several years, congressional committees issued reports expressing concern that the military was "circumvent[ing] pro-

- The administrative discharge "in lieu of court-martial" has, since 1966, become a common recourse in plea bargaining within the criminal system. The discharge is considered adverse and is administered without the U.C.M.J.'s safeguards.[2]

The overlap of criminal and administrative systems invites misuse of the latter. Standards for administrative separation are vague and often blurred in individual cases. For example, conduct which might warrant court-martial charges of disobedience of orders might also support an administrative discharge for "shirking." A commander may choose the administrative system when trial witnesses are difficult to obtain or when the lower standard of proof at an administrative board is thought useful. Similarly, a given pattern of behavior might be construed as either a series of military criminal offenses or merely a manifestation of a "personality disorder," grounds for adverse administrative separation. Use of the discharge in lieu of court-martial, where a servicemember requests administrative separation instead of facing court-martial, allows commanders to coerce separations with a bad discharge in proceedings lacking most procedural safeguards.[3] The more recent "marginal performer program" provides yet an easier way for a commander to bypass the criminal system and its attendant rehabilitation procedures.

Whenever an administrative discharge occurs, one must ask whether the servicemember could have fared better or been rehabilitated had the U.C.M.J. procedures been invoked.

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[1] (continued)

tections provided by the Uniform Code" by issuing administrative less than honorable discharges as a substitute for action by courts-martial, and that thereby "the intent of Congress is thwarted." SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL/ SUMMARY REPORT OF HEARINGS, PURSUANT TO S. RES. 58, 88th Cong., 1st Sess. at IV, V (1963); H.R. REP. NO. 496, 92d Cong., 1st Sess. (1971); REPORT BY THE COMPTROLLER GEN., ELIMINATE ADMINISTRATIVE DISCHARGES IN LIEU OF COURT-MARTIAL: GUIDANCE FOR PLEA AGREEMENTS IN MILITARY COURTS IS NEEDED 15 (FPCD-77-47, Apr. 28, 1978) [hereinafter cited as 1978 GAO REPORT].

In 1966, DoD amended its directive on administrative discharges to provide that:

> No member will be administratively discharged under conditions other than honorable if the grounds for such discharge action are based wholly or in part upon acts or omissions for which the member has been previously tried by court-martial resulting in acquittal or action having the effect thereof, except when such acquittal or equivalent disposition is based on a legal technicality not going to the merits.

DoD Dir. 1332.14, para. A.7. Two months later, a DoD official testified before a Senate subcommittee concerning the amended provision and stated:

> We are concerned about the fact that we have a case in which there is no question that the offense has been committed, but it does not result in a trial due to lack of availability of witnesses or for some other reason which does not have anything to do with the actual commission of the offense.

Joint Hearings of Bills to Improve the Administration of Justice in the Armed Forces Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and Special Subcommittee of the Senate Committee on Armed Services, 89th Cong., 2d Sess. 399 (1966) [hereinafter cited as 1966 *Hearings*]. General Manss, the Judge Advocate General of the Air Force, testified, *id.* at 85-86, as follows:

SENATOR ERVIN: But it does seem to me that where a man's discharge is based primarily upon his commission of a crime, he ought to have the right to demand that he be court-martialed, that his crime be established in a judicial manner before he is discharged. I would be glad to hear any other comments on this.

. . . .

GENERAL MANSS: Now, we are morally certain and we have sufficient evidence that the board would be convinced that this man is no good, he should be eliminated. We do not think that it is right that we should be forced to give him an honorable discharge because we do not have sufficient evidence to satisfy all of the formal rules [of a court-martial].

SENATOR ERVIN: General, would you not agree with me in the proposition that giving a man an undesirable discharge is punitive in nature, that it has consequences which follow him as long as he travels the ways of this earth?

GENERAL MANSS: Yes, sir; I agree. That is true.

Shortly after these congressional hearings, the Army amended its administrative discharge regulations to make a set of trial-type procedural safeguards available to servicemembers in any separation proceeding in which a less than honorable discharge could be issued (including a proceeding in which a General Discharge (GD) or an Honorable Discharge (HD), but not an Undesirable Discharge (UD) was authorized).

These procedural rights include the right to: (1) notice of the recommended reason for separation (AR 635-212, paras. 10a(1), 12a(3), 12b (July 1966); AR 15-6, para. 6a(5); (2) a hearing before an administrative board of officers (AR 635-212, paras. 10a, 17c-d); (3) appointment of counsel (normally a lawyer) to represent the servicemember at no charge (AR 635-212, para. 17c(2) (a)); (4) compel the attendance of material witnesses that are reasonably available at the government's expense (AR 635-212, para. 17c(2) (c)); and (5) advance notice of and an opportunity to confront any witness whom the Army calls to testify at the hearing (AR 635-212, paras. 17c(1) and 17c(2) (f)).

At such a proceeding, the burden of proof is on the Army, and the findings of the board must be supported by substantial evidence (AR 15-6, para. 20). These procedural rights remain in effect today. The other services adopted similar rules for cases where a UD could be issued and in some other cases.

The 1960 Annual Report to Congress of the U.S. Court of Military Appeals stated that:

> The unusual increase in the use of the administrative discharge since the code [*i.e.*, the U.C.M.J.] became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code. The validity of that suspicion was confirmed by Major General Reginald C. Harmon, then Judge Advocate General of the Air Force, [who] declared that the tremendous increase in undesirable discharges by administrative proceedings was the result of efforts of military commanders to avoid the requirements of the Uniform Code.

U.S. COURT OF MILITARY APPEALS ANNUAL REPORT (1960) (quoted in *Hearings on the Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 2 (1962)).

[2] *See generally* Effron, *Punishment of Enlisted Personnel Outside the U.C.M.J.: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L.L. REV. 227 (1974).

From fiscal year 1967 to fiscal year 1972, the number of administrative discharges in lieu of courts-martial annually issued by the Army increased from 294 to 25,515. About 90% of these administrative discharges were characterized as Undesirable. 1978 GAO REPORT, *supra* note 1, at 18. The above figures do not include administrative discharges for specific acts which are punishable by court-martial, such as use or possession of drugs, and which are included under such categories as "Misconduct" or "Unfitness."

[3] *See* Ch. 19 *infra* (discussion of this type of case); note 2 *supra*.

4.2 TYPES OF DISCHARGES

Since 1948, there have been five types of military discharges:

- Honorable (HD);
- General, now called "Discharge Under Honorable Conditions" (GD);
- Undesirable, now called "Discharge Under Other Than Honorable Conditions" (UD);
- Bad Conduct Discharge (BCD); and
- Dishonorable Discharge (DD) or Dismissal (when given to officers).

Prior to 1948, the Army issued a "Blue Discharge," which was the equivalent of today's General and Undesirable Discharges.

In 1974-75, President Ford created a Clemency Discharge (CD) as part of his Clemency Program[4] for persons who were returning absentees or who sought to change a UD, BCD, or DD, received for an absence offense. A few thousand of these were issued, and they are generally synonymous with the UD as far as the DoD and VA are concerned.

The first three types of discharges are called "administrative discharges" and the latter two are called "punitive discharges." A BCD can only be awarded as part of a sentence of a court-martial while a DD is only possible at a general court-martial. A court-martial sentence cannot include an administrative discharge; however, the secretary of each service can change a BCD or DD to an administrative discharge as part of the clemency process after a court-martial.[5]

These discharges may affect a servicemember's VA benefits[5a] as follows:

- HDs and GDs almost always permit VA benefits;
- DDs and BCDs from general courts-martial almost never permit VA benefits;
- UDs and BCDs from special courts-martial, and Blue Discharges must be adjudicated by the VA in order to determine eligibility.

4.3 HISTORY OF THE MILITARY DISCIPLINARY SYSTEM

This manual does not discuss pre-1940 practice under the Articles of War. Suffice it to say that the Articles of War adopted by the First Continental Congress in 1775 were similar to the harsh 1774 British Articles of War; after each war, Congress responded to the demands of its returning "citizen soldiers" for reform.[6]

4.3.1 PROCEDURES FROM 1940-1951

Two separate legal codes governed disciplinary practices until 1951. The Articles of War[6a] contained the disciplinary rules of the Army and what was then the Army Air Corps (it became the Air Force after 1947). The Navy and Marine Corps were governed by the Articles of the Government of the United States Navy.[6b] Additional guidance was found in the *Manual for Courts-Martial* and the *Naval Courts and Boards*.

In 1946, the Vanderbilt Committee[7] and the Military Affairs Committee of the United States House of Representatives[8] exposed injustices occurring within the Army; this led to passage of the Elston Act in 1948.[9] The Elston Act instituted long overdue reforms in the military and led to creation of the U.C.M.J. in 1950 (effective May 31, 1951).[10]

Like the Army's Articles of War, American Naval law was drawn directly from British law. The *Rules for the Regulation of the Navy of the United States Colonies* was adopted in 1775 and based on customary law. As customary law became less certain, statutory regulation prevailed.[11] The *Articles for the Government of the U.S. Navy* (Navy Articles) were enacted by Congress in 1862. Traditionally referred to as "Rocks and Shoals," the Navy Articles were revised thereafter but remained substantially in effect until 1951.[12]

While both Articles provided some procedural safeguards to accused servicemembers, the safeguards were often a sham. As discussed below, existing procedures often were not observed.

This section primarily discusses the Articles of War as they existed between 1940 and 1951, with major differences in Navy procedures noted.[13] For specific details, the particular Articles should be consulted along with the accompanying manuals.[14]

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[4] See Ch. 23 *infra* (discussion of this program).

[5] Art. 74(a), 74(b), U.C.M.J., 10 U.S.C. §§ 874(a), 874(b).

5a See Ch. 26 *infra* (complete discussion of consequences of discharges on VA benefits).

[6] See Effron, *supra* note 2 (further information and sources); H. MOYER, JUSTICE AND THE MILITARY § 1-118 (1972); Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. (1949). The Articles of War were antiquated, containing a system of courts-martial similar to that established by King Gustavus Adolphus of Sweden in the 17th century. Although they were changed on occasion, it was not until 1920 that a substantive revision of the Articles took place. The system did not again change significantly until the 1940s, when public outrage provoked a series of changes. See Devico, *Evolution of Military Law*, 21 JAG J. 63 (1966-67).

[6a] 10 U.S.C. ch. 36 (1934).

[6b] 34 U.S.C. § 1200 (1934).

[7] Arthur T. Vanderbilt, then Dean of the New York University School of Law, headed the War Department Advisory Committee on Military Justice. See REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SECRETARY OF WAR (1946).

[8] See H.R. REP. NO. 2722, 79th Cong., 2d Sess. (1946).

[9] Pub. L. No. 80-759, 62 Stat. 629 (1948). The effective date of the Elston Act was February 1, 1949. A history of the appellate review process and the legislative events leading to passage of the Elston Amendments and, subsequently, the U.C.M.J., is reported in OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE, REFORM OF THE COURT OF MILITARY APPEALS APP. B (May 7, 1979).

[10] Pub. L. No. 81-506, 64 Stat. 108 (1950).

[11] See E. Byrne, MILITARY LAW: A HANDBOOK FOR THE NAVY AND MARINE CORPS (U.S. Naval Institute 1970).

[12] *Id.* There was little difference between the Navy Articles in effect in 1947 and the British Articles of 1749, which were themselves substantially the Cromwell Articles of 1649. Pasley & Larkin, *The Navy Court Martial: Proposals For Its Reform*, 33 CORNELL L.Q. 195, 198 (1947). The Navy was not affected by the 1948 Elston Act, but the absence of Naval reform certainly was not due to ignorance of the antiquated legal system that existed there. See, *e.g.*, WHITE, A STUDY OF 500 NAVAL PRISONERS AND NAVAL JUSTICE (1947); Reports of the Ballatine Committee to the Secretary of the Navy (Sept. 1943, April 1946); Report of the McQuire Committee to the Secretary of the Navy (Nov. 1945).

[13] See Pasley & Larkin, *supra* note 12 (more detailed discussion of Navy procedures); Snedeker, *Developments in the Law of Naval Justice*, 23 NOTRE DAME LAW. 1 (1947).

[14] A good resource is the series *The Soldier and the Law*, which was directed to servicemembers and explained their rights under the Articles of War. The first four editions, in 1941, 1943, 1944, and 1945,

4.3.1.1 Nonjudicial Punishment

Nonjudicial punishment could be imposed by some commanding officers for minor offenses, without resorting to a court-martial. Such punishment was referred to as "company punishment" (Army), "squadron punishment" (Air Force) or "Captain's Mast" (Navy). Only minor offenses were punishable — those not involving moral turpitude or a degree of criminality greater than the average summary court-martial offense. Typical examples included failure to report to kitchen duty at the proper time, appearing drunk in quarters, and minor disorderliness. Punishment was specifically limited; forfeiture or detention of pay and confinement under guard could not be imposed.

Under Article of War 104, the accused had an absolute right to demand trial by court-martial in lieu of company punishment, but this right was rarely exercised.[15] No similar option existed in the Navy.

There was a limited right of appeal from company punishment to the next superior authority. The ground for appeal was solely that the punishment was unjust or disproportionate to the offense. This was based on the notion that waiver of a trial by court-martial was virtually an admission of guilt.[16] Moreover, an accused could be required to undergo the punishment during the appellate process.

4.3.1.2 Summary Courts-Martial (SCM)

The lowest court in the military was referred to as "summary court" in the Army and "deck court" in the Navy. The court consisted of one officer who functioned as trial judge advocate (judge), defense counsel, and fact finder.

Only lesser offenses, such as drunkenness in command, station, or quarters, and violations of post or base regulations, were triable by the SCM. In the Army, noncommissioned officers of the first two grades had to consent in writing before they could be tried by an SCM. Confinement was limited to one month; deck court sentences were limited to 20 days. Discharges could not be given.

Although the Army claimed that SCMs provided the same rights available in the other courts-martial,[17] no formal pretrial investigation was required. Only an informal investigation, undertaken by the accuser and the organization commander, was mandated.[18] The applicable rules of procedure were supposedly the same as those governing other courts-martial. There was, however, no defense counsel to represent the accused, and neither the testimony of witnesses nor oral argument was recorded. The record consisted only of the charges, pleas, findings, sentence, and action of the convening authority,[19] thereby severely limiting the scope of appellate examination.

4.3.1.3 Special Courts-Martial (SPCM)

The intermediate court of the Army and Air Corps was the "special court-martial," known as the "summary court-martial" in the Navy and Marines. It consisted of a minimum of three commissioned officers. The court's jurisdiction under the Articles was limited to noncapital offenses of enlisted personnel, and the maximum punishment it could impose was six months confinement at hard labor and forfeiture of two-thirds pay for six months.[20]

By 1948, both the special court-martial of the Army and Air Force and the summary court-martial of the Navy and Marines were allowed to issue BCDs as punishment. In order for an SPCM to impose a bad conduct discharge, a complete record of the testimony and proceedings was required. If such a discharge were issued, the record would then be reviewed by the supervisory officer. If that officer approved the sentence, the record would be transferred to the Judge Advocate General's Office or one of its branches for final review.

The procedures followed in a special court-martial were similar to those of a general court-martial, except that there was no "law member" (judge) in an SPCM. Instead, the court president made all rulings in open court subject to the objection of any other member. Upon objection, a closed vote of the court was taken. Although the trial judge advocate (prosecutor) was responsible for recording the trial proceedings, the record was usually only a summary of the evidence.[21]

4.3.1.4 General Courts-Martial (GCM) and Court-Martial Procedures Prior to the U.C.M.J.

Prior to enactment of the U.C.M.J., there were no standing courts-martial; the convening authority (CA) appointed a court for each new accused. In the Navy, the composition of a court-martial could always be changed by the CA, even during the course of a trial.

The authority to convene a particular court-martial depended upon the unit an officer commanded rather than his/her rank. A GCM could be convened by the President, the Secretary of the Army, the Secretary of the Navy, and the commanding officers down the hierarchy to the commanding officer of a separate brigade.

To be properly convened, a court-martial needed both appropriate composition of members and jurisdiction over the person and offense.[22] A GCM was

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[14] (continued)
were authored by J. McComsey and M. Edwards. The authors of the 1949 and 1951 editions were M. Edwards and M. Decker. In 1951, the title was changed to *The Serviceman and the Law*. These books set forth only the bare minimum of basic rights guaranteed to servicemembers.

[15] M. EDWARDS & M. DECKER, THE SOLDIER AND THE LAW 143 (5th ed. 1949).

[16] F. WEINER, THE UNIFORM CODE OF MILITARY JUSTICE 5 (1950).

[17] M. EDWARDS & M. DECKER, *supra* note 15.

[18] *Id.* at 235.

[19] Convening authority (CA) refers to the commanding officer who ordered and appointed the court.

[20] Officers were not subject to the jurisdiction of the SPCM until 1949, and even then, confinement could not be imposed.

[21] Wallstein, *The Revision of the Army Court Martial System*, 48 COLUM. L. REV. 219 (1948).

[22] Although civilian courts lacked general appellate jurisdiction over courts-martial, a court-martial's jurisdiction could always be challenged in civilian courts. *See* Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 MO. L. REV. 147 (1949).

composed of at least five commissioned officers, with the senior member serving as president. As of 1948, the Army and the Air Force allowed an accused enlisted person to request that one-third of the court's members, in either a GCM or an SPCM, be enlisted personnel from another company.

A formal investigation by the CA's legal adviser, the staff judge advocate (SJA), was required to determine which court should hear the case, whether the charges were in proper form, and whether the charges were supported by proper evidence. The "accuser" could not conduct this investigation. Upon completion, the investigation report was forwarded to the CA, who decided whether to refer the charges to trial and appointed the court. If no investigation of the charges was made before trial, the proceedings might be held void for lack of jurisdiction.[23]

The GCM included a "law member," who was an officer of the Judge Advocate General's Corps (JAG). More often than not, however, the officer serving this function was from another branch of the service, due to a loophole in Article 8 requiring detail of a legally trained officer only if one was "available." The determination of availability was made by the CA, and few attempts to appoint lawyers were made.[24] The law member's duty was to provide legal guidance to the other court-martial members and to make rulings in open court on interlocutory questions. Rulings on admissibility of evidence were final, but all others were subject to objection from other members. In recognition of injustices resulting from the use of unqualified law members, changes were made in Air Force and Army practice in 1948. The amendments mandated membership in the JAG Corps or the bar of a federal court or the highest court of a state, and certification by the Judge Advocate General for every law member. Thereafter, all rulings on interlocutory questions were final except those made on motions for a finding of not guilty and questions of the accused's sanity.

The same problems plaguing the selection of law members affected appointments of defense counsel. In most cases, counsel were not lawyers. An accused had a right to be represented by counsel of his/her own selection, either military counsel, "if available," or civilian counsel, if the accused paid the latter's expenses. The 1948 revisions did little to rectify these problems, stating only that when the trial judge advocate (prosecutor) was a lawyer, the defense counsel also had to possess legal qualifications, but only "if available." The result was that convictions and lengthy prison terms could be imposed in the absence of legally trained defense assistance.

During the course of a trial, the accused was entitled to most constitutional rights, including the right against self-incrimination and the right to cross-examine available witnesses. In addition to challenges for cause at any stage of the proceeding, both the defense and the prosecution, except in the Naval services, were entitled to one peremptory challenge. A verbatim transcript was required at a GCM.

The Articles mandated specific punishments for some offenses; for others, they set only mandatory minimums, leaving the sentencing largely to the discretion of the court-martial.[25] The death penalty was permitted in specified cases. In practice, the court-martial often imposed severe sentences, giving the CA who appointed the court the opportunity to reduce them.

The sentence recommended by the court-martial was not effective until approved by the CA who appointed the court. The SJA reviewed the record for jurisdictional, evidentiary, and procedural errors and made recommendations to the CA. However, these recommendations were merely advisory and were rarely critical of the proceedings, due to the CA's influence over the SJA.[26]

The CA was authorized to disapprove or reduce sentences, to order execution of any sentence except death, and to return the record to the court-martial for correction of any defects. The CA could not reverse an acquittal or impose a more severe sentence than that imposed by the court-martial. Where a record was returned for correction, no additional evidence could be received nor defects such as jurisdictional errors corrected. The record was then forwarded to the Office of the Judge Advocate General for review.

The right to a hearing by an impartial tribunal was undermined by the CA's complete control over the court and counsel (improper command influence). The lack of judicial independence was characterized by one federal court as "military despotism"[27] and the court-martial was referred to as "a court . . . saturated with tyranny."[28] Widespread influence over defense counsel and numerous attempts to influence members of courts-martial were reported by the Vanderbilt Committee.[29]

Officers and enlisted members were treated with obvious inequality. Officers were assumed to act according to an unwritten honor code[30] and regulations favored them. The standards of punishment were also grossly unequal. Until 1949, officers could be tried only by general courts-martial; and reduction in rank or confinement could not be imposed unless dismissal from the service was included in the sentence.

Article 50½ review within the Office of the Judge Advocate General was the appellate process. Cases requiring presidential confirmation or in which sentences included death, unsuspended dismissal, Dishonorable Discharge, or penitentiary confinement were automatically reviewed for legal sufficiency by a

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[23] *See Digest of Opinions of the Judge Advocate General 1912-1940* at 292.

[24] Wallstein, *supra* note 21, at 225.

[25] The Navy Articles were so broad that punishments were provided for many offenses that were not even listed. *See* Pasley & Larkin, *supra* note 12, at 201. *See also* Arts. 8(!), 22(a).

[26] Fratcher, *supra* note 6.

[27] Shapiro v. United States, 69 F. Supp. 205, 207 (Ct. Cl. 1947), *quoted in* Farmer & Wels, *Command Control – Or Military Justice*, 14 N.Y.U.L.Q. 263 (1949).

[28] Betts v. Hunter, 75 F. Supp. 825, 826 (D. Kan. 1948) (quoted in Farmer & Wels, *supra* note 27).

[29] Wallstein, *supra* note 21, at 222.

[30] *See* Wallstein, *supra* note 21, at 229-30 (egregious examples of officer misconduct).

three-officer Board of Review (BR).[31] No review was provided for an accused who pleaded guilty. The Board's decision was subject to approval of the Judge Advocate General who, upon disagreement, forwarded the case to the Secretary of War for presidential action.

GCM cases not required to be reviewed by a BR still received review within the Office of the Judge Advocate General. If legal error was found, the record was referred to the Board for further action.

In 1948, Army and Air Force Judicial Councils, composed of three general officers of the JAG Corps, were added as review tribunals. Confirmation by the applicable Council, with concurrence by the Judge Advocate General, was required for sentences that included life imprisonment or ordered dismissal of an officer below the grade of brigadier general, as well as for sentences on which the Board of Review and the Judge Advocate General disagreed.

Prior to 1949, only the CA, with advice of his judge advocate, could weigh evidence. A 1948 amendment to Article 50 changed this procedure, permitting the Judge Advocate General and the review tribunals to weigh evidence, judge the credibility of witnesses, and make factual determinations.

4.3.2 PROCEDURES UNDER THE UNIFORM CODE OF MILITARY JUSTICE, 1951-1981

Although it has sustained substantial criticism,[32] the Uniform Code of Military Justice (U.C.M.J.) was a revolutionary development in American military law. It culminated the drive for reform following World War II, in which one out of every eight soldiers was court-martialed.[33] Its final form represented a compromise between the reformers and the traditionalists.

The major problems that the U.C.M.J. and its amendments[34] sought to correct were:

- Lack of uniformity among the services;
- The need for a comprehensive code;
- The need to reduce command control;
- The need for civilian control at the top with a new "Supreme Court of the Military," the Court of Military Appeals;
- Insufficiency of existing procedural safeguards for the accused; and
- Insufficient judicialization of the process.

4.3.2.1 Changes Wrought by the U.C.M.J.

The U.C.M.J., which became effective on May 31, 1951, introduced substantial changes. It provided that a "law officer" preside over all general courts-martial (GCMs), which are the courts with the power to impose the most severe punishments, and that counsel in such courts be lawyers. The U.C.M.J. also contained numerous changes in procedure, including, with respect to GCMs, mandatory requirements for a preliminary investigation (known as an Article 32 investigation), pretrial legal advice to the commander, and post-trial legal review prior to action on the case by the commander. The Code further provided for comprehensive legal review after the commander's action. If the case affected a general or flag officer, or involved an approved sentence of death, punitive discharge, or confinement for one year or more, the record of trial was reviewed automatically by a Board of Review (known as Court of Review since August 1, 1969), composed of senior judge advocates within each service. In all other cases, the Code required legal review by a judge advocate. The most dramatic change brought about by the U.C.M.J. was creation of the United States Court of Military Appeals (U.S.C.M.A.), a tribunal composed of three civilian judges with power to review cases within the jurisdiction of the Boards of Review.

The U.S.C.M.A. was created, in part, to ensure that the U.C.M.J.'s changes in trial and review procedure became institutionalized in the military justice system. The U.S.C.M.A. was to act as a civilian watchdog over actions taken by the services to satisfy Congress's intent to modernize and upgrade military justice. Its certiorari jurisdiction to take cases on petition of the accused was designed to give it a wide-ranging view of trial court activity. Its power to review cases submitted by the Judge Advocates General was intended to enable the armed forces to obtain review in the court.

Enactment of the U.C.M.J. and establishment of the U.S.C.M.A. did not immediately transform the court-martial process into a judicial system. When the Code took effect in 1951, the status and powers of the law officers presiding at trials were quite uncertain; there was no provision until 1969 for

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[31] Holdings and opinions of the Boards of Review may be found in *Digest of Opinions of the Judge Advocate General 1912-1940* and *Bulletin of the Judge Advocate General of the Army 1942-1946*.

[32] An excellent discussion of the pros and cons of military justice under the U.C.M.J. is contained in H. MOYER, JUSTICE AND THE MILITARY §§ 1-150 to 1-152 (1972). *See also* Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1971) (proposal to further "civilianize" military law). Moyer, though somewhat dated because of the recent advances in military law, is the only complete treatise on U.C.M.J. practice. The *Military Law Reporter*, published by the Public Law Education Institute (PLEI), has reported all military and veterans law cases since the publication of JUSTICE AND THE MILITARY. The *Military Law Reporter* has also keyed all its cases to JUSTICE AND THE MILITARY. Thus, the *Reporter* is a must for all practitioners of military law and is highly recommended for discharge upgrade work; its eight volumes constitute a self-contained military law library. Details for ordering it may be found in the Bibliography *infra*.

[33] Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972). This article and a subsequent Willis article at 57 MIL. L. REV. 27 (1972) are among the best critical analyses of the decisions of the United States Court of Military Appeals (U.S.C.M.A.) before the more liberal trends began. The post-1974 trends are best described in Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1976), and Willis, *The United States Court of Military Appeals – "Born Again,"* 52 IND. L. REV. 151 (1976).

[34] The U.C.M.J. and its amendments were instituted pursuant to Congress' power to make rules for the "land and naval forces." U.S. CONST. art. I, § 8. The changes were made by Pub. L. No. 87-648, 76 Stat. 447 (NJP procedures), Pub. L. No. 90-632, 82 Stat. 1335 (Military Justice Act of 1968) (expanded rights, judges at SPCMs, etc.), and Pub. L. No. 96-107, 93 Stat. 803 (Section 801 of Title VIII) (overturned U.S.C.M.A. decisions as to jurisdiction).

The description of procedures provided in § 4.3.2.1 was drawn from Office of the General Counsel of the Department of Defense, Reform of the Court of Military Appeals (May 7, 1979).

mandatory legally qualified counsel or a law officer in SPCMs.

In the thirty years since the Code was enacted, much has changed. At all GCMs, and virtually all SPCMs, the presiding law officer is now called a judge and the parties are represented by lawyers. The rules of evidence and procedure in courts-martial compare favorably with those applicable in civilian practice, frequently providing a military accused with greater rights than a civilian counterpart would have. Except in matters unique to military practice, military courts look to civilian courts for guidance on matters of procedure and constitutional law. The U.S.C.M.A. regularly engages in statutory interpretation of the U.C.M.J. In addition, the court reviews and sometimes invalidates provisions of the *Manual for Courts-Martial* and other regulations, and exercises supervisory power to establish rules of practice and procedure.

There are four levels of appellate review:

Command Review. Each trial must be reviewed by a senior military commander prior to approval of the findings and sentence.[35] Under Article 60, this review normally is performed by the commander who convened the court-martial[36] (the convening authority or CA). The CA may approve only such findings and so much of the sentence as are "correct in law and fact."[37] In addition, the CA is free to reduce or disapprove adverse findings or sentences, even if they are correct as a matter of law.[38]

The records of inferior courts-martial (SCMs and SPCMs), in which the sentence approved by the convening authority does not include a BCD, are reviewed by a judge advocate, who is usually a member of the CA's staff.[39] The judge advocate's recommendations, made to the commander who exercises supervisory power over the CA, are not binding.[40] No further review is required, but the Judge Advocate General (TJAG) may vacate or modify the findings or sentence in any case based upon "newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused."[41] The records of such inferior courts are not subject to review by the Courts of Military Review or the U.S.C.M.A. under the statutory provisions governing appeals, but developments in case law have made such review possible through the issuance of extraordinary writs.[42]

Courts of Military Review (C.M.R.).[43] The C.M.R. of each service reviews records of the following cases: those affecting general or flag officers; those in which there is an approved sentence of death, dismissal (of a commissioned officer, cadet, or midshipman), DD or BCD, or confinement for one year or more; and those GCMs not within the automatic review jurisdiction of the C.M.R., but submitted to it by the TJAG "[i]f any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs. . . ."[44] As with the Boards of Review under the Articles of War, the C.M.R.s are empowered to weigh evidence, judge credibility, and determine issues of fact as well as questions of law.[45] Although civilians may be appointed to serve on a C.M.R., positions are customarily filled from within the military.

Court of Military Appeals (U.S.C.M.A.). Automatic review in the U.S.C.M.A. is limited to cases from the C.M.R.s which affect a general or flag officer or in which the C.M.R. has affirmed a death sentence.[46] The court has certiorari jurisdiction to review C.M.R. decisions on petition of the accused.[47] The TJAG also may certify a case from a C.M.R. to the U.S.C.M.A.[48] The U.S.C.M.A. is limited to reviewing issues of law, although it may order dismissal of charges.[49]

Secretarial Review. Although the U.S.C.M.A. is the highest judicial tribunal in the military justice system, there are other avenues of review under the Code. Every death sentence, or sentence involving a general or flag officer, must be approved by the President.[50] A sentence dismissing an officer must be approved by the service Secretary.[51] In addition, the

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[35] 10 U.S.C. § 864 (Art. 64). A sentence of confinement, however, does become effective when announced by the court-martial, though the confinement may be deferred at the discretion of the commander. 10 U.S.C. §§ 857, 858 (Arts. 57, 58).

[36] The review may also be conducted by a successor in command or any officer empowered to convene a general court-martial. 10 U.S.C. § 860 (Art. 60). Before acting on the record of a GCM or an SPCM at which a Bad Conduct Discharge has been ordered, the CA must submit the case to a staff judge advocate for a nonbinding legal opinion. 10 U.S.C. §§ 861, 865 (Arts. 61, 65). This post-trial legal review is not required following SCMs or SPCMs at which no BCD is ordered.

[37] 10 U.S.C. § 864 (Art. 64).

[38] *Id.* The CA also may return a record of trial to the court-martial for reconsideration when a charge or a specification of a charge has been dismissed on motion and the ruling does not amount to a finding of not guilty, 10 U.S.C. § 862(a) (Art. 62(a)), or for rectification of a matter that will not materially prejudice a right of the accused, with specified limitations. 10 U.S.C. § 862(b) (Art. 62(b)).

[39] 10 U.S.C. § 865(c). *See* Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 MIL. L. REV. 1, 23 (1974).

[40] *Id.*

[41] 10 U.S.C. § 869 (Art. 69). Appellate review by the Judge Advocate General in cases not reviewed by the Courts of Military Review was not provided in the Uniform Code of Military Justice as enacted, but

[41] (continued)

was added as part of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. *See* § 20.5 *infra* (discussion of Article 69 appeals).

[42] United States v. McPhail, M.J. 457, 4 MIL. L. REP. 2477 (C.M.A. 1976). Because of the jurisdictional limits of the Courts of Military Review and the Court of Military Appeals, most cases tried in the military justice system are not subject to review by them. Writing in 1972, Willis reported that since the U.C.M.J. became effective on May 31, 1951, there had been 2,873,470 courts-martial. The Court of Military Appeals had acted in 22,594 cases and had rendered 2,659 opinions. He added that from 1962 to 1970, the Courts of Military Review had acted in 6% of all courts-martial, and the Court of Military Appeals had acted in approximately 17.3% of the cases referred to a Court of Military Review. Willis, *supra* note 33, at 76 & n.189.

[43] 10 U.S.C. § 866 (Art. 66). These appellate tribunals are the successors to the Boards of Review. The title, Court of Military Review, was added by the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (effective Aug. 1, 1969).

[44] 10 U.S.C. § 869 (Art. 69).

[45] 10 U.S.C. § 866(c).

[46] 10 U.S.C. § 867(b)(1) (Art. 67(b)(1)).

[47] 10 U.S.C. § 867(b)(3) (Art. 67(b)(3)). If, under Article 69, the Judge Advocate General sends a C.M.R. the record of a general court-martial whose sentence is not within the C.M.R.'s automatic appellate jurisdiction, the Court of Military Appeals may not review unless the case is certified to it by the Judge Advocate General under Art. 67(b)(2). 10 U.S.C. § 869 (Art. 69).

[48] 10 U.S.C. § 867(b)(2) (Art. 67(b)(2)).

[49] 10 U.S.C. § 867(e) (Art. 67(e)).

[50] 10 U.S.C. § 871(a) (Art. 71(a)).

[51] 10 U.S.C. § 871(b) (Art. 71(b)).

service Secretaries have broad clemency power to remit or suspend any sentence not approved by the President and to substitute an administrative discharge for a punitive discharge or dismissal.[52]

Other significant changes in military practice since 1951 include:

- The increased possibility of punishment in a formally structured but nonjudicial proceeding (called an Article 15);
- The right to refuse, with some exceptions, an Article 15;
- The right to refuse a summary court-martial (SCM);
- Maintenance of a verbatim transcript at an SPCM where a BCD is adjudged, with a free copy for the accused;
- Liberal discovery procedures;
- Broad rights for compulsory process of witnesses;
- The appointment of counsel at the pretrial investigation stage;
- Broader rights to secure military counsel of one's choice;
- The applicability of most constitutional rights, with some exceptions peculiar to military practice;
- The right to have at least one-third enlisted members if requested;
- The right to free counsel on appeal;
- The automatic appeal of cases involving a punitive discharge or confinement for over one year even if there was a plea of guilty; and
- A comprehensive *Manual for Courts-Martial* (MCM), detailing procedures, modes of proof, elements of offenses, etc.

4.3.2.2 Structure and Procedures of the U.C.M.J.[53]

The U.C.M.J. provides four different forums in which a commander may seek to punish a servicemember. An additional forum is permitted by service regulation.[54]

A reprimand or admonition is allowed by service regulations. It is nonjudicial in nature and may be oral or in writing. The only rights normally available to an accused are notice and an opportunity to respond. Reprimands are often removed from the record after a period of time and are not very serious for an enlisted person.[55]

Nonjudicial punishment, (called Article 15, NJP, Office Hours, or Captain's Mast), is governed by Article 15, U.C.M.J.,[56] the provisions of the MCM, and service regulations. A finding of "guilt" under Article 15 does not constitute a criminal conviction but may be considered at sentencing in a subsequent court-martial. Article 15 punishment is imposed by a commanding officer for minor offenses. Depending on the rank of the officer imposing punishment, the punishment may include forfeiture of one month's pay, reduction in rank, restriction, and 30 days "correctional custody," or suspension of these punishments. The servicemember may refuse to submit to Article 15 procedures, unless assigned to a ship. (S)he has the right to receive written notice, to remain silent, to attend an informal hearing, to present evidence in defense and/or mitigation, and to appeal to a higher authority. In recent years, the rights to engage an advocate, to have a public hearing, and to examine witnesses have been added. An Article 15 punishment usually bars a subsequent trial for the same offense. Over the years, the presumption of guilt following consent to Article 15 proceedings has dissipated, and appeals on the issue of guilt or innocence, rather than strictly on the quantum of punishment, are more common.

Summary Courts-Martial (SCMs)[57] consist of one officer who acts as fact-finder, represents all parties, and, upon a finding of guilt, pronounces sentence. The "summary court officer" normally is not a judge advocate, and the accused has no right to counsel.[58] The court has jurisdiction to try enlisted personnel for any noncapital offense and to adjudge any sentence other than death, a punitive discharge, confinement for more than a month, hard labor without confinement for more than forty-five days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds pay for one month. The accused may object to trial by SCM, in which case the charge may be referred to a GCM or SPCM. Prior to 1969, an accused who had rejected an Article 15 could not also object to an SCM. The accused has all other rights at an SCM that are available at SPCMs and GCMs except the right to challenge the summary court officer for cause. There is no verbatim transcript and rarely is even a summarized record kept except for the pleas, findings, and sentence.

Special Courts-Martial (SPCMs)[59] consist of no fewer than three members (jurors). The Military Justice Act of 1968[60] amended the U.C.M.J. to permit an SPCM to consist of not less than three members plus a military judge, or a military judge sitting alone at the request of the accused. An SPCM may adjudge

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[52] 10 U.S.C. § 874 (Art. 74). *See* § 20.4.4 *infra* (discussion of these procedures).

[53] *See* Ch. 3 *supra* (definition of terms of art used in military practice). *See also Manual for Courts-Martial* (detailed discussion of procedures, rules of evidence, and other important aspects of U.C.M.J. practice).

[54] *See* §§ 12.7.2, 12.7.3 *infra* (discussion of challenges to improper nonjudicial punishments and reprimands); Ch. 20 *infra* (means of challenging improper court-martial convictions).

[55] The Air Force uses a procedure called the Control Roster which is akin to a probationary period of observation and counseling. The services also have procedures for convening demotion boards when a servicemember's work performance is below what is expected of a member of that rank.

[56] 10 U.S.C. § 815; MANUAL FOR COURTS-MARTIAL at Ch. XXVI. Hundreds of thousands of Article 15 proceedings occur each year.

[57] 10 U.S.C. §§ 816, 820 (Arts. 16, 20).

[58] The U.S.C.M.A. interpreted Argersinger v. Hamlin, 407 U.S. 25 (1972), to require counsel before confinement is imposed. United States v. Alderman, 22 C.M.A. 298, 46 C.M.R. 298, 1 MIL. L. REP. 2314 (1973). However, this ruling was invalidated by the Supreme Court in Middendorf v. Henry, 425 U.S. 33, 4 MIL. L. REP. 2148 (1976). Taken literally, the U.C.M.J. may allow exclusion of civilian counsel from an SCM, but to our knowledge the military services have never asserted such authority. The Air Force has often permitted a Judge Advocate to represent an accused at an SCM.

[59] 10 U.S.C. §§ 816, 819 (Arts. 16, 19).

[60] Pub. L. No. 90-632, 82 Stat. 1335 (effective Aug. 1, 1969), *amending* 10 U.S.C. § 819.

any sentence authorized by the President in the MCM except death, confinement at hard labor for more than six months, hard labor without confinement for more than three months, or forfeiture of two-thirds pay for six months. In addition, a BCD may be adjudged only when a verbatim record is kept, a military judge is detailed, and the accused is provided with qualified defense counsel. The last two requirements were added by the 1968 act. A military judge and qualified counsel have been detailed to most SPCMs since 1968. The use of summarized records at the CA's direction precludes the adjudication of a BCD in most SPCMs.

General Courts-Martial (GCMs)[61] consist of at least five members and a military judge, or a military judge sitting alone at the request of the accused. The accused has a right to representation by legally qualified counsel. Before charges can be referred to a GCM, there must be a pretrial investigation and the CA must receive written advice on the charge(s) from the staff judge advocate. A verbatim record of the proceedings is kept. The court is empowered to adjudge any punishment authorized for the offense by the President in the MCM and not prohibited by the Code.

The following is a description of the stages of a court-martial:

- *Apprehension* is the equivalent of civilian arrest and must be based on probable cause.
- *Arrest, restriction, or confinement* are restraints that may be imposed.
- *Bail* is nonexistent; however, recent decisions of the U.S.C.M.A. have adopted the *ABA Standards on Pretrial Restraint,* lessening the once-impossible burden of challenging pretrial restraint. A probable cause hearing must be held.[62]
- *Preferral* of charges by the immediate commander follows an informal investigation of the charges; this is akin to a civilian complaint. The preferring officer is the accuser. Charge sheets are prepared listing the charges, witnesses, and other information.[63]
- An *Article 32 investigation,* which is a hybrid of a civilian grand jury and preliminary hearing, must occur if a GCM is contemplated. Counsel is provided and witnesses are examined. A transcript and formal report are usually prepared. The recommendation of the hearing officer is not binding on the CA.
- A written *pretrial advice* is prepared by the SJA for the CA in all GCM cases and in other cases in some services.
- The *convening authority* (CA) may order a court convened within his/her authority, depending on rank, command position, and delegated authority, or may forward the case to a superior CA. Recommendations are received from subordinate commanders along the chain of command.
- A *convening order* is issued listing the court members, judge, and counsel selected by the CA, specifying the type of court, and naming the time and place of the trial. Since 1969, the GCM judge has been assigned to an independent command and most SPCM judges are now assigned to independent commands.
- *Pretrial discovery* is very liberal as is the standard for compulsory process of witnesses.
- *Pretrial hearings* (Article 39(a) sessions) since 1969 resemble motions hearings in federal court.
- *Pretrial agreements* are negotiated contracts between the accused and the CA in which the CA agrees to approve a prearranged maximum sentence in exchange for a plea of guilty.
- *Pleas* may be guilty, not guilty, or guilty of a lesser included offense.
- The *trial* is similar in many important respects to federal criminal trials. The Federal Rules of Evidence were adopted in 1980.
- The *jury* (court members) may be examined by way of voir dire and challenged for cause. There is one peremptory challenge. The jury selection process itself is subject to challenge.
- The *military judge* may be challenged for cause; since August 1, 1969, (s)he has been empowered to try a case alone at the written request of the accused.
- *Sentencing* (extenuation and mitigation (E and M)) is imposed after a separate hearing before the trier of fact where the defense may present favorable information subject to rebuttal with "matters in aggravation." The accused's service record is put into evidence. The sentence may include a recommendation for a suspended sentence; this is finally decided by the CA.
- There must be a written *post-trial review* by the SJA after all GCMs or an SPCM where a BCD was adjudged. The SJA summarizes the proceedings and makes recommendations.
- The *CA reviews* the entire record to determine guilt or innocence and may act favorably as to findings and sentence for any reason. The CA may not impose a harsher sentence, although a BCD or DD may be converted to confinement time.
- *Deferment* of sentence, akin to civilian appeal bond, pending appellate review has been possible since 1969.
- *Appeals.*[63a]
- *Confinement, clemency, and restoration.* Short terms of confinement are served locally. Lengthy confinement is imposed at either a centralized long-term confinement facility or a rehabilitation center; the goal is restoration to duty. Clemency and reduction of sentence are regularly considered by the Clemency and

[61] 10 U.S.C. §§ 816, 818, 826, 827 (Arts. 16, 18, 26, 27).

[62] United States v. Heard, 3 M.J. 14, 5 MIL. L. REP. 2082 (C.M.A. 1977); Courtney v. Williams, 1 M.J. 267, 4 MIL. L. REP. 2057 (C.M.A. 1976). *See* H. MOYER, *supra* note 32, §§ 2-345 to 2-370.

[63] DD Form 458. The possible offenses are contained in 10 U.S.C. §§ 77-134 (Arts. 77-134) and are called the "punitive articles." *See* MANUAL FOR COURTS-MARTIAL at Ch. XXVIII (discussion of the elements of these offenses and most of the charges that can occur under the general articles, Arts. 133 and 134).

[63a] *See* § 4.3.2.1 *supra.*

Parole Board during the term of confinement. Transfer to civilian federal prison is possible in cases of lengthy sentences and/or disciplinary problems.

4.4 HISTORY OF THE ADMINISTRATIVE DISCHARGE SYSTEM

The requirement that a soldier receive a certificate evidencing that (s)he was separated from military service was adopted in the American Articles of War of 1776 and remains in effect today.[64] A military contract of enlistment is enforceable by criminal penalties;[65] a written discharge certificate was originally necessary "as the legal evidence that [soldiers] have been discharged in fact."[66]

Until 1896, the only unfavorable type of graded discharge certificate, *i.e.*, a discharge certificate containing a characterization of the soldier's military service, was one issued by sentence of a formal court-martial.[67] In the 1890s, for the first time, the military issued graded discharge certificates administratively, without court-martial proceedings. These certificates were called Discharge "Without Honor,"[68] which in 1913 gave way to "Unclassified Discharge," which still later was replaced by the Army's "Blue Discharge," issued through World War II.[69]

In 1948, the Secretary of Defense issued a memorandum containing standards for administrative separation of soldiers before their enlistment contracts expired. The memorandum included standards for issuing administratively two new types of less than honorable discharges — General and Undesirable Discharges.[70] Generally, the memorandum authorized premature separation for specific acts that were punishable by court-martial. The memorandum expressly directed that "[i]ndividuals shall not be recommended for discharge . . . in lieu of punishment."[71] Each service continued to make its own regulations governing the issuance of administrative discharges.

In 1950, Congress enacted the Uniform Code of Military Justice (U.C.M.J.), a comprehensive code of military discipline. The U.C.M.J. authorized only two unfavorable types of graded discharge certificates — the Bad Conduct and the Dishonorable Discharges — both to be imposed only through courts-martial.[72]

In 1959, the Secretary of Defense issued a directive[73] revising the standards and procedures governing administrative discharge of enlisted personnel throughout the services. The directive altered the 1948 Secretary of Defense Memorandum's provisions for GDs and UDs in the following respects:

- The express prohibition against discharging individuals "in lieu of punishment" was eliminated;
- For the first time, a nonjudicial graded discharge certificate was expressly authorized "in lieu of trial by court-martial";[74]
- Additional specific acts punishable by court-martial were made bases for administrative separation;[75]
- Persons administratively separated for specific acts punishable by court-martial were to receive a UD, unless a GD or HD could be justified;[76] and
- Some procedural safeguards were placed upon the issuance of GDs and UDs.[77]

Each service revised its regulations accordingly. Some, however, provided even more procedural rights.

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[64] The current provisions requiring a written certificate of discharge, 10 U.S.C. §§ 1168-69, were preceded by: Act of May 5, 1950, ch. 169, § 6(b), 64 Stat. 145; Act of June 24, 1948, ch. 625, § 239, 62 Stat. 642; Act of June 4, 1920, ch. 227, 41 Stat. 809; Act of Aug. 29, 1916, ch. 418, 39 Stat. 668 (Article 108), Rev. Stat. § 1342 (Article 4); Act of April 10, 1806, ch. 20, 2 Stat. 361; American Articles of War of 1776, Section III, Article 2, *reproduced in* 2 W. WINTHROP, MILITARY LAW AND PRECEDENTS app. at 80 (1st ed. 1886). None of these statutes evidences a disciplinary or punitive purpose.

[65] *See In re* Grimley, 137 U.S. 147 (1890).

[66] 1 W. WINTHROP, *supra* note 64, at 775. To illustrate the importance of the discharge certificate, Winthrop noted that even if "the soldier abandons the service under a bona fide, but mistaken idea as to the duration of his term . . . his error will constitute no defense to a charge of desertion." *Id.* at 919. Moreover, a soldier who enlisted in another unit without a proper certificate of discharge from his own was held to be a deserter. *Id.* at 776, 934.

[67] Even a discharge given by executive order to a deserter, offender, or convict was not distinguishable legally from an ordinary honorable discharge at expiration of term of enlistment. A Dishonorable Discharge "is to be distinguished from the discharge given by executive order, as authorized by Art. 4, the latter being *not a punishment*, but a mere rescinding or discontinuance of a contract." 1 W. WINTHROP, *supra* note 64, at 611 (emphasis in original). *See also id.* at 777, 780.

[68] In Winthrop's 1896 edition of MILITARY LAW AND PRECEDENTS, he stated:

> DISCHARGE "WITHOUT HONOR." This is a species of discharge *recently introduced* into our practice, as supposed to be warranted by the Fourth Article, and proper to be given where circumstances which have induced the discharge are discreditable to the soldier. *But the distinction between a discharge "without honor" and a "dishonorable" discharge is fanciful and unreal*, and in the opinion of the author, it is open to discussion whether this newly invented form is legally authorized under this Article.

1 W. WINTHROP, *supra* note 2, at 848-49 (2d ed. 1896) (emphasis added).

[69] *See* Effron, *supra* note 2, at 246-47 n.74. The procedures for issuing these discharges were governed by individual service regulations.

[70] The Navy and Marine Corps began issuing General and Undesirable Discharge certificates during World War II. *Id.* at 246-47 n.73. The Secretary of Defense Memorandum to Secretaries of Army, Navy, and Air Force (Aug. 2, 1948) authorized these two types of less than honorable discharge uniformly for the services [hereinafter cited as the 1948 Memorandum].

[71] 1948 Memorandum, *supra* note 70, at notes to paras. 6(b), 7(a).

[72] Articles 74(a) and (b) of the U.C.M.J. authorized the service Secretaries to substitute an administrative discharge for a punitive discharge as a matter of clemency. *See* § 20.4.4 *infra* (discussion of this remedy).

[73] DoD Dir. 1332.14 (1959).

[74] *Id.* at para. 6(c).

[75] *Compare* 1948 Memorandum, *supra* note 70, at para. 7(a) (definition of unfitness) *with* DoD Dir. 1332.14, para. I (1959) (definition of unfitness).

[76] DoD Dir. 1332.14, para. I (1959).

[77] A UD could be issued only if an individual was "properly advised of the basis for the contemplated action and afforded an opportunity to request . . . [t]o have his case heard by a Board of not less than three officers . . . , [t]o appear in person before such board . . . , [t]o be represented by counsel, who, if reasonably available, should be a lawyer . . . [and to] submit statements in his own behalf." *Id.* at para. 8(d). A servicemember discharged for unsuitability, for which an HD or GD was authorized, "shall be afforded the opportunity to make a statement on his own behalf." *Id.* at para. 8(c).

In 1966, the DoD Directive was revised to permit a servicemember to request a discharge in lieu of court-martial when a BCD or DD was authorized for the offense[78] and to provide more procedural rights.

It is important to be aware of the major trends occurring over the last 40 years as a frame of reference when receiving discharge upgrade cases. These trends were:

- *In the 1940s*, separations were issued to servicemembers whose traits or patterns of behavior rendered further service unwarranted. The lowest discharge possible, for any reason for discharge, was generally mandatory. Procedural rights were minimal.
- *Until 1959*, characteristics, such as diagnosed "character and behavior disorders" and "homosexual tendencies" and patterns of behavior, such as "habits and traits rendering [one] undesirable" or "shirking" were viewed as different generic reasons for discharge. These were: unsuitability (would but couldn't) or unfitness (could but wouldn't), with a GD mandatory for the former and a UD for the latter. Unsuitability has since been viewed as a lesser included offense of unfitness. Procedural rights were improved, but in practice were still minimal.
- *Beginning in 1959*, UDs were presumed, but no longer mandatory, when unfitness was established (as well as for discharges in lieu of court-martial and for certain civilian convictions), and an HD or GD, depending on the person's service record, when unsuitability was established. Until the 1970s, the usual discharge was a UD in the former case and a GD in the latter.[79] Procedural rights improved substantially, particularly after 1966.
- *After 1966*, the discharge in lieu of court-martial became an increasing favorite of commanders because of the ease of charging a person with an offense and then permitting a request for discharge without a hearing.
- *After 1974*, GDs were commonly issued through the marginal performer discharge, with its simplified procedures.
- *Today*, congressional action barring federal benefits to almost all people who do not complete two years of service[80] may lead to premature issuance of HDs to unwanted servicemembers, separating them before their two-year term expires.

4.5 ADMINISTRATIVE DISCHARGE PROCEDURES

This section describes the normal phases of an administrative discharge for cause. It does not discuss GDs given at the date of normal separation,[81] discharges in lieu of court-martial,[82] or discharges initiated by the servicemember for reasons of hardship, conscientious objection, and the like.[83] The procedures[84] described below are generally based upon Army regulations from 1959 to the present. Before 1959, there were fewer procedural rights in the Army; the Air Force, Navy, and Marine regulations have always provided fewer procedural rights in most unsuitability discharge cases. The following general description is useful in most cases.

The record of service of a servicemember (SM) will list the actions taken at the following stages of the discharge process, if applicable in that service at the time of the SM's discharge.

Counseling and rehabilitative efforts must normally be attempted before a move is made to eliminate a troublesome SM. These may take the form of recorded counseling sessions with the SM, designed to identify deficiencies and assist with problems, or may involve a formal transfer to another unit (rehabilitative transfer). These requirements became more stringent after 1965; even now, they may receive pro forma treatment, although a fresh start is sometimes contemplated. The requirements may be formally waived by the discharge authority (DA) upon recommendation of subordinate commanders, or when regulations state they are never appropriate, *e.g.*, in the case of homosexuality or a serious offense for which a court-martial is warranted.

The commander's report is the next stage in the discharge process. The contents of this report and its attachments are governed by regulation; they generally include all favorable and adverse information, prior service history, counseling and rehabilitation attempts, recommended reasons for discharge, recommended discharge, medical and psychiatric information, and explanation of why other reasons for discharge are inappropriate. This report contains the basic information the DA will use in acting on the case if there has been no administrative discharge board (ADB) hearing.

Medical and psychiatric examinations accompany the commander's report. These examinations may support a medical type of discharge or suggest a more appropriate ground for discharge such as for a "personality disorder" (also called "character and behavior disorder"). If grounds for a disability discharge exist, the DA may permit it as regulations direct.

A letter of notification is given to the SM, who then acknowledges its receipt. The letter, or its attachments, must notify the SM of the specific reasons contemplated for discharge and of the type of dis-

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[78] DoD Dir. 1332.14 (1966). *See* note 2 *supra;* Ch. 19 *infra* (discussion of this type of case).

[79] *See* Chs. 16, 17 *infra* (more detailed description of trends in unsuitability and unfitness discharges).

[80] Pub. L. No. 96-342, § 102, 94 Stat. 119 (Sept. 8, 1980) (applicable to enlistments begun after September 8, 1980).

[81] *See* § 12.8 *infra* (discussion of challenges to the conduct and efficiency ratings on which these GDs are based).

[82] *See* Ch. 19 *infra.*

[83] *See* §§ 12.6.2.1, 12.6.2.2 *infra* (summary of these procedures).

[84] The basic procedures for administrative discharge are contained in DoD Directive 1332.14, which has been substantially revised several times since its initial promulgation in 1959. A new proposed Directive will likely be issued in 1981. *See* § 21.4 *infra.* Each service promulgates regulations which follow, amplify, or expand the rights set by 1332.14. *See* App. 4B *infra* (list of statutes and regulations commonly cited in discharge review briefs, with examples in proper citation form).

charge recommended. It must also list the rights the SM has and the names or locations of potential counsel.

Consultation with counsel occurs when the service regulations permit it.

An election of rights must be made by the SM within a specified time; counsel signs this document. The rights involved are usually to counsel of one's choice, to a hearing before an ADB, to submit a statement, and to waive the above rights — which is normally what the SM elects to do.

Informal plea bargaining may occur, in which the SM agrees to waive the ADB for some form of assurance that no more than a specified character of discharge will be approved by the DA. These deals ("conditional waivers") have been formalized by the Navy only in recent years. The other services have informal practices, sometimes taking the form of agreements between the staff judge advocate (SJA) and the DA to the effect that, if the DA's recommendations are not followed in waiver cases, the SM will be given an opportunity to withdraw the waiver. In some instances, the SM is promised harsher treatment unless he elects the waiver.

A withdrawal of the waiver is sometimes permitted.

The intermediate commander makes recommendations, or in some cases, terminates or changes the nature of the proceedings.

The ADB hearing has been available in most cases where a UD can be adjudged, but rarely in cases where only a GD can be issued. (In most unsuitability cases, the Air Force, Navy, and Marines use only an informal hearing without counsel before an "individual evaluation officer.") If a hearing is requested, the recorder (prosecutor) must give timely notice of the place, time, and witnesses to be called, and must give the SM an opportunity to request defense witnesses. Since 1966, an attorney has been provided unless "not reasonably available." The ADB consists of at least three officers of a specified minimum rank and no legal adviser (judge) except (since 1966) in the Air Force. No verbatim transcript (except sometimes in the Air Force) is kept, the rules of evidence and procedure are lax and governed by specified regulations, and there is no compulsory process for witnesses. The SM (respondent) may remain silent, testify and be examined under oath, or present an unsworn statement and not be cross-examined. The SM may cross-examine witnesses and present evidence and argument. The recorder must prove his/her case by substantial evidence or a preponderance of the evidence, depending on the regulation. The ADB issues a report with specific findings and recommendations on the reasons for discharge and its proper character. Findings of fact are rare.

An SJA legal review is usually required after a hearing where a UD has been recommended. Some SJAs review all cases, including those involving a waiver of the ADB. The contents of this review vary from a one line "legally sufficient" to a detailed discussion of the case.

The respondent's statement is made in some cases where there has been a waiver, and (s)he may submit a pleading by counsel to the DA.

The DA's action is normally the final step. In UD cases, the DA usually has authority to convene a GCM, and may not delegate authority to act on a UD. In GD cases, the DA may have only SPCM convening authority power. The DA may disapprove adverse findings and recommendations of the ADB, but, since 1959, can rarely impose a harsher decision than that recommended by the ADB. (The Navy and Marines permit a GD even though an HD or retention is recommended.) If there was no ADB, the DA can discharge or retain the SM, or order probation with a suspended discharge. Prior to 1959, a new hearing could be ordered when the DA thought the ADB results too lenient.

Secretarial review is possible where the DA seeks a discharge after an ADB recommendation for retention or in other unusual cases.

The Navy Administrative Discharge Board provides a written summary of the case for the Chief of Naval Personnel, in many cases where he has reserved final authority.

Appeals by SMs while in service are generally not permitted. However, on occasion, someone in higher authority will entertain a request for in-service review of a case.

4.6 RESEARCHING MILITARY LAW

4.6.1 MILITARY REGULATORY STRUCTURE

Except where a statute or executive order controls, military service regulations must conform to the regulations promulgated by the Secretary of Defense.[85] The DoD and military services base their authority for rulemaking on their status as executive agencies.[86] Military service regulations are more specific than DoD regulations and may vary among the services. They are supplemented frequently and may remain unpublished unless they affect the public.[86a] DoD and service regulations are as follows:

- DoD Directives (DoDD or DoD Dir.);
- DoD Instructions (DoDI or DoD Inst.);
- Army Regulations (AR);[87]
- Army Circulars (DA Cir.);
- Army Pamphlets (DA Pam.);
- Army General Orders (DA GO);
- Army Special Orders (DA SO);
- Army Memoranda (DA Memo);

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[85] The constitutional bases for military law are: "The Congress shall have power to make rules for the government of the land and naval forces. . . ." U.S. CONST. art. I, § 8. "The President shall be Commander in Chief of the Army and Navy. . . ." U.S. CONST. art. II § 2.

The President is empowered by 10 U.S.C. § 121 (1976), to prescribe regulations to carry out his functions; Art. 36, U.C.M.J., 10 U.S.C. § 836, delegates to the President authority to prescribe procedures for all types of military tribunals.

[86] 5 U.S.C. § 301. *See* Ch. 5 *infra* (description of various administrative discharge regulations since 1940).

[86a] *See* 32 C.F.R. (regulations which have been published). *See also* 33 C.F.R. (Coast Guard).

[87] A description of Army publications appears in AR 310-2 and an index appears in AR 310-1. Regulations governing administrative discharge and other personnel matters are mainly in the AR 600 series.

- Secretary of the Navy Instructions (SECNAVINST);[88]
- Judge Advocate General Instructions (JAGINST);
- Secretary of the Navy Notices (SECNAVNOTE);
- Judge Advocate General Notices (JAGNOTE);
- Judge Advocate General Manuals (JAGMAN);
- Navy Regulations (USNR);
- Air Force Regulations (AFR);[89]
- Air Force Manual (AFM);
- Air Force Pamphlets (AFP);
- Air Force Letters (AFL);
- Marine Corps Orders (MCO);[90]
- Marine Corps Bulletins (MCB);
- Marine Corps Manuals (MARCORMAN);
- Coast Guard Directives, Publications, and Reports (CG).[91]

Service regulations are supplemented frequently, usually by messages or "interim changes." The final versions make references to any interim changes. The Judge Advocate Generals of the services often issue formal opinions interpreting these regulations.[92]

4.6.2 MILITARY CRIMINAL LAW

Since 1951, the court-martial practice has been uniform among the services under the Uniform Code of Military Justice (U.C.M.J.)[93] and the *Manual For Courts-Martial.*[94] Some discretionary powers remain in each service.[95]

Since 1951,[96] military appellate decisions have been published as follows:

- *1951-1975* — 23 volumes of the *United States Court of Military Appeals* (U.S.C.M.A.) published by Lawyers Co-operative, was the official and primary reporter of U.S.C.M.A. cases.
- *1951-1975* — 50 volumes of the *Court-Martial Reports* (C.M.R.), published by Lawyers Co-operative, reported all U.S.C.M.A. opinions and all published decisions of the Boards of Military Review (Courts of Military Review after 1968).[97] There is a hardbound index for volumes 1-25 and clothbound indexes for volumes 26-45.
- *1973-present* — eight volumes of the bimonthly *Military Law Reporter* (Mil. L. Rep.) published by the Public Law Education Institute (PLEI) include all U.S.C.M.A. cases and all published and many unpublished C.M.R. cases. It contains a yearly index with cases keyed to the treatise *Justice and the Military*.[98]
- *1975-1976* — The C.M.R. published advance sheets through volume 54 and the U.S.C.M.A. (cited as C.M.A.) through volume 24; however, 51-54 C.M.R. and 24 C.M.A. were never published. Citations to them are obsolete.
- West's *Military Justice Reports* (M.J.) began publication in April 1975 and publishes biweekly advance sheets. There are nine bound volumes of M.J. with advance sheets running to volume 10. Currently there is no cumulative index.

The current method for citing cases is as follows:[99]

- *U.S.C.M.A.* — 1 M.J. 1, 3 Mil. L. Rep. 2401 (C.M.A. 1975).
- *C.M.R.s* — 1 M.J. 1, 3 Mil. L. Rep. 2401 (A.F.C.M.R. 1975) (Air Force), (A.C.M.R. 1975) (Army), (N.C.M.R. 1976) (Navy), or (C.G.C.M.R. 1975) (Coast Guard).
- *Pre-M.J.* cases are cited as C.M.A., C.M.R., and Mil. L. Rep. as appropriate, with the year; and pre-August 1, 1969, lower court cases are designated according to the Board of Review, as each C.M.R. was then called, *i.e.*, AFBR, ABR, NBR, and CGBR.

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[88] SECNAVINST 5215.1 describes various Navy regulations. The index of all Navy regulations is contained in NAVPUBINST 5215.4. Regulations governing administrative discharges and other personnel matters are contained in the Bureau of Naval Personnel Manual (BUPERSMAN). Naval offices often issue their own publications, *e.g.*, BUPERSMAN and Chief of Naval Operations publications (CNO).

[89] AFR 0-2 is a numerical index. The alphabetical index AFR 0-6 is no longer published. Regulations governing administrative discharge and other personnel matters have been found in the AFR 30 and 39 series. The Air Force became a separate service in 1947, before which time it was called the Army Air Corps and was governed by Army regulations; these were retained for a short time after 1947.

[90] *See* SECNAVINST 5215.1, *supra* note 88. Regulations governing administrative discharges and other personnel matters are found in the Marine Corps Separation and Retirement Manual (MARCORSEPMAN) and the Navy BUPERSMAN. The Marine Corps has been a part of the Navy administratively since 1834.

[91] CG-236 is a subject matter index. The Coast Guard was a part of the Department of the Treasury until April 1, 1967, and now is a part of the Department of Transportation. In time of war or when designated by the President, it comes under the command of the Secretary of the Navy. 14 U.S.C. § 1.

[92] *See* § 12.3.3.1 (description of these opinions). The *Digest of Opinions – The Judge Advocate General of the Army Forces (Dig. Ops.)* is a 17-volume set with a one-volume cumulative index covering volumes 1-10. Commonly known as *Dig. Ops.*, its coverage ends June 30, 1968. Volumes 11-17 have individual indexes. Each volume has a table of contents, and tables referencing the volume to digest court-martial cases, cited cases and opinions, and cited orders, regulations, and laws. Cite *Dig. Ops.* by number or name of the opinion digested, volume, number, topic, and section number, *e.g.*, JAGA 1963/4736, 1 October 1963, 13 *Dig. Ops.* ENLISTED MAN § 45.1.

The Army issued a *1912 Digest*, a *1912-1930 Digest*, and a *1912-1940 Digest*. Each volume has tables containing, among other things, references in the *Digest* to the Constitution, United States Code, Articles of War, and the *Manual for Courts-Martial*.

Opinions of The Judge Advocate General of the Army are designated by a variety of office symbols and numbering systems, which have changed from time to time. For example, in 1972 an administrative law opinion might be identified as DAJA-AL 1972/3895, 23 March 1972. In order, this citation indicates The Judge Advocate General's Office, The Administrative Law Division, the year, the opinion number, and the date of the opinion. *See also* OpJAGN (Navy); OpJAGAF (Air Force); OpCCCG (Coast Guard).

[93] 10 U.S.C. §§ 801-940.

[94] There have been three versions since 1951. MCM (1951 ed.) with a pocket part supplement, MCM (1968 ed.) appearing only at 33 Fed. Reg. 13,502 (1968), and the more recent MCM (1969 ed.) issued with three changes pursuant to Exec. Order No. 11,476, 3 C.F.R. § 132 (1969). Prior to 1951, the Army, Air Force, Navy, and Marine Corps were governed by separate MCMs applicable to the former two and the latter two.

[95] *See* AR 27-10 (Army); AFM 111-1 (Air Force); JAGMANINST 5800.7 (Navy and Marines JAGMAN); CG-241 (Coast Guard).

[96] Prior to 1951, decisions of the military appellate review boards were published in *Board of Review and Judicial Council* (BR-JC of the Army), *Court-Martial Orders* (CMO of the Navy), and the *Court-Martial Reports of The Judge Advocate General of the Air Force* (CMR-AF of the Air Force).

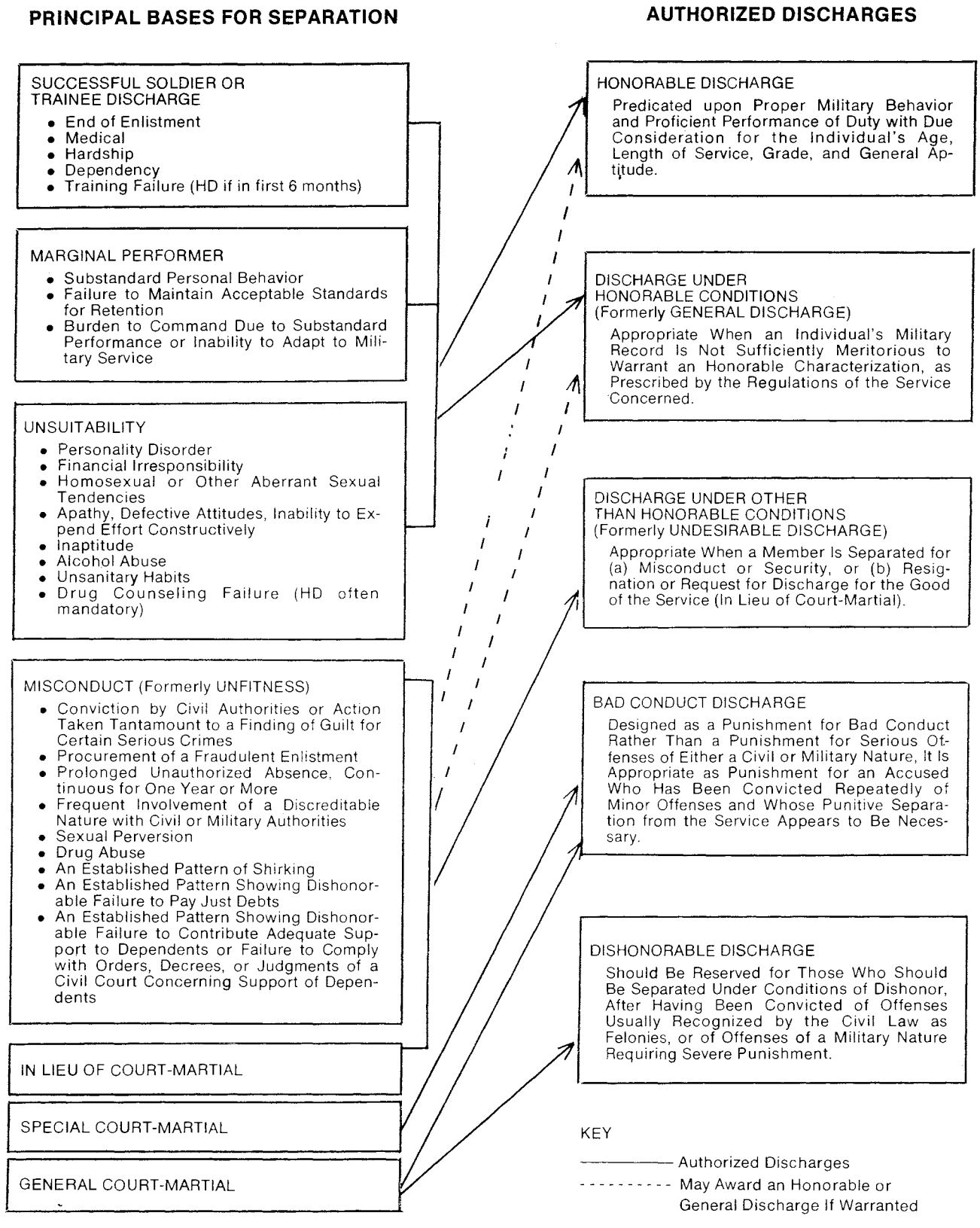
[97] The Judge Advocate General of each service determines which BR (now C.M.R.) cases to publish.

[98] H. MOYER, JUSTICE AND THE MILITARY (1972).

[99] *See* App. 4C *infra* (list of abbreviations used in court-martial orders, allied papers, and reported military cases).

APPENDIX 4A

RELATIONSHIP OF BASES FOR SEPARATION AND AUTHORIZED DISCHARGES



APPENDIX 4B
COMMON CITATIONS IN DISCHARGE REVIEW BRIEFS

ABBREVIATIONS	DESCRIPTION	CITE EXAMPLE[1]	JURISDICTION
AFR[2]	Air Force Regulation	AFR 39-23, para. 4-4b, 27 Jun. 65	Air Force
AFM[2]	Air Force Manual	AFM 110-1, para. 2-7c, 10 Apr. 70	Air Force
AR[2]	Army Regulation	AR 635-270, para. 11-6c(2) 1 May 68	Army
BUPERSMAN	Bureau of Naval Personnel Manual	BUPERSMAN 1860120	Navy
C.F.R.	Code of Federal Regulations	29 C.F.R. § 531.37 (b) (1966)	All Services
CG	Coast Guard Directives	CG-241	Coast Guard
COMDTINST	Commandant Instruction	COMDTINST 1900.2A	Coast Guard
DA Pam.	Dept. of Army Pamphlet	DA Pam. 27-9, para. 4-29(a)	Army
DoD Dir.	Dept. of Defense Directive	DoD Dir. 1325.1 LX.B	All Services
DoD Inst.	Dept. of Defense Instruction	DoD Inst. 1032.1 IIC.2	All Services
MARCORSEPMAN	Marine Corps Separation Manual	*See* MCO	Marines
MCB	Marine Corps Bulletin	MCB 1560	Marines
MCM	Manual for Courts-Martial	MCM, 1969 (Rev.) para. 145	All Services
MCO	Marine Corps Orders	MCO 1206.1	Marines
TMP	Table of Maximum Punishments	TMP, para. 127c, MCM 1969 (Rev.)	All Services
U.C.M.J.	Uniform Code of Military Justice	U.C.M.J., Art. 23 (a)(1)	All Services
USNR	U.S. Navy Regulation	USNR 700.1105	Navy

[1] These examples present the proper citation form for these materials.

[2] The Army and Air Force issue replacement pages to their regulations reflecting current changes. Changes are noted on the top of each page with the date each change occurred. The first replacement is marked (C1), second change (C2), and so forth. Change pages should be cited thus: AR 40-10(C3), para. 6, 1 Jan. 67. The date of the change, not the date on the cover page of the regulation, should be used.

APPENDIX 4C
ABBREVIATIONS IN MILITARY LAW

ABR	United States Army Board of Review
ACM	General Court-Martial (United States Air Force)
ACMR	United States Army Court of Military Review
ACMS	Special Court-Martial (United States Air Force)
AFBR	United States Air Force Board of Review
AFCMR	United States Air Force Court of Military Review
AFJC	United States Air Force Judicial Council
AFM	Air Force Manual
AGN	Articles for the Government of the Navy
AJC	United States Army Judicial Council
ALNAV	General message from the Secretary of the Navy to all naval activities
ALSTACON	General message from the Secretary of the Navy to all stations in continental United States
AR	Army Regulation
Art.	Article, Uniform Code of Military Justice
BR	Board of Review (United States Army or United States Air Force)
BR (A-P)	Board of Review, South West Pacific Area (A) Pacific (P) (United States Army)
BR (CBI-IBT)	Board of Review, China-Burma-India; India Burma Theater (United States Army)
BR ETO	Board of Review, European Theater of Operations (United States Army)
BR-JC	Board of Review and Judicial Council (United States Army)
BR NATO-MTO	Board of Review, North Africa Theater of Operations — Mediterranean Theater of Operations (United States Army)
Bull. JAG	Bulletin of The Judge Advocate General of the Army
CGBR	United States Coast Guard Board of Review
CGCM	General Court-Martial (United States Coast Guard)
CGCMM	Coast Guard Court-Martial Manual (1949)
CGCMR	United States Coast Guard Court of Military Review
CGCMS	Special Court-Martial (United States Coast Guard)
CGR	Coast Guard Regulations
CGSMCM	Coast Guard Supplement to the Manual for Courts-Martial (1951)
CM	General Court-Martial (United States Army)
CM ETO	Court-Martial European Theater of Operations (United States Army)
CMO	Court-Martial Orders (United States Navy)
C.M.R.	Court-Martial Reports — The Judge Advocates General of the Armed Forces and the United States Court of Military Appeals
C.M.R.(AF)	Court-Martial Reports of The Judge Advocate General of the Air Force
CSJAGA	Military Affairs Division, Office of The Judge Advocate General of the Army
CSJAGC; JAGC	Assistant Judge Advocate General for Procurement (Army); Contracts Division, Office of The Judge Advocate General of the Army
DAJA-AL	Administrative Law Division, Office of The Judge Advocate General of the Army
DAJA-CL	Criminal Law Division, Office of The Judge Advocate General of the Army
Dig. Ops. JAG	Digest of Opinions of The Judge Advocate General of the Army
FM	Field Manual (United States Army)
JAG	Opinion, The Judge Advocate General (United States Army)
MCM 1928	Manual for Courts-Martial (United States Army), 1928
MCM 1949	Manual for Courts-Martial (United States Army or United States Air Force), 1949

MCM 1951	Manual for Courts-Martial, United States, 1951
MCM 1969	Manual for Courts-Martial, United States, 1969
MCM 1969 (Rev)	Manual for Courts-Martial, United States, 1969 (Revised edition)
ML	Military Laws of the United States (Army) annotated
MO-JAGA	Memorandum Opinions of The Judge Advocate General of the Army
NAVOP	General message from the Chief of Naval Operations to ALNAV distribution except missions, attaches, observers, U.S. Coast Guard activities, and minor shore activities
NBR	United States Navy Board of Review
NC&B	Navy Courts and Boards, 1937
NCM	Navy Board of Review decision
NCMR	United States Navy Court of Military Review
NDA	National Defense Act
NDB	Navy Department Bulletin
NGR	National Guard Regulation
NR	Navy Regulations, 1948
NS MCM	Naval Supplement to the Manual for Courts-Martial, United States, 1951
Op CCCG	Opinion, Chief Counsel, Coast Guard
Op GCT	Opinion, General Counsel Treasury Department
Op JAGAF	Opinion of The Judge Advocate General of the Air Force
Op JAGN	Opinion of The Judge Advocate General (United States Navy)
Pub. L.	Public Law, Congress of the United States of America
SPCM	Special Court-Martial (United States Army)
SR	Special Regulation (United States Army)
TM	Technical Manual (United States Army)
U.C.M.J.	Uniform Code of Military Justice
U.S.C.M.A.	Official Reports, United States Court of Military Appeals

CHAPTER 5
REGULATORY DEVELOPMENTS

5.1 LISTS OF REGULATIONS BY SUBJECT MATTER

5.1.1 INTRODUCTION

This section contains lists of regulations arranged by service in five major areas:

- Discharge regulations;
- Drug and alcohol rehabilitation program regulations;
- Entrance standards;
- Investigative boards; and
- Evaluation reports.

These lists are in numerical order within a given topic. Dates given for changes (indicated by C or IMC) are the effective dates of the changes, not necessarily the publication dates. Effective dates are provided so that counsel can pinpoint the specific version of a relevant regulation that was in effect at any given time since 1940.[1]

Regulations listed here and any others counsel needs to analyze are available free of charge.[2] Selected regulations have been digested to assist counsel in preparing procedural contentions.[3]

5.1.2 ARMY REGULATIONS

5.1.2.1 Discharge

AR 135-175 Mar. 10, 1964
Reserve Components: SEPARATION OF OFFICERS
s/s in part AR 140-175 Feb. 24, 1955
AR 135-175, C 1 Aug. 13, 1965
AR 135-175 Mar. 8, 1967
Reserve Components: SEPARATION OF OFFICERS
s/s in part AR 135-175 Mar. 10, 1964
AR 135-175, C 1 Sep. 5, 1968
AR 135-175, C 2 Nov. 6, 1968
AR 135-175, C 3 May 1, 1969
AR 135-175 May 1, 1971
Army National Guard and Army Reserves: SEPARATION OF OFFICERS
s/s AR 135-175 Mar. 8, 1967
AR 135-175, C 1 Mar. 13, 1972
AR 135-175, C 2 Feb. 22, 1971
AR 135-175, C 3 Dec. 15, 1978
AR 135-175, C 4 Apr. 1, 1979
AR 135-178 Oct. 16, 1961
Reserve Components: SEPARATION ENLISTED PERSONNEL
s/s in part AR 140-178 Jun. 6, 1960
AR 135-178 Jan. 20, 1966
Reserve Components: SEPARATION OF ENLISTED PERSONNEL
s/s AR 135-178 Oct. 16, 1961
AR 135-178, C 1 Dec. 8, 1966
AR 135-178, C 2 Nov. 14, 1967
AR 135-178 Jun. 12, 1968
Reserve Components: SEPARATION OF ENLISTED PERSONNEL
s/s AR 135-178 Jan. 20, 1966
AR 135-178, C 1 Sep. 5, 1968
AR 135-178, C 2 Apr. 5, 1969
AR 135-178 Mar. 1, 1970
Reserve Components: SEPARATION OF ENLISTED PERSONNEL
s/s AR 135-178 Jun. 12, 1968
AR 135-178, C 1 Apr. 6, 1970
AR 135-178, C 2 Feb. 25, 1971
AR 135-178 Aug. 15, 1977
Army National Guard and Army Reserve: SEPARATION OF ENLISTED PERSONNEL
s/s AR 135-178 Dec. 30, 1969
AR 140-5 Jul. 1, 1941
OFFICERS' RESERVE CORPS
AR 140-5, C 1 Dec. 15, 1942
AR 140-5, C 2 Dec. 31, 1942
AR 140-5, C 3 Apr. 29, 1943
AR 140-5, C 4 Mar. 16, 1948
AR 140-5, C 5 Mar. 29, 1948
AR 140-5, C 6 Dec. 20, 1948

[1] Until 1947, the Air Force was still part of the Army. For a few years after 1947, certain Army regulations continued to govern Air Force personnel. Both the Army and the Air Force regulations listed here identify, when possible, regulations superseded by the named regulations. The abbreviation s/s stands for "supersedes."

[2] Requests for regulations should be sent to:
DA Military Review Boards Agency
ATTN: SFBA (Reading Room)
1E520 The Pentagon
Washington, DC 20310
See Ch. 10 *infra* (details on ordering these regulations). Persons who experience any problems in obtaining regulations are invited to contact the authors of this manual for further assistance.

[3] Regulations marked with an asterisk are digested in § 5.2. Counsel is advised that the absence of a digest does not indicate a particular regulation is not important.

SR 140-175-1 Oct. 24, 1949
Organized Reserve Corps: OFFICERS SEPARATIONS
s/s AR 140-5 Jun. 17, 1941
SR 140-175-1, C 1 Oct. 30, 1950
SR 140-175-1, C 2 Mar. 26, 1951
SR 140-175-1, C 3 Apr. 24, 1951
SR 140-175-1 Mar. 9, 1953
Army Reserve: OFFICERS SEPARATIONS
s/s SR 140-175-1 Oct. 24, 1949
SR 140-175-1, C 1 Jul. 16, 1953
SR 140-175-1, C 2 Oct. 28, 1953
SR 140-175-1, C 3 Jan. 14, 1954
SR 140-175-1, C 4 Jul. 16, 1954
SR 140-175-1, C 5 Oct. 25, 1954
AR 140-175 Feb. 24, 1955
Army Reserve: OFFICERS SEPARATIONS
s/s SR 140-175-1 Mar. 9, 1953
AR 140-175, C 1 Jul. 1, 1955
AR 140-175, C 2 Dec. 9, 1955
AR 140-175, C 3 Mar. 30, 1956
AR 140-175, C 4 Sep. 14, 1956
AR 140-175, C 5 Feb. 20, 1957
AR 140-175, C 6 Jul. 10, 1957
AR 140-175, C 7 Apr. 30, 1958
AR 140-175, C 8 Jun. 12, 1959
AR 140-175, C 9 Mar. 31, 1960
AR 140-175, C 10 May 5, 1961
SR 140-177-1 Sep. 29, 1949
Organized Reserve Corps: ENLISTED SEPARATION
s/s AR 150-5 in part Feb. 13, 1946
SR 140-177-1, C 1 May 16, 1950
SR 140-177-1, C 2 Sep. 22, 1950
SR 140-177-1, C 3 Nov. 6, 1950
SR 140-177-1, C 4 Nov. 22, 1950
SR 140-177-1, C 5 Mar. 26, 1951
SR 140-177-1 May 1, 1951
SR 140-177-1 Jan. 1, 1953
Army Reserve: ENLISTED SEPARATION
s/s SR 140-177-1 May 1, 1951
SR 140-177-1, C 1 Aug. 7, 1953
SR 140-177-1, C 2 Feb. 3, 1954
SR 140-177-1, C 3 Jul. 16, 1954
AR 140-178 May 14, 1957
Army Reserve: ENLISTED SEPARATION
s/s SR 140-177-1 Nov. 24, 1952
AR 140-178, C 1 Jan. 20, 1958
AR 140-178, C 2 Oct. 15, 1958
AR 140-178, C 3 May 15, 1959
AR 140-178, C 4 Aug. 27, 1959
AR 140-178, C 5 Mar. 31, 1960
AR 140-178 Jun. 6, 1960
Army Reserve: ENLISTED SEPARATION AND REPORTS OF DEATH
s/s AR 140-178 May 14, 1957
AR 140-178, C 1 Aug. 24, 1960
AR 140-178, C 2 Nov. 19, 1960
AR 140-178, C 3 Mar. 23, 1961
AR 140-178, C 4 May 3, 1961
AR 150-5 Sep. 30, 1931
ENLISTED RESERVE CORPS
AR 150-5, C 1 Jun. 6, 1934
AR 150-5 Nov. 10, 1944
ENLISTED RESERVE CORPS
s/s in part AR 150-5 Sep. 30, 1931
AR 150-5, C 1 Jan. 9, 1945
AR 150-5 Oct. 2, 1945
ENLISTED RESERVE CORPS
s/s AR 150-5 Nov. 10, 1944
AR 150-5 Feb. 13, 1946
ENLISTED RESERVE CORPS
s/s AR 150-5 Oct. 2, 1945
AR 150-5, C 1 Apr. 25, 1946
AR 150-5, C 2 Sep. 10, 1946
AR 150-5, C 3 Dec. 11, 1947
AR 150-5, C 4 Sep. 10, 1948
SR 600-220-1 Jun. 18, 1954
Personnel: MILITARY PERSONNEL SECURITY PROGRAM
s/s SR 600-220-1 Dec. 6, 1950
SR 600-220-1, C 1 Jul. 13, 1954
SR 600-220-1, C 2 Nov. 10, 1954
AR 600-443 Jan. 12, 1950
Personnel: SEPARATION OF HOMOSEXUALS
s/s in part AR 615-368 Oct. 27, 1948
AR 600-443, C 1 Jun. 14, 1951
AR 600-443 Apr. 10, 1953
Personnel: SEPARATION OF HOMOSEXUALS
s/s AR 600-443 Jan. 12, 1950
AR 600-443, C 1 Apr. 15, 1954
AR 604-10 Jul. 29, 1955
Personnel: SECURITY CLEARANCE
s/s SR 600-220-1 Jun. 18, 1954
AR 604-10, C 1 Oct. 17, 1955
AR 604-10, C 2 Jun. 12, 1956
AR 604-10 May, 15, 1957
Personnel: SECURITY CLEARANCE
s/s AR 604-10 Jul. 29, 1955
AR 604-10, C 1 Jun. 26, 1957
AR 604-10, C 2 Apr. 1, 1959
AR 604-10 Nov. 4, 1959
Personnel: SECURITY CLEARANCE
s/s AR 604-10 May 15, 1957
AR 604-10, C 1 Dec. 28, 1959
AR 604-10, C 2 Jul. 20, 1962
AR 604-10 Nov. 15, 1969
Personnel: SECURITY CLEARANCE
s/s AR 604-10 Nov. 4, 1959
AR 604-10 Jun. 1, 1975
Personnel: SECURITY CLEARANCE
s/s AR 604-10 Sep. 18, 1969
AR 605-10 Dec. 10, 1941
Officers Appointed in the Army: COMMISSIONED OFFICERS
s/s AR 605-10 Oct. 27, 1941
AR 605-10, C 1 Aug. 11, 1942
AR 605-10, C 2 Nov. 13, 1942
AR 605-10 Dec. 30, 1942
Officers Appointed in the Army: COMMISSIONED OFFICERS
s/s AR 605-10 Dec. 10, 1941
AR 605-10, C 1 Jan. 8, 1943
AR 605-10, C 2 Jan. 28, 1943
AR 605-10, C 3 Mar. 1, 1943
AR 605-10, C 4 Mar. 6, 1943
AR 605-10, C 5 Apr. 22, 1943
AR 605-10, C 6 May 25, 1943
AR 605-10, C 7 Jun. 16, 1943
AR 605,10, C 8 Aug. 23, 1943
AR 605-10, C 9 Sep. 13, 1943
AR 605-10, C 10 Sep. 27, 1943

AR 605-10, C 11 Oct. 19, 1943
AR 605-10 May 26, 1944
Officers Appointed in the Army: COMMISSIONED OFFICERS
s/s AR 605-10 Dec. 30, 1942
AR 605-10, C 1 Nov. 22, 1944
AR 605-10, C 2 Aug. 22, 1945
AR 605-200 Jul. 1, 1949
Officers: DEMOTION AND ELIMINATION
s/s in part AR 605-230 Sep. 6, 1945
AR 605-200, C 1 Oct. 18, 1949
AR 605-200 Mar. 1, 1951
Officers: DEMOTION AND ELIMINATION
s/s AR 605-200 May 19, 1949
AR 605-200, C 1 Jul. 25, 1951
AR 605-200 Jun. 18, 1954
Officers: DEMOTION AND ELIMINATION
s/s AR 605-200 Jun. 26, 1951
AR 605-200, C 1 Nov. 26, 1954
AR 605-200, C 2 Aug. 31, 1955
AR 605-230 Jan. 22, 1941
Commissioned Officers: RECLASSIFICATION
AR 605-230 Jun. 7, 1941
Commissioned Officers: RECLASSIFICATION
s/s AR 605-230 Jan. 22, 1941
AR 605-230 Aug. 25, 1941
Commissioned Officers: RECLASSIFICATION
s/s AR 605-230 Jun. 7, 1941
AR 605-230 Feb. 20, 1942
Commissioned Officers: RECLASSIFICATION BOARDS
s/s AR 605-230 Aug. 25, 1941
AR 605-230 Jun. 4, 1942
Commissioned Officers: RECLASSIFICATION
s/s AR 605-230 Feb. 20, 1942
AR 605-230, C 1 Aug. 13, 1942
AR 605-230, C 2 Sep. 11, 1942
AR 605-230 Dec. 24, 1942
Commissioned Officers: RECLASSIFICATION
s/s AR 605-230 Jun. 4, 1942
AR 605-230, C 1 Feb. 5, 1943
AR 605-230 Jun. 9, 1943
Commissioned Officers: RECLASSIFICATION
s/s AR 605-230 Dec. 24, 1942
AR 605-230, C 1 Nov. 5, 1943
AR 605-230, C 2 Feb. 5, 1944
AR 605-230, C 3 Aug. 7, 1944
AR 605-230, C 4 Jan. 2, 1945
AR 605-230 Sep. 6, 1945
Commissioned Officers: RECLASSIFICATION
s/s AR 605-230 Jun. 9, 1943
AR 605-230, C 1 May 24, 1946
AR 605-230, C 2 Feb. 10, 1938
AR 605-275 Sep. 25, 1948
Commissioned Officers: RESIGNATION
s/s AR 605-275 Oct. 30, 1926
AR 605-275, C 1 Dec. 21, 1942
AR 605-275 Nov. 9, 1944
Commissioned Officers: RESIGNATION
s/s AR 605-275 Sep. 25, 1928
AR 605-275, C 1 Aug. 22, 1945
AR 605-275, C 2 Nov. 22, 1948
AR 605-275 Jun. 21, 1949
Officers: RESIGNATION
s/s AR 605-275 Nov. 9, 1944
AR 605-275, C 1 Dec. 14, 1949
AR 605-275, C 2 May 12, 1950
AR 605-275, C 3 Jul. 22, 1950
AR 605-275, C 4 Feb. 12, 1951
AR 615-360 Apr. 4, 1935
Enlisted Men: DISCHARGE
s/s AR 615-360 Sep. 14, 1927
AR 615-360, C 1 Jan. 1, 1938
AR 615-360, C 2 Oct. 15, 1939
AR 615-360 Nov. 26, 1942
Enlisted Men: DISCHARGE; RELEASE FROM ACTIVE DUTY
s/s AR 615-360 Apr. 4, 1935
AR 615-360, C 1 Dec. 14, 1942
AR 615-360, C 2 Mar. 1, 1943
AR 615-360, C 3 Mar. 18, 1943
AR 615-360, C 4 Apr. 16, 1943
AR 615-360, C 5 Apr. 30, 1943
AR 615-360, C 6 May 25, 1943
AR 615-360, C 7 Jun. 8, 1943
AR 615-360, C 8 Jun. 17, 1943
AR 615-360, C 9 Jun. 19, 1943
AR 615-360, C 10 Aug. 27, 1943
AR 615-360, C 11 Sep. 20, 1943
AR 615-360, C 12 Sep. 22, 1943
AR 615-360, C 13 Oct. 2, 1943
AR 615-360, C 14 Nov. 2, 1943
AR 615-360, C 15 Nov. 30, 1943
AR 615-360, C 16 Dec. 15, 1943
AR 615-360, C 17 Dec. 21, 1943
AR 615-360, C 18 Jan. 1, 1944
AR 615-360, C 19 Mar. 17, 1944
AR 615-360 May 25, 1944
Enlisted Men: DISCHARGE; RELEASE FROM ACTIVE DUTY
s/s AR 615-360 Nov. 26, 1942
AR 615-360, C 1 Sep. 12, 1944
AR 615-360 Jul. 20, 1944
Enlisted Men: DISCHARGE; RELEASE FROM ACTIVE DUTY
s/s AR 615-380 May 25, 1944
AR 615-360, C 1 Feb. 1, 1945
AR 615-360, C 2 Mar. 9, 1945
AR 615-360, C 3 Apr. 9, 1945
AR 615-360, C 4 May 5, 1945
AR 615-360, C 5 May 25, 1945
AR 615-360, C 6 Sep. 11, 1945
AR 615-360, C 7 Apr. 22, 1946
AR 615-360, C 8 May 10, 1946
AR 615-360, C 9 Dec. 18, 1946
AR 615-360 Jul. 1, 1947
Enlisted Men: DISCHARGE
s/s AR 615-360 Jul. 20, 1944
AR 615-360, C 1 Oct. 27, 1948
AR 615-360, C 2 Dec. 17, 1948
AR 615-360, C 3 Feb. 2, 1949
AR 615-360, C 4 Jul. 19, 1949
AR 615-360, C 5 Dec. 20, 1949
AR 615-360 Jan. 23, 1952
Enlisted Personnel: DISCHARGE
s/s AR 615-360 May 14, 1947
AR 615-360, C 1 Feb. 21, 1952
AR 615-360, C 2 May 14, 1952
AR 615-360, C 3 Aug. 11, 1952
AR 615-360, C 4 Sep. 26, 1952

AR 615-360 Jun. 24, 1953
Enlisted Personnel: DISCHARGE
s/s AR 615-360 Jan. 23, 1952
AR 615-360, C 1 Aug. 6, 1953
AR 615-360, C 2 Apr. 16, 1954
AR 615-360, C 3 Jun. 25, 1954
AR 615-360, C 4 Jul. 13, 1954
AR 615-360, C 5 Dec. 1, 1954
AR 615-360, C 6 Apr. 8, 1955
AR 615-364 Feb. 1, 1949
Enlisted Personnel: DISHONORABLE AND BAD CONDUCT DISCHARGE
s/s AR 615-364 Aug. 10, 1944
AR 615-364 Jun. 20, 1950
Enlisted Personnel: DISHONORABLE AND BAD CONDUCT DISCHARGE
s/s AR 615-364 Oct. 27, 1948
SR 615-364-10 Jan. 5, 1951
Enlisted Personnel: NATURALIZED PERSONNEL SEPARATED UNDER OTHER THAN HONORABLE CONDITIONS
AR 615-364 May 31, 1951
Enlisted Personnel: DISHONORABLE AND BAD CONDUCT DISCHARGE
s/s AR 615-364 Jun. 20, 1950
AR 615-364 Jun. 22, 1954
Enlisted Personnel: DISHONORABLE AND BAD CONDUCT DISCHARGE
s/s AR 615-364 May 3, 1951
AR 615-366 Oct. 21, 1944
Enlisted Men: MISCONDUCT DISCHARGE
s/s in part AR 615-360 May 25, 1944
AR 615-366 May 24, 1945
Enlisted Men: MISCONDUCT DISCHARGE
s/s AR 615-366 Oct. 21, 1944
AR 615-366, C 1 Jul. 24, 1945
AR 615-366, C 2 Aug. 22, 1945
AR 615-366, C 3 Mar. 17, 1947
AR 615-366 Jul. 1, 1947
Enlisted Men: MISCONDUCT DISCHARGE
s/s AR 615-366 May 24, 1945
AR 615-366, C 1 Feb. 20, 1948
AR 615-366 Dec. 17, 1948
Enlisted Personnel: MISCONDUCT DISCHARGE
s/s AR 615-366 May 14, 1947
AR 615-366, C 1 Apr. 14, 1949
AR 615-366, C 2 May 17, 1949
AR 615-366 Oct. 26, 1949
Enlisted Personnel: MISCONDUCT DISCHARGE
s/s AR 615-366 Dec. 17, 1948
AR 615-366, C 1 Nov. 20, 1950
AR 615-366, C 2 May 8, 1951
AR 615-366, C 3 Mar. 21, 1952
AR 615-366 Feb. 6, 1954
Enlisted Personnel: MISCONDUCT DISCHARGE
s/s AR 615-366 Oct. 29, 1949
AR 615-366, C 1 Jun. 15, 1954
AR 615-366, C 2 Aug. 3, 1954
AR 615-366, C 3 May 6, 1955
AR 615-367 Sep. 13, 1948
Enlisted Personnel: RESIGNATION
AR 615-367, C 1 Oct. 26, 1951
AR 615-367 Feb. 27, 1953
Enlisted Personnel: RESIGNATION
s/s AR 615-367 Sep. 13, 1948
AR 615-367, C 1 Jul. 24, 1953
AR 615-367, C 2 Jun. 11, 1954
AR 615-367, C 3 Jul. 13, 1954
AR 615-368 Jul. 20, 1944
Enlisted Men: UNDESIRABLE HABITS OR TRAITS OF CHARACTER
s/s in part AR 615-360 May 25, 1944
AR 615-368 Mar. 7, 1945
Enlisted Men: UNDESIRABLE HABITS OR TRAITS OF CHARACTER
s/s AR 615-368 Jul. 20, 1944
AR 615-368, C 1 Apr. 10, 1945
AR 615-368 Jul. 1, 1947
Enlisted Men: UNFITNESS DISCHARGE
s/s AR 615-368 Mar. 7, 1945
AR 615-368, C 1 Aug. 25, 1948
*AR 615-368 Oct. 27, 1948
Enlisted Personnel: UNFITNESS DICHARGE
s/s AR 615-368 May 14, 1947
AR 615-368, C 1 May 17, 1949
AR 615-368, C 2 May 12, 1953
AR 615-368, C 3 Sep. 7, 1954
AR 615-369 Jul. 20, 1944
Enlisted Men: INAPTNESS, LACK OF REQUIRED DEGREE OF ADAPTABILITY, OR ENURESIS
s/s in part AR 615-360 May 25, 1944
AR 615-369 Jul. 1, 1947
Enlisted Men: INAPTITUDE OR UNSUITABILITY DISCHARGE
s/s AR 615-369 Jul. 20, 1944
AR 615-369, C 1 Mar. 25, 1948
AR 615-369, C 2 Aug. 25, 1948
*AR 615-369 Oct. 27, 1948
Enlisted Personnel: INAPTITUDE OR UNSUITABILITY DISCHARGE
s/s AR 615-369 May 14, 1947
AR 615-369 Nov. 15, 1951
Enlisted Personnel: INAPTITUDE OR UNSUITABILITY DISCHARGE
s/s AR 615-369 Oct. 27, 1948
AR 615-369, C 1 Jun. 14, 1952
AR 615-369, C 2 May 15, 1953
AR 615-370 Jan. 19, 1950
Enlisted Personnel: DISLOYAL OR SUBVERSIVE DISCHARGE
AR 615-370 Dec. 6, 1950
Enlisted Personnel: DISLOYAL OR SUBVERSIVE DISCHARGE
s/s AR 615-370 Jan. 19, 1950
AR 635-89 Jan. 21, 1955
Personnel Separations: HOMOSEXUALS
s/s AR 600-443 Apr. 10, 1953
AR 635-89, C 1 Apr. 27, 1955
AR 635-89, C 2 Jun. 1, 1955
AR 635-89 Sep. 8, 1958
Personnel Separations: HOMOSEXUALS
s/s AR 635-89 Jan. 21, 1955
AR 635-89, C 1 Apr. 8, 1959
AR 635-89, C 2 Jan. 22, 1960
AR 635-89 Jul. 15, 1966
Personnel Separations: HOMOSEXUALITY
s/s AR 635-89 Sep. 8, 1958
AR 635-89, C 1 Oct. 1, 1968
AR 635-89, C 2 Jun. 1, 1969
AR 635-89, C 3 Jul. 1, 1969

AR 635-100 Feb. 19, 1969
Personnel Separations: OFFICER PERSONNEL
s/s AR 135-173 Mar. 31, 1961
AR 635-100, C 1 Jun. 9, 1969
AR 635-100, C 2 Aug. 15. 1969
AR 635-100, C 3 Jan. 1, 1970
AR 635-100, C 4 Mar. 1, 1970
AR 635-100, C 5 Jun. 15, 1970
AR 635-100, C 6 Sep. 1, 1970
AR 635-100, C 7 Oct. 15, 1970
AR 635-100, C 8 May 15, 1971
AR 635-100, C 9 Oct. 15, 1971
AR 635-100, C 10 Dec. 17, 1971
AR 635-100, C 11 Apr. 15, 1972
AR 635-100, C 12 Jun. 1, 1972
AR 635-100, C 13 May 1, 1972
AR 635-100, C 14 Sep. 1, 1972
AR 635-100, C 15 Nov. 8, 1972
AR 635-100, C 16 Oct. 1, 1973
AR 635-100, C 17 Dec. 15, 1973
AR 635-100, C 18 Jun. 1, 1974
AR 635-100, C 19 Oct. 15, 1974
AR 635-100, C 20 Jan. 14, 1975
AR 635-100, C 21 Dec. 1, 1975
AR 635-100, C 22 Jul. 1, 1976
AR 635-100, C 23 May 10, 1977
AR 635-100, C 24 Jun. 1, 1978
AR 635-100, C 25 Dec. 30, 1978
AR 635-105A Jan. 2, 1957
Personnel Separations: ELIMINATION (OFFICERS)
s/s AR 605-200 Jun. 18, 1954
AR 635-105A, C 1 Jun. 24, 1957
AR 635-105A, C 2 Oct. 1, 1957
AR 635-105A, C 3 Dec. 16, 1957
AR 635-105A, C 4 Dec. 30, 1958
AR 635-105A, C 5 Aug. 7, 1959
AR 635-105A, C 6 Dec. 3, 1959
AR 635-105A, C 7 Jun. 22, 1960
AR 635-105B Jan. 2, 1957*
Personnel Separations: IDENTIFICATION AND PROCESSING OF SUBSTANDARD AND UNSUITABLE OFFICERS FOR ELIMINATION
s/s AR 605-200 Jun. 18, 1954
AR 635-105B, C 1 May 20, 1957
AR 635-105B, C 2 Dec. 16, 1957
AR 635-105B, C 3 Dec. 3, 1959
AR 635-105B, C 4 Jun. 24, 1960
AR 635-105 Dec. 13, 1960
Personnel Separations: ELIMINATION (OFFICERS)
s/s AR 635-105A & AR 635-105B Jan. 2, 1957
AR 635-105, C 1 Feb. 1, 1961
AR 635-105, C 2 Mar. 21, 1961
AR 635-105, C 3 May 11, 1961
AR 635-105, C 4 Jan. 12, 1962
AR 635-105, C 5 Sep. 14, 1962
AR 635-105, C 6 Mar. 7, 1963
AR 635-105, C 7 Aug. 3, 1965
AR 635-105, C 8 Sep. 7, 1965
AR 635-105 Jun. 17, 1968
Personnel Separations: ELIMINATION (OFFICERS)
s/s AR 635-105 Dec. 13, 1960
AR 635-105, C 1 Oct. 25, 1968
AR 635-105, C 2 Dec. 12, 1968
AR 635-105, C 3 Feb. 28, 1969
AR 635-120 Oct. 8, 1954
Personnel Separations: RESIGNATION (OFFICERS)
s/s AR 605-275 Jun. 27, 1949
AR 635-120 Nov. 25, 1955
Personnel Separations: RESIGNATIONS AND DISCHARGES (OFFICERS)
s/s AR 635-120 Oct. 8, 1954
AR 635-120, C 1 Feb. 5, 1957
AR 635-120, C 2 May 20, 1957
AR 635-120, C 3 Jul. 2, 1957
AR 635-120, C 4 Jan. 14, 1958
AR 635-120, C 5 Feb. 26, 1959
AR 635-120, C 6 Sep. 29, 1959
AR 635-120, C 7 Nov. 25, 1960
AR 635-120 May 21, 1962
Personnel Separations: RESIGNATION AND DISCHARGES (OFFICERS)
s/s AR 635-120 Nov. 25, 1955
AR 635-120, C 1 Jul. 27, 1962
AR 635-120, C 2 Oct. 5, 1962
AR 635-120, C 3 Jan. 25, 1963
AR 635-120, C 4 Mar. 8, 1963
AR 635-120, C 5 May 14, 1964
AR 635-120, C 6 Oct. 19, 1967
AR 635-120 Apr. 8, 1968
OFFICER RESIGNATIONS AND DISCHARGES
s/s AR 635-120 May 21, 1962
AR 635-120, C 1 Oct. 25, 1968
AR 635-120, C 2 Dec. 10, 1968
AR 635-120, C 3 Mar. 1, 1970
AR 635-120, C 4 Jun. 1, 1970
AR 635-120, C 5 Jun. 1, 1970
AR 635-120, C 6 Oct. 2, 1970
AR 635-120, C 7 May 15, 1971
AR 635-120, C 8 Jun. 1, 1972
AR 635-120, C 9 Jul. 1, 1972
AR 635-120, C 10 Aug. 3, 1973
AR 635-120, C 11 Jan. 14, 1975
AR 635-120, C 12 May 12, 1976
AR 635-120, C 13 May 10, 1977
AR 635-120, C 14 Oct. 1, 1978
AR 635-140 Dec. 5, 1958
DISCHARGE OF OFFICERS CONVICTED BY FOREIGN TRIBUNAL
*AR 635-200 Dec. 6, 1955
Personnel Separations: GENERAL PROVISIONS FOR DISCHARGE AND RELEASE (ENLISTED)
s/s AR 615-360 Jun. 24, 1953
AR 635-200, C 1 Jan. 24, 1956
AR 635-200, C 2 May 1, 1956
AR 635-200, C 3 Oct. 23, 1956
AR 635-200, C 4 Feb. 25, 1957
AR 635-200, C 5 Oct. 8, 1957
AR 635-200, C 6 Feb. 12, 1958
AR 635-200, C 7 Dec. 5, 1958
*AR 635-200 Apr. 14, 1959
Personnel Separations: GENERAL PROVISIONS FOR DISCHARGE AND RELEASE
s/s AR 635-200 Dec. 6, 1955
AR 635-200, C 1 Dec. 23, 1959
AR 635-200, C 2 Oct. 26, 1960
AR 635-200, C 3 Nov. 14, 1960
AR 635-200, C 4 Mar. 29, 1961

AR 635-200, C 5 Nov. 15, 1961
AR 635-200, C 6 May 10, 1962
AR 635-200, C 7 Jun. 8, 1962
AR 635-200, C 8 Nov. 13, 1962
AR 635-200, C 9 Mar. 14, 1963
AR 635-200, C 10 Mar. 3, 1964
AR 635-200, C 11 Oct. 21, 1964
*AR 635-200 Jul. 15, 1966
Personnel Separations: ENLISTED PERSONNEL
s/s in part AR 635-200 Apr. 8, 1959
& AR 635-220 Jun. 4, 1956
AR 635-200, C 1 Jun. 1, 1967
AR 635-200, C 2 Jun. 30, 1967
AR 635-200, C 3 Dec. 22, 1967
AR 635-200, C 4 Apr. 9, 1968
AR 635-200, C 5 Jun. 12, 1968
AR 635-200, C 6 Aug. 20, 1968
AR 635-200, C 7 Sep. 11, 1968
AR 635-200, C 8 Oct. 11, 1968
AR 635-200, C 9 Mar. 1, 1969
AR 625-200, C 10 Mar. 7, 1969
AR 635-200, C 11 Jul. 1, 1969
AR 635-200, C 12 Aug. 1, 1969
AR 635-200, C 13 Jul. 8, 1969
AR 635-200, C 14 Sep. 16, 1969
AR 635-200, C 15 Aug. 15, 1969
AR 635-200, C 16 Jan. 1, 1970
AR 635-200, C 17 Mar. 1, 1970
AR 635-200, C 18 May 15, 1970
AR 635-200, C 19 Mar. 19, 1970
AR 635-200, C 20 Sep. 1, 1970
AR 635-200, C 21 Aug. 31, 1970
AR 635-200, C 22 Aug. 12, 1970
AR 635-200, C 23 Sep. 2, 1970
AR 635-200, C 24 Nov. 4, 1970
AR 635-200, C 25 Nov. 19, 1970
AR 635-200, C 26 Jul. 1, 1971
AR 635-200, C 27 May 15, 1971
AR 635-200, C 28 Oct. 1, 1971
AR 635-200, C 29 Oct. 15, 1971
AR 635-200, C 30 Nov. 15, 1971
AR 635-200, C 31 Dec. 1, 1971
AR 635-200, C 32 Nov. 3, 1971
AR 635-200, C 33 Mar. 1, 1972
AR 635-200, C 34 Apr. 15, 1972
AR 635-200, C 35 May 1, 1972
AR 635-200, C 36 Jun. 1, 1972
AR 635-200, C 37 Jun. 21, 1972
AR 635-200, C 38 Oct. 1, 1972
s/s in part AR 635-206 § V
AR 635-200, C 39 Jan. 15, 1973
s/s AR 635-212
AR 635-200, C 40 Dec. 5, 1972
AR 635-200, C 41 Aug. 1, 1973
AR 635-200, C 42 Jan. 1, 1974
s/s in part AR 635-206 Jul. 15, 1966
AR 635-200, C 43 Jun. 1, 1974
AR 635-200, C 44 Dec. 4, 1973
AR 635-200, C 45 Sep. 27, 1975
*AR 635-200 Feb. 1, 1978
Personnel Separations: ENLISTED PERSONNEL
s/s AR 635-200 Jul. 15, 1966
& AR 635-206 Jul. 15, 1966
AR 635-200, C 1 Aug. 1, 1978
AR 635-200, C 2 Aug. 15, 1979
AR 635-200, C 3 Jun. 1, 1980
AR 635-200, C 4 Oct. 1, 1981

AR 635-204 Jan. 31, 1956
Personnel Separations: DISHONORABLE AND BAD CONDUCT DISCHARGE
s/s AR 615-364 Jun. 22, 1954
AR 635-204 Dec. 5, 1958
Personnel Separations: DISHONORABLE AND BAD CONDUCT DISCHARGE
AR 635-206 Jan. 16, 1956
Personnel Separations: MISCONDUCT DISCHARGE
s/s AR 615-366 Feb. 5, 1954
AR 635-206, C 1 Feb. 9, 1956
AR 635-206, C 2 Oct. 29, 1956
AR 635-206, C 3 Mar. 12, 1957
AR 635-206, C 4 Jul. 28, 1958
AR 635-206, C 5 Dec. 5, 1958
AR 635-206 Apr. 14, 1959
Personnel Separations: MISCONDUCT DISCHARGE
s/s AR 635-206 Jan. 16, 1956
AR 635-206, C 1 May 10, 1962
AR 635-206, C 2 Oct. 15, 1963
AR 635-206, C 3 Jun. 30, 1964
AR 635-206 Jul. 15, 1966
Personnel Separations: MISCONDUCT DISCHARGE
s/s AR 635-206 Apr. 8, 1959
AR 635-206, C 1 Apr. 1, 1968
AR 635-206, C 2 Aug. 9, 1968
AR 635-206, C 3 Jul. 1, 1969
AR 635-206, C 4 Oct. 1, 1969
AR 635-206, C 5 Sep. 16, 1969
AR 635-206, C 6 Feb. 4, 1970
AR 635-206, C 7 May 25, 1970
AR 635-206, C 8 Apr. 6, 1971
*AR 635-208 May 21, 1956
Personnel Separations: UNDESIRABLE HABITS AND TRAITS OF CHARACTER
s/s AR 615-368 Oct. 27, 1948
AR 635-208 Apr. 14, 1959
Personnel Separations: UNFITNESS DISCHARGE
s/s AR 635-208 May 21, 1956
AR 635-208, C 1 Sep. 11, 1959
AR 635-208, C 2 Jan. 22, 1960
AR 635-208, C 3 Jun. 16, 1960
AR 635-208, C 4 Sep. 6, 1960
AR 635-208, C 5 Oct. 6, 1961
AR 635-208, C 6 Nov. 15, 1961
*AR 635-209 Mar. 17, 1955
Personnel Separations: INAPTITUDE OR UNSUITABILITY DISCHARGE
s/s AR 615-369 Nov. 15, 1951
*AR 635-209 Apr. 14, 1959
Personnel Separations: UNSUITABILITY DISCHARGE
s/s AR 635-209 Mar. 17, 1955
AR 635-209, C 1 Sep. 11, 1959
AR 635-209, C 2 Jan. 22, 1960
AR 635-209, C 3 Jun. 16, 1960
AR 635-209, C 4 Sep. 6, 1960
AR 635-209, C 5 Nov. 17, 1960
AR 635-209, C 6 Oct. 6, 1961
AR 635-209, C 7 Nov. 15, 1961
*AR 635-212 Jul. 15, 1966
Personnel Separations: UNFITNESS AND UN-

SUITABILITY DISCHARGE
s/s AR 635-208 Apr. 14, 1959
& AR 635-209 Apr. 14, 1959
AR 635-212, C 1 Nov. 8, 1966
AR 635-212, C 2 Oct. 12, 1967
AR 635-212, C 3 Apr. 4, 1968
AR 635-212, C 4 Jun. 1, 1969
AR 635-212, C 5 Jul. 1, 1969
AR 635-212, C 6 May 27, 1969
AR 635-212, C 7 Jan. 15, 1970
AR 635-212, C 8 Mar. 1, 1970
s/s AR 635-89 Jul. 15, 1966
AR 635-212, C 9 Feb. 4, 1970
AR 635-212, C 10 May 25, 1970
AR 635-212, C 11 Mar. 1, 1971
AR 635-212, C 12 Dec. 3, 1971
AR 635-220 Jun. 4, 1956
Personnel Separations: RESIGNATION
s/s AR 615-367 Feb. 27, 1953
AR 635-220, C 1 Jan. 15, 1957
AR 635-220, C 2 Nov. 18, 1957
AR 635-220, C 3 Apr. 14, 1959

5.1.2.2 Drug and Alcohol Rehabilitation

AR 600-32 Dec. 1, 1970
DRUG ABUSE PREVENTION AND CONTROL
s/s in part AR 600-50
AR 600-32, C 1 Dec. 9, 1970
DA CIR 600-85 Jun. 30, 1972
ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM
s/s AR 600-32 Sep. 23, 1970
AR 600-85 Sep. 1, 1976
ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM
s/s DA CIR 600-85 Jun. 30, 1972

5.1.2.3 Entrance Standards

AR 40-501 Dec. 5, 1960
STANDARDS OF MEDICAL FITNESS
AR 40-501, C 1 Apr. 1, 1961
s/s in part AR 40-110 Nov. 12, 1952
AR 40-500 Aug. 16, 1956
AR 40-503 May 19, 1956
AR 611-22
& AR 612-35
AR 40-501, C 2 Mar. 24, 1961
AR 40-501, C 3 Aug. 29, 1961
AR 40-501, C 4 Oct. 23, 1961
AR 40-501, C 5 Apr. 1, 1962
AR 40-501, C 6 Mar. 16, 1962
AR 40-501, C 7 Sep. 10, 1962
AR 40-501, C 8 Oct. 2, 1962
AR 40-501, C 9 Feb. 11, 1963
AR 40-501, C 10 May 17, 1963
AR 40-501, C 11 Aug. 30, 1963
AR 40-501, C 12 Oct. 11, 1963
AR 40-501, C 13 May 13, 1964
AR 40-501, C 14 Jan. 18, 1965
AR 40-501, C 15 Mar. 11, 1966
AR 40-501, C 16 Aug. 12, 1966
AR 40-501, C 17 Oct. 17, 1966
AR 40-501, C 18 Apr. 4, 1967
AR 40-501, C 19 Apr. 12, 1967
AR 40-501, C 20 Apr. 28, 1967
AR 40-501, C 21 Jul. 10, 1967
AR 40-501, C 22 Jun. 19, 1968
AR 40-501, C 23 Feb. 4, 1969
AR 40-501, C 24 Jan. 1, 1970
AR 40-501, C 25 Feb. 2, 1970
AR 40-501, C 26 Nov. 30, 1970
AR 40-501, C 27 Oct. 15, 1971
AR 40-501, C 28 Feb. 10, 1972
AR 40-501, C 29 Mar. 15, 1974
AR 40-501, C 30 Sep. 27, 1975
AR 40-501, C 31 Jul. 1, 1976
AR 40-501, C 32 Aug. 15, 1980
AR 40-503 May 19, 1956
PHYSICAL STANDARDS AND PROFILING FOR ENLISTMENT AND INDUCTION
s/s AR 40-115 Aug. 20, 1948
AR 40-503, C 1 Aug. 3, 1956
AR 40-503, C 2 Mar. 27, 1957
AR 40-503, C 3 May 6, 1959
AR 601-210 Apr. 12, 1956
QUALIFICATIONS AND PROCEDURES FOR PROCESSING APPLICANTS FOR ENLISTMENT AND REENLISTMENT IN THE REGULAR ARMY
s/s AR 615-120
& SR 615-120-2 Mar. 31, 1954
AR 601-210, C 1 Mar. 12, 1957
AR 601-210, C 2 Apr. 9, 1957
AR 601-210, C 3 Sep. 18, 1957
AR 601-210, C 4 Oct. 8, 1957
AR 601-210, C 5 Dec. 10, 1957
AR 601-210, C 6 Jan. 13, 1958
AR 601-210, C 7 Feb. 13, 1958
AR 601-210, C 8 Apr. 16, 1958
AR 601-210, C 9 Sep. 17, 1958
AR 601-210, C 10 Jan. 16, 1959
AR 601-210, C 11 Mar. 24, 1959
AR 601-210 Apr. 27, 1959
QUALIFICATIONS & PROCEDURES FOR PROCESSING APPLICANTS FOR ENLISTMENT & REENLISTMENT IN THE REGULAR ARMY
s/s AR 601-210 Apr. 12, 1956
AR 601-210, C 1 Nov. 17, 1959
AR 601-210, C 2 Mar. 25, 1960
AR 601-210, C 3 May 6, 1960
AR 601-210, C 4 Jun. 17, 1960
AR 601-210, C 5 Sep. 6, 1960
AR 601-210, C 6 Jan. 26, 1961
AR 601-210, C 7 Apr. 3, 1961
AR 601-210, C 8 May 19, 1961
AR 601-210, C 9 Aug. 10, 1961
AR 601-210, C 10 Nov. 10, 1961
AR 601-210, C 11 Nov. 28, 1961
AR 601-210, C 12 Apr. 17, 1962
AR 601-210, C 13 Apr. 20, 1962
AR 601-210, C 14 May 23, 1962
AR 601-210, C 15 Jun. 21, 1962
AR 601-210, C 16 Aug. 3, 1962
AR 601-210, C 17 Aug. 24, 1962
AR 601-210, C 18 Oct. 19, 1962
AR 601-210, C 19 Nov. 9, 1962
AR 601-210 Nov. 16, 1964
QUALIFICATIONS & PROCEDURES FOR PROCESSING APPLICATIONS FOR ENLISTMENT & REENLISTMENT IN THE REGULAR ARMY

s/s in part AR 601-210 Apr. 27, 1959
AR 601-210, C 1 Jul. 16, 1965
AR 601-210, C 2 Aug. 2, 1965
AR 601-210, C 3 Jan. 11, 1966
AR 601-210, C 4 Jul. 27, 1966
AR 601-210, C 5 Sep. 9, 1966
AR 601-210, C 6 Feb. 13, 1967
AR 601-210 May 1, 1968
Personnel Procurement: REGULAR ARMY
s/s AR 601-210 Sep. 16, 1964
AR 601-210, C 1 Jun. 28, 1968
AR 601-210, C 2 Aug. 29, 1968
AR 601-210, C 3 Jun. 1, 1969
AR 601-210, C 4 Nov. 1, 1969
AR 601-210, C 5 Apr. 1, 1970
AR 601-210, C 6 Aug. 1, 1970
AR 601-210, C 7 Mar. 10, 1971
AR 601-210, C 8 Aug. 15, 1971
AR 601-210, C 9 Nov. 20, 1971
AR 601-210, C 10 Jan. 1, 1972
AR 601-210, C 11 Dec. 28, 1971
AR 601-210, C 12 Apr. 20, 1972
AR 601-210, C 13 May 15, 1972
AR 601-210, C 14 Jun. 1, 1972
AR 601-210, C 15 May 15, 1972
AR 601-210, C 16 Nov. 30, 1972
AR 601-210, C 17 May 1, 1973
AR 601-210, C 18 Oct. 1, 1973
AR 601-210 Apr. 1, 1975
REGULAR ARMY ENLISTMENT PROGRAM
s/s AR 601-210 May 1, 1968
AR 601-220 Nov. 30, 1970
& AR 601-221 Nov. 20, 1971
AR 601-210, C 1 Jul. 1, 1975
AR 601-210, C 2 Sep. 27, 1975
AR 601-210, C 3 Jan. 1, 1976
AR 601-210, C 4 Sep. 27, 1975
AR 601-210, C 5 Mar. 15, 1976
AR 601-210, C 6 Oct. 1, 1976
AR 601-210, C 7 Oct. 1, 1976
AR 601-210, C 8 Apr. 15, 1977
AR 601-210, C 9 Jul. 1, 1977
AR 610-210, C 10 Jun. 1, 1979
AR 601-210, C 11 May 15, 1979
AR 601-270 Apr. 5, 1956
ARMED FORCES INDUCTION AND EXAMINING STATIONS
s/s SR 615-100-1 Apr. 8, 1953
& SR 615-180-1 Apr. 10, 1953
AR 601-270, C 1 Jul. 9, 1956
AR 601-270, C 2 Aug. 14, 1956
AR 601-270, C 3 Sep. 26, 1956
AR 601-270, C 4 Nov. 26, 1956
AR 601-270, C 5 May 1, 1957
AR 601-270, C 6 Jun. 14, 1957
AR 601-270, C 7 Jul. 17, 1957
AR 601-270, C 8 Apr. 17, 1958
AR 601-270, C 9 Jun. 25, 1958
AR 601-270, C 10 Aug. 26, 1958
AR 601-270 Mar. 11, 1960
ARMED FORCES EXAMINING AND INDUCTION STATIONS
s/s AR 601-270 Apr. 5, 1956
& AR 601-287 Dec. 19, 1955
AR 601-270, C 1 Jul. 20, 1960
AR 601-270, C 2 Jan. 26, 1961
AR 601-270, C 3 May 16, 1961
AR 601-270, C 4 Mar. 14, 1962
AR 601-270, C 5 Sep. 12, 1962
AR 601-270 Aug. 2, 1965
ARMED FORCES EXAMINING AND INDUCTION STATIONS
s/s AR 601-270 Mar. 11, 1960
AR 601-270, C 1 Jan. 1, 1966
AR 601-270, C 2 Feb. 13, 1967
AR 601-270 Jun. 1, 1969
ARMED FORCES EXAMINING AND ENTRANCE STATIONS
s/s AR 601-270 Aug. 2, 1965
AR 601-205 Mar. 27, 1964
& AR 601-278
AR 601-270, C 1 Aug. 1, 1969
AR 601-270, C 2 Dec. 15, 1969
AR 601-270, C 3 Jun. 1, 1971
AR 601-270, C 4 Jan. 13, 1972
AR 601-270, C 5 Oct. 15, 1972
AR 601-270, C 6 Feb. 1, 1974
AR 601-270, C 7 Sep. 27, 1975
AR 601-270 Oct. 20, 1977
ARMED FORCES EXAMINING AND ENTRANCE STATIONS
s/s AR 601-270 Mar. 18, 1969
AR 601-270, C 1 Dec. 15, 1978
SR 615-100-1 Oct. 30, 1951
ARMED FORCES EXAMINING STATIONS
SR 615-100-1, C 1 Jan. 30, 1953
SR 615-100-1 Apr. 8, 1953
ARMED FORCES EXAMINING STATIONS
s/s SR 615-100-1 Oct. 30, 1951
SR 615-100-1, C 1 Jun. 17, 1953
SR 615-100-1, C 2 Sep. 23, 1953
SR 615-100-1, C 3 Jan. 28, 1954
SR 615-100-1, C 4 May 27, 1954
SR 615-100-1, C 5 Jul. 16, 1954
SR 615-100-1, C 6 Jun. 8, 1955
SR 615-100-1, C 7 Aug. 29, 1955
SR 615-105-1 Apr. 15, 1949
RECRUITING FOR REGULAR ARMY AND AIR FORCE
SR 615-105-1 Sep. 6, 1950
RECRUITING FOR REGULAR ARMY AND AIR FORCE
s/s SR 615-105-1 Apr. 15, 1949
& SR 615-105-25 Dec. 13, 1949
SR 615-105-1, C 1 Mar. 22, 1951
SR 615-105-1, C 2 Jul. 6, 1951
SR 615-105-1, C 3 Nov. 7, 1951
SR 615-105-1 Jun. 6, 1952
RECRUITING FOR REGULAR ARMY
SR 615-105-1, C 1 Oct. 16, 1952
SR 615-105-1, C 2 Jan. 29, 1953
SR 615-105-1, C 3 Mar. 27, 1953
SR 615-105-1, C 4 May 18, 1953
SR 615-105-1, C 5 Jul. 30, 1953
SR 615-105-1, C 6 Dec. 22, 1953
AR 615-120 Mar. 31, 1954
QUALIFICATIONS FOR ENLISTMENT AND REENLISTMENT IN THE REGULAR ARMY
s/s SR 615-105-1 Jun. 6, 1952
AR 615-120, C 1 Aug. 27, 1954
AR 615-120, C 2 Jun. 18, 1955
AR 615-120, C 3 Sep. 29, 1955

AR 615-120, C 4 Oct. 10, 1955
SR 615-120-2 Mar. 31, 1954*
PROCEDURES FOR PROCESSING APPLICANTS FOR ENLISTMENT & REENLISTMENT IN THE REGULAR ARMY
s/s SR 615-120-8 May 24, 1950
& AR 615-120 Mar. 31, 1954
SR 615-120-2, C 1 Aug. 27, 1954
SR 615-120-2, C 2 Jun. 18, 1955
SR 615-120-2, C 3 Sep. 29, 1955
SR 615-120-2, C 4 Oct. 10, 1955
SR 615-120-2, C 5 Nov. 4, 1955
SR 615-120-15 Dec. 19, 1952
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D-9101, Discharge
D-9102, Classification of Discharges
* D-9103, Table of Matters Relating to Discharge
D-9104, Expiration of Enlistment
D-9105, Medical Survey for Physical or Mental Disability
D-9106, Convenience of the Government
D-9107, Own Convenience
D-9108, Dependency
D-9109, Enlistment of Minor Without Consent
* D-9110, Unsuitability
* D-9111, Inaptitude
* D-9112, Unfitness
D-9113, Desertion Without Trial: Trial and Conviction by Civil Authorities: Fraudulent Enlistment
D-9114, Sentence of Court-Martial
D-9115, General Instructions Relating to Discharge
D-9116, Detailed Statement of Net Service
D-9201, Cancellations of Enlistments — Definition

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Chapter 10, Section 3 (Separations: Types, Reasons, and Provisions)

C-10301, Classification of Discharges, Enlisted Personnel
C-10302, Determination of Types of Discharges for Enlisted Personnel
* C-10303, Table of Matters Relating to Discharges of Enlisted Personnel
C-10304, Discharge of Enlisted Personnel for Reason of Expiraton of Enlistment
C-10305, Discharge of Enlisted Personnel for Reason of Physical or Mental Disability
C-10306, Discharge of Enlisted Personnel for Convenience of the Government
C-10307, Discharge of Enlisted Personnel for Own Convenience, by Purchase, and Furlough Without Pay
C-10308, Discharge of Enlisted Personnel for Reason of Dependency or Hardship
C-10309, Discharge of Enlisted Personnel for Reason of Minority
* C-10310, Discharge of Enlisted Personnel for Reason of Unsuitability
* C-10311, Discharge of Enlisted Personnel for Reason of Inaptitude
* C-10312, Discharge of Enlisted Personnel for Reason of Unfitness
C-10313, Discharge of Enlisted Personnel for Reason of Misconduct
C-10314, Discharge of Enlisted Personnel Adjudged by Sentence of Court-Martial
C-10315, General Provisions and Restrictions Relating to Enlisted Discharges
C-10316, Cancellation, Voiding or Validating Illegal Enlistments
C-10317, Early Discharge of Regular Navy Enlisted Personnel

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C-10302, Determination of Tupes of Discharges for Enlisted Personnel
C-10303, Summary of Matters Relating to Discharges of Enlisted and Inducted Personnel
C-10304, Separation of Enlisted Personnel by Reason Expiration of Enlistment, Fulfillment of Service Obligation, or Expiration of Tour of Active Service
C-10305, Separation of Enlisted Personnel by Reason of Physical Disability
C-10306, Separation of Enlisted Personnel for Convenience of the Government
C-10307, Discharge of Enlisted Personnel for Own Convenience, by Purchase, and Furlough Without Pay
C-10308, Discharge or Release to Inactive Duty for Reasons of Dependency and Hardship
C-10309, Discharge of Enlisted Personnel by Reason of Minority
* C-10310, Discharge of Enlisted Personnel by Reason of Unsuitability

C-10310A, Discharge of Enlisted Personnel by Reason of Security
* C-10311, Discharge of Enlisted Personnel by Reason of Unfitness
C-10312, Discharge of Enlisted Personnel by Reason of Misconduct
* C-10313, Preparation of Brief Form and OTher Documents Required Under Articles C-10310, C-10311, and C-10312
C-10313A, Field Boards of Officers
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C-10315, General Provisions and Restrictions Relating to Enlisted Separations
C-10316, Cancellation of Illegal Enlistments
C-10317, Early Separation of Enlisted Personnel

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5.1.3.4 Bureau of Naval Personnel Manual [BUPERSMAN], 1969

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* 3420180, Administrative Procedures for Processing Enlisted Personnel for Discharge by Reason of Unsuitability
3420200, Administrative Procedures Concerning Discharge of Enlisted Personnel by Reason of Security
* 3420220, Administrative Procedures for Processing of Enlisted Personnel for Discharge by Reason of Unfitness
3420240, Administrative Procedures for Processing Enlisted Personnel for Discharge by Reason of Misconduct
3420250, Administrative Discharge Board
3420255, Actions by the Chiet of Naval Personnel on Administrative Discharge Proceedings
3420280, Personnel Awaiting Appellate Review of Court-Martial

Chapter 38

3840100, General Provisions and Restrictions Relating to Enlisted Separation
3850120, Determination of Type of Discharge for Enlisted Personnel
3850140, Discharge Certificates
3850190, Discharge of Enlisted Personnel Adjudged by Sentence of Court-Martial
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5.1.3.5 Bureau of Naval Personnel Manual [BUPERSMAN], 1969 Through Change 10/80 (Dec. 15, 1980)[4a]

Chapter 34, Section 20 (Administration of Performance and Discipline)

3420175, Administrative Procedures for Disposition Recommendation of Enlisted Personnel Identified as Drug Abusers
3420180, Administrative Discharges
3420181, Policy and Definitions Concerning Separation of Enlisted Personnel
3420182, General Provisions and Restrictions Relating to Enlisted Sepatations
3420183, Procedures for Processing Enlisted Personnel for Discharge by Reason of Personal Abuse of Drugs Other Than Alcoholic Beverages
* 3420184, Procedures for Processing Enlisted Personnel for Discharge by Reason of Unsuitability
* 3420185, Procedures for Processing Enlisted Personnel for Discharge by Reason of Misconduct
3420186, Memorandum of Agreement to Waive an Administrative Discharge Board to Preclude Discharges Under Other Than Honorable Conditions
3420187, Administrative Discharge Board
3420188, Actions by the Chief of Naval Personnel on Administrative Discharge Proceedings
3420200, Administrative Procedures Concerning Discharge of Enlisted Personnel by Reason of Security
3420260, Detachment for Cause of Certain Enlisted Personnel
3420270, Administrative Procedures for Requesting Discharge for the Good of the Service
3420280, Personnel Awaiting Appellate Review of Court-Martial
3420440, Weight Control

[4a] In late 1981 a new Naval Military Personnel Manual (MILPERSMAN, NAVPERS 15560) was issued but at this writing was not "in effect."

[4] With this change, numerous articles were renumbered as follows: 3420180 became 3420184; 3420220 and 3420240 became 3420185; 3420250 became 3420186 and 3420187; 3420255 became 3420188; 3840080 became 3420181; 3840100 became 3420182. Two new articles were added: 3420180 and 3420183.

Chapter 38 (Separation)

3810170, Separation of Members With Dependency or Pregnancy Status
3840240, Early Separation of Enlisted Members Within Three Months of Expiration of Active Obligated Service
3840160, Separation of Enlited Personnel by Reason of Expiration of Enlistment, Fulfillment of Service Obligation, or Expiration of Tour of Avtive Service
3850100, Types of Discharges for Officers
3850120, Determination of Type of Discharge for Enlisted Personnel
3850190, Discharge of Enlisted Personnel Adjudged by Sentence of Court-Martial
3850220, Separation of Enlisted Personnel for Convenience of the Government
3850240, Discharge or Release to Inactive Duty for Reason of Dependency or Hardship
3850260, Discharge of Enlisted Personnel by Reason of Minority
3850280, Separation of Enlisted Personnel by Reason of Physical Disability
3850300, Discharge of Naval Reserve Enlisted Personnel on Inactive Duty
3850320, Discharge of Surviving Family Members

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5.1.4.6 Marine Corps Separation and Retirement Manual [MARCORSEPMAN], Mar. 23, 1978

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AFR 35-62, C A Jul. 23, 1952
AFR 35-62, C A Aug. 13, 1952
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s/s AFR 35-62 Aug. 11, 1965
AFR 35-66 Feb. 20, 1950
Military Personnel: DISCHARGE OF HOMOSEXUALS
AFR 35-66, C A May 15, 1950
AFR 35-66 Jan. 12, 1951
Military Personnel: DISCHARGE OF HOMOSEXUALS
s/s AFR 35-66 Feb. 20, 1950
AFR 36-66A C Feb. 18, 1953
AFR 35-66 May 31, 1954
Military Personnel: DISCHARGE OF HOMOSEXUALS
s/s AFR 35-66 Jan. 12, 1951
AFR 36-66A C Dec. 6, 1954
AFR 35-66 Jul. 23, 1956
Military Personnel: DISCHARGE FOR HOMOSEXUAL ACTS OR TENDENCIES
s/s AFR 35-66 May 31, 1954
AFR 35-66 Apr. 14, 1959
Military Personnel: DISCHARGE PROCESSING WHERE HOMOSEXUAL ACTS OR TENDENCIES ARE INVOLVED
s/s AFR 35-66 Jul. 23, 1956
AFR 35-66, C A Nov. 17, 1960
AFR 35-66, C B Jan. 12, 1961
AFR 35-66, C B Jul. 19, 1963
AFR 35-66, C C Sep. 18, 1967
AFR 36-2 Aug. 2, 1976
Officer Personnel: ADMINISTRATIVE DISCHARGE PROCEDURES (UNFITNESS, UNACCEPTABLE CONDUCT, OR IN THE INTEREST OF NATIONAL SECURITY)
AFR 36-2, C 1
AFR 36-2, C 2
AFR 36-2, C 3
AFR 36-3 Aug. 2, 1976
Officer Personnel: ADMINISTRATIVE DISCHARGE PROCEDURES (SUBSTANDARD PERFORMANCE OF DUTY)
AFR 36-3, C 1
AFR 36-3, C 2
AFR 36-3, C 3
AFR 36-12 Jul. 15, 1977
Officer Personnel: ADMINISTRATIVE SEPARATION OF COMMISSIONED OFFICERS AND WARRANT OFFICERS OF THE AIR FORCE
s/s AFR 36-12 Jun. 28, 1973
AFR 36-12, C 1 Feb. 28, 1978
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AFR 36-12, C 3 Aug. 10, 1979
AFR 36-12, C 4 Oct. 1, 1979
AFR 39-3 Aug. 18, 1964
Enlisted Personnel: PROBATION AND REHABILITATION PROGRAM FOR AIRMEN SUBJECT TO ADMINISTRATIVE DISCHARGE FOR CAUSE
*AFR 39-10 Sep. 21, 1949
Enlisted Personnel: DISCHARGE — EXPIRATION OF ENLISTMENT OR REQUIRED SERVICE AND GENERAL PROVISIONS
AFR 39-10, C 1 Sep. 14, 1950

*AFR 39-10 Oct. 27, 1953
Enlisted Personnel: DISCHARGE — EXPIRATION OF ENLISTMENT OR REQUIRED SERVICE AND GENERAL PROVISIONS
s/s AFR 39-10 Sep. 21, 1949
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*AFR 39-10 Apr. 14, 1959
Enlisted Personnel: EXPIRATION OF ENLISTMENT OR REQUIRED SERVICE AND GENERAL PROVISIONS
s/s AFR 39-10 Oct. 27, 1953
AFR 39-10, C A Jun. 28, 1963
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*AFM 39-10 Aug. 22, 1966
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AFR 39-11 Dec. 30, 1949
AFR 39-12 Jun. 5, 1951
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AFM 39-10, C 1 May 1, 1967
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Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
s/s AFM 39-10 Aug. 22, 1966
*AFM 39-10 May 18, 1972
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY AND HARDSHIP
s/s AFM 39-10 Oct. 20, 1970
AFM 39-10, C 1 Jan. 26, 1973
*AFR 39-10 Jan. 3, 1977
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE, FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
s/s AFM 39-10 May 18, 1972
AFR 39-10, C 1 Sep. 12, 1977
AFR 39-10, C 2 Jan. 31, 1979
IMC 79-1 Feb. 27, 1979
IMC 80-1 Jul. 7, 1980
AFR 39-11 Dec. 30, 1949
Enlisted Personnel: DISCHARGE — MARRIAGE AND PREGNANCY
AFR 39-11, C A Apr. 24, 1950
AFR 39-11, C A Jul. 25, 1951
AFL 39-12 Jun. 5, 1951
Enlisted Personnel: RELEASE FROM EXTENDED ACTIVE DUTY OR RESERVE FORCES AIRMEN
AFR 39-12 Nov. 2, 1949
Enlisted Personnel: DISCHARGE — MINORITY
AFR 39-12, C 1 May 15, 1950
AFR 39-12 Nov. 8, 1954
Enlisted Personnel: DISCHARGE — MINORITY
s/s AFR 39-12 Nov. 1949
AFR 39-12 Apr. 14, 1959
Enlisted Personnel: DISCHARGE OR RELEASE ON ACCOUNT OF MINORITY
s/s AFR 39-12 Nov. 8, 1954
AFM 39-12 Sep. 1, 1966
Enlisted Personnel: SEPARATION FOR UNSUITABILITY, [UNFITNESS OR] MISCONDUCT; PERSONAL ABUSE OF DRUGS; RESIGNATIONS OR REQUESTS FOR DISCHARGE FOR THE GOOD OF THE SERVICE; AND PROCEDURES FOR THE REHABILITATION PROGRAM
s/s AFR 39-3 Aug. 18, 1964
AFR 39-18 Mar. 3, 1961
AFR 35-66 (in part) Apr. 14, 1959
AFR 39-15 Apr. 14, 1959
AFR 39-16 Apr. 14, 1959
AFR 39-17 Apr. 14, 1959
AFR 39-21 Apr. 14, 1959
AFR 39-22 Apr. 14, 1959
AFR 39-23 Mar. 17, 1959
AFM 39-12, C 1 Nov. 30, 1961
AFM 39-12, C 2 Oct. 28, 1968
AFM 39-12, C 3 Apr. 10, 1969
AFM 39-12, C 4 Oct. 21, 1970
AFM 39-12, C 5 May 14, 1971
AFM 39-12, C 6 May 18, 1972
AFM 39-12, C 7 Mar. 25, 1974
AFM 39-12, C 8 May 24, 1974
AFM 39-12, C 9 Mar. 25, 1975
AFM 39-12, C 10 May 20, 1975
AFM 39-12, Interim C Mar. 31, 1976
AFM 39-12, Interim C Jun. 28, 1976
AFM 39-12, C 11 Dec. 30, 1976
AFM 39-12, Interim C Dec. 30, 1976
AFM 39-12, C 12 May 20, 1977
AFM 39-12, Interim C Jul. 1, 1977
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AFM 39-12, Interim C Sep. 9, 1977
AFM 39-12, Interim C Dec. 15, 1977
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AFM 39-12, C 15 Aug. 10, 1979
IMC 80-1 Jan. 21, 1981
IMC 80-2 Mar. 16, 1981
AFR 39-13 Nov. 3, 1949
Enlisted Personnel: DISCHARGE — DEPENDENCY OR HARDSHIP
AFR 39-13, C A Jun. 16, 1950
AFR 39-14 Sep. 21, 1949
Enlisted Personnel: DISCHARGE — CONVENIENCE OF THE GOVERNMENT
AFR 39-14, C A Nov. 24, 1950
AFR 39-14, C B Jan. 24, 1951
AFR 39-14 May 2, 1951
Enlisted Personnel: DISCHARGE FOR THE CONVENIENCE OF THE GOVERNMENT
s/s AFR 39-14 Sep. 21, 1949
AFR 39-14, C A Jan. 30, 1952
AFR 39-14, C B Sep. 24, 1952
AFR 39-14 May 27, 1953
Enlisted Personnel: DISCHARGE FOR THE CONVENIENCE OF THE GOVERNMENT
s/s AFR 39-14 May 2, 1951

AFR 39-14, C A Oct. 27, 1953
AFR 39-14 May 18, 1955
Enlisted Personnel: SEPARATION FOR CONVENIENCE OF THE GOVERNMENT
s/s AFR 39-14 May 27, 1953
AFR 39-14, C A Oct. 26, 1955
AFR 39-14 Apr. 14, 1959
Enlisted Personnel: SEPARATION FOR CONVENIENCE OF THE GOVERNMENT
s/s AFR 39-14 May 27, 1955
AFR 39-14, C A Aug. 14, 1959
AFR 39-14, C B Oct. 14, 1959
AFR 39-14 Mar. 1, 1960
Enlisted Personnel: SEPARATION FOR THE CONVENIENCE OF THE GOVERNMENT
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AFR 39-14A Aug. 4, 1959
AFR 39-14B Oct. 14, 1959
AFR 39-14, C A Mar. 28, 1960
AFR 39-14, C A Sep. 15, 1960
AFR 39-14, C A Jun. 28, 1962
AFR 39-14, C A Jul. 21, 1964
AFR 39-14, C B Aug. 4, 1964
AFR 39-15 Apr. 19, 1951
Enlisted Personnel: DISCHARGE BY REASON OF RESIGNATION
AFR 39-15, C A Jan. 6, 1953
AFR 39-15, C B Apr. 9, 1953
AFR 39-15 Nov. 22, 1954
Enlisted Personnel: DISCHARGE BY REASON OF RESIGNATION
s/s AFR 39-15 Apr. 19, 1951
AFR 39-15, C A May 3, 1955
AFR 39-15, C B Apr. 9, 1954
AFR 39-15 Apr. 14, 1959
Enlisted Personnel: DISCHARGE BY REASON OF RESIGNATION
s/s AFR 39-15 Nov. 22, 1954
AFR 39-15, C A Apr. 15, 1959
AFR 39-15, C A Jul. 19, 1963
AFR 39-16 May 9, 1951
Enlisted Personnel: DISCHARGE FOR INAPTITUDE OR UNSUITABILITY
AFR 39-16, C A Oct. 9, 1952
AFR 39-16, C A Dec. 10, 1952
AFR 39-16 Apr. 14, 1959
Enlisted Personnel: DISCHARGE FOR UNSUITABILITY
s/s AFR 39-16 May 9, 1951
AFR 39-16, C A Mar. 17, 1960
AFR 39-16, C A Jun. 23, 1961
AFR 39-16, C B Jan. 11, 1962
AFR 39-16, C B May 17, 1962
AFR 39-16, C C Jul. 19, 1963
AFR 39-16, C C Mar. 16, 1964
AFR 39-16, C D Jul. 21, 1964
AFR 39-17 Jan. 25, 1951
Enlisted Personnel: DISCHARGE — UNFITNESS
AFR 39-17, C A Nov. 5, 1952
AFR 39-17, C B Dec. 11, 1952
AFR 39-17 Feb. 9, 1954
Enlisted Personnel: DISCHARGE — UNFITNESS
s/s AFR 39-17 Jan. 25, 1951
AFR 39-17, C A Nov. 22, 1954
AFR 39-17, C B May 4, 1955
AFR 39-17 Apr. 14, 1959
Enlisted Personnel: DISCHARGE OF AIRMEN BECAUSE OF UNFITNESS
s/s AFR 39-17 Feb. 9, 1954
AFR 39-17, C A Apr. 14, 1959
AFR 39-17, C A Feb. 21, 1962
AFR 39-17, C B Jul. 19, 1963
AFR 39-18 Sep. 21, 1949
Enlisted Personnel: DISCHARGE — DISHONORABLE AND BAD CONDUCT
AFR 39-19 Nov. 15, 1953
Enlisted Personnel: RELEASE FROM ACTIVE DUTY AND TRANSFER TO AIR FORCE RESERVE FOR COMPLETION OF UMTS OBLIGATION
AFR 39-21 Mar. 31, 1949
Enlisted Personnel: DISPOSITION OF INDIVIDUALS WHO FRAUDULENTLY ENLIST IN THE AIR FORCE
AFR 39-21, C A Dec. 27, 1950
AFR 39-21, C A May 25, 1951
AFR 39-21, C B Jan. 16, 1953
AFR 39-21 Aug. 4, 1953
Enlisted Personnel: DISPOSITION OF PERSONS WHO FRAUDULENTLY ENLIST IN THE AIR FORCE
s/s AFR 39-21 Mar. 31, 1949
AFR 39-21 Apr. 14, 1959
Enlisted Personnel: DISCHARGE OF AIRMEN FOR MISCONDUCT BECAUSE OF FRAUDULENT ENLISTMENT IN THE AIR FORCE
s/s AFR 39-21 Aug. 4, 1953
AFR 39-21, C A Mar. 21, 1960
AFR 39-21, C A Jan. 21, 1961
AFR 39-21, C A Jul. 19, 1963
AFR 39-22 Jul. 19, 1949
Enlisted Personnel: DISPOSITION OF INDIVIDUALS CONVICTED BY CIVIL COURT
AFR 39-22, C A Jan. 20, 1953
AFR 39-22 Sep. 23, 1953
Enlisted Personnel: DISPOSITION OF AIRMEN CONVICTED BY CIVIL COURT OR ADJUDGED WAYWARD MINORS YOUTHFUL OFFENDERS, OR JUVENILE DELIQUENTS
s/s AFR 39-22 Jul. 9, 1949
AFR 39-22, C B Feb. 26, 1957
AFR 39-22 Apr. 14, 1959
Enlisted Personnel: DISCHARGE OF AIRMEN FOR MISCONDUCT BECAUSE OF CIVIL COURT DISPOSITION
s/s AFR 39-22 Sep. 23, 1953
AFR 39-22, C A Mar. 21, 1960
AFR 39-22, C A Jul. 19, 1963
AFR 39-23 Oct. 5, 1949
Enlisted Personnel: DISPOSITIONS OF CERTAIN ABSENTEES AND DESERTERS
AFR 39-23, C A Dec. 19, 1949
AFR 39-23 Jun. 29, 1951
Enlisted Personnel: DISCHARGE OF ABSENTEES AND DESERTERS
s/s AFR 39-23 Oct. 5, 1949
AFR 39-23, C A Nov. 6, 1952
AFR 39-23, C B Jan. 20, 1953
AFR 39-23, C A Jul. 29, 1954
AFR 39-23, C A Nov. 30, 1956

AFR 39-23 Jul. 17, 1957
Enlisted Personnel: DISCHARGE OF ABSENTEES AND DESERTERS
s/s AFR 39-23 Jun. 29, 1951
AFR 39-23 Apr. 14, 1959
Enlisted Personnel: DISCHARGE OF CERTAIN ABSENTEES AND DESERTERS FOR MISCONDUCT
s/s AFR 39-23 Jul. 17, 1957
AFR 39-23, C A Mar. 21, 1960
AFR 39-23, C A Jan. 12, 1961
AFR 39-23, C A Jul. 1, 1963
AFR 39-63 Oct. 8, 1954
Enlisted Personnel: RELEASE FROM ACTIVE DUTY AND TRANSFER TO AIR FORCE RESERVE FOR COMPLETION OF UMTS OBLIGATION
s/s AFR 39-19 Nov. 13, 1953
AFR 45-43 May 31, 1956
Reserve Forces: ADMINISTRATIVE DISCHARGE OF AIRMEN MEMBERS OF THE AIR FORCE RESERVE
s/s in part AFR 35-6 Feb. 3, 1953
AFR 45-43, C A Apr. 25, 1957
AFR 45-43, C B Sep. 28, 1958

5.1.5.2 Drug and Alcohol Rehabilitation

AF DRUG PROGRAM MANUAL Aug. 17, 1971
THE AIR FORCE PROGRAM FOR DRUG ABUSE REHABILITATION
AFR 30-19 Jul. 12, 1976
Personnel: AIR FORCE PERSONNEL ASSIGNED TO DUTY OUTSIDE THE DEPARTMENT OF DEFENSE AND SUPPORTING NON-DOD ACTIVITIES
AFR 30-2 Nov. 8, 1976
Personnel: SOCIAL ACTIONS PROGRAM
s/s AFR 30-2 Aug. 1, 1974
AFR 30-2, C 1 Jul. 22, 1977
AFR 30-2, C 2 Jan. 31, 1979
AFR 30-2 Aug. 1, 1974
Personnel: SOCIAL ACTIONS PROGRAM
s/s AFR 30-19 Oct. 11, 1973
AFR 30-23 Nov. 16, 1973
AFR 35-78 May 28, 1971
AFR 50-26 Dec. 2, 1971
AFR 30-2, C 1 Jan. 15, 1975
AFR 30-23 Nov. 16, 1973
Personnel: ALCOHOL ABUSE CONTROL AND REHABILITATION
AFR 160-12 Oct. 7, 1977
Medical Service: PROFESSIONAL POLICIES AND PROCEDURES
s/s AFR 160-12 Sep. 9, 1974

5.1.5.3 Entrance Standards

AFM 33-3 Dec. 31, 1964
Recruiting: ENLISTMENT IN THE REGULAR AIR FORCE
s/s AFM 39-7 Sep. 24, 1959
& (in part) AFM 30-9 May 2, 1960
AFM 33-3, C 1 Jul. 1, 1965
AFM 33-3, C 2 Mar. 10, 1966
AFM 33-3 Nov. 9, 1966
Recruiting: ENLISTMENT IN THE REGULAR AIR FORCE
s/s AFM 33-3 Dec. 31, 1964
AFM 33-3, C 1 Jan. 9, 1967
AFM 33-3, C 2 Jun. 26, 1967
AFM 33-3, C 3 Sep. 1, 1967
AFM 33-3, C 4 Dec. 20, 1967
AFM 33-3, C 5 May 9, 1968
AFM 33-3, C 6 Aug. 6, 1968
AFM 33-3, C 7 Jan. 29, 1969
AFM 33-3, C 8 Apr. 1, 1969
AFM 33-3, C 9 Jul. 3, 1969
AFM 33-3, C 10 Nov. 14, 1969
AFM 33-3 Apr. 15, 1970
Military Personnel Procurement: ENLISTMENT IN THE U.S. AIR FORCE
s/s AFM 33-3 Nov. 9, 1966
AFM 33-3, C 1 Oct. 26, 1970
AFM 33-3, C 2 Aug. 2, 1971
AFM 33-3, C 3 Dec. 3, 1971
AFM 33-3, C 4 May 4, 1972
AFM 33-3, C 5 Sep. 28, 1972
AFM 33-3, C 6 Apr. 25, 1973
AFM 33-3, C 7 Aug. 30, 1973
AFM 33-3, C 8 Nov. 5, 1973
AFM 33-3, C 9 Jun. 28, 1973
AFR 33-3 Mar. 31, 1975
Military Personnel Procurement: ENLISTMENT IN THE UNITED STATES AIR FORCE
s/s AFM 33-3 Apr. 15, 1970
& (in part) AFM 35-3
AFR 33-3, C 1 Jun. 27, 1975
AFR 33-3, C 2 Sep. 19, 1975
AFR 33-3, C 3 Oct. 1, 1975
AFR 33-3, C 4 Apr. 30, 1976
AFR 33-3, C 5 Jun. 14, 1976
AFR 33-3, C 6 Aug. 10, 1976
AFR 33-3 Oct. 14, 1977
Military Personnel Procurement: ENLISTMENT IN THE UNITED STATES AIR FORCE
s/s AFR 33-3 Mar. 31, 1975
& AFR 33-5 May. 20, 1974
AFR 33-3, C 1 Jan. 16, 1978
AFR 33-3, C 2 Sep. 29, 1978
AFR 33-3, C 3 Nov. 10, 1978
AFR 33-3, C 4 Apr. 13, 1979
AFR 33-3, C 5 Mar. 7, 1980
AF Letter 35-114, Cir. 66 Mar. 12, 1948
Personnel: RECRUITING FOR THE REGULAR ARMY AND AIR FORCE
AFR 39-9 Apr. 13, 1949
Enlisted Personnel: RECRUITING FOR REGULAR ARMY AND AIR FORCE
AFR 39-9 Sep. 6, 1950
Enlisted Personnel: RECRUITING FOR REGULAR ARMY AND AIR FORCE
AFR 39-9, C A Jun. 20, 1956
AFR 39-9, C B Sep. 14, 1956
AFR 39-9, C C Nov. 1, 1956
AFR 39-9, C D Jan. 1, 1957
AFM 39-9 Dec. 1, 1954
ENLISTMENT AND REENLISTMENT IN REGULAR AIR FORCE
s/s AFR 39-3 Dec. 3, 1951

C AFM 39-9A May 15, 1954
AFM 39-9, Interim C 1 Jan. 15, 1955
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AFM 39-9 May 1, 1956
ENLISTMENT AND REENLISTMENT IN REGULAR AIR FORCE
s/s AFM 39-9 Dec. 1, 1954
AFM 39-9 Jul. 1, 1957
ENLISTMENT AND REENLISTMENT IN REGULAR AIR FORCE
s/s AFM 39-9 May 1, 1955
AFM 39-9, C A Jan. 13, 1958
AFM 39-9, C B Mar. 14, 1958
AFM 39-9, C C Apr. 1, 1958
AFM 39-9, C D May 4, 1958
AFM 39-9, C E Oct. 17, 1958
AFM 39-9, C F Oct. 17, 1958
AFM 39-9, C G Dec. 1, 1958
AFM 39-9, C H Feb. 2, 1959
AFM 39-9, C I Feb. 6, 1959
AFM 39-9, C J May 12, 1959
AFM 39-9, C K Jun. 30, 1959
AFM 39-9 May 2, 1960
Enlisted Personnel: ENLISTMENT AND REENLISTMENT IN REGULAR AIR FORCE
s/s AFM 39-9 Jul. 1, 1957
AFM 39-9, C A Jun. 13, 1960
AFM 39-9, C B Oct. 1, 1960
AFM 39-9, C C Oct. 20, 1960
AFM 39-9, C D Dec. 28, 1960
AFM 39-9, C E Apr. 28, 1961
AFM 39-9, C F Jun. 20, 1961
AFM 39-9, C G Jul. 24, 1961
AFM 39-9, C H Oct. 25, 1961
AFM 39-9, C I Feb. 20, 1962
AFM 39-9, C J Sep. 27, 1962
AFM 39-9, C K Mar. 6, 1963
AFM 39-9, C L May 17, 1963
AFM 39-9, C M Nov. 1, 1963
AFM 39-9, C N Apr. 29, 1964
AFR 39-9 Dec. 4, 1961
Enlisted Personnel: RECRUITING FOR THE REGULAR AIR FORCE
s/s AFR 39-9 Sep. 6, 1950
C AFR 39-9A Aug. 26, 1953

5.1.5.4 Investigative Boards

AFR 11-1 Dec. 29, 1953
Administrative Practices: BOARDS OF OFFICERS FOR CONDUCTING INVESTIGATIONS
s/s AFR 14-20 Sep. 17, 1951
C AFR 11-1A May 28, 1963
AFR 11-31 Jun. 20, 1975
Administrative Practices: BOARDS OF OFFICERS
s/s AFR 11-1 Dec. 29, 1953
AFR 11-31 Aug. 23, 1976
Administrative Practices: BOARDS OF OFFICERS
s/s AFR 11-31 Jun. 20, 1975
AFR 14-20 Sep. 17, 1961
Boards and Committees: BOARDS OF OFFICERS FOR CONDUCTING INVESTIGATIONS
C AFR 14-20A Nov. 14, 1969
AFR 110-9 Oct. 16, 1951
Judge Advocate General: COURTS OF INQUIRY
C AFR 110-9A Feb. 18, 1957
AFR 110-9 Nov. 19, 1963
Judge Advocate General Activities: COURTS OF INQUIRY
s/s AFR 110-9 Oct. 16, 1951
C AFR 110-9A Nov. 18, 1964

5.1.5.5 Evaluation Reports

AFR 36-10 Apr. 1, 1980
Officer Personnel: OFFICER EVALUATIONS
C 1
AFR 39-62 May 21, 1954
Enlisted Personnel: AIRMAN PERFORMANCE REPORT-AF FORM 75
AFR 39-62 Oct. 1, 1957
Enlisted Personnel: AIRMAN PERFORMANCE REPORT, AF FORM 75
s/s AFR 39-62 May 21, 1954
AFR 39-62 Dec. 4, 1958
Enlisted Personnel: USAF AIRMAN PERFORMANCE REPORT, AF FORM 75
s/s AFR 39-62 Jul. 23, 1957
C AFR 39-62A May 15, 1959
AFR 39-62 Apr. 16, 1960
Enlisted Personnel: USAF AIRMAN PERFORMANCE REPORTS
s/s AFR 39-62 Dec. 4, 1958
& AFR 39-62A May 15, 1959
AFM 39-62 Oct. 5, 1961
Enlisted Personnel: USAF AIRMAN PERFORMANCE REPORTS
s/s AFR 39-62 Apr. 15, 1960
AFR 39-62 May 28, 1962
Enlisted Personnel: USAF AIRMAN PERFORMANCE REPORTS
s/s AFM 39-62 Oct. 5, 1961
C AFM 39-62A Jun. 8, 1962
AFM 39-62 Oct. 30, 1963
Enlisted Personnel: USAF AIRMAN PERFORMANCE REPORTS
s/s AFM39-62 May 23, 1962
C AFM 39-62A Apr. 7, 1964
AFM 39-62B Jan. 22, 1965
Enlisted Personnel: NONCOMMISSIONED OFFICER AND AIRMAN PERFORMANCE REPORT
s/s AFM 39-62 Oct. 30, 1963
C A AFM 39-62A May 10, 1965
C B AFM 39-62B Jun. 24, 1966
AFM 39-62 May 20, 1968
eff: Jul. 1, 1968
Enlisted Personnel: NONCOMMISSIONED OFFICER AND AIRMAN PERFORMANCE REPORTS
s/s AFM 39-62 Jan. 22, 1965
AFM 39-62, C 1 Jun. 26, 1963
AFM 39-62, C 2 Aug. 14, 1968
AFM 39-62, C 3 Apr. 15, 1969
AFM 39-62, C 4 May 11, 1969

AFM 39-62, C 5	Nov. 20, 1969
AFM 39-62	Feb. 25, 1972
	eff: Apr. 1, 1972
Enlisted Personnel: NONCOMMISSIONED OFFICER AND AIRMAN PERFORMANCE REPORTS	
s/s AFM 39-62	May 20, 1968
AFM 39-62, C 1	Dec. 27, 1972
AFM 39-62, C 2	Apr. 19, 1974
AFM 39-62, C 3	Nov. 22, 1974
AFR 39-62	Jul. 15, 1976
Enlisted Personnel: NONCOMMISSIONED OFFICER AND AIRMAN PERFORMANCE REPORTS	
s/s AFM 39-62	Feb. 25, 1972

5.2 DIGESTS OF SELECTED REGULATIONS

5.2.1 INTRODUCTION

The digests of regulations in this section are designed to assist counsel in identifying procedural rights. Other portions of this manual discuss procedural errors and should be consulted in conjunction with this section.[5] Counsel must not rely solely on a digest. The full text of each regulation is available free.[6]

The Review Boards have issued decisions interpreting procedural requirements and counsel may locate these decisions in the Discharge Index.[7]

The digests given here generally track the following procedural requirements:

- Medical examination (whether an examination was required and whether it was to be performed by a physician or a psychiatrist);
- Rehabilitation (whether a specific course of rehabilitation was required before recommending discharge and whether rehabilitation was limited to counseling sessions or required transfer to a different unit);
- Notice (whether the member was to have been told anything and whether written notice was required);
- Commanding officer's report (whether the CO was required to submit a report to superiors detailing the reasons for discharge and whether positive elements of a member's service were to be included);
- Discharge authority (whether a commander exercising special court-martial jurisdiction could order discharge or whether general court-martial jurisdiction was required and whether such authority could be delegated);
- Counsel (whether lawyer-counsel was required, whether proper documentation was present when lawyer-counsel was required but not available, whether servicemember had choice of counsel, and whether counsel was required for prehearing counseling as well as at hearing); and
- Hearing (whether the hearing was properly convened and composed of the correct number of members, whether a minority or woman board member was required if the respondent was a minority or woman, whether witnesses could be compelled to attend and be cross-examined under oath, and whether a board or discharge authority was limited in what it could recommend).

[5] *See* Ch. 12 *infra.*
[6] *See* note 1 *supra.*
[7] *See* Ch. 10 *infra.*

5.2.2 ARMY

5.2.2.1 AR 15-6, July 25, 1955 PROCEDURAL GUIDE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS supersedes SR 15-20-1, August 13, 1953

The only changes from SR 15-20-1 are provisions:

- That reasonably available counsel, if specifically requested, be provided unless the appointing authority determines reasonable unavailability [¶ 9]; and
- That the president of the board rules on the admissibility of evidence subject to objection by another member (a majority rules).

Change 1 (effective October 27, 1955) made using DA Form 1574 (checklist) mandatory. This checklist asked about 50 questions, many of which involved procedural rights of the respondent and was to be submitted to the appointing authority. Change 2 (effective January 15, 1959) added that polygraph tests could be used as an investigative technique, but that the tests could not be used as evidence at any board proceedings.

5.2.2.2 AR 15-6, November 3, 1960 PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS supersedes AR 15-6, July 25, 1955

The only changes from the prior AR 15-6 follow. The promulgation of these regulations shall not invalidate any investigations or proceedings initiated prior to receipt of these regulations and conducted in conformity with then-existing regulations. [¶ 1.] Any errors in the proceedings "which do not adversely affect the substantial rights of the individual" or the government will not invalidate the action of the appointing authority. No person shall attempt to coerce or unlawfully influence the actions of the investigating officer, the board, or the appointing authority. [¶ 2.] The appointing members may permit the recorder to vote. When no recorder is designated, the junior member of the board becomes the recorder and may vote.

On October 27, 1961, a provision was added requiring that a board convened to investigate a member of a reserve component consist of one member of the Regular Army and the remainder reserve officers. The Regular Army officer need not be appointed if the appointing authority determines that

one is not available. If a challenge of a board member is sustained, the remaining members will constitute the board unless the number is reduced below the minimum required. In that event, the appointing authority will detail additional members. [¶ 5.] The right to civilian counsel is mentioned for the first time. [¶ 8.]

CONDUCT OF INVESTIGATION: "[W]henever possible, the *highest quality* of evidence obtainable and available will be considered," *e.g.*:

- Sworn testimony;
- Depositions upon due notice to both parties;
- Affidavits;
- Original or properly identified copies of records and documents;
- Other writings and exhibits;
- Stipulations; and
- Views and inspections.

Facts should be established by substantial evidence and not by rumor. No evidence bearing upon the results, taking, or refusal of polygraph tests will be received in evidence or considered for any purpose but may be used as an investigative technique. [¶ 9.] The Board is not bound by rules of evidence prescribed for trial "subject to the provisions of paragraph 9." Therefore, the best evidence must be used. "[A]ny oral or written evidence, including hearsay which in the minds of reasonable men is relevant and material" may be admitted. [¶ 10.] There thus appears to have been a greater right to strict rules of evidence *prior* to this regulation than under it.

> Witnesses should be sworn and personal appearance of a witness should always be obtained whenever possible in preference to use of his deposition, affidavit, or written statement. . . . However, in the event a material witness resides or is on duty at a substantial distance from the installation at which the hearing is conducted his evidence may be obtained by deposition, affidavit, or written statement. Where personal appearance is otherwise not feasible, evidence should be obtained by deposition or affidavit.

If it is impracticable to obtain evidence by the above methods, evidence may be obtained by correspondence. When evidence is obtained by affidavits or written statements, the respondent should be given reasonable notice thereof and afforded an opportunity to rebut adverse allegations. [¶ 13.]

FINDINGS: "Each finding must be supported by substantial evidence, which is defined as such evidence as a reasonable mind can accept as adequate to support a conclusion." [¶ 20.] "Findings will be stated in such form as to give a coherent and clear recital of the facts as established by the evidence and the conclusions thereon. . . ." [¶ 21.]

5.2.2.3 AR 15-6, August 12, 1966 PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS supersedes AR 15-6, November 3, 1960

There appear to be only two significant changes in this section of the regulation. First, the provision that allows a new or alternative board member to participate after having read the record of proceedings was noticeably missing the word "verbatim." Secondly, the paragraph concerning counsel was changed so that counsel specifically does not mean "legally qualified counsel" unless the specific regulation under which the board was appointed so provides.

CONDUCT OF INVESTIGATION: This section of the regulation is likewise similar to its November 1960 predecessor. Under this new regulation, the results of polygraph tests may be considered if stipulated to by all parties. The order of examples of "highest quality evidence" listed in paragraph 9 has been altered, perhaps to avoid the inference that one method of receiving testimony must be tried before a less reliable method is finally used.

FINDINGS AND REPORTS OF PROCEEDINGS: These sections are essentially unchanged from the November 1960 publication of AR 15-6. DA Form 1574 (the checklist) becomes the report unless the basic regulation requires another format. When there is no verbatim testimony, testimony should be summarized on DA Form 19-24 and signed by the witness. [¶ 24.]

5.2.2.4 AR 15-20, July 30, 1951 BOARDS OF OFFICERS FOR CONDUCTING INVESTIGATIONS supersedes AR 420-5, May 20, 1940

Boards of officers are normally appointed under specific Army regulations. This regulation is supplemental to such regulations; if a conflict arises, the specific regulation under which the board is appointed will govern. "Failure of the board to conform to these regulations in conducting its investigation and in submitting its findings shall not in itself render void any action of the appointing authority, or any superior authority, based thereon." [¶ 2.] The additional circumstances required to void such action are unclear; prejudice may have to be shown.

Unless the specific regulations state otherwise, boards of officers will consist only of commissioned officers. A warrant officer or other officer may be designated as recorder (prosecutor), but may not at the same time sit as a member of the board. The members of the board need not be sworn.

A majority of the members of a board will constitute a quorum and must be present at all its sessions, except that a member who was previously absent from or who has been newly appointed to a board may participate in the proceedings if the evidence introduced previously was recorded verbatim and if such evidence and the substance of all prior proceedings have been made know to him.

Orders appointing a board will clearly specify the matter to be investigated and the scope of the findings required. If a board is convened under specific Army regulations, the regulations will be cited.

The recorder or junior member of the board, will, at a "reasonable time" in advance of the convening of the board, deliver or dispatch by messenger or

mail to the individual concerned a written communication stating:

- The date, hour, and exact place of the convening of the board;
- The specific allegations or questions to be investigated;
- The names of probable witnesses; and
- That the recorder will arrange for attendance of available witnesses requested by the individual concerned upon timely written request.

A copy of this communication, bearing certificate of the recorder that it is a true copy and that the original was delivered or dispatched to the individual, will be read in evidence and the record will affirmatively show this action. The recorder will also note for the record the presence of the members of the board, the individual, and his counsel, if any. [¶ 5.].

Members are normally not subject to challenge unless the specific regulation indicates otherwise; however, if it "appears clearly that a member cannot conscientiously participate, appropriate action will be taken on the challenge. If the challenge is sustained, the remaining members will constitute the board; except that whenever, through challenge, the number of members is reduced below the minimum required, additional members will be detailed." [¶ 6.]

The individual under investigation is not entitled to have counsel unless the law or the specific regulation so provides. "However, when it appears that a full and fair investigation will be expedited thereby, or when the nature of the case warrants, or for other cogent reasons, counsel will be provided." The regulation nowhere indicates that "counsel" means a lawyer. In cases that may involve the individual in criminal prosecution or furnish grounds for disciplinary action, or that might be fairly regarded as jeopardizing his/her rating or status, (s)he should not be denied counsel if (s)he requests it. [¶ 7.]

CONDUCT OF INVESTIGATION: Whenever possible, *the best evidence obtainable* and available will be considered, *i.e.*:

- Sworn testimony by witnesses appearing before the board;
- Depositions taken upon due notice to both parties;
- Certificates of officers and affidavits of enlisted men and civilians;
- Original and properly authenticated true copies of records and documents; and
- Other writings and exhibits.

[¶ 9.] ". . . facts should be established by substantial evidence, and not, for instance, by mere uncorroborated hearsay or rumor." Boards are enjoined to fix dates, places, persons, and events definitely, and persons should be properly identified by full name, title, business or profession, and residence. Since the boards are administrative, the "board is not bound by the rules of evidence . . . however, a general observance of the spirit of the rules . . . [in the *Manual for Courts-Martial*] will promote orderly procedure and increase the probability of a full, fair and impartial investigation." [¶ 10.] Examples are given of *MCM* paragraphs that are relevant, *e.g.*, Hearsay (¶ 139 *MCM*, 1951.).

A person whose conduct or fitness is under investigation should be permitted to be present at all open sessions and to cross-examine all witnesses. The individual "has no vested right . . . to be present during the examination of witnesses and to cross-examine them, unless such right has been conferred by statute or regulations." "However, . . . the individual should be given full opportunity by appropriate method to rebut adverse allegations." [¶ 11.] If evidence is to be secured by affidavit or correspondence, the individual concerned should be given reasonable notice thereof and afforded an opportunity to meet adverse allegations. If it is impracticable to produce a witness to identify an unofficial paper or document, a board is authorized to dispense with formal proof of its authenticity, provided it is satisfied that the paper is what it purports to be. Depositions are preferred over affidavits. Live testimony is preferred over either. [¶ 13.] This paragraph seems to imply, however, that witnesses stationed "at some distance" from the hearing need not appear, paragraph 10 notwithstanding.

"The board's primary mission is to present in the written record all pertinent facts and circumstances supported by the recorded evidence. Its findings and recommendations must be supported by the facts and not based upon personal knowledge not of record in its report." [¶ 20.]

REPORT OF PROCEEDINGS: The record will be clear and legible; erasures and other changes will be initialed by the recorder or by another member. Testimony will be summarized. The report of the board will be authenticated by the signatures of all the members of the board present at its deliberations and that of the recorder. In case of disagreement, a minority report may be submitted. The reasons for the minority report must be stated clearly. The findings will be the substance of the material facts supported by the evidence. This regulation [¶ 24] seems to require a recitation of findings of specific material facts.

5.2.2.5 SR 15-20-1, August 13, 1953 PROCEDURAL GUIDE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS supersedes AR 15-20, July 30, 1951

This regulation provided no substantial change from AR 15-20, but does provide that civilian employees of the Army may be included on the board if "an adequate number of commissioned officers cannot be obtained because of physical conditions or military exigencies (not because of mere inconvenience)." In such cases, the appointing authority shall make a written statement, to be appended to the record justifying his appointment of the civilians. In the checklist, which is Appendix 3 of this regulation, concern is shown for the respondent's rights, *e.g.*, counsel, cross-examination, and use of the best evidence.

5.2.2.6 AR 615-368, October 27, 1948 Enlisted Personnel: UNFITNESS DISCHARGE supersedes AR 615-368, July 1, 1947

REASON:

- Gives evidence of habits or traits of character

manifested by antisocial or amoral trends, chronic alcoholism, criminalism, drug addiction, pathological lying, homosexuality,[8] sexual perversion or misconduct;
- Unclean habits, including repeated venereal infections;
- Repeatedly committed petty offenses not warranting trial by court-martial;
- Is a habitual shirker; or
- Was recommended for discharge by board of medical examiners because of a psychological (antisocial) personality disorder, or is classified as having no disease by the board and his/her record of service reveals frequent disciplinary actions because of infractions of regulations, and commission of offenses, and/or it is clearly evident his/her complaints are unfounded and are made with the intent of avoiding service.

CHARACTER: Undesirable (UD).
REHABILITATION: May be discharged only after repeated attempts at rehabilitation or where attempts at rehabilitation are impracticable.
MEDICAL EXAM: Prior to appearing before a board of officers, the individual will first appear before a medical officer who will report on whether there are disqualifying mental or physical defects. When psychiatric considerations are involved, the medical officer will be a psychiatrist, and the report will also include a statement to the effect that the individual is mentally competent. If any doubt exists as to mental or physical disability, the individual will be brought before a board of medical officers.
C.O.'S REPORT: To include:
- Name, grade, serial number, age, date of enlistment or induction, length of term for which enlisted, and prior service;
- Reasons for the recommendation;
- AGCT score and MOS;
- "[S]tatement as to the attempts made within the organization to make a satisfactory soldier out of the individual and indicating whether or not the individual's assignments and duties have been varied to include service under different officers and noncommissioned officers in a different organization or unit;"
- Character and efficiency rating;
- Individual's record of trial by court-martial;
- Record of other disciplinary action;
- Abstract of outpatient index;
- Report of psychiatric examiner or medical officer, if any; and
- Any other pertinent information.

HEARING: GCM convening authority required. If respondent is a WAC, one of the three board members must be a WAC officer. Witnesses are to be sworn. Individual is entitled to counsel of own selection if reasonably available, otherwise competent counsel will be furnished by the CA (counsel does not necessarily mean a lawyer).[9] Board will recommend either retention or discharge (for unfitness or unsuitability).

POST-HEARING: CA can either:
- Accept board's recommendation;
- Dispose of the case in a manner more favorable to the individual; or
- Order a new board.

CA cannot make a disposition less favorable than that recommended by board and can only order a new board once (unless the proceedings of the new board are found to be "illegal").

5.2.2.7 AR 615-369, October 27, 1948 Enlisted Personnel: INAPTITUDE OR UNSUITABILITY DISCHARGE supersedes AR 615-369, May 14, 1947

REASON: Discharge for inaptitude when the person "does not possess the required degree of adaptability for military service." Inaptitude may be due to "lack of general fitness, want of readiness or skill, or unhandiness." Discharge for unsuitability for:
- Lack of physical stigma;
- Character of behavior disorders;
- Mental deficiency;
- Apathy, defective attitudes, and inability to expend effort constructively;
- Nonpersistent, but temporarily disruptive reaction to acute or special stress; or
- Enuresis.

CHARACTER: General (GD).
REHABILITATION: Before discharge for inaptitude "reasonable attempts [must] have been made to reclassify and reassign him in keeping with his abilities and qualifications."
MEDICAL EXAM: Requirement is contained in AR 615-368, October 27, 1948.
C.O.'S REPORT: Requirements are contained in AR 615-368, October 27, 1948.
HEARING: Most requirements are contained in AR 615-368, October 27, 1948. In addition, board can recommend:
- Discharge because of inaptitude or unsuitability;
- Retention; or
- Referral for consideration by a board convened under AR 615-368.

When discharge is not recommended, the individual will not be discharged.

5.2.2.8 AR 635-200, December 6, 1955 Personnel Separations: GENERAL PROVISIONS FOR DISCHARGE AND RELEASE supersedes AR 615-360, June 24, 1953

CHARACTER OF DISCHARGE: Unless otherwise indicated in a specific discharge regulation, an individual will be discharged with an HD who meets the following requirements:
- Conduct ratings of at least "Good";
- Efficiency ratings of at least "Fair";
- No conviction by a GCM; and
- No more than one conviction by an SPCM.

Ratings of unknown applicability and ratings for

[8] On January 12, 1950, AR 600-443 superseded this regulation as it pertained to homosexuals.
[9] *See also* AR 420-5, AR 15-20.

periods of less than 30 days are not disqualifying. Servicemember normally disqualified from receiving an HD because of the third or fourth requirements above may still receive an HD if the offenses were not serious or severe and the remainder of his/her service would normally entitle servicemember to an HD.

Individuals discharged under honorable conditions who do not qualify for an HD will be furnished a GD.

> Officers effecting discharge are . . . required to deviate from this criteria and furnish an HD when, after considering all aspects of the individual's service, it appears that furnishing a GD would not be in the best interest of the service or the individual. The criteria for GD may be deviated from in the following instances:
>
> (a) regardless of previous record, an individual who has received a decoration or award, provided his record subsequent to the act for which he was decorated, awarded, or commended would so entitle him, be furnished an HD;
>
> (b) when it is apparent from inconsistent entries in the service record that furnishing a GD is not warranted, an HD may be furnished. . . .

SEPARATION DATE: An individual is to be discharged on the date (s)he completes his/her term of service unless:

- Awaiting result of trial;
- Retained in service by authority of the Secretary of Army; or
- Retained in service with his/her own consent to undergo medical treatment.

Time missed due to AWOL, desertion, confinement associated with trial conviction, intemperate use of drugs or alcohol, and disease or injury due to own misconduct do not count toward the fulfillment of service obligation. No one may be retained in service to fulfill any debt obligation.

DISCHARGE AUTHORITY: The authority to order the discharge of an individual prior to the end of his/her term of service is vested in the following:

- Commanders of all units, installations, posts, camps, and stations normally commanded by general officers;
- Commanding officers of named general hospitals, personnel centers, training centers, overseas replacement depots, ports of embarkation; and
- Commanders of all active posts, camps, and stations having an authorized military strength of 4,000 or more.

Only commanders exercising GCM convening authority may discharge individuals for unfitness, fraudulent entry, or conviction by a civil court. There is to be no delegation of this authority without prior approval of the Secretary of the Army.

5.2.2.9 AR 635-200, April 14, 1959 Personnel Separations: GENERAL PROVISIONS FOR DISCHARGE AND RELEASE supersedes AR 635-200, December 6, 1955

CHARACTER OF SERVICE: Ratings necessary for an HD are same as in 1955 version; but reference to unknown ratings and ratings for periods of 30 days are deleted. GD may be issued if servicemember convicted by GCM or more than one SPCM; decision is discretionary. If there is evidence that the individual's military behavior has been proper over a reasonable period of time subsequent to the convictions, (s)he may be considered for an HD. UD may be issued for unfitness, misconduct, or for security reasons, but only if procedures itemized below are followed.

PREHEARING: If subject to UD, servicemember must be properly advised of basis for action and afforded opportunity to request or waive, in writing, the following privileges:

- To have board hearing;
- To appear in person;
- To have counsel; and
- To submit statements.

HEARING: If UD is contemplated, board to consist of not less than three officers. If female respondent, must be at least one female officer on board. Counsel should be a lawyer.

POST-HEARING: Separation with UD effected by GCM authority.

DISCHARGE AUTHORITY: Basically the same as the 1955 version. In addition, however, authority to discharge by reason of unsuitability was given to SPCM convening authorities.

Change 11 (effective October 21, 1964) subjects discharges under AR 604-10, AR 635-89, AR 635-208, and AR 635-209 to the following:

- No one will be considered for discharge because of conduct which has been the subject of judicial proceedings resulting in acquittal or action having the effect thereof;
- No one will be considered for discharge because of conduct which was considered by a GCM if a sentence to a punitive discharge was authorized but was not adjudged, or was disapproved or suspended; and
- No one will be considered for administrative discharge because of conduct which has been the subject of administrative proceedings resulting in a final determination that the servicemember should be retained in the service.

However, these limitations do not apply when substantial new evidence is discovered, or when subsequent misconduct by the member warrants consideration of conduct of which the member had been absolved in a prior final factual determination by an administrative or judicial body. The Department of the Army may grant an express exception pursuant to a request by a CA.

5.2.2.10 AR 635-200, July 15, 1966 Personnel Separations: ENLISTED PERSONNEL supersedes, in part, AR 635-200, April 14, 1959 and AR 635-220, June 5, 1956

This regulation underwent 45 changes. Between 1966 and 1974, almost every regulation for a specific reason for discharge was incorporated into this regulation in one of a number of separate chapters. The following analysis is limited to Ch. 1 (relating generally to all discharges), Ch. 10 (good of the service), and Ch. 13 (unfitness and unsuitability).

Chapter 1:

CHARACTER OF DISCHARGE: Preservice and prior service activities will not be considered. The standard for an HD is:

- Proper military behavior and proficient performance of duty; and
- Conduct ratings of at least good, efficiency ratings of at least fair, no GCM conviction, and not more than one SPCM conviction.

Reference to ratings and CMs was deleted on May 19, 1975 (message change). HD may be awarded despite disqualifying entries if record is outweighed by subsequent honest and faithful service or if CM offenses were not too serious. GD may be issued under same circumstances as in 1959 version. UD may be issued for unfitness, misconduct, homosexuality, or for security reasons; however, HD or GD may be awarded if member "has been awarded a personal decoration, or if warranted by the particular circumstances of a specific case."

PREHEARING: If subject to a UD, servicemember must be given:

- Notice of specific regulation and "specific allegations" contemplated as the basis of discharge;
- Notice (by registered mail if in confinement) of right to board hearing;
- Appointed counsel;
- Opportunity to submit statements; and
- A minimum of 48 hours to consult with counsel prior to waiving rights (documentation, necessary when servicemember refused counsel or sought to withdraw waiver, varied widely over the effective dates of this regulation).

DISCHARGE AUTHORITY: UD can be given only by a GCM commander, or higher authority. Change 42 (effective January 1, 1974) expanded this to include an authorized general officer with a JAG on staff. Limitations on conducting discharge proceedings are generally the same as those in the 1959 version.

POST-HEARING: CA can only act more favorably than the board recommends. Change 28 (effective October 1, 1971) gave HQ DA authority to give an HD or GD if retention was recommended. If discharge has been recommended and the CA notes substantial defects in the proceedings, (s)he may direct retention, return the case to the board for regulatory compliance, or send the case to a new board with new members. In the last case, th new board may use the old record if the witnesses are not deemed by the CA to be reasonably available; a less favorable recommendation cannot be approved absent substantial new evidence. Only HQ DA can approve more than one rehearing.

Chapter 10:

This chapter permits a person whose conduct *could* result in a trial by court-martial, for an offense punishable by a punitive discharge, to be discharged instead in lieu of such trial for the good of the service. Charges need not be formally pending; and if they are, the cout-martial need not be one that could award a punitive discharge. Change 8 (effective October 11, 1968) changed the phrase "triable by court-martial for an offense punishable by" to "triable by court-martial under circumstances which could lead to" a BCD or DD. Although the meaning of this change is unclear, it may be that the person must actually be pending trial by a CM empowered to award a BCD or DD. Change 24 (effective November 19, 1970), however, seems to cut the other way. Change 24 made clear that the request could be submitted only after preferral of charges (the first formal step in CM proceedings — the swearing to charges on the charge sheet). Before this change, resignation seemingly could be submitted even before preferral of charges.

Change 36 (effective June 1, 1972) clearly permitted resignation at any time after preferral, regardless of the type of court-martial to which the charges might be referred. Change 36 strengthens the argument that the earlier language meant the CM must be empowered to impose a BCD or DD. This is important, because the Army often conducted what were called non-BCD SPCMs.

There must be "no element of coercion in submitting a request for discharge for the good of the service." The member has 48 hours to consult with counsel. Change 42 (effective January 1, 1974) increased the consultation period to 72 hours and added that chapter 10 discharge should not be used "when the surrounding facts do not establish a serious offense, even though the punishment in the particular case, under the [U.C.M.J.] may include a [BCD] or [DD]. Consideration should be given to the member's potential for rehabilitation. . . ."

5.2.2.11 AR 635-200, February 1, 1978 Personnel Separations: ENLISTED PERSONNEL supersedes AR 635-200, July 15, 1966 and AR 635-206, July 16, 1966

There are 14 chapters in this regulation:

- Ch. 1, General Provisions;
- Ch. 2, Separation of Enlisted Personnel;
- Ch. 3, Separation of Enlisted Personnel in Foreign Countries;
- Ch. 4, Naturalized Personnel Separational Under Other Than Honorable Conditions;
- Ch. 5, Separation for Convenience of the Government;
- Ch. 6, Separation Because or Dependency or Hardship;
- Ch. 7, Minority;

- Ch. 8, Separation of Enlisted Women — Marriage or Pregnancy;
- Ch. 9, Alcohol or Other Drug Abuse (Exemption Policy);
- Ch. 10, Discharge for the Good of the Service;
- Ch. 11, Dishonorable and Bad Conduct Discharge;
- Ch. 12, Retirement for Length of Service;
- Ch. 13, Separation for Unsuitability; and
- Ch. 14, Separation for Misconduct.

Chapter 1: General Provisions
CHARACTER OF DISCHARGE: Preservice activities (except misrepresentations), prior service activities, and mental status evaluations will not be considered. HD is "predicated upon proper military behavior and proficient performance of duty . . . with due consideration for the member's age, length of service, grade, and general aptitude." No specific number of Article 15s or CMs will rule out an HD. HDs may be furnished despite disqualifying entries if there is subsequent "honest and faithful service over a greater period of time"; or if servicemember received personnel decorations. Any doubt about issuing an HD or GD should be resolved in favor of the servicemember. GD is issued to a servicemember whose miltary record is satisfactory but not sufficiently meritorious to warrant an HD. Under other than honorable conditions discharge may be issued for misconduct, good of the service, or for security reasons.
MEDICAL EXAM: Certain reasons for discharge require medical exams; other reasons for discharge (*e.g.*, good of the service and unsuitability) require mental status evaluations, which in certain cases can be performed by a doctor, social worker, or clinical psychologist. Before discharge by reason of personality disorder, a psychiatrist must conduct the evaluation.

REHABILITATION: Separation for the following reasons normally will not be initiated until a servicemember has been counseled by the unit commander and afforded a "reasonable" opportunity to overcome them:

- Alcohol or other drug abuse;
- Apathy, defective attitudes, or inability to expend effort constructively;
- Inaptitude;
- Frequent involvement;
- Expeditious or Trainee Discharge Program; and
- Inability to perform prescribed duties due to parenthood.

PREHEARING: Servicemember must receive written notice of recommendation for discharge and "specific allegations," and must be advised of the following rights:

- To consult with consulting counsel (JAG officer);
- To be present at board hearing in unsuitability and misconduct cases;
- To be represented by an "appointed counsel for representation" (generally a lawyer, if one is available);
- To submit statements;
- To waive hearing (with certain exceptions); and
- To withdraw waiver.

HEARING: Board to consist of at least 3 officers. If respondent is a woman or minority, one board member may be a woman or minority (respectively) if available and if requested. Written notice of hearing date must be provided at least 15 days before hearing. Servicemember may call witnesses and cross-examine witnesses. Board will recommend discharge (for unsuitability), separation, or retention for servicemember being processed for misconduct. If servicemember is being processed for unsuitability, board will recommend separation or retention. In either case board will recommend character of discharge.
POST-HEARING: CA may direct separation for unsuitability despite board recommendation to separate for misconduct, or may direct retention, or may approve board's recommendations. CA is also empowered to suspend execution of separation in certain cases or to transfer the servicemember to the reserves. CA may not direct discharge if board recommends retention, nor direct a less favorable character of discharge. There are additional limitations when servicemember has 18 years of federal service.

Chapter 9: Alcohol or Other Drug Abuse (Exemption Policy)
There is no right to a board hearing under this chapter. An HD must be issued. Character applies when servicemember is entitled to exemption under AR 600-85 (Alcohol and Drug Abuse Prevention and Control Program) and has been determined to be an alcohol or other drug rehabilitation failure under AR 600-85.

Chapter 10: Discharge for the Good of the Service
Basically the same as the 1966 version of AR 635-200 following Change 42 except that the provisions of the Table of Maximum Punishments, Section B, para. 127c, *MCM* 1969 (Rev.) do not apply to requests for discharge for GOS and that a mental status evaluation is required and a medical exam may be requested by the member.

Chapter 13: Separation for Unsuitability
REASONS FOR DISCHARGE:

- Inaptitude;
- Personality disorders;
- Apathy, defective attitude, or inability to expend effort constructively; and
- Homosexuality.

CHARACTER OF DISCHARGE: HD or GD "as warranted by his military record." HD required when reason for separation is personality disorder, unless servicemember was convicted by GCM or by more than one SPCM.
MEDICAL EXAM: Requirements given in Ch. 1.
REHABILITATION: Counseling sessions are to be recorded on DA Form 3856. Rehabilitation measures include recycling, reassignment, and permanent change-of-station transfer. In certain cases counseling and rehabilitation may be waived.
HEARING: Requirements given in Ch. 1.

Chapter 14: Separation for Misconduct
REASONS FOR DISCHARGE:
- Fraudulent entry;
- Conviction by civil court;
- Desertion and absence without leave;
- Other acts or patterns of misconduct (sexual perversion, alcohol or other drug offenses, homosexual acts, frequent incidents, shirking, failure to pay just debts or to contribute adequate support to dependents).

CHARACTER OF DISCHARGE: A discharge under other than honorable conditions "is normally appropriate." HD or GD may be issued if merited by overall record. Some types of fraudulent entry discharges may result in "voided service" with no discharge certificate.
HEARING: Required for some categories of misconduct, but not for others.
REHABILITATION: When discharge is for "other acts or patterns of misconduct," rehabilitation and counseling requirements are the same as those in Ch. 13.

5.2.2.12 AR 635-208, May 21, 1956 Personnel Separations: UNDESIRABLE HABITS AND TRAITS OF CHARACTER supersedes AR 615-368, October 27, 1948

REASON: Discharge when person:
- Gives evidence of habits and traits of character manifested by antisocial or amoral trends, chronic alcoholism, criminalism, drug addiction, pathological lying, or misconduct;
- Possesses unclean habits, including repeated venereal infections;
- Repeatedly commits petty offenses not warranting trial by court-martial;
- Is a habitual shirker;
- Is recommended for discharge by a board of medical officers because (s)he possesses a psychopathic personality disorder or defect, or is classified as having no disease by the board and his/her record of service reveals frequent disciplinary actions due to infractions of regulations and commission of offenses, or if it is evident that his/her complaints are unfounded and were made with the intention of avoiding service; or
- Demonstrates behavior or participates in activities or associations that tend to show that (s)he is not reliable or trustworthy.

CHARACTER: Undesirable (UD).
REHABILITATION: Individual will be considered for discharge under this regulation when it appears (s)he cannot be rehabilitated to become a satisfactory soldier.
MEDICAL EXAM: Prior to appearing before a board of officers, the individual will first appear before a medical officer who will report on whether (s)he has disqualifying mental or physical defects. When psychiatric considerations are involved, the medical officer must be a psychiatrist and his/her report must include a statement that the individual is mentally competent. If any doubt exists, about his/her mental or physical disability, the individual will be brought before a board of medical officers.
C.O.'S REPORT: To include:
- Individual's name, grade, service number, age, date of enlistment or induction, length of term for which enlisted, and prior service;
- Reasons for action recommended;
- Individual's AFQT score and MOS;
- Statement of attempts made within the organization to make a satisfactory soldier out of the individual, noting whether or not the individual's assignments have been varied to include service under different officers and noncommissioned officers in a different organization or unit, and whether or not there is expert opinion regarding probable usefulness of further rehabilitative efforts;
- Individual's conduct and efficiency ratings;
- Individual's record of trial by court-martial;
- Records of other disciplinary action;
- Report of psychiatric examiner or medical officer;
- An abstract of individual's outpatient record;
- Any additional pertinent information; and
- A signed statement by the individual that (s)he was afforded the opportunity of requesting counsel and whether or not (s)he declined it.

HEARING: GCM convening authority required. Witnesses must be sworn. Individual entitled to counsel of own selection if reasonably available; otherwise, competent military counsel will be furnished by the CA. Civilian counsel may be retained at no expense to the government.[10] Board will recommend either discharge (for unfitness or unsuitability) or retention.
POST-HEARING: CA may either accept the board's recommendation, appoint a new board, or dispose of the case in a manner more favorable than recommended by the board. Only one new board may be appointed without approval of Department of Army Headquarters.

AR 635-208, April 14, 1959
Personnel Separation: UNFITNESS DISCHARGE supersedes AR 635-208, May 21, 1956

REASON:
- Frequent incidents of a discreditable nature, with civil or military authority;
- Sexual perversion, including, but not limited to, lewd and lascivious acts, indecent exposure, indecent acts with a child, assault upon a child, or other indecent acts or offenses;
- Drug addiction or the unauthorized use or possession of habit-forming narcotic drugs or marijuana;
- An established pattern of shirking; and
- An established pattern showing dishonorable failure to pay just debts.

CHARACTER: Undesirable (UD).
REHABILITATION: "Reasonable attempts to rehabilitate or develop the individual as a satisfactory soldier" should be taken. Rehabilitation may be considered impracticable, "as in cases of confirmed drug

[10] *See* AR 15-6.

addiction, or when the medical and/or personal history record indicate that the individual is not amendable to rehailitation measures."
MEDICAL EXAM: Prior to appearing before a board of officers, the individual will first appear before a medical officer. When psychiatric considerations are not involved, the medical officer will submit to the Board a complete report, which describes the essential points of the mental and physical condition of the individual. Included will be a statement that there are no disqualifying mental or physical defects sufficient to warrant disposition through medical channels. When psychiatric considerations are involved, the medical officer will be a psychiatrist. When available, the psychiatric report will include a statement that the individual was and is mentally capable both of distinguishing right from wrong and of adhering to the right, and has the mental capacity to understand and participate in the Board proceedings. If it appears that a mental or physical disability is the cause of unfitness, a board of medical officers will be convened under AR 635-40A. Change 2 (effective January 22, 1960) required that the medical exam be conducted by a medical officer with specialized psychiatric training unless no such person was available.
C.O.'S REPORT: To include:

- Individual's name, grade, service number, age, date of enlistment or induction, length of term for which enlisted, and prior service;
- Statement indicating whether individual has a reserve commission or a warrant;
- Brief statement of the reason for the action recommended (the use of general, nondescriptive terms will be avoided);
- Individual's AFQT score, aptitude area scores, and duty MOS;
- Description of attempts made to rehabilitate individual, noting whether individual has been given varied assignments and duties under different officers and noncommissioned officers in a different organization or unit, and noting time spent in such status;
- Statement as to why it is not feasible or appropriate to recommend elimination under the provisions of AR 635-209 (unsuitability), or to effect other disposition;
- Individual's conduct and efficiency ratings;
- Individual's record of trials by court-martial;
- Records of other disciplinary actions;
- Report of psychiatrist or medical officer, if a psychiatrist is not available (including the probable effectiveness of further rehabilitative efforts);
- Any other information pertinent to the case;
- A statement by the respondent indicating that (s)he has been counseled and advised of the bases for the action recommended, was afforded the opportunity of requesting counsel (noting whether he accepted or declined the opportunity), requests that his/her case be heard by a board of officers or waives this hearing, and does or does not desire to submit a statement in his/her own behalf (if answer is affirmative, the statement will be appended or deferred for later submission to the board, at the respondent's option); and
- If the individual was enlisted under the Lodge Act, a statement written in the individual's native language including any matters (s)he wishes to relate.

PRE-HEARING:

- Notice ("counseled and advised") of the bases for the action recommended;
- Opportunity to request counsel;
- Right to request or waive board hearing; and
- Opportunity to submit statement in own behalf.

HEARING: GCM convening authority required. Board of officers will consist of not less than three commissioned officers, at least one of whom is of field grade; if respondent is a WAC, Board will include a WAC officer; if respondent is in reserve enlisted status, board will include at least one reserve officer; if respondent holds reserve commission warrant, board is composed in accordance with AR 140-15. Respondent is entitled to be present at all hearings, to be confronted with witnesses against him (to the maximum extent practicable), and to military counsel of his own selection, if reasonably available. Respondent may be represented by civilian counsel at own expense. If counsel of respondent's own choosing is not available, counsel will be provided by the convening authority. Counsel should be a lawyer, if reasonably available. Board may recommend discharge for unsuitability or for unfitness or retention. Change 4 (effective September 6, 1960) stated that "a minimum of 15 days written notice prior to the date of hearing will normally be given an individual who is to appear before a Board of Officers." Request for an additional delay (normally not to exceed the total of 30 days prior to notice) will be granted if, in the judgment of the convening authority or the president of the board, such delay is warranted to ensure that the respondent receives a full and fair hearing.
POST-HEARING: CA will personally approve or disapprove the action recommended by the Board, or authorize issuance of a discharge of higher character than recommended by the Board. CA cannot direct discharge for unfitness when Board recommended discharge for unsuitability, nor recommend discharge when board has recommended retention, nor authorize issuance of a discharge of lesser character than that recommended by board. Change 1 (effective September 11, 1959) permitted delegation of CA's responsibility to sign discharge actions personally, unless discharge was to be less than honorable.

5.2.2.13 AR 635-209, March 17, 1955 Personnel Separation: INAPTITUDE OR UNSUITABILITY DISCHARGE supersedes AR 615-369, November 15, 1951

REASON: Discharge for inaptitude when individual "does not possess the required degree of adaptability for military service." Discharge for unsuitability for:

- Lack of physical stamina;
- Character or behavior disorders, immature reactions;
- Apathy, defective attitude, or inability to expend effort constructively;

- Nonpersistent, but temporarily disruptive reactions to acute or special stress.
- Mental deficiency ("in general, those with a mental age of 8 to 10 or I.Q.'s 50 to 70, can not be expected to render satisfactory performance of duty");
- Enuresis; and
- Youthful offenders.

CHARACTER: General or Honorable (GD or UD).
REHABILITATION: Discharge for inaptitude follows "reasonable attempts [to] reclassify and reassign [the individual] in keeping with his abilities and qualifications."
MEDICAL EXAM: An individual scheduled to appear before the board will first appear before a medical officer. When psychiatric considerations are not involved, the medical officer will submit a concise report of the physical and mental condition of the individual, including a statement that there are no disqualifying mental or physical defects sufficient to warrant separation under AR 600-450. When psychiatric considerations are involved, the medical officer will be a psychiatrist and his report will include a statement that the individual was and is mentally capable both of distinguishing right from wrong and of adhering to the right. If any doubt exists as to the existence of a mental or physical disability, the individual will be brought before a board of medical officers.
C.O.'S REPORT: To include:

- Individual's name, grade, service number, age, date of enlistment or induction, length of term for which entered on active duty, and prior service;
- Statement of reason for the action recommended;
- Individual's AFQT score and MOS;
- Statement of the attempts made within the organization to make a satisfactory soldier of the individual;
- Individual's character and efficiency ratings;
- Individual's record of trials by court-martial;
- Records of other disciplinary action;
- Abstract of individual's outpatient index;
- Report of psychiatric examiner or medical officer;
- Any other information pertinent to the case, and
- A signed statement from the individual that (s)he was afforded the opportunity of requesting counsel and whether or not (s)he declined it.

PREHEARING: Opportunity to request counsel.
HEARING: Respondent entitled to counsel of own selection, if reasonably available; if counsel of own choosing is not available, competent counsel will be furnished by the CA. CA is "the appropriate higher commander," usually the regimental or separate battalion commander. Board will consist of one or more officers, one of whom will be a field grade officer. If respondent is a WAC, the board will include a WAC officer. Board will recommend:

- Discharge for inaptitude;
- Discharge for unsuitability;
- Referral to board for unfitness proceeding; or
- Retention.

Recommendation for discharge "will be made when it has been shown that [individual] can not be developed to the extent where he may be expected to absorb military training and/or become a satisfactory soldier."
POST-HEARING: CA approves or disapproves board action and indicates this on endorsement of the proceedings. The proceedings are forwarded to the reviewing authority, which is the next higher commander authorized in AR 615-360 to take final action and order discharge.

5.2.2.14 AR 635-209, April 14, 1959 Personnel Separations: UNSUITABILITY DISCHARGE supersedes AR 635-209, March 17, 1955

REASON:

- Inaptitude (persons who are inapt, due to lack of general adaptability, want of readiness or skill, unhandiness, or inability to learn);
- Character and behavior disorders;
- Apathy, defective attitude, or inability to expend effort constructively;
- Enuresis;
- Alcoholism; and
- Homosexuality, Class III (evidences homosexual tendencies, desires, interest, but without overt homosexual acts).[11]

CHARACTER: General or Honorable (GD or HD).
REHABILITATION: "Reasonable attempts [will be] made to reclassify and reassign" individual. Rehabilitation of a chronic alcoholic "is difficult" and such a person who "has not responded to the usual rehabilitative measures or is not motivated to take advantage of available local therapeutic measures" will be discharged.
MEDICAL EXAM: Same as under the March 17, 1955 version of AR 635-209. Change 2 (effective January 22, 1960) required medical evaluation "not be delegated to a medical officer without specialized psychiatric training except when a psychiatrist is not available."
C.O.'S REPORT: Requirements include those named in the March 17, 1955 version of AR 635-209. A statement by the individual must be included indicating that (s)he:

- Has been counseled and advised of the bases for the action recommended;
- Was afforded the opportunity of requesting counsel, noting whether (s)he accepted or declined;
- Requests that his/her case be heard by a board of officers or that (s)he waives this hearing; and
- Does (or does not) desire to submit a statement in his/her own behalf (if answer is affirmative, the statement will be appended or deferred for later submission to the board at the respondent's option).

In the case of an individual who enlisted under the

[11] All cases involving homosexuals are processed under the provisons of AR 635-89. If a board acting under AR 635-89 determines that a servicemember is a Class III homosexual and approves discharge, discharge will be effected under AR 635-209.

Lodge Act, the report will include a statement from the servicemember written in his/her native language.
PREHEARING:

- Notice ("counseled and advised") of the bases for the action recommended;
- Opportunity to request counsel;
- Opportunity to waive hearing; and
- Opportunity to make statement in own behalf.

Change 6 (effective October 6, 1961) required "a minimum of 15 days written notice prior to date of hearing."
HEARING: SPCM convening authority required. Board to consist of one or more commissioned officers, one of whom will be a field grade officer. If respondent is a WAC or reserve member, one of the board members is to be a WAC officer or reserve officer (respectively).[12] Respondent is entitled to be present, to be confronted with witnesses, and to have military counsel of own selection, if reasonably available. Respondent may also be represented by civilian counsel at own expense. If counsel of person's choosing is not available, counsel will be furnished by the CA. President of the board will ensure that sufficient testimony is presented to enable the board to evaluate fairly the usefulness of the individual; the testimony will be factual. The board will recommend discharge and character of discharge (HD or GD), or referral to a board for unfitness proceedings, or retention.
POST-HEARING: The SPCM CA is authorized:

- If the board recommends discharge for unsuitability, to approve discharge or to direct retention;
- If board recommends retention to approve retention, but not to direct discharge; and
- If board recommends referral to a board for consideration for unfitness discharge, to approve referral, to direct discharge for unsuitability, or to direct retention.

The CA may not approve a lesser character of discharge than that recommended by the board. A second board may not be appointed to reconsider the case unless there is newly discovered substantial evidence or subsequent conduct by the individual indicating that new proceedings should be instituted. However, if the board has not adequately developed the facts, or if the rights of the respondent have been substantially prejudiced through errors committed by the board, the CA may disapprove the findings and recommendation of the board and order a new board to be convened. Only one new board may be convened without approval of Department of Army headquarters.

5.2.2.15 AR 635-212, July 15, 1966 Personnel Separations: UNFITNESS AND UNSUITABILITY DISCHARGE supersedes AR 635-208 and AR 635-209, April 14, 1959

REASON: Unfitness:

- Frequent incidents of a discreditable nature with civil or military authorities;
- Sexual perversion;
- Drug addiction or the unauthorized use or possession of habit forming drugs or marijuana;[13]
- An established pattern of shirking;
- An established pattern showing dishonorable failure to pay just debts;
- An established pattern showing dishonorable failure to contribute adequate support to dependents; and
- (Under Change 8 (effective March 1, 1970)) homosexual acts.

Unsuitability:

- Inaptitude;
- Character and behavior disorders (combat exhaustion and other acute situational maladjustments per se are not included);
- Apathy, defective attitudes, or inability to expend effort constructively;
- Alcoholism;
- Enuresis; and
- Homosexuality in which there has been no overt act.

CHARACTER: Unfitness: Undesirable (UD) "except that an Honorable or General Discharge certificate may be awarded if the individual being discharged has been awarded a personal decoration or if warranted by the particular circumstances." Change 12 (effective December 3, 1971)required that individuals separated for unfitness/drug abuse who had enrolled and cooperated in drug amnesty programs would be considered for GDs when overall character aside from drug usage warrants such consideration or when degree or type of drug involvement precludes rehabilitation and restoration to full duty.
Unsuitability: Honorable or General (HD or GD) as warranted by the individual's military record. A fairly good record may create a presumption of deserving an HD.
REHABILITATION: "Commanders will insure that before taking separation action against an individual under this regulation, adequate counseling and rehabilitation measures have been taken." [¶ 7.] When it appears that continued behavior of an individual may subject him/her to proceedings under this regulation,

> the individual will be counseled by a responsible person or persons. Each counseling session will be recorded (to

[12] *See* AR 15-6 (rules of procedure and evidence; swearing witnesses).

[13] The definition of drug abuse was broadened several times. Change 4 (effective April 4, 1968) expanded it to include narcotics, hypnotics, sedatives, tranquilizers, stimulants, hallucinogens, and similar known harmful or habit-forming drugs or hallucinogenic drugs, as defined in ¶ 18.1, AR 600-50, and also added: "The introduction of such drugs onto any Army installation or other Government property under Army jurisdiction." Change 5 (effective July 1, 1969) dropped reference to AR 600-50; the change's provision on drugs was as follows:

> Drug addiction, habituation, or the unauthorized use, sale, possession or transfer of any narcotic, marijuana, hypnotics, sedatives, depressants, stimulants, hallucinogens, or other known harmful or habit-forming drugs and/or chemicals or the introduction of such drugs and/or chemicals onto any Army installation or other Government property under Army jurisdiction.

Change 7 (effective January 15, 1970) rechanged this provision, although it remained functionally the same.

include date and by whom counseled). Counseling will include, but not be limited to, the following: reasons for counseling; the fact that continued behavior of a similar nature may result in initiating action under this regulation; and if action is taken and separation accomplished, the type of discharge that may be issued and the effect of each type.

[¶ 7a.]

Rehabilitation must be attempted, which at a minimum includes one of the following measures:

- Reassigning replacement stream personnel between training companies (recycling);
- Transferring other than replacement stream personnel at least between Article 15 jurisdictions for two or more months; or
- If case reassignment is precluded by restriction on expending certain funds, employing alternative rehabilitation measures.

[¶ 7b.]

Change 11 (effective March 1, 1971) stated that other than replacement stream personnel "will be reassigned at least once, with a minimum of 2 months duty in each unit. Reassignment should be between special court-martial jurisdictions where this is possible without a permanent change of station." If this is not possible and if reassignment between Article 15 jurisdictions is undesirable because of the particular circumstances involved, or if "a permanent change of station is considered essential to provide a change in commanders, associates, and living or working conditions as a means of rehabilitating an individual," the GCM commander may authorize reassignment within the same command, provided that:

- The individual is an E-4 or below with less than 4 years service (E-4s with 2 years service and 6 years obligation and members eligible for reimbursement of dependents' transportation expenses are not eligible for reassignment under this paragraph); and
- The transfer would not be detrimental to the individual (*e.g.*, in cases involving on-going special counseling or indebtedness).

[¶7b(2), (3)).

The required counseling and rehabilitation may be waived, depending on the specific reason contemplated for discharge and the specific findings by the CA. The CA may waive counseling and rehabiltation when separation is being considered for unfitness/sexual perversion or drug addiction (including use or marijuana) or for unsuitability/character and behavior disorders, enuresis, or homosexual tendencies. [¶7c(1).] Change 7 (effective January 15, 1970) forbade waiver of counseling and rehabilitation in cases involving use or possession of marijuana, but allowed such waiver in cases of drug addiction or sale or transfer of marijuana. Change 8 (effective March 1, 1970) incorporated the provisions for discharging homosexuals in AR 635-89 into this regulation and the criteria for waiving counseling and rehabilitation were extended to unfitness/homosexual acts. Change 12 (effective December 3, 1971) allowed waiver by the CA of counseling and rehabilitation if discharge was to be for unfitness/sexual perversion, drug addiction, sale or transfer of marijuana, or homosexual acts, or if it was to be for unsuitability generally — except that counseling was required for inaptitude, apathy or alcoholism. [¶7c(1).] Change 12 also permitted the GCM CA to waive counseling and rehabilitation in cases in which discharge was to be for frequent incidents, use and possession of marijuana, shirking, failure to pay just debts, or failure to contribute support to dependents. [¶7c(2).]

A specific finding by the GCM CA that "further duty of the individual will create a hazard to the military mission or to the individual" enabled the GCM CA to waive the counseling and rehabilitation requirements. [¶7c(2).] Change 2 (effective October 12, 1967) provided that the GCM CA could also waive counseling and rehabilitation in unfitness cases when the CA "determined that further duty [would], in his best judgment, create serious disciplinary problems." A new paragraph was added under Change 2 to permit CAs of installations commanded by general officers and colonels having judge advocates on their staffs to waive counseling and rehabilitation requirements for the same two reasons as in unsuitability cases. Change 12 (effective December 3, 1971) however, rescinded this paragraph.

MEDICAL EXAM: To include a statement as to:

- Whether the individual is mentally responsible for his/her actions;
- Whether (s)he has the mental capacity to understand and participate in board proceedings;
- The effects of further rehabilitation efforts; and
- Whether (s)he meets medical retention standards.

The psychiatric evaluation must be by a psychiatrist, unless none is available. If the individual is being processed for unsuitability and does not meet retention standards, (s)he is to be processed under the medical regulations. If (s)he is being processed for unfitness, the individual is to be referred to a medical board, and the unit commander must decide on a medical or an unfitness discharge if the board finds him/her to be medically unfit.

Change 12 (effective December 3, 1971) required a "psychiatric evaluation" in cases of homosexuality only when specifically requested by the respondent or CO recommending separation, when deemed necessary by the physician performing the "mental status evaluation," or when requested by a board. In all other cases the physician performing the medical examination will perform the mental status evaluation. When performing the evaluation in homosexuality cases, the psychiatrist will be furnished copies of the documents that detail the alleged behavior. In these cases, the psychiatrist will express opinions as to homosexuality and retention.

C.O.'S REPORT: When the individual's commanding officer determines that it would be in the best interest of the service to eliminate the individual for *unfitness*, the officer will submit a letter [¶12.] to the GCM convening authority through the appropriate intermediate commanders, if any. The letter must include the following:

- Individual's name, grade, service number, age,

date of enlistment or induction, length of term of service, and prior service;
- Statement as to whether the individual has reserve commission or warrant officer status;
- Reason for action recommended;
- Individual's AFQT score, Aptitude Area scores, and duty MOS;
- Results of individual's MOS testing, including name of MOS in which evaluated and scores;
- Individual's record of counseling;
- Rehabilitation attempts (list assignments and duties must be listed under different officers and NCOs in each unit and include duration of each assignment);
- Statement as to why elimination for unsuitability or other action is inappropriate;
- Individual's conduct and efficiency ratings;
- Individual's record of courts-martial;
- Records of other disciplinary action;
- Individual's mental status report (to include probable effectiveness of further rehabilitative efforts, and to be by a psychiatrist, unless none is available);
- A statement by individual indicating that (s)he has been advised of his/her rights; and
- Any other pertinent information.

When elimination is contemplated for unsuitability, the same letter is to be submitted except that the eighth item above will state why no other disposition is feasible.

PREHEARING: The unit commander may "afford the individual the opportunity to waive his/her right to a hearing before a board." [¶10.] To accomplish a waiver, the commander "will advise the individual in writing of the basis for the action" and advise him/her that (s)he has the right to present his/her case before a board of officers, to submit a statement in his/her own behalf, be represented by counsel, and to waive these rights in writing. Change 9 (effective February 4, 1970) requires that the individual also be advised that (s)he may withdraw the waiver of his/her rights anytime prior to the discharge authority approval of the discharge.[14]

The USARV supplements required that the servicemember be furnished with copies of all documents relating to the case, before being given the opportunity to consult with counsel or to sign an election of rights. The servicemember will be given a reasonable time (not less than 48 hours) to consider waiver and will have an opportunity to consult with counsel prior to waiving his/her rights. The USARV supplements required consultation with lawyer counsel except in unsuitability cases in which no lawyer was reasonably available. Counsel was to be a 1st Lt. or higher and could never be the commander who initiated the proceedings. Waivers acknowledge the advisement of rights and are to be signed by the individual and counsel. If the individual refused to sign the waiver, (s)he will be considered not to have waived his/her rights.

The individual will be given a minimum of 15 days written notice before the date of the hearing. Notice will include the names and addresses of witnesses expected to be called and will state that the recorder will, upon request, endeavor to arrange for the presence of any available witness (s)he desires to call. Copies of all affidavits and depositions of witnesses unable to appear at the hearing will be furnished to the individual. If for "over-riding reasons" the minimum of 15 days cannot be granted, the reasons will be fully explained and recorded in the proceedings of the board. Requests for delays (normally not in excess of 30 days) will be granted if in the judgment of the convening authority or the president of the board, delay is warranted to insure a full and fair hearing.

Upon receipt of the recommendation for separation, the GCM convening authority may act upon it if the individual has waived his/her right to appear before a board of officers.

HEARING: SPCM convening authorities are authorized to convene boards and order separation for unsuitability. GCM convening authorities are authorized to convene boards and order separation for both unfitness and unsuitability. Change 5 (effective July 1, 1969) provides that this authority can be delegated to a general in command who has a judge advocate on his staff. Every such delegation will state the authority.

Counsel will be appointed. The individual may be represented by civilian counsel at no expense to the government. The individual will be represented by appointed military counsel of his/her own choosing if "reasonably available." Appointed counsel, if the proceeding is an unfitness case, will be a lawyer within the meaning of Article 27(b) of the U.C.M.J., unless the GCM authority certifies in the permanent record the nonavailability of a qualified lawyer and sets forth the qualifications of the substituted nonlawyer counsel. In an unsuitability case, if the appointed counsel is not a lawyer, counsel will be a commissioned officer of the grade of first lieutenant or higher. Counsel in this case must be a person "who is fully aware of his responsibility to prepare and present the respondent's case." [¶ 1b.] If the individual chooses to appear without counsel, the record will show that the president of the board counseled him/her as to type of discharge (s)he may receive, the effects of such discharge, and his/her right to request counsel.

Boards will be composed of at least three commissioned officers, at least one of whom is in the grade of major or higher, a nonvoting recorder, and an officer of the WACs (if the enlisted member under consideration is a WAC). [¶ 17.] Change 8 (effective March 1, 1970) required exclusion of the officer initiating the action and of any intermediate officer with direct knowledge of the case from being a member of the board.

The following rights also adhere in all cases:
- Any voting member may be challenged, but for cause only;
- The individual may request the appearance of

[14] The U.S. Army Vietnam Supplement of April 23, 1971 (USARV Supp.), can be read to require a specific determination prior to waivers. The USARV Supp. also required that the waiver be signed personally by the convening authority; that if a board hearing is requested the waiver of counseling and transfer requirements must be before the hearing.

any witnesses (s)he believes are pertinent to his/her case;
- The individual may at any time before and during the proceedings submit any written statement, sworn or unsworn of his/her own or from others;
- The individual may testify or submit to examination by the board or may remain silent as (s)he chooses; and
- The individual and his/her counsel may question any witness appearing before the board.[15]

The president of the board will insure that sufficient testimony is presented to evaluate fairly the usefulness of the individual. "The testimony will be specific as to circumstances, events, times, dates and other facts." The board proceedings "will be as complete as possible and will contain a verbatim record of the findings and recommendations."

A board convened to consider if an individual should be separated for unfitness or for unsuitabilty may recommend separation for unsuitability (indicating the type of discharge: HD or GD) or retention. A board convened under the unfitness provisions of this regulation may recommend separation for unfitness (indicating the type of discharge: HD, GD, or UD). The completed report of the proceedings will be forwarded to the appropriate convening authority.

POST-HEARING: The GCM convening authority may delegate his/her authority under this regulation to an officer in his/her command, but the authority to direct a UD may not be delegated. The CA is required personally to sign any action directing a UD. The SPCM convening authority may not delegate his/her authority. When the board recommends a UD, the proceedings must be reviewed by a JAG.

The CA's action must be at least as favorable as the board's recommendation. Rehearings are limited by paragraph 1-13 of AR 635-200. A discharge may be suspended for up to six months probation.

If an individual is not separated, the CA will direct his/her reassignment, when practicable, to a different organization. An individual who is separated will be given a copy of the board proceedings.

5.2.3 NAVY

5.2.3.1 BUPERSMAN, 1942[16]

UNSUITABILITY OR INAPTITUDE

REASON FOR DISCHARGE: Unsuitability discharge is authorized for immaturity or other cause when it is not considered desirable to discharge the individual for inaptitude. [D-9110.] Inaptitude discharge authorized for servicemember serving in first enlistment "whose general qualifications are such as not to warrant his retention"; it should be given only when servicemember has "demonstrated his inability to cope with service conditions and when there is no evidence of his being able to adapt himself to the requirement of naval life in the future." [D-9111.]

CHARACTER OF DISCHARGE: Character is "indifferent"; discharge certificate is "ordinary." [D-9103.]

NOTICE: None appears to be required in unsuitability cases. Before making or recommending inaptitude discharge, CO must give servicemember opportunity to make statement.

UNFITNESS [D-9112]

REASON FOR DISCHARGE: "Should be given only after a man had already demonstrated that he is totally unfitted for further retention. In this category is a man who repeatedly commits petty offenses not necessitating trial by court-martial, an habitual shirker, or a man of unclean habits."

CHARACTER OF DISCHARGE: UD (or satisfactory) type; discharge certificate is "unfavorable."

NOTICE: "Before making or recommending [unfitness] discharge, a [CO] shall investigate each case after giving the man concerned an opportunity to make any statement in his own behalf that he may desire."

DISCHARGE AUTHORITY: Bureau of Naval Personnel in all cases in which member has less than four months of service. In certain cases, CO who is a lieutenant commander or above may direct discharge.

5.2.3.2 BUPERSMAN, 1948

UNSUITABILITY OR INAPTITUDE

REASON FOR DISCHARGE: Discharge for unsuitability can be effected for "psychiatric or neurological handicaps, enuresis, personality disorders or defects, or other good and sufficient reason when determined by administrative process." [C-10310.] Discharge for inaptitude authorized for servicemember in first two years of first enlistment, "whose general qualifications are such as not to warrant retention in the service" and when "it is determined that the enlisted member does not possess the required degree of adaptability for Navy life." [C-10311.] Change 16 (effective May 2, 1955), added to the inaptitude category servicemembers "whose inaptness may be due to want of readiness or skill, or unhandiness.

CHARACTER OF DISCHARGE: General (GD). [C-10303.]

REHABILITATION: Discharge for inaptitude "should be directed only when it is determined that the enlisted person does not possess the required degree of adaptability for Navy life after reasonable attempts have been made to reclassify and reassign him in keeping with his abilities and qualifications."

MEDICAL EXAM: If there is doubt about the existence of a mental or physical disability, the individual should be brought before a board of medical survey for a determination of fact.

NOTICE: Member "shall be informed of the contemplated action, with the reason therefor, and shall be given an opportunity to submit any signed statement desired in his own behalf."

DISCHARGE AUTHORITY: CO "shall not effect discharge . . . for unsuitability except when specifically authorized or directed by the Bureau." CO who is lieutenant commander or above is authorized to direct inaptitude discharge.

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[15] See AR 15-6 (rules of procedure).

[16] Changes to the 1942 BUPERSMAN are not tracked in this section.

UNFITNESS [C-10312]
REASON FOR DISCHARGE:

- Persons who give evidence of habits or traits of character manifested in antisocial or antimoral trends, criminalism, chronic alcoholism, drug addiction, pathological lying, or sexual perversion or misconduct;
- Persons who repeatedly commit petty offenses;
- Habitual shirkers;
- Persons of unclean habits; or
- Persons recommended for discharge by a board of medical survey because they possess personality disorders or defects.

CHARACTER OF DISCHARGE: Undesirable (UD).
NOTICE: Servicemember shall be informed of the contemplated action, the reasons therefor, and his/her opportunity to appear and present any facts or submit any signed statement in his/her own behalf that (s)he may desire.
MEDICAL EXAM: If there is doubt about the existence of a mental or physical disability causing unfitness, servicemember should be brought before a board of medical survey for a determination of fact.

5.2.3.3 BUPERSMAN, 1959

UNSUITABILITY
REASON FOR DISCHARGE:

- Inaptitude;
- Character and behavior disorders;
- Apathy, defective attitudes and inability to expend efforts constructively;
- Enuresis;
- Alcoholism;
- Homosexual tendencies; or
- Other good and sufficient reasons as determined by the Chief of Naval Personnel.

Change 13 (effective September 13, 1966) made financial irresponsibility a reason for unsuitability discharge and expanded homosexual tendencies to include "other aberrant tendencies."
CHARACTER OF DISCHARGE: Honorable or General (HD or GD) as warranted by military record.
NOTICE: Servicemember must be informed of basis for contemplated action and be given opportunity to submit a statement.
MEDICAL EXAM: An addendum to Change 13 (effective March 20, 1967) requires psychiatric evaluation if discharge is for apathy, alcoholism, C&B disorders, enuresis, or homosexual tendencies.
REHABILITATION: Change 13 (effective September 13, 1966) stated that a discharge for inaptitude, apathy, alcoholism, or financial irresponsibility normally is not to be initiated "until the individual has been given a reasonable time to overcome his deficiencies." Change 15 (effective February 6, 1968) requires an opportunity for overcoming deficiencies only in the case of a discharge for alcoholism or financial irresponsibility.
C.O.'S REPORT: Detailed report required.
HEARING: Change 13 (effective September 13, 1966) established right to hearing for members with 8 or more years of service.[17]

[17] *See* C-10313.

DISCHARGE AUTHORITY: Final action is taken by CNP.

UNFITNESS [C-10311]
REASON FOR DISCHARGE:

- Frequent involvement of a discreditable nature with civil or military authorities;
- Sexual perversion including but not limited to lewd and lascivious acts, homosexual acts, sodomy, indecent exposure, indecent acts with or assault upon a child under age 16, or other indecent acts or offenses;
- Drug addiction or the unauthorized use and possession of habit-forming narcotic drugs or marijuana;
- An established pattern of shirking;
- An established pattern showing dishonorable failure to pay just debts; or
- Other good and sufficient reasons, as determined by the Chief of Naval Personnel.

CHARACTER OF DISCHARGE: Undesirable (UD) or higher.
NOTICE: The individual is to be informed of the basis for the contemplated action. C-10313 granted the opportunity to request or waive the following rights:

- To have his/her case hearing by a board of at least three officers;
- To appear in person before such board (unless in civil confinement);
- To be represented by counsel, who, if reasonably available, should be a lawyer; and
- To submit statements in his/her own behalf.

Both the request for a hearing or the waiver of that right are required to be in writing.
C.O.'S REPORT: Detailed report required.
REHABILITATION: Change 13 (effective September 13, 1966) stated that processing for discharge is not to be initiated until the individual is given a reasonable opportunity to overcome his deficiencies, if the grounds for the discharge are frequent involvement, shirking, failiure to pay debt, or failure to support dependents. The individual is to be notified of such deficiencies and counseled with regard to them.
HEARING: C-10313A sets out the rules governing the composition and procedures of the field board, which (under C-10313(3)) considers cases referred to it upon election of the individuals involved. The board is to be composed of no less than three active-duty commissioned officers. The board must include a woman if the respondent is female. If the respondent requests counsel, the CO is to appoint a "law specialist, graduate of law school, or member of a state or the federal bar if such an officer is reasonably available." Civilian counsel may also be retained at the individual's expense. The board lacks authority to subpoena witnesses or to pay the expenses of nonmilitary witnesses who appear voluntarily. Respondent has no right to call military witnesses not in the immediate area; their testimony should be presented in the form of written statements. Respondent has right to cross-examine the witnesses who testify against him/her and present his/her own case in rebuttal by offering witnesses, written statements, and his/her own testimony.
POST-HEARING: C-10313A requires the CO to review the record and indicate his/her concurrence or non-

currence. In all cases in which discharge is recommended by the CO and in all cases involving sexual perversion, final action must be taken by the CNP through the Enlisted Performance Evaluation Board of the Bureau of Personnel. In no case can the CNP's final action be less favorable than that recommended by the field board which held the hearing or the Enlisted Performance Evaluation Board, unless the individual has been given the opportunity to show why such unfavorable action should not be taken.

Change 10 (effective July 7, 1964) deleted C-10313A. C-10313A was again added by Change 13 (effective September 13, 1966) to deal exclusively with the post-hearing review process. The change eliminated the Enlisted Performance Evaluation Board. The field board record is to be transmitted directly to the CNP, which can then take one of the following actions:

- Approve the board action,
- Change the discharge to a more creditable one (but not a less favorable one),
- Change the basis for discharge,
- Disapprove a board recommendation for discharge and recommend retention,
- Disapprove a recommendation for retention and direct a GD or HD; or
- Send the case to a new board if prejudicial legal error occurred.

If a second board is convened, the CNP may not approve a lesser discharge than that recommended by the first board.

5.2.3.4 BUPERSMAN, 1969 (as of July 1, 1969)[18]

UNSUITABILITY [3420180]
REASON FOR DISCHARGE:

- Alcoholism;
- Financial irresponsibility;
- Character and behavior disorders;
- Enuresis;
- Homosexual or other aberrant tendencies; and
- CO's of naval training centers may process members undergoing recruit training for discharge because of inaptitude, apathy, defective attitudes, or inability to expend effort constructively.

CHARACTER OF DISCHARGE: Honorable or General (HD or GD) as warranted by the military records.
REHABILITATION: Processing for discharge by reason of alcoholism or financial irresponsibility normally should not be initiated until servicemember has been given a reasonable opportunity to overcome his/her deficiencies.
MEDICAL EXAM: Psychiatric or medical evaluation required except where reason is inaptitude.
CO'S REPORT: Detailed report required.
NOTICE: Servicemember must be given written notice of reasons being considered for discharge and afforded an opportunity to make a statement.
HEARING: Servicemember with eight or more years of continuous active duty may request or waive a hearing. Prior to waiving the hearing, servicemember shall consult with lawyer-counsel.
DISCHARGE AUTHORITY: Chief of Naval Personnel.

UNFITNESS [3420220]
REASON FOR DISCHARGE: Unchanged from 1959 Manual. Drug abuse as a reason for discharge underwent several changes, beginning in 1970. Notable among these are Change 7/70 (effective April 30, 1970), Change 7/71 (effective April 17, 1971), Change 1/73 (effective Oct. 3, 1972), Change 10/73 (effective July 12, 1973).
CHARACTER OF DISCHARGE: UD or more creditable type, when it is warranted by the particular circumstances of the case. There are no major changes from the 1959 Manual.[19]
NOTICE: Member has right to consult with counsel before making decision to demand or waive hearing.

5.2.3.5 BUPERSMAN, 1969 (as of December 31, 1980)[20]

UNSUITABILITY [3420184]
CHARACTER OF DISCHARGE: Honorable or General (HD or GD) as warranted by performance marks.
REASON FOR DISCHARGE:

- Alcohol abuse;
- Financial irresponsibility;
- Personality disorders;
- Homosexual preferences/tendencies;
- Aberrant sexual tendencies;
- Inaptitude;
- Apathy, defective attitudes, or inability to expend effort constructively; or
- Unsanitary habits.

REHABILITATION: Processing for discharge by reason of alcohol abuse, financial irresponsibility, unsanitary habits, apathy, defective attitudes, or inaptitude shall not be initiated until the servicemember has been given a reasonable opportunity to overcome his/her deficiencies.
MEDICAL EXAM: Personality disorder must be diagnosed by military medical authority, preferably a psychiatrist or clinical psychologist. Psychiatric or medical evaluation is also required in homosexual tendencies or other aberrant sexual tendencies cases.
NOTICE: Servicemember must be informed, in writing, of the reasons (s)he is being considered for discharge, must be afforded opportunity to consult with a lawyer if performance marks would result in a GD, and must be given opportunity to make a statement.
CO'S REPORT: Detailed report required.
HEARING: Hearing available only to members with a total of eight or more years of active and/or reserve service. [3420187.]
DISCHARGE AUTHORITY: Chief of Naval Personnel.

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[18] This section does not track the 44 quarterly changes that had been issued as of December 1980.

[19] *See* 3420250 (Administrative Discharge Board), 3420255 (actions by the Chief of Naval Personnel).

[20] The digests in this section are complete through Change 10/80 (effective December 15, 1980). Extensive changes in BUPERSMAN are likely in order to implement DoD Dir. 1332.14, 45 Fed. Reg. 9,571 (1981) (to be codified in 32 C.F.R. Part 41). In addition, the Bureau of Naval Personnel is now called the Naval Military Personnel Command and will be issuing a manual in that name soon.

MISCONDUCT [3420185]
REASON FOR DISCHARGE:
- Frequent involvement of a discreditable nature with civil and/or military authorities (a minimum of three or more minor civil convictions or three or more punishments under the U.C.M.J. or combination thereof within the past year, or a minimum of five or more minor civil convictions or five or more punishments under the U.C.M.J. or combination thereof within the past two years);
- Shirking, failure to pay just debts, or failure to contribute support to dependents;
- Homosexual acts;
- Sexual perversion;
- Drug abuse;
- Conviction by civil authorities;
- Procurement of fraudulent enlistment, induction, or period of active service; or
- Prolonged UA.

CHARACTER OF DISCHARGE: Under Other Than Honorable Conditions (UOTH), unless the particular circumstances in a given case warrant General or Honorable (GD or HD). [3420180.3b.]
REHABILITATION: Reasonable opportunity to overcome his/her deficiencies must be afforded if discharge is for frequent involvement of a discreditable nature with civil and/or military authorities. At least one written counseling/warning entry in service record is required to verify that opportunity was afforded.
NOTICE: If servicemember is under military control, (s)he must be advised in writing of specific reason for proposed action and of his/her right to consult lawyer-counsel before making decision to request or waive the right to representation by counsel and the right to a hearing.
HEARING: Requirements contained in 3420187, Administrative Discharge Board.
POST-HEARING: Requirements contained in 3420188, Actions by the Chief of Naval Personnel on Administrative Discharge Proceedings.
DISCHARGE AUTHORITY: Chief of Naval Personnel.

5.2.4 MARINE CORPS

[reserved]

5.2.5 AIR FORCE

5.2.5.1 AFR 39-10, September 21, 1949 Enlisted Personnel: DISCHARGE — EXPIRATION OF ENLISTMENT OR REQUIRED SERVICE AND GENERAL PROVISIONS

CHARACTER OF DISCHARGE: Honorable (HD) if all character ratings are at least "very good," all efficiency ratings are at least "excellent," servicemember has no GCM conviction, and servicemember has not more than one SPCM conviction. General (GD) if above criteria are not met, except that HD may be issued if:
- Servicemember received decoration or award;
- Servicemember is being discharged for disability incurred in line of duty;
- Inconsistent entries are found in his/her service record; or
- Disqualifying entries are outweighed by subsequent honest and faithful service.

5.2.5.2 AFR 39-10, October 27, 1953 Enlisted Personnel: DISCHARGE — EXPIRATION OF ENLISTMENT OR REQUIRED SERVICE AND GENERAL PROVISIONS supersedes AFR 39-10, September 21, 1949 and AFL 39-12, June 5, 1951

CHARACTER OF DISCHARGE: Honorable (HD) if all character ratings are at least "very good," all efficiency ratings are at least "excellent," and servicemember was not convicted by GCM or SPCM for an offense for which Dishonorable (DD) or Bad Conduct (BCD) could have been adjudged. Change A (March 21, 1957) provided that an HD be issued if servicemember had no record of lost time, had no court-martial convictions, and had not been reduced in grade for misconduct or inefficiency. GD issued if the above criteria not met. Disqualifying criteria "should be deviated from" and an HD issued when:
- Servicemember received a decoration;
- Servicemember is being separated for physical disability;
- The disqualifying entries occurred during first half of his/her period of service; or
- The officer effecting discharge feels that an HD is merited.

5.2.5.3 AFR 39-10, April 14, 1959 Enlisted Personnel: EXPIRATION OF ENLISTMENT FOR REQUIRED SERVICE AND GENERAL PROVISIONS supersedes AFR 39-10, October 27, 1953

CHARACTER OF DISCHARGE: Preservice activities (except misrepresentations) may not be considered. Honorable (HD) conditioned upon proper military behavior and proficient and industrious performance of duty, giving due regard to grade held and capabilities. General (GD) issued if military record is not sufficiently meritorious to warrant HD. Undesirable (UD) is issued for unfitness, misconduct, or for security reasons, but the conclusion to discharge for unfitness or misconduct "should not result automatically in a second conclusion that [a UD] must be furnished." The regulation sets forth numerous factors "to emphasize the need for weighing all pertinent facts of the case before a final decision is reached as to whether an airman, who can be given [a UD] with the resultant stigma attached thereto, should not instead be given a [GD or HD]."
HEARING: Before UD can be issued, servicemember must be afforded opportunity to request or waive:
- Hearing before board of three officers;
- Appearance in person before board (unless servicemember is in civil confinement);
- Counsel, who should be a lawyer; and
- Submission of statements.

5.2.5.4 AFM 39-10, August 22, 1966
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE, FOR THE CONVENIENCE OF THE GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
supersedes AFR 39-10, AFR 39-11, AFR 39-12, and AFR 39-15, April 14, 1959; AFR 39-14, March 1, 1960

CHARACTER OF DISCHARGE: Honorable (HD) conditioned upon pattern of proper military behavior and proficient performance of duty with due consideration for age, length of service, grade, and general aptitude. HD will not necessarily be denied solely by reason of a specific number of CM convictions or Article 15s. Preservice or prior enlistment conduct will not be considered.
GENERAL: (GD) issued if military records are not sufficiently meritorious to warrant HD. If servicemember had a conviction by a GCM or more than one by SPCMs, a GD may be warranted. However, evidence of subsequent rehabilitation, a personal decoration, or line of duty disability may warrant an HD. The reasons for the GD, along with the servicemember's rebuttal, if any, will be included in the file.
UNDESIRABLE: (UD) may not be awarded under this regulation.
CO'S REPORT: If GD is to be issued, the immediate commander must prepare detailed explanation supported by documentary evidence. Servicemember must be afforded right to examine that report and submit rebuttal. Some SPCM discharge authorities must make report, too.
DISCHARGE AUTHORITY: CAs of units commanded by general officers, commanders of air divisions, wings, separation facilities, and others specially designated by HQ USAF. Commanders exercising SPCM jurisdiction can request authority to discharge. GCM commander required for certain reasons for discharge.
HEARING: None required.

5.2.5.5 AFM 39-10, October 20, 1970
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
supersedes AFM 39-10, August 22, 1966

No significant changes from 1966 version.

5.2.5.6 AFM 39-10, May 18, 1972
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
supersedes AFM 39-10, October 20, 1970

No significant changes from 1970 version.

5.2.5.7 AFR 39-10, January 3, 1977
Enlisted Personnel: SEPARATION UPON EXPIRATION OF TERM OF SERVICE, FOR CONVENIENCE OF GOVERNMENT, MINORITY, DEPENDENCY, AND HARDSHIP
supersedes AFM 39-10, May 18, 1972

CHARACTER OF DISCHARGE: Generally the same as 1966 version until 1980. Following IMC 80-1 (effective July 7, 1980), only HD permitted.
NOTICE: When GD was possible (through July 6, 1980), servicemember was to be informed in writing of the recommendation and afforded opportunity to consult with judge advocate, to examine recommendation, and to submit rebuttal.

5.2.5.8 AFM 39-12, September 1, 1966
Enlisted Personnel: SEPARATION FOR UNSUITABILITY, [UNFITNESS OR] MISCONDUCT; PERSONAL ABUSE OR DRUG; RESIGNATIONS OR REQUESTS FOR DISCHARGE FOR THE GOOD OF THE SERVICE; AND PROCEDURES FOR THE REHABILITATION PROGRAM
supersedes AFR 39-3, August 18, 1964; AFR 39-18, March 3, 1961; AFR 35-66 (in part), 39-15, 39-16, 39-17, 39-21, 39-22, and 39-23, March 17, 1959.

As of 1979, this manual consisted of four chapters:
- Chapter 1, General Procedures and Authority;
- Chapter 2, Reasons for Discharge;
- Chapter 3, Administrative Discharge Board; and
- Chapter 4, Protection and/or Rehabilitation of Airmen Subject to Administrative Discharge for Cause.

Chapter 2 consists of nine sections:
- Unsuitability;
- Misconduct;
- Misconduct Because of Civil Court Disposition;
- Misconduct Because of Fraudulent Enlistment;
- Misconduct of Certain Absentees and Deserters;
- Resignation or Request for Discharge for the Good of the Service;
- Dishonorable or Bad Conduct Discharge;
- Policy for Processing When Homosexual Acts or Tendencies Are Involved; and
- Personal Abuse of Drugs.

Only Chapter 1, the first two sections of Chapter 2 named above, and Chapter 3 are digested here.

Chapter 1: General Procedures and Authority
CHARACTER OF DISCHARGE: Honorable (HD) conditioned upon proper military behavior and proficient performance of duty, with due consideration for the airman's age, length of service, grade, and general aptitude. General (GD) may be issued if airman convicted by GCM or more than one SPCM. Under Other Than Honorable Conditions (UOTH) may be issued for misconduct or security.
NOTICE: Detailed notice must be provided to the

servicemember being considered for unsuitability or misconduct discharge, where entitled.
CO'S REPORT: Detailed report requested, to include, in unsuitability and misconduct cases, a statement relating to efforts to rehabilitate the member.
HEARING: The Air Force permits a conditional waiver of hearing, *i.e.*, a waiver contingent on receipt of characterization higher than the lowest possible, in certain situations. Joint processing, *e.g.*, discharge for misconduct and civil conviction, is also permitted.

Chapter 2: Section A: Discharge for Unsuitability
CHARACTER OF DISCHARGE: Honorable (HD) "will be furnished . . . unless the military record warrants issuance" of GD. Under Other Than Honorable Conditions (UOTH) discharge is not permitted.
HEARING: Hearing available for members with more than eight years federal service or if member is an E-4 or higher. Other members are processed by "individual evaluation."

Chapter 2: Section B: Discharge For Misconduct
CHARACTER OF DISCHARGE: Under Other Than Honorable Conditions (UOTH) discharge "should be furnished . . . unless the particular circumstances in a given case warrant a [GD or HD]."
HEARING: Same as unsuitability unless UOTH recommended, hearing is then required.

Chapter 3: Administrative Discharge Board
HEARING: SPCM commander may convene board. Board to consist of not less than three officers each with at least three years active service. If respondent is a woman or a minority, (s)he may request that the board include a woman or a minority (respectively).[21]

5.3 STANDARDS FOR AN HONORABLE DISCHARGE AT EXPIRATION OF TERM OF SERVICE

5.3.1 INTRODUCTION

The following material will enable counsel to locate the criteria governing the issuance of an HD at expiration of term of service (ETS). These standards are very important in preparing contentions for clients who were improperly or illegally discharged. They govern the extent of relief that is to be issued. Other chapters of this manual provide details on preparing contentions relating to these standards.[22]

5.3.2 ARMY

Effective Dates	Criteria
Jul. 1, 1947, through Jan. 22, 1952.	• Has all character ratings of at least "very good"; • Has all efficiency ratings of at least "excellent"; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a special court-martial. AR 615-350, para. 1.c, Jul. 1, 1947.
Jan. 23, 1952, through Jun. 23, 1953.	• Has character ratings of at least "very good"; • Has efficiency ratings of at least "excellent"; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a special court-martial. AR 615-360, para. 8, Jan. 23, 1952.
Jun. 24, 1953, through Dec. 5, 1955.	Same criteria as previous entry. AR 615-360, para. 8, Jun. 24, 1953
Dec. 6, 1955, through Apr. 13, 1959.	• Has conduct ratings of at least "good"; • Has efficiency ratings of at least "fair"; • Has not been convicted by a general court-martial; • Has not been convicted more than once by a special court-martial. AR 635-200, para. 8, Dec. 6, 1955.
Apr. 14, 1959, through Jul. 14, 1966.	Same criteria as previous entry. AR 635-200, para. 9, Apr. 14, 1959.
Jul. 15, 1966, through May 18, 1975.	Same criteria as previous entry. AR 635-200, para. 1-9d(2), Jul. 15, 1966.

[21] *See* AFR 11-31, Boards of Officers (board procedures).
[22] *See* §§ 7.3, 11.3, 12.8 *infra*.

May 19, 1975, through Mar. 31, 1978.	No objective criteria. AR 635-200, para. 1-9d(1), Jul. 15, 1966.
Feb. 1, 1978, through Dec. 31, 1980.	No objective criteria. AR 635-200, para. 1-13, Feb. 1, 1978.

5.3.3 NAVY

Oct. 1, 1942, through Jun. 4, 1947.	• Has proficiency ratings of at least 3.0; • Has conduct ratings of at least 3.25; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a summary court-martial. BUPERSMAN D-9103, Oct. 1, 1942.
Jun. 5, 1947, through Jun. 10, 1948.	• Has proficiency ratings of at least 2.75; • Has conduct ratings of at least 3.25; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a summary court-martial. BUPERSMAN D-9103(1), C 12, Jun. 5, 1947.
Jun. 11, 1948, through Jul. 24, 1951.	Same criteria as previous entry. BUPERSMAN C-10303(1)(a), Jun. 11, 1948.
Jul. 25, 1951, through Feb. 20, 1957.	• Has proficiency ratings of at least 2.75; • Has conduct ratings of at least 3.25; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a special court-martial. BUPERSMAN C-10303(1)(a), C 3, Jul. 25, 1951.
Feb. 21, 1957, through Apr. 13, 1959.	• Has final proficiency average of at least 3.0; • Has conduct ratings of at least 2.6 for each trait; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a special court-martial.[23] BUPERSMAN C-10303(1)(a), C 23, Feb. 21, 1957.
Apr. 14, 1959, through Jun. 30, 1969.	• Has final average ratings of at least 2.7; • Has military behavior ratings of at least 3.0; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a special court-martial.[24] BUPERSMAN C-10302, Apr. 14, 1959.
Jul. 1, 1969, through Dec. 31, 1980.	• Has final average ratings of at least 2.7; and • Has military behavior ratings of at least 3.0. BUPERSMAN 3850120, Jul. 1, 1969.[25]

5.3.4 MARINE CORPS

Jun. 3, 1940, through Feb. 28, 1945.	HD only (Marines discharged at ETS are Class 1). MCM, Art. 3-11, Jun. 3, 1940.

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[23] Court-martial criteria may be disregarded in certain cases involving individuals with military behavior averages of 3.0 or better.
[24] See note 23 *supra.*
[25] Until December 18, 1979 (C 1/80), 3410150 contained the standard for enlisted members in grades E-5 to E-9. Change 1/80 added this standard to 3850120. However, the above standard applies only to E-1 to E-4 personnel.

March 1, 1945, through Apr. 10, 1949.	• Has proficiency ratings of at least 3.44; • Has conduct ratings of at least 4.0; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a summary court-martial. MCM, Art. 3-12, C 8, Jun. 11, 1945.
Apr. 11, 1949, through Jan. 1954.	• Has proficiency ratings of at least 5.0; • Has conduct ratings of at least 4.0; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a summary court-martial. MCM, Art. 10252, Apr. 11, 1949.
Jan. 1954 through Jun. 1955.	• Has proficiency ratings of at least 5.0; • Has conduct ratings of at least 4.0; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a special court-martial. MCM, Art. 10252, C 4, Jan. 1954.
Jun. 1955 through Apr. 1956.	• Has proficiency ratings of at least 3.0; • Has conduct ratings of at least 4.0; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a special court-martial. MCM Art. 10252, C 8, Jun. 1955.
Apr. 1956 through May 1959.	Same as previous entry except that evaluation marks only apply to personnel below the grade of Staff Sergeant. MCM Art. 10253, C 13, Apr. 1956.
May 1959 through March 12, 1961.	Same as previous entry except that evaluation marks only apply to personnel of the rank of Corporal (E-4) and below. MCM Art. 10253, C 34, May 1959.
Mar. 13, 1961, through Sep. 8, 1968.	Same as previous entry. MCO P50003, para. 13252, Mar. 13, 1961.
Sep. 9, 1968, through Jun. 27, 1972.	Same as previous entry except that HD will not be denied solely by reason of specific number of court-martial convictions. MCO 1900.16, para. 6003, Sep. 9, 1968.
Jun. 28, 1972, through Mar. 22, 1978.	Same criteria as previous entry. MCO 1900.16A, para. 6003, Jun. 28, 1972.
Mar. 23, 1978, through Dec. 31, 1980.	Same criteria as previous entry. MCO 1900.16B, para. 6003, Mar. 23, 1978.

5.3.5 AIR FORCE

Jul. 1, 1947, through Sep. 20, 1949.	• Has all character ratings of at least "very good"; • Has all efficiency ratings of at least "excellent"; • Has not been convicted by a general court-martial; and • Has not been convicted more than once by a special court-martial. AR 615-360, para. 1.c, Jul. 1, 1947.
Sep. 21, 1949, through Oct. 26, 1953.	Same criteria as previous entry. AFR 39-10, para. 3c, Sep. 21, 1949.

Oct. 27, 1953, through Mar. 20, 1957.	Same criteria as previous entry. AFR 39-10, para. 9, Oct. 27, 1953.
Mar. 21, 1957, through Apr. 13, 1959.	• Has no record of lost time; • Has no court-martial conviction; and • Has not been reduced in grade for misconduct or inefficiency. AFR 39-10, para. 9, Change A, Mar. 21, 1957.
Apr. 14, 1959, through Aug. 21, 1966.	No objective criteria. AFR 39-10, para. 9d, Apr. 14, 1959.
Aug. 22, 1966, through Oct. 19, 1970.	No objective criteria. AFR 39-10, Aug. 22, 1966.
Oct. 20, 1970, through May 17, 1972.	No objective criteria. AFM 39-10, Oct. 20, 1970.
May 18, 1972, through Jan. 2, 1977.	No objective criteria. AFM 39-10, May 18, 1972.
Jan. 3, 1977, through Jul. 6, 1980.	No objective criteria. AFR 39-10, Jan. 3, 1977.
Jul. 7, 1980, through Dec. 31, 1980.	Only an HD is permitted. AFR 39-10, para. 2-5, IMC 80-1, Jul. 7, 1980.

CHAPTER 6
INTAKE AND OBTAINING RECORDS

6.1 INTRODUCTION

The burden of proof in a discharge upgrade case lies entirely with the applicant. A Board produces no evidence or witnesses; it simply reviews the veteran's military records and any matters submitted on the veteran's behalf. A general presumption exists that the discharge awarded was proper and equitable.[1] The veteran must overcome this presumption by presenting his/her version of relevant military service, witness testimony, statements, character references, and legal and equitable arguments challenging the validity of the original discharge characterization.

The key to winning a case is the quality of case preparation. Counsel must obtain a clear version of the veteran's story in order to develop a case theory that will be plausible to a Review Board.[2]

6.2 INITIAL CLIENT INTERVIEW

The initial interview in a discharge upgrade case is often different from other routine cases. Because the initial interview will entail extracting information that is often detailed, repressed, or unpleasant, a rapport with the veteran is important. Frequently, bad paper veterans have suffered financially and psychologically from bad discharges. The veteran may exhibit hostility, impatience, and feelings of hopelessness in "fighting the military establishment." The veteran also may have begun to accept the label "undesirable" and exhibit feelings of self-worthlessness. Particularly with combat veterans, it is essential to exhibit an understanding of their feelings.

[1] "There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption." 32 C.F.R. § 70.5(b)(12)(vi). *But see* ADRB SOP, para. I.C., 44 Fed. Reg. 25,047 (1979) ("In cases where there is any doubt as to whether the applicant's discharge should be upgraded, the vote should be resolved in favor of the applicant."). *See also* ADRB SOP, Annex F-1, para. 1.H., 44 Fed. Reg. 25,068 (1979).

[2] *See* Ch. 12 *infra*. Other chapters also relate to the specific reasons for discharge. It is recommended that a propriety (legal) issue should always be framed as an equitable basis for relief as well.

Counsel should offer encouragement and support at the initial interview. This is necessary for two reasons. First, the veteran may have to participate in the upgrade process to a large degree. Second, the length of the process often causes veterans to lose interest after a great deal of initial work has been accomplished. Office procedures that provide for periodic contact with the client might also be helpful.

When beginning a discharge upgrade case, the difficulties that have prompted the veteran to seek an upgrade should be determined. Counsel should then begin a general discussion of the events that led to the discharge, being careful to allow the veteran to tell the story, not just to answer questions. This technique will provide detailed information and will also help establish rapport with the client.

The goals of the initial interview are to:

- Establish a rapport;
- Have the necessary forms completed;
- Complete a detailed questionnaire and obtain a personal history statement;
- Begin to formulate a theory of the case.

6.3 INTAKE CONSIDERATIONS

Several matters must always be explored at intake:

- Counsel should consider whether the veteran's problem is the bad discharge, or whether it is something else that can be easily resolved. If an upgrade is unlikely, counsel's energies may be better spent assisting the veteran in obtaining an employment referral, medical treatment, VA benefits, or something other than the probable increased discouragement of a rejected discharge upgrade application.[3]
- Statutes of limitations are often a consideration. In general, on a backpay claim for an illegal discharge, suit must be filed within six years after date of discharge; after April 1, 1981, an application to a Discharge Review Board must normally be made within 15 years of date of discharge;[4] the Board for Correction of Military Records has a statute of limitations of three years "from the date of discovery of error or injustice" which the Board may waive in the appropriate case (the Board almost always waives the statute of limitations "in the interest of justice").
- If the veteran already has a DRB application pending and a hearing is scheduled, counsel must act quickly if a continuance is desired and to note an appearance.[5]
- Counsel should decide whether it is advantageous to file an application with the Veterans Administration for a determination of eligibility for benefits.[6]

6.4 OBTAINING THE VETERAN'S MILITARY AND PERSONAL HISTORY

The initial session is a good time to obtain a complete statement of the veteran's history. If the veteran did not bring copies of his/her service records, and is having difficulty reconstructing events, counsel should set up a second appointment to examine the service records (s)he has, and should try to provide some opportunity for the veteran to describe the case; an experienced discharge upgrade advocate can frequently begin to predict positive results in the case after hearing only a few facts. A quick reference to the checklist of "easy" cases might help.[7]

It is important to devise a method to obtain as much information as possible about the veteran's military service, the events surrounding the discharge, and all relevant information about the veteran's pre-service and post-service activities. For example, a questionnaire may be used;[7a] whether the veteran is asked to complete the questionnaire or whether it is used as an interview device depends on the veteran's willingness to participate.

Another method, for use with the questionnaire, is to request that the veteran write a chronological description of the relevant events.[7b] In addition, a combination of these methods may be employed to learn the veteran's story.

Because it may be difficult for the veteran to recall all relevant events, his/her state of mind, and possible witnesses, it is essential that the necessary time be spent reconstructing all possible details. Such reconstruction will permit development of a theory of the case and a framework for a complete analysis of the veteran's military records. Occasionally, any concept of case development may have to await the arrival of the veteran's military records.

At the initial interview, the veteran should be told to plan for the following events:

- To go over the military service records with counsel in two to four weeks;
- To travel to a regional hearing site if a personal appearance hearing is being requested, (this may entail financial planning); and

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[3] Many community-based veterans organizations are primarily funded by the Department of Labor or through CETA funds to promote veterans employment. To date, the VA has funded 94 Veterans Outreach Centers to assist Vietnam-era veterans with psychological and adjustment problems. A variety of support services are offered by all these groups. A list of centers or veterans groups is kept by the Veterans Education Project, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 466-2244, or the NVLC.

[4] The current waiver of the 15-year statute of limitations for all UDs or other cases previously heard by a DRB before March 31, 1978, has been extended until April 1, 1981. Persons who responded to the 1980-1981 DoD outreach program by writing to the P.O. Box in St. Louis have an additional six months from the date of the DoD letter transmitting the specially marked application form.

[5] *See* § 9.2.12 *infra*.

[6] In some cases, it is best to file a simultaneous application with the VA to determine whether a UD, or BCD from an SPCM, is disqualifying. This will prevent the VA from later finding that benefits would have been awarded had the veteran applied and are consequently now time-barred. Filing can also fix a date for retroactive payments for certain benefits upon an upgrade. In other cases, a VA adjudication might be necessary even after an upgrade, *e.g.*, 180-day AWOL cases. *See* Ch. 26 *infra*.

[7] *See* Ch. 2 *supra*.

[7a] *See* App. 6A *infra*. The questionnaire might also serve as a case folder summary of the case. *See* Apps. 6F, 6G *infra* (processing checklist and case control mechanism).

[7b] *See* App. 6B *infra* (sample instructions that can be used to obtain this personal statement).

- To collect documentary evidence both to corroborate his/her version of the events and to establish him/her as a useful member of the community.[7c]

6.5 COMPLETING THE NECESSARY FORMS

At the initial session, it is essential to have the veteran sign all necessary forms.[7d] These forms are:

- DD Form 293, the application form for the Discharge Review Boards;
- DD Form 149, the application form for the Boards for Correction of Military Records;
- SF 180, the request for military records;
- Authorization for Release of Military Medical Patient Records, which is needed to obtain sensitive information, such as records of drug treatment;
- VA Form 07-3288, the request for (and consent to release) information contained in a claimant's records at the VA regional office;
- A retainer agreement that gives counsel the right to receive and have access to all agency files relating to the veteran's claim or potential claim;
- VA Form 2-22a, which will be necessary to pursue a VA claim and have access to the VA records (if a service organization has already been designated as counsel, the veteran will have to rescind this appointment); and
- VA Form 21-526, which can be used if it is determined that a VA determination of eligibility for benefits will be pursued.[7e]

6.6 OBTAINING NECESSARY MILITARY RECORDS

Before discussing access to service and medical records, three important points should be noted:

- A DD 293 or DD 149 should rarely be filed before obtaining a copy of the service records;[8]
- The veteran may be referred to the VA to obtain records;[9] and
- The veteran may be told that the records were destroyed in a fire.[10]

6.6.1 OFFICIAL SERVICE RECORDS

Once the servicemember has been discharged, the Official Military Personnel File (OMPF) is forwarded to the National Personnel Records Center (NPRC) in St. Louis, Missouri for permanent storage.[11] In most cases, the SF 180 is all that is needed to obtain the OMPF.[12] There is no fee for the first copy of these records.[13] Until recently a complete file

[7c] *See* App. 6C *infra* (sample "to whom it may concern" letter for prospective character witnesses).

[7d] *See* Apps. 6D, 6E *infra*.

[7e] *See* Ch. 9 *infra* (detailed discussion of the military forms). *See also* App. 6E *infra* (sample forms that have been completed). It is important at the first session to have the veteran sign all of these forms; counsel can complete them later. The SF 180, the most important form at this stage, permits an immediate request for a veteran's service record. A stock of these forms can be obtained from the nearest VA regional office. VA Form 7051B can be used to requisition VA forms and publications.

[8] Before July 1981, if an applicant filed an application form before filing an SF 180, the Board would require that (s)he withdraw the application and submit another SF 180 to the St. Louis Records Center. This practice was ended by a stipulation of voluntary dismissal in O'Shea v. Secretary of Defense, No. 81-1084 (D.D.C. July 16, 1981). DoD agreed no longer to require DRB applicants who request their records after applying for discharge review to withdraw their applications or to submit a second request for records in order to get copies of their records. It also agreed to suspend temporarily the processing of a DRB application when an applicant requests his/her records and to disclose those records "as promptly as circumstances permit," without causing the applicant to lose his/her place in line except to the extent necessitated by the temporary suspension. Finally, it agreed to conduct a rulemaking proceeding to promulgate a rule governing disclosure of military personnel records after a veteran submits an application for discharge review. *See* 46 Fed. Reg. 43,185 (Aug. 27, 1981) (proposed rules). This rulemaking proceeding is expected to lead to a change in the DD 293 application form.

[9] Sometimes a veteran will have a claim for benefits pending at the VA regional office. If this is the case, much of the OMPF will be at the VA. A request can be made at a VA regional office using VA Form 07-3288 along with VA Form 2-22a (power of attorney), to obtain the OMPF without charge. (38 C.F.R. § 26 permits a free copy at the discretion of the "station head" when veterans are seeking "to obtain financial or other benefits to which they may be entitled." Letter from Blake E. Turner, Assistant Administrator for Planning and Evaluation of the VA, April 19, 1975, to David F. Addlestone.) However, if there is a problem, the VA can be asked to return the records to the NPRC where a free copy can be obtained. Because this transfer of records may be cumbersome and time consuming, a cover letter to the VA should be enclosed explaining the immediate need for these records. Including the veteran's claim number will expedite the request.

[10] In July 1973, there was a major fire at the NPRC destroying or damaging hundreds of thousands of service records. The affected files concern the following veterans:

- *Army* personnel discharged between November 1, 1912, and December 31, 1959 (2.5 million of the 20 million files have been partially reconstructed); and personnel discharged between January 1, 1973, and July, 1973 (314,000 of 316,000 records have been reconstructed); and
- *Air Force* personnel discharged between September 25, 1947, and December 31, 1963, with last names beginning with the letters I-Z (423,000 of the 1.4 million have been partially reconstructed).

When NPRC notifies the veteran that his/her records may have been destroyed, they send a "service history questionnaire." The information supplied by the veteran is then used in an attempt to reconstruct the records by searching other file systems.

If a complete service record cannot be reconstructed, a personal appearance at the hearing or a sworn statement or other evidence is essential.

[11] Each service maintains legal custody of the records. NPRC is part of the General Services Administration (GSA). GSA is the physical, not the legal, custodian of these records.

Once the servicemember has been discharged, all service records, except court-martial transcripts, are normally forwarded to the National Personnel Records Center (NPRC) in St. Louis, Missouri for permanent filing. The Air Force and Army records are sent to NPRC as soon as they are processed (approximately 30 days after discharge). Marine Corps records are sent within four months of discharge. Navy records, except for medical records, are transferred to NPRC within one year after discharge of officers, and within six months after discharge of enlisted personnel. Navy medical records for all personnel are transferred to the NPRC within six months after discharge.

[12] Most veterans can obtain their records from: National Personnel Records Center, (Military Personnel Records), 9700 Page Boulevard, St. Louis, MO 63132. Some veterans may need to use a different address and should consult the back of the SF 180 for further information.

[13] If the stated purpose for seeking the records is discharge review, no charge is assessed. Fees may be assessed, however, if a copy of the records has been provided before. *See* 32 C.F.R § 288.8. If NPRC tries to impose a fee, it may thus be possible to challenge it or request a waiver.

has been sent without any difficulty; a copy of the SF 180 should be retained.[14]

The NPRC recently has reverted to screening requests concerning records for discharge review, and omitting some documents. Accordingly, to assure receiving the complete file, a cover letter should be enclosed requesting all personnel and medical records for purposes of confirming the accuracy of the entire file under the Freedom of Information Act and the Privacy Act, and should state that viewing the records at the Board will not be sufficient. In addition, a fee waiver for discharge review purposes should be requested and a copy of the form retained in the veteran's file.

One other problem has developed recently involving microfiche copies of service records. Since 1977, the permanent Naval copy of service records is maintained on microfiche; the Navy no longer keeps paper copies. Anyone who needs a paper copy, but was sent a microfiche copy, should appeal under the Privacy Act, which requires that records be provided "in a form comprehensible" to the requestor.[14a]

6.6.2 MEDICAL RECORDS

A request on the SF 180 for "complete service and medical records" generally produces a copy of the final separation physical examination only. In most cases, this might be enough. However, if the veteran describes a problem with drugs or alcohol, some other medical problem that affected performance, or indicates that (s)he saw a psychiatrist, additional medical records will be important.

It is NPRC policy that copies of medical records may be released to a veteran "unless it appears that such release might prove detrimental to his/her physical or mental health."[15] However, under this policy, only the minimum records necessary to respond to a request will be released.[16] To obtain records of visits to sick call, records compiled when hospitalized, or a psychiatric consultation, it is necessary to identify specifically on the SF 180 the type of record, name of the facility visited, the year of the visit. A letter to the hospital rather than to NPRC may also be useful.

Drug and alcohol abuse treatment records must also be specifically requested. Access is readily granted to the individual veteran but access by a third party requires additional paperwork which NPRC will forward as necessary.

6.6.3 OTHER MILITARY RECORDS

6.6.3.1 Court-Martial Records

Charge sheets listing court-martial offenses are usually filed with the OMPF. A copy of the transcript of the court-martial is provided to the servicemember shortly after trial, but is not usually filed with the service record. Transcripts are retained for varying lengths of time by different offices depending on the type of court-martial. However, a request for the transcript can be made with the SF 180 at the same time that the OMPF is requested.[17]

6.6.3.2 Investigative Records

Records of investigations conducted by military police or investigative units may provide important help to veterans in remembering the events that led to discharge. For example, servicemembers discharged for homosexual acts may never have seen the statements made against them and may be able to rebut any inference of aggravating circumstances. Members discharged for possession or sale of drugs may be able to contest the adequacy of the evidence.

Investigative records are not usually kept in the OMPF, and must be requested from the specific investigative agency that conducted the investigation.[18] The DRBs and BCMRs may obtain these records. Write the Board to determine whether the records were obtained.

6.6.3.3 Miscellaneous Military Records

Copies of pay records may be available through the service's finance center.[19] Such records may be

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[14] If records are not received within two to four weeks, send another copy of the SF 180 labelled, "SECOND REQUEST." When the records arrive, they should be compared with other records. *See* Ch. 7 *infra*. If any are missing, another copy of the SF 180, specifying the missing records, should be submitted. It may also be helpful to telephone the Chief of the Reference Branch (Army, Navy, or Air Force) in St. Louis.

The instructions used by NPRC for processing requests are contained in its *Release and Access Guide for Military Personnel and Related Records at NPRC*. A copy of that instruction — NPRC 1865.16A — is available from: Director, General Services Administration, NPRC, St. Louis, MO 63132.

[14a] 5 U.S.C. § 552a(d)(1). The appeal should be directed to the Secretary of the Navy, ATTN: General Counsel, Washington, D.C. 20350, as well as to the National Personnel Records Center.

[15] This category of information includes:

- Diagnosis of mental, psychoneurotic, or personality disorder;
- Diagnosis or implications of sexual deviation; and
- Any illness that carries a uniformly unfavorable prognosis.

NPRC 1864.110, Ch. 3, ¶ 3. The veteran is generally told that these records can only be released to a physician because they "contain adverse information that can only be interpreted by a physician." If possible, a doctor should sign the SF 180 as the requestor of the records. If no doctor is available, some counsel have been successful in appealing the denial of records to the General Counsel of the Service. The basis of the denial ostensibly is the provision in the Privacy Act of 1974 relating to "special procedure[s] . . . for the disclosure to the individual of medical records, including psychological records. . . ." 5 U.S.C. § 552a(f)(3).

[16] NPRC 1864.110, Ch. 1, ¶ 7(b).

[17] A request on an SF 180 for a copy of the court-martial transcript should detail the type of court-martial, date, and place of trial. If the transcript is not in the OMPF, NPRC should respond with the appropriate address. *See* App. 6H *infra* (procedures for obtaining transcripts as published in the *Code of Federal Regulations*).

[18] A request on the SF 180 for investigative records is not likely to produce them. Even if such records were filed with the OMPF, NPRC clerks would reply that a request must be directed to the originating agency. NPRC should then provide the appropriate address. *See* App. 6I *infra* (details for obtaining records from the Army's Criminal Investigation Division, Navy's Naval Investigative Service, and the Air Force's Office of Special Investigations). Requests should be made under the provisions of the Privacy Act and Freedom of Information Act. Many other military police or investigative agency records are described in the DoD's annual publication of its systems of records. *See* 46 Fed. Reg. 6,426 (1981).

[19] The addresses for the finance centers are:

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

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

useful in establishing a servicemember's rank when all other records are missing.

Morning reports, personnel rosters, files of field commands, records of activities,[20] and many other kinds of helpful records may also be available. Ship's logs and unit diaries may be available on request under the Freedom of Information Act. There may also be a division historian with extensive records.

If the veteran has already appeared before a Review Board, there may be an available transcript or tape recording of that hearing.[21]

6.6.4 OTHER NONMILITARY RECORDS

Pre-service records, such as high school or grade school transcripts, juvenile arrest records, psychiatric counseling, or welfare department records, may be useful in documenting a "deprived background."

While in service, the servicemember may have faced a family crisis or hardship which led to an AWOL. (S)he may not have formally requested emergency leave or a hardship discharge, and no official documentation of the hardship may exist. However, if the servicemember turned to the Red Cross or a community organization for help, records of visits to those offices may exist. Letters describing family problems, sent or received by the servicemember or his/her family may be another source of helpful documentation.

Records of civilian hospital medical treatment, and post-service drug or alcohol rehabilitation or therapy records should not be overlooked. These records are important in documenting problems, such as alcohol or drug abuse, that may have contributed to disciplinary infractions but were undetected during active duty. Records of post-discharge participation in an alcohol rehabilitation program have been successfully used to argue that the disciplinary infractions leading to discharge for misconduct due to frequent involvement resulted from an undetected alcohol problem.

If military pay records are not available, it may be possible to reconstruct earnings (*e.g.*, to establish rank), by obtaining wage information from the Internal Revenue Service or the Social Security Administration.[22]

6.7 LOCATING MILITARY PERSONNEL OR VETERANS

If an affidavit or character reference is needed from someone still on active duty, it may be possible to locate that person using the military's locator service. The locator service may also be used to contact a veteran's lawyer or counsel.[23] The NPRC offers a free forwarding service to other veterans if the "requestor's VA/SSA benefits are dependent on contacting this veteran" or the "veteran to be contacted will have veteran's benefits affected."[24]

6.8 INITIAL INTERVIEW CHECKLIST

The following is a checklist of items that should be followed at the initial interview or completed thereafter:

- Veteran signed SF 180, DD Form 293, DD Form 149, VA Form 07-3288, VA 2-22A, VA Form 21-526, authorization for release of medical treatment information and, if appropriate, recision of appointment of other counsel at VA;
- SF 180 completed for mailing to NPRC (do *not* file 293 or 149 before obtaining OMPF);
- Questionnaire and/or personal statement completed;
- Retainer containing Privacy Act waiver signed;
- Veteran given copy of "to whom it may concern" letter for purposes of obtaining character references;
- Veteran told to provide office with any copies of military records in his/her possession;
- Statutes of limitations considered;
- If VA claim pending or if the previous claim was filed, veteran's claim number (C number) obtained;
- Veteran given information as to next steps, *i.e.*, a review of the military records within four weeks, list of additional information to be provided to counsel, and an estimate of when and where a hearing will be held (financial planning may be necessary);
- Whether a VA claim or other referral should be pursued immediately; and
- Initial determination of other government records that might be necessary.

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[19] (continued)

NAVY	MARINE CORPS
Finance Center	Finance Center
U.S. Navy, Cellebrezze Building	Examination Division
Cleveland, OH 44199	Kansas City, MO 64197

[20] *See, e.g.*, 32 C.F.R. § 518.17(n). Each service is required to publish notice of its systems of records in the *Federal Register*. It may be useful to consult those notices if efforts by NPRC to reconstruct a missing service record are not productive. *See, e.g,* 46 Fed. Reg. 6,426 (1981).

[21] *See* Ch. 9 *Infra*.

[22] Use IRS Form 4506 (Request for Copy of Tax Form) or SSA-L137 (Social Security Request for Detailed Earnings Information).

[23] Each service's locator office prefers if possible that a full name, Social Security Number, and date of birth be provided. Also indicate whether the individual is an enlisted member or an officer.

ARMY	NAVY
U.S.A. Enlisted [and officer] Records Center	NMPC (Code 03L)
Ft. Benjamin Harrison, IN 46249	Washington, D.C. 20370
(317)542-4211	(202)694-5157
USMC	AIR FORCE
CMC (Code MSRB-10)	MPC/MPCD003
Headquarters USMC	Randolph AFB, TX 78148
Washington, D.C. 20380	(202)695-4803
(202)694-1610	

Lawyer-counsel may also be contacted by calling the JAG office (at a particular base) or the office of The Judge Advocate General in Washington (call (202)545-6700 for the Pentagon operator).

[24] The requirement that the requestor's VA benefits depend on contacting the veteran is clearly met when the information from that veteran may lead to an upgrade and then VA benefits. *See* NPRC 1865.49F. NPRC will "forward up to five letters to the last known address of individuals." To obtain a copy of the NPRC instruction and to request this forwarding service, counsel should write: Director, National Personnel Records Center, St. Louis, MO 63132.

This questionnaire is designed to assist an attorney or paralegal in deciding whether (s)he can help you upgrade your discharge. Try to answer as many questions as you can. Many of the questions will not be applicable to you. Put "N/A" if it is not applicable. Put "?" if you do not remember. Do not worry if you cannot remember details. Many answers will be in your military records which we will obtain, and you will be interviewed for more details. Please leave all your military papers with us. If you did not bring them, please send them in.

If you need additional space, write on the back and write "see back" in the blank space. Please PRINT all information. This information will be kept confidential.

Full Name_____

Did You Use Another Name in the Service? Yes_____ No _____

If "Yes", What Was It? _____

Current Address_____
(Include Zip Code)

Telephone Number(s) (Including area code)_____

Name, Address, and Telephone Number of Person Who Can Best Be Relied Upon to Reach You _____

Former Branch of Service _____

Social Security Number _____

Service Number (if same as Social Security Number, put N/A)

_____

Date of Birth _____Place of Birth_____

Date of Entry on Active Duty
(Check Block 6 or 10c on most DD Form 214s)_____

Date of Discharge
(Check Block 11d on most DD Form 214s)_____

Highest Rank Held_____

Circle Type of Discharge:

General
(Honorable Conditions)

Bad Conduct

Clemency
(Under 1974-75 Clemency Program)

Undesirable
(Under Other Than Honorable Conditions)

Dishonorable
(Dismissal If a Former Officer)

Regulations Under Which You Were Discharged (see Block 11c on DD Form 214 for pre-1974 discharges under "Reasons and Authority")

_____

_____

What Was the Specific Reason for Your Discharge? (e.g., possession of drugs, instead of a court-martial, by a court-martial, etc.)

_____

FOR ENLISTEES ONLY

Why Did You Enlist? _____

Did You Enlist Under Any Particular Option/Program? Yes___No___

If Yes, Specify_____

Did the Recruiter Promise You Anything? Yes_____ No_____

In Writing? Yes _____ No_____

What Were the Promises/Guarantees?_____

_____

Did the Service Carry Out Its Promises? Yes_____ No _____

Explain_____

_____

If "No," Did You Complain? Yes_____ No_____

If You Did Complain, When and To Whom? _____

_____

What Happened? _____

_____

_____

Were You Forced to Enlist by Anyone? (e.g., courts, police, parents, no job, pressure of the draft) YES _____ NO _____

If "Yes," Describe in Detail Events Leading to Your Enlistment:

_____

_____

Were You Under 18 When You Enlisted? Yes_____ No_____
If So, Did Both of Your Living Parents or Guardian(s) Sign For You? Yes _____ No _____

FOR DRAFTEES ONLY

Before Your Induction, Were You (Please Check If "Yes"): A Student _____; An Apprentice _____; A Ministerial Student or Minister _____; A Conscientious Objector _____

Was Any of Your Family Missing, Captured or Killed Due to Military Service ? Yes _____ No _____

Was There Any Hardship in Your Family? Yes _____ No _____
If Yes to Any of the Above, Please Give Details: _____

_____

_____

Did You Apply to Your Local Board for Deferment/Exemption from the Draft? Yes _____ No _____
If "Yes," When? _____ Result _____

If Turned Down, Were You Given Reasons? Yes ____ No ____
What Were They? _____

FOR BOTH ENLISTEES AND DRAFTEES

Circle the Highest Grade Completed in School: 1 2 3 4 5 6 7 8 9 10 11 12; College: 1 2 3 4; Other: _____

Were You Married When You Entered the Military? Yes ____ No ____
Did You Have Any Children or Other Dependents You Were Supporting? Yes _____ No _____

If "Yes," Please List (Age, Relationship, Amount Per Month You Contributed):

_____

_____

List Employment Held Before Military Service (Employer, Type of Job, Address, Dates):

_____

_____

Were You Convicted of Any Offense(s), Other Than Traffic Violations, Before You Entered the Military? Yes ____ No _____

If "Yes," Please List (Offense, Date, Place, Disposition):

_____

_____

Did You Tell the Recruiter (if you enlisted) or AFEES People (if drafted) About Your Conviction(s)? Yes _____ No _____

If "Yes," What Did (S)he/They Do?_____

_____

Were You Enlisted/Inducted While on Probation, Parole, or Awaiting Trial for Any Juvenile/Civilian Offenses?Yes ___No ___

If "Yes," Explain: _____

_____

MEDICAL INFORMATION

Do You Believe You Had Any Physical or Mental Grounds for Rejection by the Armed Forces Prior to Entry? Yes _____ No _____

Explanation? _____

_____

If "Yes" Above, Did You Point This Out at Your Physical Before Service? Yes _____ No _____ What Happened? _____

_____

Did You Ever Fail an Entry Physical and Take Another One?
Yes _____ No _____ If "Yes," Give Details: _____

_____

Date of Your Physical(s):_____
If "Yes" (to the Physical or Mental Grounds Mentioned Above, Did It Get Worse After Entry into Military Service?Yes ____ No ____

Details: _____

Did You See a Medical Specialist? Yes ____ No ____

Was Your Information/Complaint Carefully Considered? Yes___No__

Details: _____

_____

YOUR DISCHARGE

Resignations in Face of Court-Martial

Did You Resign in Face of a Court-Martial? Yes ____ No ____

If "Yes," Why? _____

_____

Were You in Pre-Trial Confinement When You Resigned? Yes___No__

What Were the Court-Martial Charges Pending When You Resigned?

_____

What Defense Were You Planning?_____

_____

Were You Advised by a Lawyer? Yes _____ No _____ or Non-Lawyer Yes ____ No ____; If "Yes", What Were You Advised: _____

_____

Describe Your Relationship With Your Lawyer or Counsel: _____

_____

Did (S)he Advise Other People to Resign at the Same Time? Yes ____ No____

Was It a Group Meeting Where This Occurred? Yes ____ No ____

Did You Attempt to Withdraw Your Request for Discharge?

Yes _____ No _____ If "Yes," What Happened? _____

DISCHARGE FOR AWOL

Did You Turn Yourself In Under the Ford Clemency Program (September 1974 to February 1975) or the Carter Special Program (April 1977 to October 1977)? Yes _____ No _____

How Long Were You AWOL? _____

What Did You Do While AWOL? _____

Were You Caught or Turned Yourself In? _____

If So, Did You Complete Alternative Service? Yes _____ No _____

If Not, Why? _____

_____

Did You Try to Apply but Were Told You Were Not Eligible?

Yes _____ No _____ Explain _____

_____

If You Were Eligible, Why Didn't You Apply? _____

_____

Relate Any Other Important Factors About Either of These Programs if You Applied: _____

_____

DISCHARGES OTHER THAN RESIGNATION

Did You Have a Lawyer? Yes _____ No _____ Military _____

Civilian _____or both _____ or just a Military Officer Who Was Not a Lawyer? Yes _____ No _____

Name(s) of Lawyer(s) _____

_____

Address(es)_____

_____

Did You Have a Hearing Before a Board of Officers? Yes___No____

Did You Think the Hearing Was Unfair? ____ Why? (For example, were you denied witnesses, were written statements used against you, were confessions or the products of a search used?)

_____

_____

Did You Give Up (Waive) Your Right to a Hearing? ____ If So, Explain Why. (For example, were you promised another type of discharge, did you understand your rights, did you just want to get out?)

_____

_____

Were You Held Beyond Your Normal Date of Suspension for the Discharge Action? Yes _____ No _____ If So, Did You Complain? Yes ____ No ____

Was Your Discharge the Sentence of a Court-Martial (i.e., BCD or DD)? Yes _____ No _____ If So, Did You Appeal? Yes__No ___

If So, How Far? _____

What Happened? _____

_____

Do You Have or Can You Get the Transcript? Yes _____ No _____

Did Anyone Tell You What Your Discharge Would Automatically Be Upgraded To Within a Certain Period of Time? Yes _____ No_____

Details: _____

SERVICE RECORD

Place and Dates of Basic Training: _____

_____

AIT/Secondary/Post-Basic: _____

M.O.S. or AFSC or Rating? _____

Did You Work in It? Yes _____ No _____ If "No," Explain: _____

_____

While You Were in the Service, Did You Try to Be Discharged or Were You Considered for Discharge for Any of the Following Reasons?

Erroneous Enlistment/Induction _____; Minority (Under 19) _____;

Conscientious Objection_____; Hardship _____; Unsuitability ___;

Medical _____; Other _____

Explain the Claim and/or Recommendation(s) _____

_____

Was the Claim or Recommendation Written _____ Oral _____

To Whom Did You Submit the Claim ? Name _____;

Rank _____; Job _____; Date _____;

Place _____; Unit _____

Did You Ask for or Receive Legal Counsel? Yes _____ No _____

If "Yes," Give Details: _____

_____

What Happened to Your Claim/Recommendation? _____

_____

Were You Given Any Reasons? Yes _____ No _____

What Were They? _____

_____

Do You Believe You Were Denied Any of Your Rights in Your Attempt to Be Discharged? Yes _____ No _____ If "Yes," Explain:

_____

Do You or Relatives or Friends Have Any of the Paperwork Connected With the Discharge Request or Recommendations? Yes _____ No _____

If "Yes," Please List Who Has the Information, Where It Is, and What Was Kept; or Enclose Copies.

_____

_____

Did You Receive any Article 15s, Captain's Masts, Office Hours or Non-Judicial Punishment (NJP) During Your Term of Service?

Yes _____ No _____; If "Yes," How Many? _____

Give Details (Date, Charge, Punishment, Place);

_____

_____

Do You Believe You Were Denied Any of Your Rights (Article 31 warning; legal counsel by lawyer; right to refuse Article 15; enough time to consider your decision; right to appeal)?

Yes _____ No _____ Explain _____

_____

Did You Appeal Your Article 15(s)/Captain's Mast(s), etc.?

Yes _____ No _____

If "Yes," Result: _____

_____

Were You Ever Court-Martialed, but not Discharged as a Result?

Yes _____ No _____

If "Yes," Please Give Details (Date, Kind of Court-Martial--Summary, Special,General; Offenses; Plea--Guilty or Not Guilty; Findings; Punishment):

_____

_____

_____

Did You Have Counsel? Yes _____ No _____ If "Yes," Was (S)he a Lawyer _____ or a Non-Lawyer _____? Did You Get Along With Your Counsel? Yes _____ No _____ If "No," Explain: _____

Were You Sentenced to Confinement? Yes _____ No _____

Did You Actually Serve Time? Yes _____ No _____

Were You in Pre-Trial Confinement? Yes _____ No _____ If "Yes," How Long? _____

Did You See Your Counsel During Pre-Trial? Yes _____ No _____

How Many Times? _____

How Long Did the Visits Last? _____

Did Anyone Threaten You With or Promise You Anything at That Time? Yes _____ No _____ Details: _____

Do You Have a Transcript of the Court-Martial(s)? Yes ___ No ___

If "No," Explain: _____

Do You Have Any Other Discharges? Yes _____ No _____

What Kind? _____

Branch of Service _____ Dates of Service _____

Did You See Any Combat? Yes _____ No _____ Give Details: _____

Did You See a Psychiatrist While in the Service? Yes ___ No ___

If "Yes," Who, Where and for What Reason? _____

Did You Have Any Other Medical Problems While on Active Duty? Yes _____ No _____ If "Yes," Describe(effect on your duty performance, etc.): _____

At Which Military Hospitals Were You Treated and Give Dates?:

Did You Ever Have a Medical Profile? Yes _____ No _____

If "Yes," For What? _____

Do You Think There Is Any Reason You Should Have a Medical Discharge? Yes _____ No _____ If"Yes," Explain: _____

Do You Still Have These Problems? Yes _____ No _____

Have You Been Treated? Yes _____ No _____ If "Yes," By Whom and When? _____

Can You Think of Any Witness Who Could Help You Favorably Explain Your Version of Why You Got in Trouble in the Military? If So, List Their Names, Addresses or Anything You Know About Them, and What They Could Say: _____

Did You Have Any Other Problems While in the Military That Would Explain What Happened to You? Yes _____ No _____

If So, Explain _____

Did You Write Any Letters to Family or Friends That Might Contain Your Description of These Problems? Yes _____ No _____

If "Yes," Where Are They? _____

Did You Have a Drug or Alcohol Problem While in the Military?

Yes _____ No _____; If "Yes," Describe: (include any treatment or "amnesty" program in which you participated, or explain, if you were denied help, the extent of the problem; did it cause your discharge, etc.)

Did You Give Any Urine Samples That Detected Drug Use?

Yes _____ No _____ If "Yes," Give Details: _____

Did These Problems Continue After the Military? Yes ___ No ___

If "Yes," Have You Received Treatment? Yes ___ No ___

If "Yes," Describe: _____

Did You Have Any Family Problems While in the Military?

Yes _____ No _____ If "Yes," Describe: _____

APPEALS

(This section has to do with any applications you have made on your own to have your discharge changed. Any information you have in addition to what we ask here would be greated appreciated.)

Have You Ever Applied to Have Your Discharge Upgraded? Yes___ No___

If "Yes," Describe What Happened. _____

Do You Currently Have an Application Pending? Yes ____ No____

If So, When Did You File It? _____

Was It Filed With a Discharge Review Board? Yes ____ No____
or With a Board for Correction of Military Records? Yes____ No___

What Was the Result? _____

Did You Have a Hearing? Yes ____ No____

Did You Appear at the Hearing? Yes ____ No____

Did You Have Counsel? Yes ____ No____ If "Yes," Who or What Organization? _____

If "Yes," Did Your Counsel Submit a Written Brief? Yes ___ No___

If "Yes," Do You Have a Copy? Yes____ No____

Do You Have a Transcript of the Hearing? Yes ____ No ____

Have You Applied to the U.S. Department of Labor for an Exemplary Rehabilitation Certificate? Yes ____ No ____ If So, Did You Get It and When? _____

Did You Apply for a Clemency Discharge Under President Ford's Program for Vietnam Veterans (September 1974-February 1975)?

Yes_____ No_____ or to President Carter's Special Discharge Review Program (April 1977-October 1977)? Yes_____ No_____

If So, What Happened? _____

_____

PERSONAL INFORMATION

List Your Job, Dates of Employment, Employers, Their Addresses and Telephone Numbers Since Discharge:

_____

_____

List the Names and Addresses of People Who Will Attest to Your Good Character. List Their Relationship to You (e.g., uncle, employer, friend, minister).

_____

_____

Have You Had Difficulty in Getting a Job Because of Your Discharge? Yes No If So, Explain and List the

Companies or Agencies That Turned You Down and the Date:

_____

Does Your Discharge Keep You From Advancing in Your Current Job or Does It Keep You From Getting a Job for Which You Are Otherwise Qualified? Yes _____ No_____ Explain: _____

_____

POST-SERVICE ACTIVITIES

Any Additional Schooling or Training (School or program, degree or certificate)?:

_____

Any Arrests or Convictions Other Than Traffic Violations Since Discharge? Yes_____ No_____ If "Yes," Describe (charge, result, date): _____

_____

Any Activities, Awards, etc. That Would Reflect Favorably on Your Character? Describe: _____

_____

V.A. BENEFITS

Have You Ever Applied for V.A. Benefits? Yes____ No____

If "Yes," What Happened? _____

_____

If Denied, When? _____

Did You Appeal? Yes_____ No_____ Is Appeal Pending? Yes___No___

V.A. Claim Number _____

Did You Have V.A. Benefits Denied After an Upgrade by President Carter's Special Discharge Review Program (April-October 1977)?

Yes____ No____ Have You Applied for Unemployment Benefits After Discharge? Yes_____ No_____ If So, When and Where? _____

_____

What Were the Results? _____

_____

APPENDIX 6B
PERSONAL STATEMENT GUIDELINE

The personal statement you write will serve several purposes: (A) it will aid us in establishing the facts and background of your case; (B) it gives us something to go by when checking your military records; (C) it may be used as the basis of a personal statement that will be sent along with your application for discharge upgrade.

The statement should be as accurate as you can make it. It should progress from before you entered the military until the present. Be sure to indicate names of witnesses, dates, places where incidents occurred, conditions where you were discharged, reasons the military gave, etc. Remember, the statement is being written for your discharge review. *You are trying to establish your side of the story.*

BASIC OUTLINE FOR PERSONAL STATEMENT

1) Why you went into the service, your hopes, expectations, and motivations.

2) What was your military experience? How would you describe your performance of duty? Who were your military superiors and how did you get along with them? Did you encounter problems before those that led to your discharge? Talk about your entire military experience, from basic training on. Be sure to include any good things that happened to you or that you accomplished as well as problems that you had.

3) What were the conditions/incidents that led to your discharge? Be specific as to why the military gave you a less-than-honorable discharge. What exactly were you involved in that led to the discharge?

4) What were the procedures used by the military to give you the discharge? Did you see a lawyer or other counsel? Talk about everything that (s)he told you, what you asked him/her, what his/her responses were, etc. Did you have a discharge hearing by a board of officers? If so, what did you and your counsel say at the hearing? Did you have witnesses in your behalf? If not, why not? If you were court-martialed, what did your counsel say at the court-martial? Before sentence was pronounced, did he say anything about the good things you had done in the military? If you requested discharge for the good of the service, did your lawyer talk to you about defenses you might have had to the pending court-martial charges? Did (s)he tell you about how bad the effects of a less-than-honorable discharge could be in civilian life? Did anyone tell you a bad discharge would be easy to change later, or might change automatically after a period of time? Why did you sign a request for discharge or a paper saying you did not want a discharge hearing? Did your lawyer investigate your case, talk to witnesses, etc., or did it seem that (s)he was just interested in getting your case out of the way? (Include any similar pertinent information.)

5) What reasons do you have for believing that the type discharge you received was wrong (drug or alcohol problems, medical, conscientious objection, etc.)?

6) What have been the effects of your discharge? (no GI Bill, employment problems, family problems, etc.)

7) What do you expect to gain by having your discharge upgraded?

APPENDIX 6C
SAMPLE LETTER REQUESTING CHARACTER STATEMENT

TO WHOM IT MAY CONCERN:

This office is assisting the bearer of this letter, who is a veteran with a less than fully honorable discharge. We are seeking a better discharge for him/her. As part of the application process, it is important that statements be included from people who know the veteran. You are requested to make such a statement.

The statement should be sworn to before a notary public and typed if possible. If not, a non-sworn handwritten or typed statement will do. The form of the letter is up to you, but most counselors and attorneys agree that typed letters, especially on letterhead stationery, are most likely to be read, and letters one page long are more likely to be read than longer ones. The statement should be addressed "To Whom It May Concern" if it is not sworn to. You should identify yourself and state your relationship to the veteran. For example, "I was his/her employer from 'X' date to 'X' date."

A personal, detailed letter in your own words is more convincing than a general, impersonal one, or one which uses legal phrases taken from this memo or other counseling material. The statement should include comments as to the veteran's character, honesty, trustworthiness as a worker, his/her contributions to the community, and anything else you can say that is favorable.

All statements should, if the maker has the knowledge, include a description of the veteran's reputation in the local community for honesty, peacefulness — as a husband or wife and/or parent. If you are an employer or former employer, detail how the veteran progressed in his/her work or anything favorable about his/her desire to work, etc.

If you did not know of the veteran's problems before, please do not hold the discharge against him/her. Since 1942, there have been over 3,000,000 less than honorable discharges. Many of these were for unfair reasons and given pursuant to unfair procedures. The discharge almost always occurred when the veteran was very young.

If you have any questions, feel free to contact us.

Sincerely,

APPENDIX 6D
RETAINER/PRIVACY ACT WAIVER

POWER OF ATTORNEY AND RETAINER

I, _____,
(give name and address)

retain attorney(s) _____ to represent me and act as my chief counsel in any judicial, civil, or administrative proceedings relating to veterans benefits, my discharge from the armed forces, or any other matters that relate to my service in the armed forces.

I understand that no fee will be charged for any representation arising out of this agreement. Any court-awarded attorneys fees and costs will be disposed of as directed by aforementioned attorneys. I hereby authorize such awards to be made payable to these attorneys directly.

DELEGATION OF RESPONSIBILITIES TO LAW STUDENT

If my case involves proceedings before a Discharge Review Board, Board for Correction of Military Records or Veterans Administration, I authorize the aforementioned attorneys to assign my case to a law student working under their supervision for case preparation, including the review of all documents in any military, Veterans Administration or other public and private facility maintaining such records and for case presentation, including representation in any military or Veterans Administration proceeding or in any court in which an appropriate student practice rule is in effect.

PRIVACY ACT WAIVER

In order to waive my rights under the Privacy Act, 5 U.S.C. 552a(b), and under any other federal or state law or regulation which controls access to my records, I hereby give my prior written consent to the National Personnel Records Center (Military Personnel Records), St. Louis, Missouri; to the Veterans Administration; or any other public or private custodian of or agency that possesses or controls my military, veteran, medical, Discharge Review or Correction Board records and files, to disclose fully and promptly to aforementioned attorneys, their agents, any law students working under their supervision or to any other person associated with the [————], any and all records contained in my file which said attorneys, any law students working under their supervision or any other person associated with the [————] may request.

APPOINTMENT OF [————] AS COUNSEL

I, the above-named claimant, under the conditions of Section 3404, Title 38, U.S.C., hereby appoint the above-named attorneys as my attorneys to present and prosecute my claim for any and all benefits from the Veterans Administration, hereby ratify and confirm all that my said attorneys may or shall lawfully do or cause to be done by virtue thereof, and discharge any prior appointment of counsel that I may have executed for purposes of my veterans administration claim.

DATE: _____ SIGNATURE: _____

VA CLAIM NUMBER: _____ SSN: _____

APPENDIX 6E
SAMPLE FORMS

REQUEST PERTAINING TO MILITARY RECORDS

Please read instructions on the reverse. If more space is needed, use plain paper.

DATE OF REQUEST

PRIVACY ACT OF 1974 COMPLIANCE INFORMATION. The following information is provided in accordance with 5 U.S.C. 552a(e)(3) and applies to this form. Authority for collection of the information is 44 U.S.C. 2907, 3101, and 3103, and E.O. 9397 of November 22, 1943. Disclosure of the information is voluntary. The principal purpose of the information is to assist the facility servicing the records in locating and verifying the correctness of the requested records or information to answer your inquiry. Routine uses of the information as established and published in accordance with 5 U.S.C. 552a(e)(4)(D) include the transfer of relevant information to appropriate Federal, State, local, or foreign agencies for use in civil, criminal, or regulatory investigations or prosecution. In addition, this form will be filed with the appropriate military records and may be transferred along with the record to another agency in accordance with the routine uses established by the agency which maintains the record. If the requested information is not provided, it may not be possible to service your inquiry.

SECTION I—INFORMATION NEEDED TO LOCATE 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
Joe, Gerald Ivan	444-22-3333	6/8/49	Washington, D.C.

5. ACTIVE SERVICE, PAST AND PRESENT (For an effective records search, it is important that ALL service be shown below)

BRANCH OF SERVICE (Also, show last organization, if known)	DATES OF ACTIVE SERVICE: DATE ENTERED	DATES OF ACTIVE SERVICE: DATE RELEASED	Check one: OFFICER	Check one: ENLISTED	SERVICE NUMBER DURING THIS PERIOD
U.S. Army, CoB 142d Seg BN (AD) Ft. Hood, TX	22 June 66	16 May 68		XXX	RA 61616161

6. RESERVE SERVICE, PAST OR PRESENT — If "none," check here ▶ [X]

a. BRANCH OF SERVICE	b. DATES OF MEMBERSHIP: FROM	b. DATES OF MEMBERSHIP: TO	c. Check one: OFFICER	c. Check one: ENLISTED	d. SERVICE NUMBER DURING THIS PERIOD
			[ ]	[ ]	

7. NATIONAL GUARD MEMBERSHIP (Check one): [ ] a. ARMY [ ] b. AIR FORCE [ ] c. NONE

d. STATE	e. ORGANIZATION	f. DATES OF MEMBERSHIP: FROM	f. DATES OF MEMBERSHIP: TO	g. Check one: OFFICER	g. Check one: ENLISTED	h. SERVICE NUMBER DURING THIS PERIOD
				[ ]	[ ]	

8. IS SERVICE PERSON DECEASED — [ ] YES [X] NO — If "yes," enter date of death:

9. IS (WAS) INDIVIDUAL A MILITARY RETIREE OR FLEET RESERVIST — [ ] YES [ ] NO

SECTION II—REQUEST

1. EXPLAIN WHAT INFORMATION OR DOCUMENTS YOU NEED; OR, CHECK ITEM 2; OR, COMPLETE ITEM 3: COMPLETE SERVICE AND MEDICAL RECORDS

2. IF YOU ONLY NEED A STATEMENT OF SERVICE — check here [ ]

3. LOST SEPARATION DOCUMENT REPLACEMENT REQUEST (Complete a or b, and c)

a. REPORT OF SEPARATION (DD Form 214 or equivalent)	YEAR ISSUED	This contains information normally needed to determine eligibility for benefits. It may be furnished only to the veteran, the surviving next of kin, or to a representative with veteran's signed release (item 5 of this form).
[ ]		
b. DISCHARGE CERTIFICATE	YEAR ISSUED	This shows only the date and character of discharge. It is of little value in determining eligibility for benefits. It may be issued only to veterans discharged honorably or under honorable conditions, or, if deceased, to the surviving spouse.
[ ]		

c. EXPLAIN HOW SEPARATION DOCUMENT WAS LOST

4. EXPLAIN PURPOSE FOR WHICH INFORMATION OR DOCUMENTS ARE NEEDED

To review entire records to confirm accuracy of each under FOIA/Privacy Act; fee waiver: discharge review

6. REQUESTER

a. IDENTIFICATION (check appropriate box)

[ ] Same person identified in Section I [ ] Surviving spouse
[ ] Next of kin (relationship): _____
[X] Other (specify): Attorney/representative

b. SIGNATURE (see instructions 3 and 4 on reverse side)

5. RELEASE AUTHORIZATION, IF REQUIRED (Read instruction 3 on reverse side)

I hereby authorize release of the requested information/documents to the person indicated at right (item 7).

VETERAN SIGN HERE ▶ G. I. Joe

(If signed by other than veteran, show relationship to veteran:)

7. Please type or print clearly — COMPLETE RETURN ADDRESS

Name, number and street, city, State and ZIP code

TELEPHONE NO (Include area code) ▶

180-105

STANDARD FORM 180 (Rev. 5-78)
Prescribed by GSA, FPMR (41 CFR) 101-11.410-1

INSTRUCTIONS

1. Information needed to locate records. Certain identifying information is necessary to determine the location of an individual's record of military service. Please give careful consideration to and answer each item on this form. If you do not have and cannot obtain the information for an item, show "NA," meaning the information is "not available." Include as much of the requested information as you can. This will help us to give you the best possible service.

2. Charges for service. A nominal fee is charged for certain types of service. In most instances service fees cannot be determined in advance. If your request involves a service fee you will be notified as soon as that determination is made.

3. Restrictions on release of information. Information from records of military personnel is released subject to restrictions imposed by the military departments consistent with the provisions of the Freedom of Information Act of 1967 (as amended 1974) and the Privacy Act of 1974. A service person has access to almost any information contained in his own record. The next of kin *(see item 4 of instructions)* if the veteran is deceased and Federal officers for official purposes are authorized to receive information from a military service or medical record only as specified in the above cited Acts. Other requesters must have the release authorization, in item 5 of the form, signed by the veteran or, if deceased, by the next of kin. Employers and others needing proof of military services are expected to accept the information shown on documents issued by the Armed Forces at the time a service person is separated.

4. Precedence of next of kin. The order of precedence of the next of kin is: unremarried widow or widower, eldest son or daughter, father or mother, eldest brother or sister.

5. Location of military personnel records. The various categories of military personnel records are described in the chart below. For each category there is a code number which indicates the address at the bottom of the page to which this request should be sent. For each military service there is a note explaining approximately how long the records are held by the military service before they are transferred to the National Personnel Records Center, St. Louis. Please read these notes carefully and make sure you send your inquiry to the right address. *(If the person has two or more periods of service within the same branch, send your request to the office having the record for the last period of service.)*

6. Definitions for abbreviations used below:

NPRC—National Personnel Records Center PERS—Personnel Records
TDRL—Temporary Disability Retirement List MED—Medical Records

SERVICE	NOTE	CATEGORY OF RECORDS — WHERE TO WRITE ADDRESS CODE		▼
AIR FORCE (USAF)	*Air Force records are transferred to NPRC from Code 1, 90 days after separation and from Code 2, 30 days after separation.*	Active members (includes National Guard on active duty in the Air Force), TDRL, and general officers retired with pay.		1
		Reserve, retired reservist in nonpay status, current National Guard officers not on active duty in Air Force, and National Guard released from active duty in Air Force.		2
		Current National Guard enlisted not on active duty in Air Force.		13
		Discharged, deceased, and retired with pay (except general officers retired with pay).		14
COAST GUARD (USCG)	*Coast Guard officer and enlisted records are transferred to NPRC 3–6 months after separation*	Active, reserve, and TDRL members.		3
		Discharged, deceased, and retired members (*see next item*).		14
		Officers separated before 1/1/29 and enlisted personnel separated before 1/1/15.		6
MARINE CORPS (USMC)	*Marine Corps records are transferred to NPRC 4 months after separation*	Active and TDRL members, reserve officers, and Class II enlisted reserve.		4
		Class III reservists and Fleet Marine Corps Reserve members.		5
		Discharged, deceased, and retired members (*see next item*).		14
		Officers and enlisted personnel separated before 1/1/1896.		6
ARMY (USA)	*Army records are transferred to NPRC as soon as processed (about 30 days after separation)*	Reserve, living retired members, retired general officers, and active duty records of current National Guard members who performed service in the U.S. Army before 7/1/72.*		7
		Active officers (including National Guard on active duty in the U.S. Army).		8
		Active enlisted (including National Guard on active duty in the U.S. Army) and enlisted TDRL.		9
		Current National Guard officers not on active duty in the U.S. Army.		12
		Current National Guard enlisted not on active duty in the U.S. Army.		13
		Discharged and deceased members (*see next item*).		14
		Officers separated before 7/1/17 and enlisted separated before 11/1/12.		6
		Officers and warrant officers TDRL.		8
NAVY (USN)	*Navy records are transferred to NPRC 6 months after retirement or complete separation.*	Active members (including reservists on active duty)—PERS and MED		10
		Discharged, deceased, retired (with and without pay) less than six months, TDRL, drilling and nondrilling reservists	PERS only	10
			MED only	11
		Discharged, deceased, retired (with and without pay) more than six months (see next item)—PERS & MED		14
		Officers separated before 1/1/03 and enlisted separated before 1/1/1886—PERS and MED		6

* *Code 12 applies to active duty records of current National Guard officers who performed service in the U.S. Army after 6/30/72.*
Code 13 applies to active duty records of current National Guard enlisted members who performed service in the U.S. Army after 6/30/72.

ADDRESS LIST OF CUSTODIANS (BY CODE NUMBERS SHOWN ABOVE)—Where to write / send this form for each category of records

1 USAF Military Personnel Center
Military Personnel Records Division
Randolph AFB, TX 78148

2 Air Reserve Personnel Center
7300 East 1st Avenue
Denver, CO 80280

3 Commandant
U.S. Coast Guard
Washington, DC 20590

4 Commandant of the Marine Corps
Headquarters, U.S. Marine Corps
Washington, DC 20380

5 Marine Corps Reserve Forces
Administration Center
1500 E. Bannister Road
Kansas City, MO 64131

6 Military Archives Division
National Archives & Records Service
General Services Administration
Washington, DC 20408

7 Commander
U.S. Army Reserve Components
Personnel & Administration Center
9700 Page Boulevard
St. Louis, MO 63132

8 USA MILPERCEN
Attn: DAPC-PSR-R
200 Stovall Street
Alexandria, VA 22332

9 Commander
U.S. Army Enlisted Records and Evaluation Center
Ft. Benjamin Harrison, IN 46249

10 Chief of Naval Personnel
Department of the Navy
Washington, DC 20370

11 Naval Reserve
Personnel Center
New Orleans, LA 70146

12 Army National Guard Personnel Center
Columbia Pike Office Building
5600 Columbia Pike Boulevard
Falls Church, VA 22041

13 The Adjutant General
(of the appropriate State, DC, or Puerto Rico)

14 National Personnel Records Center
(Military Personnel Records)
9700 Page Boulevard
St. Louis, MO 63132

STANDARD FORM 180 BACK (Rev. 5-78)

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

OMB APPROVED 22-R-0014

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 10 U.S.C. 1553, Executive Order 9397, 22 Nov 43 (SSN)
PRINCIPAL PURPOSES: To apply for upgrading of type of discharge issued.
ROUTINE USES: Placed in applicant's file. Used in applicant's case in determining the relief sought. To compare facts presented with evidence in the record.
DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the Board.

SEE INSTRUCTIONS ON REVERSE BEFORE COMPLETING THIS FORM. TYPE OR PRINT.

BRANCH OF SERVICE

☒ ARMY ☐ NAVY ☐ MARINE CORPS ☐ COAST GUARD ☐ AIR FORCE

1. LAST NAME - FIRST NAME - MIDDLE INITIAL	2. SERVICE NO./SSN	3. SEPARATION RATE OR GRADE
Joe, Gerald Ivan	RA 61616161	PVT. (E-1)

4. SEPARATION UNIT AND LOCATION	5. NATURE OF DISMISSAL OR TYPE OF DISCHARGE RECEIVED	6. SEPARATION DATE
COB, 142d Seg. Bn (AD) Fort Hood, Texas	Undesirable	16 May 68

7. I REQUEST THE FOLLOWING CORRECTIVE ACTION BE TAKEN *(See instructions)*

☒ UPGRADE DISCHARGE TO: ☒ HONORABLE ☐ GENERAL ☐ CHANGE REENLISTMENT CODE *(Air Force Only)*
☒ CHANGE DISCHARGE REASON *(Explain)* Unsuitability ☐ OTHER *(Explain)*

8. REASON FOR REVIEW OF DISCHARGE *(State in your own words the reasons you feel your discharge should be changed - use additional sheets if necessary) (See instructions)*

See attached brief [or brief to follow].

9. SUPPORTING DOCUMENTS *(See instructions)*

See attachments A-J [or to follow].

10. PERSONAL APPEARANCE: ☒ I DESIRE TO APPEAR BEFORE THE BOARD *(No expense to the GOVERNMENT) (See instructions)*

☐ AT WASHINGTON, D.C. ☐ HEARING EXAMINER *(Army Only)* CLOSEST TO: _____ *(City and State)*
☒ BEFORE THE TRAVELING/REGIONAL BOARD CLOSEST TO Salt Lake City, Utah *(City and State)*
☐ I DO NOT DESIRE TO APPEAR BEFORE THE BOARD AND HAVE LEFT THE ABOVE BLANK. I DESIRE TO HAVE MY DISCHARGE REVIEWED BASED ON MY MILITARY RECORDS AND WHATEVER DOCUMENTATION I HAVE SUBMITTED.

11. REPRESENTATIVE:

☒ I DESIRE TO BE REPRESENTED BY, AND AUTHORIZE RELEASE OF MY RECORDS TO *(No expense to the GOVERNMENT) (See instructions)*

NAME: LSC Advocate

ADDRESS: *(Include ZIP Code)*
Central Legal Services
Somewhere, USA 00000

☐ I DO NOT DESIRE TO BE REPRESENTED AND HAVE LEFT THE ABOVE BLANK.

I make the foregoing statements as a part of my application with full knowledge of the penalties involved for willfully making a false statement. *(U.S. Code, Title 18, Section 1001, formerly Section 80, provides a penalty as follows: A maximum fine of $10,000 or maximum imprisonment of 5 years, or both.)*

STREET OR RFD	CITY, STATE AND ZIP CODE
4121 P Street, N.W.	Salt Lake City, Utah

(IF YOU MAKE A CHANGE IN RESIDENCE, NOTIFY THE APPROPRIATE BOARD IMMEDIATELY)

DATE	SIGNATURE OF APPLICANT
1 April 1981	Gerald I. Joe

NOTE: IF VETERAN IS DECEASED OR INCOMPETENT, the application may be signed by a person other than the one whose name appears in block 1 above, indicate status in box below. Legal proof of death or incompetency and satisfactory evidence of the relationship between the discharged person and the petitioner must accompany application.)

☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ SURVIVING SPOUSE

UPON COMPLETION, MAIL THIS APPLICATION AS FOLLOWS

ARMY	NAVY & MARINE CORPS	COAST GUARD	AIR FORCE
CO, USARCPAC 9700 Page Blvd St. Louis, MO 63132	Navy Discharge Review Board 801 No. Randolph St. Arlington, VA 22203	Commandant (CED) U.S. Coast Guard Headquarters Washington, DC 20591	National Personnel Records Center, GSA (Military Personnel Records) 9700 Page Blvd St. Louis, MO 63132

DD FORM 1 MAR 293 PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE AND WILL NOT BE ACCEPTED.

INSTRUCTIONS

Copy of Military Record. Should you desire to have copies of your records, you must submit a General Services Administration Standard Form 180 (GS SF 180) before you submit this form. Once this DD Form 293 is submitted, you records will be obtained by the Board. Official records and copies of records obtained by the Board will be available to applicants only at the hearing locations.

Item 1 thru 6. - *Self* Explanatory.

Item 7. Indicate the corrective action you are requesting. You must check at least one block and can check more blocks if desired. Due to certain limitations in the Board's authority, the Board cannot: (a) review discharges issued as a result of General Court-Martial *(Use DD Form 149)*; (b) review discharges issued more than fifteen years prior to the application *(DD Form 293)* submission date; (c) review a Release from Active Duty until a final discharge is issued; (d) change a reenlistment code *(except Air Force)*; (e) change the reason for a discharge from or to physical disability; or (f) determine eligibility for veteran's benefits.

Item 8. State here your reasons why you feel your discharge should be changed. Briefly summarize each of your contention *(reasons)* and/or issues of fact, law, or discretion that you want the Board to address and resolve. Additions or modifications may be made at any time up to the date of review of your case by the Board.

Item 9. Evidence not in your official records should be submitted to the Board before hearing date. Review Boards do not locate witnesses nor do they secure evidence for applicants. Legal briefs or counsel submissions should also be submitted in advance of hearing date. Documents that may be helpful are statements, affidavits, and depositions such as: character references; police clearances; educational achievement; exemplary post-service conduct; medical reports; employment record; verification of alcoholism or drug abuse; award of Department of Labor Exemplary Rehabilitation Certificate; explanation of disciplinary problem or discharge problem; brief of counsel arguing error or injustice. Witnesses may appear in person at no cost to the Government.

Item 10. If you state on your application that you will appear before the Board in person and fail to do so without previous satisfactory arrangements with the Board, such failure will be considered as a waiver of appearance and your case will be reviewed on the evidence contained in your military record.

AIR FORCE, NAVY, AND MARINE CORPS: The Discharge Review Boards meet daily in Washington, D.C., for personal appearance hearings and documentary reviews. If you request a review based on records only or a hearing in Washington, DC, your case will be scheduled there at the earliest date possible. Personal appearance hearings are also scheduled before the Traveling Boards in various cities throughout the 48 contiguous states as the population of requests on hand requires. If you ask for a hearing before the Traveling Board, it will be scheduled after your case is prepared and when the Traveling Board is next in your area. You will ordinarily not have to travel more than 300 miles for your hearing.

ARMY: Panels of the Review Board meet daily in Washington, DC and other locations and on an irregularly scheduled basis at major cities and other smaller metropolitan areas of the U.S. at least once each year. You may appear before the Board in Washington, DC, or in front of a Traveling Panel elsewhere in the U.S. or you may also appear in front of a Hearing Examiner who will video tape testimony for presentation to the Board in Washington, DC. For Hearing Examiners you must be accompanied by counsel or representative. Normally ex-Army members will not have to travel in excess of 200 miles if you are heard by a Traveling Panel or Hearing Examiner. Generally speaking, scheduled cases are heard as follows: (1) Personal Appearance, Washington, DC, within six months; (2) Personal Appearance by Traveling Panel or Hearing Examiner, within twelve months; (3) Representation by counsel or other person/organization only at Washington, DC, within three months; and (4) Without personal appearance or representation, review based on military records and documents submitted by applicant, within 30 days.

Block 11. The services do not provide counsel, representation, or evidence for applicant, nor do they defray cost of such under any circumstances. However, certain agencies recognized by the VA, some state, county, and city organizations, private organizations, and some schools of law do provide assistance in presenting your appeal. If you wish to be assisted, you are responsible for obtaining representation and may:

a. Obtain a lawyer at your own expense.

b. Contact an appropriate state, county, city, private or law school organization.

c. Obtain representation from any other agency or individual who is willing to assist you.

d. Select one of the following organizations which regularly furnish representation at no charge to you. Representatives may or may not be lawyers.

(1) American Red Cross
(2) American Legion
(3) Disabled American Veterans
(4) Jewish War Veterans of the U.S.A.
(5) Veterans of Foreign Wars

An appearance by your representative will not be scheduled in your absence unless your representative requests it. In this event, if a. or c. apply, power of attorney is mandatory.

DD Form 293 (Reverse)

INTAKE AND OBTAINING RECORDS

APPLICATION FOR CORRECTION OF MILITARY OR NAVAL RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SEC. 1552
(See instructions on reverse side BEFORE completing application.)

Form Approved
Budget Bureau No. 22-R0009

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: Title 10, U.S. Code 1552, Executive Order 9397, 22 Nov 43 (SSN)
PRINCIPAL PURPOSE: To apply for correction of a military or naval record.
ROUTINE USES: To docket a case. Reviewed by board members to determine relief sought. To determine qualification to apply to board. To compare facts present with evidence in the record.
DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the Board.

BRANCH OF SERVICE: [X] ARMY [ ] NAVY [ ] AIR FORCE [ ] MARINE CORPS [ ] COAST GUARD

1. NAME *(Last, first, middle initial) (Please print)*	2. PRESENT RATE, GRADE	3. SERVICE NUMBER	4. SOCIAL SECURITY NUMBER
Joe, Gerald Ivan	Civilian	RA 61616161	444-22-3333

5. TYPE OF DISCHARGE *(If by court-martial, state type of court.)*	6. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES *(Active duty, retired, Reserve, etc.)*	7. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY
Undesirable	None	11 May 68

8. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD	9. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. *(No expense to the Government)*
Co. B, 132 Sig. Bn (AD)	[XX] YES [ ] NO

10. NAME AND ADDRESS OF COUNSEL *(If any)*

11. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE:

Upgrade in discharge to Honorable.

12. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS:

The undesirable discharge was improper and inequitable for the reasons stated in the attached brief [or the brief to be submitted].

13. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: *(If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)*

Attached as Exhibits A-J [or to follow].

14. a. THE DATE OF THE DISCOVERY OF THE ALLEGED ERROR OR INJUSTICE WAS 16 May 68. b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IS IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION.

I was unaware of the BCMR until I lost at the DRB (1/16/80) which was in any event less than three years ago.

15. APPLICANT MUST SIGN IN THE SPACE PROVIDED. IF THE RECORD IN QUESTION IS THAT OF A PERSON WHO IS DECEASED OR INCOMPETENT, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY SPOUSE, WIDOW OR WIDOWER, NEXT OF KIN OR LEGAL REPRESENTATIVE, INDICATE RELATIONSHIP OR STATUS IN APPROPRIATE BOX. [ ] SPOUSE [ ] WIDOW [ ] WIDOWER [ ] NEXT OF KIN [ ] LEGAL REP. [ ] OTHER *(Specify)*_____

16. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILFULLY MAKING A FALSE STATEMENT OR CLAIM *(U.S. Code, Title 18, Sec. 287, 1001, provides a penalty of not more than $10,000 fine or not more than 5 years imprisonment or both.)*

17. COMPLETE ADDRESS, INCLUDING ZIP CODE *(Applicant should forward notification of all changes of address)*
4121 P Street, N.W., Washington, D.C. 20008

DOCUMENT NUMBER *(DO NOT WRITE IN THIS SPACE)*

18. DATE	19. SIGNATURE *(Applicant must sign here.)*
2 April 1981	G. J. Joe

DD, FORM 1 FEB 78 149 EDITION OF 1 APR 69 MAY BE USED.

INSTRUCTIONS

1. For detailed information see:

   Air Force Regulation 31-3

   Army Regulations 15-185

   Coast Guard, Code of Federal Regulations
   Title 33, Part 52

   Navy, NAVEXOS P-473, as revised

2. Submit original only of this form.

3. Complete all items. If the question is not applicable, mark—"None".

4. If space is insufficient, use "Remarks" or attach additional sheet if necessary.

5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.

6. List all attachments or inclosures.

7. ITEMS 9 and 10. Personal appearance of you and your witnesses or representation by counsel is not required to insure full and impartial consideration of applications. Appearances and representations are permitted, at no expense to the Government when a hearing is authorized.

8. ITEM 11. State the specific correction of record desired.

9. ITEM 12. In order to justify correction of a military or naval record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.

10. ITEM 14. 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY	NAVY AND MARINE CORPS	COAST GUARD	AIR FORCE
(For Active Duty Personnel) Army Board for Correction of Military Records Department of the Army Washington, D.C. 20310 *(For Other than Active Duty Personnel)* CO, USARCPAC 9700 Page Blvd St. Louis, MO. 63132	Board for Correction of Naval Records Department of the Navy Washington, D.C. 20370	U.S. Coast Guard ATTN: Senior Member Board for Correction of Coast Guard Records Washington, D.C. 2059[illegible]	USAFMPC/DPMDOAI Randolph AFB, Tex. 78148

REMARKS *(Applicant has exhausted all administrative channels in seeking this correction and has been counseled by a representative of his/her servicing military personnel office. (Applicable only to active duty and reserve personnel.))*

☆ U.S. Government Printing Office: 1980—311-645/1274

VETERANS ADMINISTRATION

APPOINTMENT OF ATTORNEY OR AGENT AS CLAIMANT'S REPRESENTATIVE

1. VA FILE NO(S). *(Include prefix)*

PRIVACY ACT NOTICE: The information requested on this form is solicited under Sections 3403 and 3404, Title 38, United States Code. It will provide necessary written authority for the designated individual to act as the claimant's attorney or agent for the preparation, presentation, and prosecution of a claim for VA benefits. Submission is voluntary but substitution of a power of attorney in different form would require individual legal determination as to sufficiency with resultant delay. The information may be disclosed outside the VA as permitted by law, or as stated in the "Notices of Systems of VA Records" which have been published in the Federal Register in accordance with the Privacy Act of 1974.

2. NAME OF CLAIMANT *(Veteran, guardian, beneficiary, dependent, or next of kin)*

3. ADDRESS OF CLAIMANT *(No. and street or rural route, city or P.O., State, and ZIP Code)*

4. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN

5. SERVICE NO(S).

6. BRANCH OF SERVICE

☐ ARMY ☐ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD ☐ OTHER *(Specify)*

7A. HAS CLAIMANT EVER FILED A CLAIM FOR DISABILITY INSURANCE BENEFITS?

☐ YES ☐ NO *(If "Yes," answer questions 7B, 7C and 7D.)*

7B. CLAIM FOR DISABILITY INSURANCE BENEFITS MADE UNDER

☐ NSLI ☐ USGLI ☐ BOTH USGLI AND NSLI

7C. POLICY NO(S). *(Include letter prefix)*

7D. GIVE LOCATION OF VA OFFICE WHERE CLAIM FOR DISABILITY INSURANCE BENEFITS HAS BEEN FILED

8. NAME OF PERSON DESIGNATED AS *(Check appropriate box)*

☐ ATTORNEY ☐ AGENT

9. ADDRESS OF PERSON DESIGNATED AS ATTORNEY OR AGENT *(No. and street or rural route, city or P.O., State, and ZIP Code)*

I, the above-named claimant, under the conditions of Section 3404, Title 38, U.S.C. hereby appoint the above-named person, shown in Item 8, as my attorney to present and prosecute my claim for any and all benefits from the Veterans Administration based on the service of the above-named veteran, hereby ratifying and confirming all that my said attorney may or shall lawfully do or cause to be done by virtue hereof.

It is understood and agreed that no fee or compensation shall be charged or received for services rendered under this power of attorney unless approved and paid by the Veterans Administration pursuant to Section 3404, Title 38, U.S.C. A fee of ten dollars ($10) in an original claim for monetary benefits under the statutes administered by the Veterans Administration and a fee of two dollars ($2) in a claim for increase for such benefits will be payable to the recognized agent or attorney of record in an allowed claim. Exceptions: No fee may be charged or collected by a person recognized only for a particular claim, nor by anyone in an accrued or burial claim. Executed and accepted subject to the foregoing conditions.

10. DATE OF SIGNATURE OF PERSON DESIGNATED AS ATTORNEY OR AGENT

11. SIGNATURE OF PERSON DESIGNATED AS ATTORNEY OR AGENT

12. DATE OF SIGNATURE OF CLAIMANT

13. RELATIONSHIP *(If other than veteran)*

14. SIGNATURE OF CLAIMANT

STATE _____

SS

COUNTY _____

I, the undersigned officer, do hereby certify that the above-named claimant, party to the foregoing power of attorney, personally appeared before me in my county and State aforesaid, and then and there executed and acknowledged the same to be (his) (her) voluntary act and deed.

15. DATE OF SIGNATURE OF OFFICER

16. SIGNATURE OF OFFICER

17. ADDRESS OF OFFICER

18. TITLE OF OFFICER

VA FORM JAN 1976 **2-22a** EXISTING STOCKS OF VA FORM 2-22A, AUG 1968, WILL BE USED. 551222

Form approved
Budget Bureau No. 76-R0138

REQUEST FOR AND CONSENT TO RELEASE OF INFORMATION FROM CLAIMANT'S RECORDS

NOTE —The execution of this form does not authorize the release of information other than that specifically enumerated herein.

TO	Veterans Administration, Washington D.C. Regional Office	NAME OF VETERAN (Type or print) Joe, Gerald Ivan	
		CLAIM NO. c 16 1793	SOCIAL SECURITY NO. 444-22-3333

NAME AND ADDRESS OF ORGANIZATION, AGENCY, OR INDIVIDUAL TO WHOM INFORMATION IS TO BE RELEASED

VETERAN'S REQUEST

I hereby request and authorize the Veterans Administration to release the following information, from the records identified above, to the organization, agency, or individual named hereon:

INFORMATION REQUESTED (*Number each item requested and give the dates or approximate dates—period (from and to) covered by each.*)

Complete OMPF in custody of VA to specifically include medical records; VA claim file.

PURPOSES FOR WHICH THE INFORMATION IS TO BE USED

To be used to pursue claim for discharge upgrade.

NOTE —Additional items of information desired may be listed on the reverse hereof.

DATE	SIGNATURE AND ADDRESS OF CLAIMANT, OR FIDUCIARY IF CLAIMANT IS INCOMPETENT
1 April 1981	G. J. Joe 4121 P Street, N.W. Washington, D.C. 20008

VA FORM NOV 1970 07-3288 Existing stocks of VA Form 07-3288, Apr 1965, will be used.

AUTHORIZATION FOR RELEASE OF MILITARY MEDICAL PATIENT RECORDS

The National Personnel Records Center, General Services Administration, is hereby authorized to release copies of my military medical treatment records as described below to LSC Advocate
(Name of person authorized to receive records) at: _____
(Name and address of facility to receive records)

Place where treatment occurred: Ft. Hood, Texas

Approximate period of treatment: January - May 1968

Specific type of treatment involved: Drug treatment program

Purpose for which records are needed: To assist in discharge review

1 April 1981
(Date)

G. J. Joe
(Signature of individual whose records are requested.)

VETERANS ADMINISTRATION

VETERAN'S APPLICATION FOR COMPENSATION OR PENSION

(DO NOT WRITE IN THIS SPACE) VA DATE STAMP

IMPORTANT: Read attached General Specific Instructions before completing this form. Type, print or write plainly.

1A. FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN	1B. TELEPHONE NO. *(Incl. Area Code)*
2. MAILING ADDRESS OF VETERAN *(Number and street or rural route, city or P.O., State and ZIP Code)*	3A. VETERAN'S SOC. SECURITY NO.
	3B. SPOUSE'S SOC. SECURITY NO.

4. DATE OF BIRTH	5. PLACE OF BIRTH	6. SEX	7. RAILROAD RETIREMENT NO.

8. HAVE YOU EVER FILED A CLAIM FOR COMPENSATION FROM THE OFFICE OF WORKERS' COMPENSATION PROGRAMS? *(Formerly the U.S. Bureau of Employees Compensation)*

☐ YES ☐ NO

9A. VA FILE NUMBER

C-

9B. HAVE YOU PREVIOUSLY FILED A CLAIM FOR ANY BENEFIT WITH THE VETERANS ADMINISTRATION?

☐ NONE
☐ HOSPITALIZATION OR MEDICAL CARE
☐ WAIVER OF NSLI PREMIUMS
☐ DISABILITY COMPENSATION OR PENSION
☐ VOCATIONAL REHABILITATION *(Chapter 31)*
☐ VETERANS EDUCATIONAL ASSISTANCE *(Chapter 33 or 34)*
☐ WAR ORPHANS OR DEPENDENTS EDUCATIONAL ASSIST. *(Chap. 35)*
☐ DENTAL OR OUTPATIENT TREATMENT
☐ OTHER *(Specify)*

9C. VA OFFICE HAVING YOUR RECORDS *(If known)*

SERVICE INFORMATION

NOTE: Enter complete information for each period of active duty including Reservist or National Guard status. Attach Form DD 214 or other separation papers for all periods of active duty to expedite processing of your claim. If you do NOT have your DD 214 or other separation papers check (√) here ☐

10A. ENTERED ACTIVE SERVICE		10B. SERVICE NO.	10C. SEPARATED FROM ACTIVE SERVICE		10D. GRADE, RANK OR RATING, ORGANIZATION AND BRANCH OF SERVICE
DATE	PLACE		DATE	PLACE	

10E. HAVE YOU EVER BEEN A PRISONER OF WAR?	10F. NAME OF COUNTRY	10G. DATES OF CONFINEMENT
☐ YES ☐ NO *(If "Yes," complete Items 10F and 10G)*		

11. IF YOU SERVED UNDER ANOTHER NAME, GIVE NAME AND PERIOD DURING WHICH YOU SERVED AND SERVICE NO.	12. IF RESERVIST OR NATIONAL GUARDSMAN, GIVE BRANCH OF SERVICE AND PERIOD OF ACTIVE OR INACTIVE TRAINING DUTY DURING WHICH DISABILITY OCCURRED

13A. ARE YOU NOW A MEMBER OF THE RESERVE FORCES OF THE ARMY, NAVY, AIR FORCE, MARINE CORPS, COAST GUARD OR NATIONAL GUARD?	13B. BRANCH OF SERVICE	13C. RESERVE STATUS
☐ YES ☐ NO		☐ ACTIVE ☐ INACTIVE ☐ RESERVE OBLIGATION

14A. ARE YOU NOW RECEIVING OR WILL YOU RECEIVE RETIREMENT OR RETAINER PAY FROM THE ARMED FORCES?	14B. BRANCH OF SERVICE	14C. MONTHLY AMOUNT	14D. RETIRED STATUS
☐ YES ☐ NO *(If "Yes," complete Item 14B, 14C, and 14D)*		$	☐ PERMANENT ☐ TEMPORARY DISABILITY RETIRED LIST

15A. HAVE YOU EVER APPLIED FOR OR RECEIVED DISABILITY SEVERANCE PAY FROM THE ARMED FORCES?	15B. AMOUNT	16A. HAVE YOU RECEIVED LUMP SUM READJUSTMENT PAY FROM THE ARMED FORCES?	16B. AMOUNT
☐ YES ☐ NO *(If "Yes," complete Item 15B)*	$	☐ YES ☐ NO *(If "Yes," complete Item 16B)*	$

MARITAL AND DEPENDENCY INFORMATION

17A. MARITAL STATUS *(Check one)*	17B. NUMBER OF TIMES YOU HAVE BEEN MARRIED	17C. NUMBER OF TIMES YOUR PRESENT SPOUSE HAS BEEN MARRIED	17D. IS YOUR SPOUSE ALSO A VETERAN?
☐ NEVER MARRIED *(If so, do not complete Items 17B through 21D)* ☐ MARRIED ☐ WIDOWED ☐ DIVORCED			☐ YES ☐ NO *(If "Yes," complete Item 17E if known)*
			17E. SPOUSE'S VA FILE NUMBER C-

18A. DO YOU LIVE TOGETHER?	18B. REASON FOR SEPARATION	18C. AMOUNT YOU CONTRIBUTE TO YOUR SPOUSE'S SUPPORT MONTHLY	18D. PRESENT ADDRESS OF SPOUSE
☐ YES ☐ NO *(If "No," complete Items 18B through 18D)*		$	

19. CHECK (√) WHETHER YOUR CURRENT MARRIAGE WAS PERFORMED BY:

☐ CLERGYMAN OR AUTHORIZED PUBLIC OFFICIAL ☐ OTHER *(Explain)*

VA FORM **21-526**

(A new VA Form 21-526, which appeared while this manual was in production, supercedes this form. Instructions on right to personal hearings are added to the new form.)

NOTE - Furnish the following information about each of your marriages. A certified copy of the public or church record of your CURRENT marriage is required if you or your spouse had a prior marriage.

20A. DATE AND PLACE OF MARRIAGE	20B. TO WHOM MARRIED	20C. TERMINATED *(Death, Divorce)*	20D. DATE AND PLACE TERMINATED

FURNISH THE FOLLOWING INFORMATION ABOUT EACH PREVIOUS MARRIAGE OF YOUR PRESENT SPOUSE

21A. DATE AND PLACE OF MARRIAGE	21B. TO WHOM MARRIED	21C. TERMINATED *(Death, divorce)*	21D. DATE AND PLACE TERMINATED

IDENTIFICATION OF CHILDREN AND INFORMATION RELATIVE TO CUSTODY

NOTE: Furnish the following information for each of your unmarried children. A certified copy of the public or church record of birth or court record of adoption is required if the child is adopted, a stepchild, or illegitimate child.

22A. NAME OF CHILD *(First, middle initial, last)*	22B. DATE OF BIRTH *(Month, day, year)*	22C. SOCIAL SECURITY NUMBER OF CHILD	22D. CHECK EACH APPLICABLE CATEGORY				
			MARRIED PREVIOUSLY	STEPCHILD OR ADOPTED	ILLEGITIMATE	OVER 18 ATTENDING SCHOOL	SERIOUSLY DISABLED

22E. NAME AND ADDRESS(ES) OF PERSON(S) HAVING CUSTODY OF CHILD(REN), IF OTHER THAN VETERAN.

23A. IS YOUR FATHER DEPENDENT UPON YOU FOR SUPPORT? ☐ YES ☐ NO *(If "Yes," complete 23B)*	23B. NAME AND ADDRESS OF DEPENDENT FATHER	23C. IS YOUR MOTHER DEPENDENT UPON YOU FOR SUPPORT? ☐ YES ☐ NO *(If "Yes," complete 23D)*

23D. NAME AND ADDRESS OF DEPENDENT MOTHER	23E. NAME AND ADDRESS OF NEAREST RELATIVE	23F. RELATIONSHIP OF NEAREST RELATIVE

NATURE AND HISTORY OF DISABILITIES

24. NATURE OF SICKNESS, DISEASE OR INJURIES FOR WHICH THIS CLAIM IS MADE AND DATE EACH BEGAN

25A. ARE YOU NOW OR HAVE YOU BEEN HOSPITALIZED OR FURNISHED DOMICILIARY CARE WITHIN THE PAST 3 MONTHS? ☐ YES ☐ NO *(If Yes," complete 25B and 25C)*	25B. DATES OF HOSPITALIZATION OR DOMICILIARY CARE	25C. NAME AND ADDRESS OF INSTITUTION

NOTE: Items 26, 27, and 28 need NOT be completed unless you are now claiming compensation for a disability incurred in service.

IF YOU RECEIVED ANY TREATMENT WHILE IN SERVICE, COMPLETE THE FOLLOWING INFORMATION

26A. NATURE OF SICKNESS, DISEASE OR INJURY	26B. DATES OF TREATMENT	26C. NAME, NUMBER OR LOCATION OF HOSPITAL, FIRST-AID STATION, DRESSING STATION, OR INFIRMARY	26D. ORGANIZATION AT TIME SICKNESS, DISEASE, OR INJURY WAS INCURRED

LIST CIVILIAN PHYSICIANS AND HOSPITALS WHERE YOU WERE TREATED FOR ANY SICKNESS, INJURY OR DISEASE SHOWN IN ITEM 26A ABOVE BEFORE, DURING, OR SINCE YOUR SERVICE, AND ANY (MILITARY) HOSPITALS SINCE YOUR LAST DISCHARGE.

27A. NAME	27B. PRESENT ADDRESS	27C. DISABILITY	27D. DATE

LIST PERSONS OTHER THAN PHYSICIANS WHO KNOW ANY FACTS ABOUT ANY SICKNESS, DISEASE OR INJURY SHOWN IN ITEM 26A ABOVE WHICH YOU HAD BEFORE, DURING, OR SINCE YOUR SERVICE.

28A. NAME	28B. PRESENT ADDRESS	28C. DISABILITY	28D. DATE

IF YOU CLAIM TO BE TOTALLY DISABLED *(Complete Items 29A through 32E)*

29A. ARE YOU NOW EMPLOYED?	29B. DATE YOU LAST WORKED	29C. IF YOU WERE SELF-EMPLOYED BEFORE BECOMING TOTALLY DISABLED, WHAT PART OF THE WORK DID YOU DO.	
29D. IF YOU ARE STILL SELF-EMPLOYED WHAT PART OF THE WORK DO YOU DO NOW?		29E. WHAT IS THE MOST YOU EVER EARNED IN ANY ONE YEAR?	29F. WHAT YEAR?

30A. EDUCATION *(Circle highest year completed)*	30B. NATURE OF AND TIME SPENT IN OTHER EDUCATION AND TRAINING
1 2 3 4 5 6 7 8 (GRADE SCHOOL) 1 2 3 4 (HIGH SCHOOL) 1 2 3 4 (COLLEGE)	

LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, FOR 1 YEAR BEFORE YOU BECAME TOTALLY DISABLED

31A. NAME AND ADDRESS OF EMPLOYER	31B. KIND OF WORK	31C. MONTHS WORKED	31D. TIME LOST FROM ILLNESS	31E. TOTAL EARNINGS

LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, SINCE YOU BECAME TOTALLY DISABLED

32A. NAME AND ADDRESS OF EMPLOYER	32B. KIND OF WORK	32C. MONTHS WORKED	32D. TIME LOST FROM ILLNESS	32E. TOTAL EARNINGS

NET WORTH OF VETERAN AND DEPENDENTS *(See attached Instructions for Items 33A to 33E inclusive)*

NOTE: Items 33A through 33E should be completed ONLY if you are applying for nonservice-connected pension

ITEM NO.	SOURCE	VETERAN	SPOUSE	NAME OF CHILD(REN)		
33A.	STOCKS, BONDS, BANK DEPOSITS	$	$	$	$	$
33B.	REAL ESTATE *(Do Not include residence)*					
33C.	OTHER PROPERTY					
33D.	TOTAL DEBTS					
33E.	NET WORTH	$	$	$	$	$

INCOME RECEIVED AND EXPECTED FROM ALL SOURCES

NOTE - Items 34A through 38F should be completed ONLY if you are applying for nonservice - connected pension.

34A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANY BENEFITS FROM THE SOCIAL SECURITY ADMINISTRATION (OTHER THAN SSI) OR RAILROAD RETIREMENT BOARD? ☐ YES ☐ NO *(If "YES," complete Items 34B through 34F, as applicable)*	34B. MONTHLY AMOUNT *(Include Medicare Deduction)*	34C. BEGINNING DATE	34D. DATE YOU EXPECT BENEFITS TO BEGIN
	VETERAN $		
	SPOUSE $		
	34E. WILL YOU OR YOUR SPOUSE APPLY FOR EITHER BENEFIT DURING THE NEXT 12 MONTHS ☐ YES ☐ NO	34F. DATE OF INTENTION TO APPLY VETERAN	SPOUSE

35A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANNUITY OR RETIREMENT BENEFITS OR ENDOWMENT INSURANCE FROM ANY OTHER SOURCE?

☐ YES ☐ NO *(If "YES," complete Items 35B through 35E, as applicable)*

	35B. MONTHLY AMOUNT	35C. BEGINNING DATE	35D. DATE OF INTENTION TO APPLY	35E. SOURCE OF BENEFIT
VETERAN	$			
SPOUSE	$			

SOURCE OF YETERAN AND DEPENDENTS INCOME *(Specify source for Items 36F, 37F and 38F. "ALL OTHER INCOME" in Item 39, "REMARKS")*		AMOUNT OF INCOME				
		VETERAN	SPOUSE	NAME OF CHILD/REN		
36. AMOUNT RECEIVED FROM JAN 1 TO DATE YOU SIGN THIS STATEMENT	A. EARNINGS	$	$	$	$	$
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					
37. AMOUNT EXPECTED FROM DATE YOU SIGN THIS STATEMENT TO END OF THIS CALENDAR YEAR	A. EARNINGS					
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					
38. AMOUNT EXPECTED FOR THE NEXT CALENDAR YEAR	A. EARNINGS					
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					

39. REMARKS *(Identify your statements by their applicable Item number. If additional space is required, attach separate sheet and identify your statements by their item numbers)*

NOTE - Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation or pension to which you may be entitled.

CERTIFICATION AND AUTHORIZATION FOR RELEASE OR INFORMATION - I certify that the foregoing statements are true and complete to the best of my knowledge and belief. I CONSENT that any physician, surgeon, dentist or hospital that has treated or examined me for any purpose, or that I have consulted professionally, may furnish to the Veterans Administration any information about myself, and I waive any privilege which renders such information confidential.

40. DATE SIGNED	41. SIGNATURE OF CLAIMANT
	SIGN HERE

WITNESSES TO SIGNATURES OF CLAIMANT IF MADE BY "X" MARK

Note - Signature made by mark must be witnessed by two persons to whom the person making the statement is personally known, and the signatures and addresses of such witnesses must be shown below

42A. SIGNATURE OF WITNESS	43A. SIGNATURE OF WITNESS
42B. ADDRESS OF WITNESS	43B. ADDRESS OF WITNESS

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false, or for the fraudulent acceptance of any payment to which you are not entitled.

INSTRUCTIONS FOR COMPLETING APPLICATION FOR COMPENSATION OR PENSION

PRIVACY ACT INFORMATION - No allowance of compensation or pension may be granted unless this form is completed fully as required by existing law (38 U.S.C. Chapters 11 and 15). The information requested by this form is considered relevant and necessary to determine maximum benefits provided under law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.
Disclosure of Social Security number(s) of those for whom benefits are claimed is requested under the authority of Title 38 U.S.C. and is mandatory as a condition to receipt of pension (38 C.F.R. 1.575). Social Security numbers will be used in the administration of veterans' benefits, in the identification of veterans or persons claiming or receiving Veterans Administration benefits and their records and may be used to verify Social Security benefit entitlement (including amounts payable) with the Social Security Administration and, for other purposes where authorized by both Title 38, U.S.C. and the Privacy Act of 1974 (5 U.S.C. 552a) or, where required by another statute.

NOTE: PLEASE READ VERY CAREFULLY

A. GENERAL INSTRUCTIONS
DISABILITY COMPENSATION is paid for disability resulting from service in the armed forces. An additional amount of compensation may be payable for a spouse, child, and/or dependent parent when a veteran is entitled to compensation based on disability(ies) evaluated as 30 percent or more disabling. The additional benefit for a spouse is payable in a higher amount when he/she is a patient in a nursing home or is so disabled as to require the regular aid and attendance of another person.

DISABILITY PENSION is paid for permanent and total disability not resulting from service in the armed forces. If the veteran is 65 years of age or older and is not substantially gainfully employed, permanent and total disability is presumed. Pension is paid only to veterans of wartime service, or, of service on or after June 27, 1950 and prior to February 1, 1955, or, during the period between August 5, 1964, and May 7, 1975. Additional amounts of pension may be paid for a spouse and/or child(ren).

If you need information about the meaning of any question, contact your nearest Veterans Administration Regional Office. If additional space is needed for any item, use Item 39,"Remarks," page 4 or number a separate sheet of paper to correspond to the items you are answering and attach the sheet to the application.

B. REPRESENTATION. You may be represented, without charge, by an accredited representative of a veterans organization or other service organization, recognized by the Administrator of Veterans Affairs, or you may employ an attorney to assist you with your claim. Typical examples of counsel who may be available include attorneys in private practice or legal aid services. The services of a recognized attorney are subject to a maximum fee limitation of $10, set forth in 38 U.S.C. 3404(C). If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action is required on your part.

C. EVIDENCE - GENERAL
If you have not previously filed claim, attach a photostatic or certified true copy of all separation forms or discharges you received from the armed forces. If you are a pension applicant, 65 years of age or older, no medical evidence is necessary. If you are under age 65, or if you claim additional pension because of the need for regular aid and attendance (unless you are a patient in a nursing home), or, because you are housebound, a medical statement should accompany your application. If you are a patient in a nursing home include a statement to that effect in Item 39, "Remarks".

D. REPORTING NET WORTH FOR PENSION FOR DISABILITY NOT RESULTING FROM SERVICE
NET WORTH - Pension cannot be paid if net worth is sizeable. Net worth is the market value of all interest or rights in any kind of property except ordinary personal effects necessary for daily living such as automobile, clothing or furniture and the dwelling (single family unit) used as your principal residence. Therefore, all other assets must be reported so that we may determine whether net worth prevents you from receiving pension benefits.

E. INCOME LIMITS AND RATES OF PENSION. The rate of pension paid to a veteran depends upon the amount of family income and the number of dependents, according to a formula provided by law. Because benefit rates and income limits are frequently changed, it is not feasible to keep such information current in these instructions. Information regarding current income limitations and rates of benefits may be obtained by contacting your nearest VA office.

(1) A higher rate of pension is payable to a veteran who is a patient in a nursing home or otherwise determined to be in need of regular aid and attendance or who is permanently housebound due to disability.
(2) Pension rates are also increased for a veteran who served during the Mexican Border Period or World War I.

IMPORTANT

THERE ARE CERTAIN TYPES OF INCOME WHICH MAY BE EXCLUDED IN DETERMINING THE INCOME COUNTABLE FOR VA PURPOSES. HOWEVER, YOU MUST REPORT THE SOURCES AND AMOUNTS OF ALL INCOME BEFORE DEDUCTIONS FOR YOURSELF, SPOUSE, AND DEPENDENT CHILDREN. WE WILL DETERMINE ANY AMOUNT WHICH DOES NOT COUNT. INCLUDE ALL SEVERANCE PAY OR OTHER ACCRUED PAYMENTS OF ANY KIND OR FROM ANY SOURCE. WHEN NO INCOME IS RECEIVED OR EXPECTED FROM A SPECIFIED SOURCE, WRITE "NONE" IN THE APPROPRIATE BLOCK (ITEMS 36A THROUGH 38F). IF INCOME FROM ANY SOURCE IS ANTICIPATED BUT THE AMOUNT IS NOT YET DETERMINED WRITE "UNKNOWN" IN THE APPROPRIATE BLOCK. ATTACH SEPARATE SHEETS IF ADDITIONAL SPACE IS NEEDED.

F. FAMILY UNUSUAL MEDICAL EXPENSES are amounts actually paid by you during the calendar year for unusual medical expenses for which you are not reimbursed by insurance or otherwise. You should report the total unreimbursed amount you paid for medical expenses for yourself or for relatives you are under an obligation to support. You may include premiums paid for health, sickness or hospitalization insurance. In computing your income for pension purposes, the VA will deduct the amount you paid for medical expenses if they qualify for exclusion under the formula provided by law.

G. LAST ILLNESS AND BURIAL EXPENSES
Your countable income may be reduced by the amount of expenses of the last illness and burial of a spouse or child paid by you at any time prior to the end of the year following the year of death for which you were not reimbursed. Use Item 39, "Remarks", to report such expenses.

H. EDUCATIONAL OR VOCATIONAL REHABILITATION EXPENSES are amounts paid for courses of education, including tuition, fees, and materials and may be deducted from the respective incomes of a veteran and the earned income of a child if the child is pursuing a course of postsecondary education or vocational rehabilitation or training. If you or your school child(ren) paid these expenses, report the total amounts paid, dates of payment, and state to whom the expenses apply.

SPECIFIC INSTRUCTIONS

IMPORTANT: These instructions are numbered to correspond with the items on the application. If additional space is required, attach a separate sheet and identify your statements by their item numbers.

ITEMS 3A and 3B - The number entered in 3A, Veteran's Social Security Number, should be your own social security number. In Item 3B enter your spouse's social security number. These social security numbers are necessary for identification purposes.

ITEMS 14A and 14D inclusive - Retired Pay - A veteran may not receive full service retired pay and VA compensation or pension at the same time. In the absence of a request to the contrary, filing of this application will constitute an election to receive VA compensation or pension in lieu of the total amount of retired pay, or a waiver of that portion of retired pay equal in amount to the VA compensation or pension. No special action will be required of you, as we will notify the retired pay division of your waiver if entitlement to VA benefits is established.

ITEMS 15A and 15B - Disability Severance Pay - The full amount of disability severance pay received for the disability or disabilities for which VA compensation is payable will be recouped from that benefit.

ITEMS 16A and 16B - Lump Sum Readjustment Pay - Recoupment of 75 percent of readjustment pay you received will be made from any VA compensation payable.

ITEMS 17A to 21D inclusive - Marital Information - Complete information concerning all marriages entered into by either you or your spouse and the termination of such marriages must be furnished. Specific details as to the date, place and manner of dissolution of marriage must be included. If your spouse is also a veteran, include his/her VA file number (if known) in Item 17E.

ITEMS 31C and 32C - Months Worked - The time actually worked should be stated. For example: If you worked full time for 2, 4, 6, 8 or 10 months, you should so state. If you did not work full time each month you should state the months or parts of months you actually worked. For example: 2 months, 1 week, 2 days.

ITEM 33A - Include market value of stocks, checking accounts, bank deposits, savings accounts and cash. If such assets are held jointly by you and your spouse, one half of the total value of these holdings should be reported for each of you.

ITEM 33B - Do not include the value of the single dwelling unit or that portion of real property used solely as your principal residence. On all other real estate reduce the market value by amount of the indebtedness thereon and further report only one-half of the net value when the real estate is held jointly between husband and wife.

ITEM 33C - Report the total market value of your rights and interest in all other property not included in Items 33A and 33B. Do not include value of ordinary personal effects necessary for your daily living such as an automobile, clothing and furniture. Include gifts, bequests and inheritances of all property other than cash.

ITEM 33D - Report all debts except mortgage(s) on real estate.

ITEM 33E - Report the total of Items 33A through 33C less 33D. This should be your NET WORTH.

ITEMS 34A to 35E - If you or your spouse have applied for social security, unemployment or workmen's compensation or any disability benefit, show the expected payment in the appropriate column. If the amount or date of payment is not yet determined, enter the word "unknown."

ITEMS 36, 37 and 38 inclusive - You should report under these items your expected total income for the periods covered. You must report total income of yourself and your dependents from all sources. When reporting income, report the total amount to which you are entitled before any deductions, not the amount you actually receive. Include as income all amounts received or expected as severance pay or accrued payments of any kind or from any source. If you and your spouse receive income from dividends, interest, rents, investments or operation of a business, profession or farm, which you own jointly, report one-half of the income as yours and one-half as your spouse's. Report Social Security Benefits (Green Check) on Line B, and Supplemental Security Income (SSI) benefits (Gold Check) on Line E.

CASE PROCESSING CHECKLIST

INITIAL CONSULTATION: ___/___/___ INTERVIEWER: _____

APPLICANT: _____ SERVICE BRANCH _____

Address: _____

Telephone: (Home) _____ (Work) _____

Social Security No.: _____ Service No.: _____

Date of Birth: _____ Place of Birth: _____

Dates of Service: ___/___/___ TO ___/___/___

Referred by: _____

Friend/Relative/Contact:

Name: _____

Address: _____

Phone: _____

DISCHARGE

Type: _____

Reason: _____

Regulatory Authority: _____

STATUTE OF LIMITATIONS

DRB (15 years from Date of Discharge): ___/___/___

Federal Court for Money Judgment
(6 years from Date of Discharge) : ___/___/___

FORMS	SENT TO CLIENT	RETURNED (SIGNED)	FILED
Questionnaire & Retainer	/ /	/ /	/ /
SF 180	/ /	/ /	/ /
DD 293	/ /	/ /	/ /
DD 149	/ /	/ /	/ /
VA Form 07-3288	/ /	/ /	/ /
VA Form 2-22a	/ /	/ /	/ /
VA Form 21-526 Medical Release	/ /	/ /	/ /
Other:	/ /	/ /	/ /
RECORDS RECEIVED			
National Personnel Records Center (NPRC)	/ /	/ /	/ /
VA Regional Office (VARO)	/ /	/ /	/ /
Military Investigative	/ /	/ /	/ /
Other:	/ /	/ /	/ /

PRIOR DRB ACTION: ___/___/___ RESULT: ___/___/___

PRIOR BCMR ACTION: ___/___/___ RESULT: ___/___/___

DRB HEARING

Docket Number: _____

Does Veteran intend to be present at the hearing? YES_____ NO_____

MAYBE_____

Record Review in D.C. without counsel Yes_____ NO_____

Hearing Date: ___/___/___

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Witnesses or Statements: If Statement, date rec'd.

Name: _____ / /

Address: _____

Phone: _____

Name: _____ / /

Address: _____

Phone: _____

Name: _____ / /

Address: _____

Phone: _____

Brief and Contentions Filed On: ____/____/____

Advisory Opinions Received On: ____/____/____

Response to Advisory Opinions Needed: YES_____ NO_____

Date Sent: ____/____/____

DRB RESULT: _____ Date: ____/____/____

Board Members: _____

_____

Navy DRB only: Deadline for filing rebuttal to DRB decision: ____/____/____

Rebuttal to DRB decision filed: ____/____/____

APPEAL

Decisional Document YES_____ NO_____

Date ____/____/____ Response: ____/____/____

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BCMR Application

BCMR Docket Number: _____

Recommended: Why or why not? _____

_____

_____

DD Form 149 filed: ____/____/____

Does vet intend to be present at hearing? YES_____ NO_____
(Hearings are rare and are in D.C. only.) MAYBE_____

If hearing, is counsel in D.C. obtained? YES_____ NO_____

If yes: Name: _____

Address: _____

Phone: _____

Brief and Contentions Filed: ____/____/____

Advisory Opinion Received: ____/____/____

Rebuttal to Advisory Opinion Filed: ____/____/____

Date Released Case to Board: ____/____/____

RESULT: _____ DATE: ____/____/____

VA HEARING INFORMATION

Is Applicant interested in pursuing VA benefits? YES_____NO____

Has Applicant ever applied for VA benefits? YES_____NO____

If so, were benefits granted? YES_____NO____

Is an appeal pending to the Board of Veterans Appeals (BVA)? YES_____NO____

Did applicant apply for unemployment within one year of discharge? YES_____NO____

If so, was it granted? YES_____NO____

(VA INFO. CONTINUED)

Date Notice of Disagreement due to be filed ____/____/____
(60 days from Form Denial)

Date appeal due to be filed ____/____/____
(1 year from Statement of Case)

Date of VA hearing ____/____/____ Place:_____

Result: Granted_____ Not Granted_____

FEDERAL COURT ACTION

RECOMMENDED: WHY OR WHY NOT?_____

_____

_____

COURT: Court of Claims_____ U.S. District Court_____

U.S. Court of Military Appeals_____

Court of Military Review_____

STATUTE OF LIMITATIONS Dates

Money/Pay: 6 years from Date of Discharge ____/____/____

Discharge: 6 years from BCMR denial ____/____/____
(conservative construction of statute of limitations)

APPENDIX 6G
CASE MONITORING AND CONTROL MECHANISM

One method of case control designed to ensure maximum tracking of case records and files when there is a large caseload consists of the following three major elements: (1) the case log; (2) the docket cards; and (3) the case files themselves.

CASE LOG

The case log is a listing of cases chronologically as clients are interviewed and cases are opened. A control number is assigned. For Legal Services Corporation reporting purposes, one can use a 3-digit code for sex, race, and age. The log also contains a space for the date of opening and a space to record the closing date. It might also be helpful to leave space for indicating the outcome of each particular case.

DOCKET CARDS

After the necessary information has been listed on the case log, docket cards are completed. The cards are particularly helpful if more than one casehandler, *i.e.,* an attorney-paralegal team, are jointly working on cases. The docket cards should contain: (1) name; (2) address; (3) phone; (4) nature of the case; (5) branch of service; (6) initials of staff member assigned to the case; (7) the date the case was accepted/opened; (8) the docket number (taken from the case log); and (9) notes on transfer and outcome. The docket card is then centrally filed under open cases in the docket card file. When the case is closed, the docket card is pulled and appropriate notations made in the section under case records. The docket card is moved to a central file for closed docket cards.

THE CASE FILE

The case file jacket contains the client's name and the case docket number. The case files can be held by the casehandler or filed centrally in cabinets for open and closed cases. The casehandler or member of a team must regularly check the open files for cases that need work. This process can be simplified by the introduction of a tickler system. That is after the casehandler has worked the case (*i.e.,* submitted 180s, 293s, 149s, etc.) and a delay is anticipated, the case file (jacket) should be dated. During the regular, periodic review of open files, case files whose time has come, as indicated by the tickler date, can be pulled for action.

APPENDIX 6H
OBTAINING COURT-MARTIAL RECORDS

ARMY (32 C.F.R. § 518.17)

(h) Legal records.

(1) Requests involving records of trial by court-martial.

(i) General courts-martial records and those special courts-martial records where a bad conduct discharge has been approved by the convening authority must be directed to The Judge Advocate General, JAAJ-CC, Nassif Building, Falls Church, VA 22041 (202 756-1888), if the record of trial has been forwarded for appellate review. If the record has not been forwarded for appellate review, requests for such records must be directed to the staff judge advocate of the command which has jurisdiction over the case. The Initial Denial Authority for those requests is the Judge Advocate General, JAAJ-CC, and they will be processed in accordance with § 518.8.

(ii) The records of trial of special courts-martial which do not involve a bad conduct discharge are retained for 10 years after completion of the case. Requests for such records of trials must be directed as follows:

(*a*) Up to 3 years after completion of the case. Requests must be directed to the staff judge advocate of the headquarters where the case was reviewed.

(*b*) From 3 to 10 years after completion of the case. Requests must be directed to the National Personnel Records Center (Military Records), 9700 Page Boulevard, St. Louis, MO 63132. After 10 years, the only evidence of a special court-martial conviction is the special court-martial order maintained in the individual's permanent records. Request for such orders involving individuals currently on active duty must be directed to HQDA (DAPC-PAR), 200 Stovall Street, Alexandria, VA 22332 (202 325-9060), for commissioned and warrant officer personnel and to the Commander, US Army Enlisted Records Center, Fort Benjamin Harrison, IN 46249 (317 542-3111) for enlisted personnel. If the individual is no longer on active duty, the request must be directed to the National Personnel Records Center (Military Records), 9700 Page Boulevard, St. Louis, MO 63132. If the individual retired from service and is still living, or is a member of the Army Reserve, refer the request to address in paragraph (f)(1).

(iii) The records of trial of summary courts-martial are destroyed 1 year after action of the appropriate supervisory authority. Until that time, requests for such records of trial must be directed to the appropriate staff judge advocate at the installation where the court-martial was conducted. After 1 year, the only evidence of a summary court-martial conviction is the summary court-martial order maintained in the individual's permanent records. Requests for such orders involving individuals currently on active duty must be directed to HQDA (DAPC-PAR), 200 Stovall Street, Alexandria, VA 22332 (202 325-9060) for commissioned and warrant officer personnel and to the Commander, US Army Enlisted Records Center, Fort Benjamin Harrison IN 46249 (317 542-3111) for enlisted personnel. If the individual is no longer on active duty, the request must be directed to the National Personnel Records Center (Military Records), 9700 Page Boulevard, St. Louis, MO 63132. If the individual retired from service and is still living, or is a member of the Army Reserve, refer the request to address in paragraph (f)(1).

(iv) Requests submitted under a(2) and (3) above will be processed in accordance with § 518.8. The Initial Denial Authority is The Judge Advocate General (DAJA-CL), Washington, DC 20310 (202 695-5468).

NAVY/MARINE CORPS (32 C.F.R. § 701.31)

Members of the public should address requests to the commanding officer or head of the activity where the record is located. When the official having custody of the record is not known, the request should be addressed to the originating official, or the official having primary responsibility for the subject matter involved. The cognizant official to whom requests for the most commonly requested types of records should be addressed are as indicated below.

Court-Martial Records:	
Involving bad-conduct discharge. For request involving records of trial by general court-martial, and by special court-martial involving an officer accused or involving a sentence which, as approved by the general court-martial convening authority, extends to a bad conduct discharge.	Judge Advocate General, Navy Department, Washington, D.C. 20370.
Not involving a bad-conduct discharge. For requests involving records of trial of other special and summary court-martial other than those described above (after final actions and a retention period at a shore activity for 2 years and at a fleet activity for 3 months).	Manager, National Personnel Records Center (Military Personnel Records), 9700 Page Boulevard, St. Louis, MO 63132.

AIR FORCE (32 C.F.R. § 806.53)

§ 806.53 Where to address requests for records of military personnel.

NOTE: Records of members and former members of the Air Force are maintained in different locations, depending on the member's current status. Address requests for such records to the address indicated in this section.

Present military status	Present/past military rank	Proper address
Former member, no longer has an Air Force affiliation.	A commissioned officer, warrant officer, or airman.	National Personnel Records Center (Military Personnel Records) 9700 Page Blvd., St. Louis, Mo. 63132.
	Do.	Do.

APPENDIX 6I

OBTAINING INVESTIGATIVE RECORDS

ARMY (32 C.F.R. § 518.17)

(l) Criminal investigation files. Requests involving criminal investigation files will be directed to the Commander, US Army Criminal Investigation Command, ATTN: CIJA, Second and R Streets, SW., Washington, DC 20318 (Telephone 693-0371 or 693-1695). Only the Commanding General, USACIDC, is authorized to release any CIDC-originated criminal investigation file.

(m) Personnel security investigation files. Requests involving personnel security investigative files will be directed to the Commander, US Army Intelligence Agency, ATTN: MIIA-PS-D, Fort Meade, MD 20756.

NAVY/MARINE CORPS (32 C.F.R. § 701.31)

Addressees for requests for Department of the Navy records.

Members of the public should address requests to the commanding officer or head of the activity where the record is located. When the official having custody of the record is not known, the request should be addressed to the originating official, or the official having primary responsibility for the subject matter involved. The cognizant official to whom requests for the most commonly requested types of records should be addressed are as indicated below.

Naval Investigative Service Reports and Related Matters. (This covers any request for information from reports prepared by the Naval Investigative Service, even though copies may be held by other activities. Requests addressed elsewhere will be promptly forwarded to this proper address.)	Director, Naval Investigative Service, 2461 Eisenhower Avenue, Alexandria, VA 22331.

AIR FORCE (32 C.F.R. § 806.51)

§ 806.47 Identifying material requested.

Requests to inspect or obtain copies of records will be made in writing. The request should contain at least the information in paragraphs (a) through (d) of this section.

(a) An identification as complete as possible of the desired material, including (if known) its title, description, its number, date, and the issuing authority.

(b) If the request concerns a matter of official record about civilian or military personnel, the request must identify the person as follows: first name, middle name or initial, and surname; date and place of birth; and social security account number (or Air Force service number), if known.

(c) A statement as to whether the requester wishes to inspect the record or obtain a copy of it.

(d) If the request is for information which is part of a military service record, the request may be submitted on a Standard Form 180, Request Pertaining to Military Records. Any agency may furnish copies of the SF 180 to the public to facilitate an unofficial inquiry, or may direct a nongovernmental organization to the Superintendent of Documents to purchase quantities of the form.

§ 806.49 Addressing requests.

To expedite processing, requesters should address their requests as shown in § 806.51. In addressing correspondence concerning their request for records to any Air Force activity, requesters should use the functional address indicator DADF (DADF is the standard Air Force-wide symbol to identify a request for records under the Freedom of Information Act). The mandatory time limit does not begin until the request is received by the proper DADF responsible for processing the request.

§ 806.51 Where to send requests.

Nature of request	*Address the request to*
For reports of investigation compiled by the Air Force Office of Special Investigations.	HQ AFOSI/DADF, Forrestal Building, Washington, D.C. 20314.

CHAPTER 7
INTERPRETING MILITARY RECORDS

7.1 INTRODUCTION

Each branch of the military maintains an individual personnel file on everyone in its ranks, from the date of entry into the service, to the date of separation. The file, while called different things in each service, contains the same essential information.[1] It records all actions taken by the service affecting the servicemember, including entry (enlistment or induction), test scores, training, duty assignments, promo-

[1] Official Military Personnel File (OMPF) or "201 file" (Army); Unit Personnel Records Group (Air Force); Service Record Book (SRB) (Navy and Marines). The Navy and Marine records more closely resemble a chronological narrative of actions taken, with some specific kinds of actions entered on specific pages of the SRB.

tion, awards, performance, conduct, medical examination and treatment, and separation.

In a discharge review proceeding, the veteran's military personnel file is retrieved from storage by the Discharge Review Board (DRB) or the Boards for Correction of Military Records (BCMR), put in evidence, and made a part of the record on review. A presumption of regularity attaches to the preparation of the documents contained in the record.[2] In practice, Review Boards assume that the information contained in the records is accurate unless:

- Information appearing in various records is contradictory; or
- The veteran can demonstrate by evidence or inference that the information contained in the service records is inaccurate.

It is essential, therefore, that counsel be thoroughly familiar with the veteran's service records.

The vast majority of written actions affecting servicemembers are made and recorded with specific forms, codes, and abbreviations. An understanding of these is crucial to "deciphering" the service record and to understanding what happened to the veteran from entry to separation.[3]

The kinds of records in a particular case vary depending upon the branch of service involved and the service history of the veteran. Most of the information in a file is entered on standard forms which are identified by title and a group of letters and numbers located in one of the corners of the form. For example, the induction record is entitled "Record of Induction" and contains the form identifier "DD Form 47" in the lower left-hand corner of the form. The following is a list of the letter prefixes to forms most frequently encountered in service records:

- SF — Standard Form (government-wide);
- DD — Department of Defense Form (service-wide);
- DA — Department of the Army Form;
- AF — Air Force Form;
- NAVPERS — Navy Form; and
- NAVMC — Marine Corps Form.

Copies of a veteran's service records received from the National Military Personnel Records Center are not assembled in any particular order. They may, however, be divided into the following categories:

- Entry records;
- Records containing administrative data such as education, training, transfers, test scores, awards, etc.;
- Medical records;
- Conduct and performance records;
- Records of disciplinary actions and lost time;
- Separation records;
- Records of prior periods of service, if any; and
- Records of prior discharge reviews, if any.

Within each category, the records should be organized chronologically to the extent possible.

The balance of this chapter discusses the records and information in them pertinent to the above categories and their relationship to standards and potential issues in discharge review cases.

[2] 32 C.F.R. § 70.5(a)(12)(vi); § 9.3.3 *infra*.

[3] *See* Ch. 3 *supra* (glossary of abbreviations and terms).

7.2 RECORDS OF ENTRY INTO THE SERVICE

7.2.1 GENERAL REMARKS

A person may enter the service voluntarily (enlistment) or involuntarily (induction or draft). The record of enlistment is the DD Form 4,[4] and the record of induction is the DD Form 47.[5]

Applicants for enlistment and potential inductees both undergo a screening process in each of the following areas to determine their qualifications for service:

- Mental eligibility (aptitude for military service);
- Medical eligibility (physical and mental health);
- Moral eligibility;
- Age eligibility; and
- Citizenship.

Minimum standards[6] exist in each of these areas for the benefit of the individual as well as the service. If the individual did not meet these minimum standards at the time (s)he entered the military, the enlistment or induction was illegal and void. Where the individual's original enlistment or induction into the military is void, there is a strong basis for arguing for an upgrade of discharge from the military.[7]

Enlistment applicants are screened at the recruitment station and at an Armed Forces Entrance and Examination Station (AFEES) while an induction is processed by the local draft board and an AFEES.

7.2.2 MENTAL ELIGIBILITY

An individual's aptitude for military service is measured by a series of tests administered at the AFEES. Applicants for enlistment must attain qualifying scores prescribed in service directives.[8]

The tests which have been administered are:

- *Armed Forces Qualifying Test (AFQT).*
  This is a general aptitude test.[9] Absolute scores are converted into percentile scores which are divided into five mental categories.[10] An average score is 50.
- *Armed Services Vocational Aptitude Battery (ASVAB).*
  This is a series of tests designed to measure

[4] *See* AR 601-210, Table 4-5 (Army); COMNAVCRUITCOMINST 1130.8B, Para. 8-I-17 (Navy); MCO P1070.12 (Individual Records and Accounting Manual (IRAM)), Para. 4006 (Marine Corps); AFR 33-3, Attachment 6 (Air Force) (explanation of the data appearing on this form).

[5] *See* AR 601-270, Para. 5-26 (explanation of the data appearing on this form, applicable to all services).

[6] Until recent years higher standards were required of female enlistees (women have never been inducted).

[7] *See* § 12.6 *infra*; Ch. 22 *infra*.

[8] *See* AR 601-210, Table 2-2 (Army); AFR 33-3, Table 2-2 (Air Force); COMNAVCRUITCOMINST 1130.8B, ch. 9 (Navy); MCO 5310 series (Marine Corps). *See* AR 601-270, Para. 4-10 (mental standards for induction for all services).

[9] *See* AR 601-270, Para. 4-10 (all services).

[10] The percentile categories are:

Mental group	*Score*
I	93-100
II	65-92
III	31-64
IV	10-30
V	9 and below

potential in various military occupational fields.[11] On January 1, 1976, DoD directed all services to use this test for determination of enlistment qualifications. This test is also used to determine AFQT Mental Group Categories, program guarantee eligibility, whether the applicant is "School Eligible" for reporting purposes, and "Success Chances for Recruits Entering the Navy (SCREEN)." The score is based on the AFQT Range.[12]

- *Army Qualification Battery (AQB).* The AQB consisted of the AFQT as Part A and additional groups of tests as Parts B and C, resulting in scores in the same aptitude areas as the ASVAB. This test was administered to potential inductees and applicants for enlistment (as required by service regulations) only prior to 1976.[13]

The AFQT and other test scores are recorded on the DD Form 47 (Item 20a) or the DD Form 4 (Items 10, 44, and 47), as appropriate, and the following service forms: DA Form 20 (Item 24), AF Form 7 (Item 11), NAVPERS 601-3, and NAVMC 118(8)-PD. The AFQT score is also entered on the SF 88 (Item 73) (Medical Examination).

An AFQT score of 9 or below (Mental Group V) disqualifies one for enlistment or induction. Generally, an individual whose AFQT score falls between 10 and 30 (Mental Group IV) must meet certain minimum scores in certain aptitude areas to qualify for induction or enlistment. The minimum score is higher for high school dropouts than for high school graduates. Recruiter assistance or acquiescence in the falsification of a high school diploma is possible.

During the Vietnam War, many lower mental category young men enlisted or were inducted under a program called Project 100,000, purportedly designed to teach them skills. They can usually be identified by a large letter M stamped in red or black on the enlistment or induction form.[14]

If a veteran's difficulties in the service were related to the inability to perform assigned duties, his/her score for the aptitude area or areas most closely related to the duties (*i.e.,* Military Occupational Specialty or MOS (Army and Marines); Air Force Specialty Code or AFSC; Navy Enlisted Code or NEC) should be checked. If this score is low, perhaps the individual should not have been trained for and given the duties in question. The aptitude area score(s) and the minimum qualifying score(s) for a particular program into which the individual may have been accepted should be compared; the veteran may have been ineligible.

When two or more sets of test scores appear in the service records, they should always be compared. If the scores differ markedly, there exists the possibility of recruiter fraud. For example, Marine Corps enlistees are tested at AFEES and then again at the beginning of recruit training. AFEES test scores appear on the DD Form 4. Results of testing at the recruit depot, *i.e.,* the ACB or ASVAB, are recorded on the NAVMC 118(8)-PD. Compare the General Technical (GT) scores for each set of tests. If the ACB GT score is such that it would have been disqualifying if received at the time of enlistment, and if this GT score is 30 points or more lower than the AFEES testing GT score, the possibility of recruiter fraud exists with respect to the AFEES test results. Recruiters have been known to get a copy of the AFEES tests and prep applicants for enlistment.[15]

7.2.3 MEDICAL ELIGIBILITY

Every enlistment applicant and inductee must undergo a complete medical examination at an AFEES before entering the service. Only those individuals who have undergone a complete medical examination within one year prior to the date of induction or enlistment processing and have been found medically qualified for service are exempt.[16]

The medical examination consists of:

- Clinical examination (including psychiatric and orthopedic examinations);
- Laboratory findings; and
- Measurements and other related findings.

Results of the medical examination are entered on the SF 88 "Report of Medical Examination."[17]

Alcoholism and drug dependence disqualify one for enlistment or induction. The clinical examination includes a physical inspection of the individual's body to detect needle marks resulting from the use of injectable, illicit drugs.[18] The absence of any mention of such marks on the SF 88 by the examining physician can be significant in light of this standard operating procedure. If the veteran states that, at the time of enlistment or induction, (s)he was taking drugs by injection and there is no mention of needle marks on the entry SF 88, the veteran's credibility is questionable unless the examination was extremely cursory or the AFEES physician intentionally failed to mention the marks. The latter is improbable. During the height of the Vietnam War, however, it is possible that the examining physicians at some AFEES may have omitted certain parts of the examination at an

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[11] *See* AR 601-270, Para. 4-10 (all services).

[12] This series of tests covers the following aptitude areas: Infantry (IN); Armor and Engineer (AE); Electronics (EL); General Maintenance (GM); Motor Maintenance (MM); Clerical (CL); and General Technical (GT). The actual tests given are: Work Knowledge/Verbal (WK/VE); Arithmetic Reasoning (AR); Pattern Analysis (PA); Classification Inventory (CI); Mechanical Aptitude (MA); Clerical Speed (ACS); Radio Code (ARC); General Information (GIT); Shop Mechanics (SM); Automotive Information (AI); and Electronics Information (ELI).

The scores in the aptitude areas are computed from the test results as follows: IN = (AR + 2CI) ÷ 3; AE = (GIT + AI) ÷ 2; EL = (MA + 2ELI) ÷ 3; GM = (PA + 2SM) ÷ 3; MM = (MA + 2AI) ÷ 3; CL = (VE + AR) ÷ 3; GT = (VE + AR) ÷ 2. The Navy and Marine Corps have also used a GCT score formula: GCT = VE ÷ 3 or (WK + AR + PA) ÷ 3.

[13] *See* AR 601-270, Para. 4-10 (all services).

[14] *See* § 22.5.2 *infra*.

[15] *See* § 12.6.3.5 *infra*; Ch. 18 *infra*.

[16] *See* AR 601-270, Paras. 4-20, 4-21. *See also* AR 40-501, ch. 2 (medical standards for induction and enlistment for all services); AR 40-501, ch. 7 (specific standards for individuals applying for enlistment in certain specialty assignments); AR 40-501, ch. 10 (administrative procedures for the medical examination).

[17] *See* AR 601-270, Paras. 4-20(h), 5-7, 5-36 (explanation of information entered on the SF 88).

[18] *See* AR 601-270, Para. 4-20(h)(1)(a). *See also* AR 40-501, Para. 2-34(a)(4) (providing that drug addiction is a cause for medical rejection from induction into the service).

AFEES if large numbers of people were being processed.

A specific psychiatric examination will be conducted only when the examining physician has reason to question the examinee's emotional, social, or intellectual adequacy for military service. The mere possibility that a psychiatric condition will arise later in the military is not in itself a disqualification for service. This possibility should be considered, however, in light of other factors present, such as a criminal record of serious offenses. A psychiatric determination of mental deficiency must be made independently of the examinee's scores on the mental tests, but these scores may be used to confirm evidence of such a disorder.[19]

Each applicant for enlistment or potential inductee is given a physical profile which is recorded on an SF 88 (Item 76). The purpose of the physical profile is to classify an individual according to his/her functional ability to perform military duties.[20] Individuals who are medically qualified for military service under enlistment or induction medical standards are profiled either "1" (no assignment limitation) or "2" (no significant assignment limitation). Individuals who are medically disqualified from military service are profiled either "3" or "4."[21]

In addition to the SF 88, a "Report of Medical History" is filled out at the AFEES by the applicant for enlistment or by the potential inductee. This form is the SF 89 or SF 93 depending upon whether the servicemember entered the service before or after January, 1971.[22]

The Report of Medical History consists of the individual's personal account of his/her medical history. This form must be scrutinized carefully. The individual's responses may provide the basis for an argument that the military was aware of a particular condition at the time of enlistment or induction which later led to discharge (*i.e.*, drug habit, excessive drinking, depression, homosexual tendencies, etc.).[23]

7.2.4 MORAL ELIGIBILITY

Standards for determining the moral acceptability of an individual for induction and for enlistment are fixed by service regulations.[24]

Matters which normally render an individual morally unacceptable for service include:

- A record of criminal convictions or adverse juvenile adjudications;
- Criminal charges pending against the individual at the time of enlistment or induction;
- Drug abuse;
- Homosexuality;
- Sexual perversion; and
- Prior unsatisfactory military service.

A waiver of a civil conviction or adverse juvenile adjudication for drug abuse may be obtained in certain circumstances, depending upon the nature and number of offenses involved, extent of the drug use, and the branch of service concerned. The appropriate regulation as it appeared at the time of enlistment or induction should be checked.

The information for the determination of moral eligibility is entered on the DD Form 398 or DD Form 1966, as applicable.[25]

Recruiter fraud with respect to moral acceptability for military service is possible. For example, an applicant for enlistment may inform the recruiter that (s)he uses drugs regularly. The recruiter, zealously trying to meet a monthly quota of recruits, may invite the individual to conceal the drug history from AFEES personnel. In this and other types of recruiter fraud cases, corroborating evidence is essential. If it is merely the word of the veteran against entries by the recruiter, the recruiter's document is likely to prevail. Sometimes the parents or friends of a veteran will have been present when the recruiter gave fraudulent advice, and their affidavits can be obtained. Sometimes enlistment at a place outside of the enlistee's home town would indicate that the local recruiter was aware of a problem.[26]

7.2.5 AGE ELIGIBILITY

The minimum age for enlistment in the armed forces is 17 years.[27] No person under 18 years may enlist without the written consent of his/her parents or legal guardian. The parental consent form is DD Form 373.

The enlistment of a person under age 17 is void. The enlistment of a person under age 18 without written consent of parent or legal guardian is voidable if the parent files an application for release within 90 days of the child's enlistment, and if the child has not turned 18 by the time the application is made.

Recruiter fraud with respect to age (*i.e.*, changing the date of birth on a birth certificate or making fake birth certificates) is possible. The date of birth as it appears in different forms in the service record should be checked. If it is not identical throughout the record, there may be a question as to the servicemember's age at the time of enlistment.[28]

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[19] *See generally* AR 601-270, Para. 4-20(h)(1)(b).

[20] *See* AR 40-501, ch. 9.

[21] *See* AR 601-270, Para. 4-20(h)(9).

[22] *See* AR 601-270, Paras. 4-20, 5-9 (explanation of entries made in the SF 89 and SF 93).

[23] *See* SF 89 (Item 20), SF 93 (Item 11).

[24] *See* AR 601-270, Para. 3-8 (induction for all services). *See* AR 601-210, ch. 3, § III, apps. A-G (Army enlistment); AFR 33-3, Paras. 2-5, 2-6, Table 2-3 (Air Force enlistment); COMNAVCRUITCOMINST 1130.8B, Paras. 1-I-1, 1-I-2, and 1-I-4 (Navy enlistment); MCO P1100.74, Paras. 2011, 2012 (Marine Corps enlistment).

[25] *See* NAVPERS 1130/2 "Fraudulent Enlistment Warning" (Navy and Marine Corps); NAVCRUIT 1133/7 "USN Drug Abuse Certificate" (Navy); NAVCRUIT 1133/8 "Drug Abuse Circumstances for Waiver Questionnaire" (Navy); COMNAVCRUITCOMINST 1130.8B, Paras. 8-I-3, 8-I-4 (preparation of the two Navy reports). *See also* AF Form 2030 (USAF Drug Abuse Certificate); AF Form 2031 (Drug Abuse Circumstances). Form 2031 must be prepared when an individual evaluation is requested on Form 2030. *See* AFR 33-3, Para. 6-3(c). Prior to 1971, drug dependency and homosexual tendencies were also required to be disclosed on the SF 89 "Report of Medical History."

[26] *See* § 12.6.3.5. *infra*; § 18.2.4 *infra*.

[27] 10 U.S.C. § 505. Until 1974, a higher age was required for female recruits.

[28] *See* AR 601-210, ch. 2, Table 2-1 (Army recruiting actions); AFR 33-3, Para. 2-3 (Air Force recruiting actions); COMNAVCRUIT-

7.2.6 CITIZENSHIP

To be eligible for enlistment in the armed services, an individual must be a United States citizen, a noncitizen national of the United States, or a permanent resident alien.[29]

7.2.7 THE ENLISTMENT CONTRACT

The enlistment contract, DD Form 4, should be examined for any *written* guarantees or promises made to the client. Sometimes a specific training or duty assignment promised on the enlistment contract fails to materialize once the enlistee reports for duty. If this happens, there may be breach of contract which may, in turn, void the entire enlistment. Military enlistment contracts may contain "escape" clauses for the military; thus a breach of contract argument is often not viable, particularly for oral guarantees.[30]

7.3 PERFORMANCE AND CONDUCT RECORDS

7.3.1 PERFORMANCE EVALUATIONS

All branches of the armed forces have methods for periodically rating the performance and conduct of enlisted personnel.[31] Over the years, the methods have changed. Usually, enlisted members in the rank of E-5 and above have more elaborate ratings on different forms. Ratings are important for three reasons:

- Good ones impress the Boards;
- Erroneous ones may have prejudiced the person who decided upon the character of the veteran's discharge; and
- Low ratings alone can warrant a General Discharge without notice, a hearing, or a chance for rebuttal (usually just in the Navy and Marine Corps).

Improper ratings can occur when a servicemember is:

- Rated at a point in time not provided for in the regulations;
- Assigned a low mark without an explanation when required by the regulations;
- Assigned a mark that does not exist in the regulations; and
- Assigned a mark based on irrelevant and prejudical matters.

A general description of the grading methods is set out below.[32]

7.3.1.1 Army

The ratings are found on the DA Form 20, Item 38. They are excellent (exc.), good, poor, and unsatisfactory (unsat.). Anything less than excellent is considered bad. E-5s and above receive written evaluations.[33] Sometimes these written evaluations conflict with the Form 20 evaluations which may have been entered all at once to build up a case for a bad discharge. This vague rating system leaves much to be desired, especially in cases involving reconstructed records. Record reconstruction frequently occurred during the Vietnam War when servicemembers turned themselves in after long periods of AWOL.

7.3.1.2 Air Force

Airman Performance Reports (APRs) are recorded on AF Forms 75 and 909 or 910. Although these reports rate the servicemember overall, on specific qualities, and in a narrative, the overall rating is the most important. In recent years, this rating has been given in the form of a number up to 9. The rating is usually endorsed by one or more persons superior to the person being rated. The reports are usually inflated, such that an "average" rating is in reality bad. Sometimes there are "referral APRs" which, by regulation, the servicemember can attempt to rebut. If the servicemember was not permitted to do this, it should be argued that the APR be removed from the records. Sometimes APRs can be attacked by arguing that a rater used the APR to make the servicemember look bad. For example, if a constant such as "ability" was consistentiy rated high and then was suddenly lowered along with everything else, such an argument is plausible.

7.3.1.3 Navy

Ratings, called marks in the Navy, are based on a 4.0 scale, and are normally done semiannually or upon transfer to a new unit. When a mark of less than 3.0 is given and the service record contains no entries to substantiate why, a "page 13 entry" of explanation must be made ("page 13" refers to the Service Record Book (SRB)). Marks found on the NAVPERS 601-9 (Enlisted Performance Record) in the SRB are generally as follows:

- 4.0 or 3.8 is exemplary (no offenses);
- 3.6 or 3.5 is good (no offenses);
- 3.2 or 3.0 is satisfactory (no offenses);
- 2.8 or 2.6 is marginal (no more than one summary court-martial or two nonjudicial punishments); and
- 2.0 or 1.0 is unsatisfactory (repeated minor offenses or conviction for a major offense).

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[28] (continued)
COMINST 1130.8B, Para. 1-I-6 (Navy recruiting actions); MCO P1100.74, Paras. 2002, 2005 (Marine Corps recruiting actions. *See* § 12.6.3.4 *infra* (discussion of this requirement and the legal effects of enlistment under the minimum age or without parental consent).

[29] *See* AR 601-210, ch. 2, Table 2-1 (Army); AFR 33-3, Para. 2-1 (Air Force); COMNAVCRUITCOMINST 1130.8B, Para. 1-I-11 (Navy); MCO P1100.74, Para. 2006 (Marine Corps).

[30] *See* Ch. 22, *infra* at note 39.

[31] A good summary of the servicemember's service activities, including performance evaluations, duty assignments, and test scores, is provided on the Army's DA Form 20, the Enlisted Qualification Record, and the Air Force's Form 7. These forms also provide some pre-service data such as civilian education. All services have a summary of service activity form similar to the DA 20. Counsel should review this form before reviewing specific areas of the servicemember's in-service activities.

[32] *See* AR 600-200, ch. 8 (Army); AFR 39-62 (Air Force); BUPERSMAN, Para. 5030360 (Navy); MCO P1070.12 (IRAM), Para. 4008 (Marine Corps). *See* § 12.8 *infra* (how to challenge these ratings).

[33] *See* DA Form 2166-4.

A sailor needs an overall 2.7 average and 3.0 average in military behavior for an Honorable Discharge and recommendation for reenlistment (other criteria are also listed for reenlistment eligibility). The average of the marks is often important; thus, the arithmetic should be checked. Marks that cover a short period should not be equally averaged with those that cover a long period.

7.3.1.4 Marines

The efficiency and conduct rating system is based on a 5-point system, although the highest rating usually given is 4.9. An enlisted person will usually need to maintain a 4.0 or better average in both ratings to be promoted. To receive an Honorable Discharge, a final average of 4.0 conduct and 3.5 proficiency is required. The ratings are given semiannually and whenever a person is transferred to a new unit. The ratings are found on the NAVMC 118(3)-PD in the SRB.

7.3.2 RECORDS OF NONJUDICIAL PUNISHMENT UNDER ARTICLE 15, U.C.M.J. (10 U.S.C. § 815)

This type of punishment is referred to as an Article 15 (Art. 15) by the Army and Air Force, a mast or NJP by the Navy, and office hours (OH) or NJP by the Marine Corps. It is normally recorded on forms, *e.g.*, DA Form 2627, recorded in the SRB as a page 13 entry (Navy), AF Form 3070, or under "Offenses and Punishment" (Marines). When reviewing a record of a nonjudicial punishment, the following questions should be considered:[34]

- Did the veteran consent to the imposition of punishment under this article of the U.C.M.J. as required by the statute? This is a jurisdictional question; if not, the punishment is illegal and void.
- Did the veteran appeal from the punishment? If so, what was the substance of the appeal and the result of the appeal? Note that Article 15 of the U.C.M.J. provides that the punishment may not be increased by the appellate authority and that some appeals must be referred to a legal officer.
- Did the punishment imposed exceed the powers of the officer who imposed it? Only limited punishment may be imposed by a captain (Navy lieutenant).
- Was the officer who imposed the punishment in the direct line of command over the veteran? If not, the punishment is invalid.
- Should the old Article 15 have been destroyed by regulation?

Often a series of nonjudicial punishments can be mitigated if linked to other problems such as alcoholism, drug abuse, or psychological impairments.[35]

7.3.3 COURT-MARTIAL RECORDS

There are three types of court-martial. In order of least severity they are: summary court-martial (SCM); special court-martial (SPCM); and general court-martial (GCM). As the severity of the court-martial increases, so does the rank of the officer who can order one, the severity of punishment which can be imposed if a conviction results, and the rights afforded the accused at the proceeding.

Rarely will a transcript of a court-martial appear in a veteran's service records, although the U.C.M.J. does require that the servicemember be given a personal copy. There will, however, usually be an "Extract of Military Records of Previous Convictions," found on DD Form 493 or AFF Form 1226 (Air Force), DA Form 20B (Army), a page 13 entry (Navy), Record of Court-Martial, NAVMC 118(3) (Marines), and/or copies of the Charge Sheet, DD Form 458.[36]

7.3.4 LETTERS OF REPRIMAND OR ADMONITIONS

This is the least severe recorded punishment a servicemember can receive. It seems to be used most frequently in the Air Force and against officers. As with all punishments, the authority of the superior to impose the punishment and adherence to regulatory procedures should be checked. As letters of reprimand normally do not involve serious infractions of discipline, counsel can at times argue these away as minor offenses or misunderstandings.[37]

7.4 MISCELLANEOUS RECORDS

7.4.1 AWARDS AND DECORATIONS

A summary of the awards and decorations received by the servicemember will be found on DD Form 214 (Item 24), on the Army's Form 20, the Air Force's Form 7 (Item 10), the Navy's NAVPERS 601-4, and the Marine's NAVMC 118(9)-PD.[38] The names of most medals and awards are abbreviated. For example, NDSM stands for National Defense Service Medal. Some medals, like the NDSM, are given to everyone who is in the service at a particular time. The same is true for unit citations. Only medals awarded for some significant achievement, such as the Army Commendation Medal (ARCOM), or for wounds received in combat, such as the Purple Heart, can be used to argue that the veteran performed above average in the service. Certain awards, such as a Marksman's Badge, can also be used as evidence of good performance. Often there will be records explaining the circumstances of an award. If not, the veteran should be questioned concerning all awards. Sometimes medals were authorized but not awarded. A letter home mentioning wounds can help

[34] *See* § 12.7.2 *infra* (invalid nonjudicial punishments).
[35] *See* §§ 13.2.2, 22.5.8, 22.5.9 *infra*.
[36] *See* Ch. 6 *supra* (availability of court-martial transcripts); Ch. 20 *infra* (common errors and appealing old court-martial convictions).
[37] *See* §§ 12.7.3; 22.4.8 *infra*.
[38] *See* Ch. 3 *supra* (list of possible medals); § 22.4.2 *infra* (use of medals in equity argument).

support a claim of entitlement to a medal never awarded. Sometimes letter(s) of commendation will be included in a servicemember's records.

7.4.2 OVERSEAS AND COMBAT ASSIGNMENTS

Time spent overseas and/or in combat is indicated on the DD Form 214 and on a summary of service activity form such as the DA 20. Successful completion of duties in a combat area is generally viewed favorably by the DRBs and BCMRs.

7.4.3 COUNSELING AND REHABILITATION

Records of counseling sessions are sometimes included in the service records. These records should be checked for frequency, completeness, and compliance with applicable regulations. Lack of recorded counseling sessions when the veteran had problems can support an argument that adequate efforts were not made to help the veteran overcome those problems.

Entries in some of the records may indicate that the servicemember was given a rehabilitative transfer. Again, compliance with applicable regulations should be checked. Sometimes, alleged rehabilitative transfer occurs between two units of the same company.[39]

7.4.4 MILITARY OCCUPATIONAL SPECIALTY

Each servicemember is given a military occupational specialty (MOS, AFSC, or NEC) which defines the assignments and positions (s)he can hold. The servicemember's MOS will be recorded on the DD 214 and usually on the DA 20 (Item 38), AF Form 7 (Items 7 and 19), NAVPERS 601-4 (Item 1), or NAVMC 118(3) and (8)-PD. Unexplained changes in the MOS or assignments outside the scope of the MOS should be carefully examined. Such changes may coincide with a drop in the servicemember's performance ratings due to dissatisfaction or inability to perform the new duties.[40]

Throughout a servicemember's career, periodic training and testing is given in the MOS skills for purposes of improvement and promotion; such action is recorded in the service records.[41]

7.4.5 MEDICAL RECORDS

Most military cases will have some documents which record the servicemember's visits to sick call and notes made by the examining doctor.[41a] These notes may be useful in documenting problems the servicemember had. For example, emotional problems may be evidenced by a number of psychiatric interviews or notations of medication prescribed to alleviate anxiety or depression. Notations that document dizziness, glassy eyes, or incoherent speech may support a theory of alcoholism. Similarly, drug abuse may be shown by references in medical records to track marks or hepatitis. Negative findings, however, may undercut a claim of medical problems as the root of an inability to perform.

Each enlistee or inductee is given a physical "profile." Occasionally, as a result of injury suffered during the course of military service, this physical profile will be changed.[42] If the profile is changed, the servicemember may be given assignment limitations restricting his/her activities; sometimes, the servicemember may be given duties in accord with the original profile, but which violate the new physical profile assignment limitations. If so, this can be used to mitigate punishments or low ratings received for poor duty performance. For example, black soldiers suffering from pseudofolliculitis barae should be given profiles exempting them from shaving, but frequently are not.[43]

Before a servicemember is separated from service, a physical examination is performed and a medical history is taken. The examining physician notes changes in the medical history and may make notations indicating that a discharge for unsuitability or medical reasons is warranted, even though the servicemember was processed for discharge for other reasons. These examinations are generally recorded on the same forms as are the entrance physicals.

Records of alcohol and drug abuse treatment will not generally be sent unless specifically requested.[44]

7.5 RECORDS PERTAINING TO SEPARATION FROM THE MILITARY

7.5.1 GENERAL

When a servicemember is separated at the expiration of his/her term of service (ETS or EOS), there generally will be an order reflecting this action. If discharge was based upon application by the servicemember for early separation, or if such an application was denied, the application, the supporting documents, and actions taken by superiors will all be contained in the service records.[45] Any documents relating to a medical discharge will also be included.

When there is an involuntary separation leading to a bad discharge, supporting documents will be included in the file.[46]

7.5.2 SUMMARY OF INVOLUNTARY SEPARATION DOCUMENTS

A list of the usual separation documents and some common considerations follow.[47]

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[39] *See* § 12.5.2 *infra*.
[40] *See* §§ 22.5, 22.6.1 *infra*.
[41] The forms are DA Form 20 (Item 30), AF Form 7 (Item 5), NAVPERS 601-4 (Item 7), and NAVMC 118 (5)-PD.
[41a] *See* § 7.2.3 *supra* (discussion of medical records relating to entrance physical examination and medical history).
[42] *See* DA Form 3349, AF Form 7 (Item 6), and NAVMC 136 (Item 8).
[43] *See* § 22.5.6 *infra*.
[44] *See* § 6.6.2 *supra*.
[45] *See* § 12.6.2 *infra*.
[46] *See* Ch. 4 *supra* (overview of the involuntary separation process); § 12.5 *infra* (procedural errors that can occur).
[47] *See* § 12.5 *infra* (additional possible errors).

7.5.2.1 Letter of Notification

With respect to letters of notification, the following questions should be considered:

- Was the notice of the proposed discharge and its reason adequately and clearly stated?
- Was the servicemember correctly informed of his/her rights by this letter?

7.5.2.2 Election of Rights

If a servicemember waived his/her rights, the waiver must have been voluntary, knowing, and intelligent, in order to be valid. Advice or assistance of counsel is normally required.

7.5.2.3 Medical and Psychiatric Evaluation

Any psychiatric findings or recommendations should be compared to the ultimate disposition of the case. If the psychiatric recommendation was more favorable to the servicemember than the action taken by command, the psychiatric report may help an argument for a discharge upgrade.

7.5.2.4 Commanding Officer's Report

The commanding officer's report is used to aid the ultimate discharge authority in making an informed judgment as to whether the proposed discharge should be approved and, if so, the reason for the discharge and the type of discharge that should be issued. Service regulations delineate the kinds of information that must be included in this report.

Common errors in the commanding officer's report are:

- Inaccurate personal data, (*e.g.*, mental test scores of the servicemember);
- Exclusion of information favorable to the servicemember (*e.g.*, personal decorations and awards);
- Exclusion of extenuating and mitigating circumstances in the case (if the commander was aware of such information);
- Erroneous information as to punishment history;
- Inclusion of any information that is arguably improper or prejudicial;
- Inclusion of improper performance ratings; and
- Exclusion of a written statement made by the servicemember for the consideration of the ultimate discharge authority.

7.5.2.5 Board Proceedings

The various service regulations describe the requirements governing a discharge board (ADB), including qualification of counsel, confrontation rights, and board make-up. Rarely will there be a verbatim transcript; a brief summary is usually all that will exist.

7.5.2.6 Discharge Authority Action

The service regulation governing the discharge action should be checked in each case to see whether the officer who personally directed the servicemember's discharge was the appropriate discharge authority.

7.6 CHECKLIST OF RECORDS IN A MILITARY PERSONNEL FILE

- Enlistment contract, including any agreements, warning of fraudulent enlistment, record of civil convictions, and parental consent.
- Form 20, Form 7, or Service Record Book.
- Records of commendations or awards.
- Record of nonjudicial punishment.
- Administrative remarks.
- Record of assignments (including conduct and proficiency marks).
- Performance evaluations.
- Extracts of convictions by courts-martial and all subsequent court-martial orders, opinions, and review.
- All records of discharge, including any notification of proceedings, acknowledgement thereof, waiver of rights, appointment of boards, record of board proceedings, board findings, endorsements, legal review, and letters of approval.
- Requests for discharge and subsequent endorsements.
- Letters to and from civilian or military authorities.
- DD Form 214.
- Any records of proceedings before the DRB or BCMR.
- Enlistment/induction physical examination and record of medical history.
- Discharge physical examination.
- Medical records.

7.7 ADVERSE INFORMATION AND CODES ON DISCHARGE CERTIFICATES

7.7.1 GENERAL

When a servicemember is discharged, (s)he receives a DD 214, "Report of Transfer [to the Reserves where appropriate] or Discharge." This form must be shown to the Veterans Administration when applying for benefits. Many employers will ask to see it when considering a veteran for a job and it must be shown when applying for any government employment. This document contains not only favorable information, such as time served and awards, but also, until July 1, 1979,[48] unfavorable information such as the character of discharge. The reenlistment code (RE) and a code indicating the reason for discharge (SPN) were included from the early 1950s until May 1, 1974. New

[48] On July 1, 1979, 32 C.F.R. Part 45 was amended to eliminate the character of service and other unfavorable information from the member's copy of the DD 214. The member may optionally receive a complete form and the complete information is sent to interested government agencies. Upon a discharge upgrade these latter copies are amended. 44 Fed. Reg. 3,972 (Jan. 19, 1979).

documents without these codes may be obtained as described below.

7.7.2 DISCHARGE AND REENLISTMENT CODES

7.7.2.1 General

In the early 1950s, the services started to use two and three digit figures (and sometimes letters) on the DD Form 214. These figures appeared in the block reserved for "reason and authority" (usually block 11c). The figure was usually preceded by SPN (Separation Program Number), SDN (Separation Designation Number), or TINS (Transaction Identification Number). The SPN or SDN was occasionally omitted from the Air Force Forms (the Navy and Marines never used a letter prefix). In the early 1970s the codes were computerized so that the names of people who received certain codes could be located. Many employers have had access to this list of codes.[49] Erroneous codes often had an adverse impact on even honorably discharged veterans.[50] The form also contained the specific regulation and paragraph under which a person was discharged, and a reenlistment code that indicated whether a person was eligible to reenlist. Any code other than RE-1 might cause an employer to wonder about a veteran's military service, because that is the code that has almost always been given to those eligible to reenlist, even though some non-RE-1 codes do not actually stand for something bad.[50a]

7.7.2.2 Removing Codes and Other Information

Why should SPN codes be removed? Besides preventing persons who see a veteran's DD Form 214 from seeing adverse information, there are several good reasons. The codes were revised over the years so that some old but good codes became bad codes, and some lists may not reflect the changes. Some employers are confused about the codes and think that any number on Form 214 is "the code." The block near 11c until 1979 contained a place for a number that stood for the type of discharge certificate issued. These numbers are often mistaken for SPN codes that indicate involuntary discharges. Sometimes a typographical error creates the wrong code or one that does not exist.

If a DD Form 214 contains no code, the services will supply, upon request, a "narrative" giving a brief description of the reason for discharge (*e.g.*, "Unfitness, drugs"). Thus, an employer can require a veteran to furnish this document unless the state or city in which the veteran is applying for employment has forbidden employers by law or regulation to ask about the discharge.

When a veteran requests a DD Form 214 not containing any reference to these codes, an employer may conclude that (s)he has something to hide. The only real solution would be for DoD to recall all discharge certificates. DoD, however, has refused to do so.

On balance, the best course of action is to request a "clean" DD Form 214, one with no codes at all.

The practice of including RE and SPN codes on the DD Form 214 ceased on May 1, 1974.[51] After that date, people could request a separate statement of the reason for their separation. If a veteran was discharged before that date, (s)he can have the two codes and the notation as to the regulatory authority for discharge removed by writing to the appropriate office.[52] The veteran's name, social security number, any military service identification number, dates of service, and a copy of the DD Form 214 should be included. A narrative description of the reason for discharge will be provided if requested. The request should specifically state that a photocopy of the old DD Form 214 with the codes blacked out is unacceptable. If the meaning of the code is unclear, an explanation should be requested [53] at the appropriate address.[54] It is not certain that new certificates identical to the ones issued at the time of discharge are still available.

Routine errors (*e.g.*, spelling) can be corrected by writing to the Records Center. Other errors can be corrected by application to the Board for Correction of Military [or Naval] Records. These Boards have the power to do or recommend almost anything to correct any error or injustice, including changing the

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[49] *See* GAO Report No. B-17 3688, Need for and Uses of Data Recorded on DD Form 214 Report of Separation from Active Duty, (Jan. 23, 1975); 119 CONG. REC. E7547 (1973) (Survey by Congressman John F. Seiberling).

[50] *See* A. NEIER, DOSSIER, THE SECRET FILES THEY KEEP ON YOU ch. 7 (1975).

[50a] *See* Apps. 7B, 7C *infra* (common SPN and RE codes).

[51] *See* Memoranda of DASD (MPP), "Discontinuation of the Use of Certain Information on Separation Documents Issued to Individuals" (March 27, 1974; June 16, 1975). After May 1, 1974, the internal copy of the DD 214 contained a new letter code called the SPD Code.

[52] Army, Commander, Reserve Components Personnel and Administration Center, Box 12479, Olivette Branch, St. Louis, Mo. 63132; Air Force, Air Force Military Personnel Center (DPMDR), Randolph Air Force Base, Texas 78148; Navy, Chief, Bureau of Naval Personnel (Pers 38), Department of the Navy, Washington, D.C. 20370; Marine Corps, Commandant, U.S. Marine Corps (MSRB-10), Headquarters, U.S. Marine Corps, Washington, D.C. 20380; or Coast Guard, Commandant, U.S. Coast Guard (G-PS), Washington, D.C. 20590 or through a local base personnel office.

[53] Deputy Assistant Secretary of Defense for Manpower and Reserve Affairs (Military Personnel Policy) Finneran issued the following directive on December 28, 1976:

> A question has been raised concerning the authority of the Department of Defense to withhold the SPN/SPD and RE Code when the subject of the record makes a specific request for this data. It has been determined that under the provisions of the Freedom of Information Act and the Privacy Act of 1974 (5 U.S.C. § 552 and 5 U.S.C. § 552a, respectively), there is no legal basis for denying the SPN/SPD and RE Code to a specific individual who is the subject of the record. In the interest of protecting the privacy of other persons separated from military service, the general policy of restricting the external dissemination of SPN/SPD and RE code information continues to be in effect.
>
> However, the guidance cited above is modified to the extent that the SPN/SPD and RE Code may be disclosed to an individual who specifically requests this data from his/her record or to an appropriate party representing that individual.
>
> Each Military Department is requested to establish procedures authorizing the release of SPN/SPD and RE Codes as provided in this memorandum.

See App. 7B, 7C *infra* (common SPN and RE codes).

[54] *See* note 52 *supra*.

character of discharges, date of rank, actual rank, or length of service. The BCMR index category for changing RE codes is 100.3.[54a]

The Privacy Act of 1974 can also be used to correct errors in the records.[55] Although the Act has been infrequently used in cases involving military records, it appears to be applicable.[56] Among other things, the Act permits an individual to inspect any records kept on him/her by any government agency. A person can request that a record be corrected if the person believes it "is not accurate, relevant, timely, or complete." The agency must act promptly to change the record or explain why it won't, and inform the requesting individual how to appeal any denial. The appeal must be completed within 60 days. Alternatively, the individual can have the record include an explanation of why (s)he believes it to be in error. Should the requesting individual be dissatisfied, (s)he may file suit in federal district court. The issue is considered by the court on the basis of evidence presented to the court; the agency determination is not presumptively accurate, and a trial over the issue may occur. Attorneys' fees may be awarded if the requestor "substantially prevails," and damages are also possible if inaccurate information was disseminated after September 30, 1975, the effective date of the Privacy Act.

When a Review Board changes a discharge, it may change the reason and appropriate code. Sometimes the SPN code 21 L is used, indicating a neutral Secretarial action.[57]

[54a] *See* Ch. 9, *infra* at note 132a (alternative methods of changing RE codes).

[55] 5 U.S.C. § 552(a).

[56] *See* Ch. 25 *infra*.

[57] *See* ADRB SOP, Annex 0-1, SFRB Memo #3, 21 Jan 1976, 44 Fed. Reg. 25,083 (1979).

APPENDIX 7A
TABLE OF FORMS[1]

	I ENLISTMENT CONTRACT ——— RECORD OF INDUCTION	II SPECIAL PROMISES AND AGREEMENTS AT TIME OF ENLISTMENT	III RECORD OF SEPARATION	IV MILITARY APTITUDE TEST/SCORES	V CIVILIAN EDUCATION AT TIME OF ENTRY INTO THE MILITARY	VI MILITARY SCHOOLS ATTENDED	VII SERVICE IN FOREIGN COUNTRIES
ARMY	DD Form 4 ——— DD Form 47	DD Form 3285 DD Form 3286 series DD Form 4: Item 54, 48	DD Form 214	DD Form 4: Item 10, 44, 47 or DD Form 47: Item 20a SF 88: Item 73 DA Form 20: Item 24	DA Form 20: Item 32 DD Form 398: Item 9 DD Form 4: Item 2 or DD Form 47: Item 10	DA Form 20: Item 27	DA Form 20: Item 31 DD Form 214: Item 22c
AIR FORCE	DD Form 4 ——— DD Form 47	AF Form 1114 DD Form 4: Item 54, 48	DD Form 214	DD Form 4: Items 10, 44, 47 or DD Form 47: Item 20a SF 88: Item 73 AF Form 7: Item 11	AF Form 7: Item 9 DD Form 398: Item 9 DD Form 4: Item 2 or DD Form 47: Item 10	AF Form 7: Item 8	AF Form 7: Item 2 DD Form 214: Item 22c
NAVY	DD Form 4 NAVPERS 601-1 ——— DD Form 47	DD Form 4: Item 54, 48	DD Form 214 NAVPERS 601-14	DD Form 4: Items 10, 44, 47 NAVPERS 601-1: Item 10 DD Form 47: Item 20a NAVPERS 601-3 SF 88: Item 73	NAVPERS 601-3 DD Form 398: Item 9 DD Form 4: Item 2 or DD Form 47: Item 10	NAVPERS 601-4: Item 4	NAVPERS 601-12 DD Form 214: Item 22c
MARINE CORPS	DD Form 4 NAVMC 118 (2)-PD ——— DD Form 47	DD Form 4: Item 54, 48	DD Form 214	DD Form 4: Items 10, 44, 47 or DD Form 47: Item 20a SF 88: Item 73 NAVMC 118-(8)-PD	NAVMC 118(8a)-PD DD Form 398: Item 9 or DD Form 47: Item 10	NAVMC 118(8a)-PD	NAVMC 118-(3)-PD DD Form 214: Item 22c

[1] This table generally covers the period from the early 1960s to the late 1970s.

	VIII COMBAT RECORD	IX SERVICE AWARDS/ DECORATIONS/ MEDALS	X HISTORY OF ADVANCEMENT/ REDUCTION IN RANK	XI TIME LOST	XII PRIOR SERVICE	XIII PRE-SERVICE EMPLOYMENT HISTORY	XIV MILITARY JOB CLASSIFICATION HISTORY
ARMY	DA Form 20: Item 39	DA Form 20: Item 41 DD Form 214: Item 24	DA Form 20: Item 33	DA Form 20: Item 44 DD Form 214: Item 26a	DA Form 4: Item 49 DD Form 398: Item 8	DA Form 20: Item 34 DD Form 398: Item 13	DA Form 20: Item 38
AIR FORCE	AF Form 7: Item 14	AF Form 7: Item 10 DD Form 214: Item 24	AF Form 7: Item 5	DD Form 214: Item 26a	DD Form 4: Item 49 AF Form 7: Item 16 DD Form 398: Item 8	AF Form 7: Item 15 DD Form 398: Item 13	AF Form 7: Items 7, 19
NAVY	NAVPERS 601-4: Item 11	NAVPERS 601-4: Items 9, 10, 11 DD Form 214: Item 24	NAVPERS 601-4: Item 7	DD Form 214: Item 26a NAVPERS 601-13 (Administrative Remarks)	DD Form 4: Item 49 NAVPERS 601-11 DD Form 398: Item 8	NAVPERS 601-3 DD Form 398: Item 13	NAVPERS 601-4: Item 1
MARINE CORPS	NAVMC 118-(9)-PD	NAVMC 118-(9)-PD DD Form 214: Item 24	NAVMC 118(5)-PD	NAVMC 118(5)-PD DD Form 214: Item 26a	DD Form 4: Item 49 DD Form 398: Item 8	NAVMC 118(8)-PD DD Form 398: Item 13	NAVMC 118(3)-PD NAVMC 118(8)-PD

	XV RECORD OF MILITARY ASSIGNMENTS	XVI RECORD OF NON JUDICIAL PUNISHMENT UNDER U.C.M.J. ART. 15	XVII MEMORANDUM OF COURTS-MARTIAL	XVIII PERFORMANCE EVALUATIONS (PAY GRADES E-1 TO E-4)	XIX PERFORMANCE EVALUATIONS (PAY GRADES E-5 to E-9)	XX PHYSICAL PROFILE HISTORY	XXI MEDICAL EXAMINATIONS AT ENTRY AND SEPARATION
ARMY	DA Form 20: Item 38	DA Form 2627-1 DA Form 2627-2	DA Form 20B DA Form 26 DA Form 493	DA Form 20: Item 38 DA Form 2166-4 (E-4 only)	DA Form 20: Item 38 DA Form 2166-4	DD Form 4: Item 25 DD Form 27: Item 18 DA Form 20: Item 17 DA Form 3349 SF 88: Item 76	SF 88 SF 89 (old) SF 93 (current)
AIR FORCE	AF Form 7: Item 19	AF Form 3070 AF Form 3072	AF Form 1226 DD Form 493	AF Form 75 (old) AF Form 909 (current)	AF Form 910 (E-5 & E-6 only)	DD Form 4: Item 26 or DD Form 47: Item 18 AF Form 7: Item 6 SF 88: Item 76	SF 88 SF 89 (old) SF 93 (current)
NAVY	NAVPERS 601-5	NAVPERS 601-6 NAVPERS 601-13 (Administrative Remarks)	NAVPERS 601-6 DD Form 493	NAVPERS 601-9 NAVPERS 792 (old) NAVPERS 161 6 (current)	NAVPERS 601-9 NAVPERS 1616 5 (old) NAVPERS 1616 18 (current) (E-5 & E-6 only) NAVPERS 1616 5 (old) NAVPERS 1616 8 (current) (E-7 to E-9 only)	DD Form 4: Item 25 or DD Form 47: Item 18 SF 88: Item 76	SF 88 SF 89 (old) SF 93 (current)
MARINE CORPS	NAVMC 118(3)-PD	NAVMC 118(12)-PD	NAVMC 118(13) DD Form 493	NAVMC 118(3)-PD	NAVMC 118(3)-PD NAVMC 10233-PD	NAVMC 136: Item 8 DD Form 4: Item 25 or DD Form 47: Item 18 NAVMC 118(1)-PD SF 88: Item 76	SF 88 SF 89 (old) SF 93 (current)

APPENDIX 7B
COMMON REENLISTMENT CODES[1]

ARMY RE CODES

RE-1	Fully qualified for immediate reenlistment
RE-1A	Fully qualified for immediate reenlistment; ineligible to reenlist for 93 days after date of separation
RE-2	Fully qualified for immediate reenlistment; separated for convenience of the government under a separation which does not contemplate immediate reenlistment (*see* AR 635-200 Chapter 5, 6, 8, 9, 11 and 12)
RE-2A	Fully qualified for immediate reenlistment; ineligible to reenlist in grade and for 93 days after date of separation
RE-3	Not eligible for reenlistment unless a waiver is granted
RE-3A	Not eligible for reenlistment unless a waiver is granted. Waiver, if approved, is valid only for the purpose of providing continuous, unbroken service for RA in-service personnel
RE-3B	Not eligible for reenlistment unless a waiver is granted. Applicable to EM who have time lost during their last period of service
RE-3C	Not eligible for reenlistment unless a waiver is granted. Applicable to persons who have completed over 8 months service who do not meet the prior grade and service criterion of the Qualitative Management Program (see AR 600-200 Chapter 4)
RE-4	Not eligible for reenlistment. Disqualification is nonwaivable
RE-4A	Not eligible for reenlistment. Applicable to EM who fail to meet citizenship requirements

NAVY AND MARINE RE CODES

RE-1	Recommended for reenlistment
RE-2	Recommended for reenlistment but ineligible because of status: Fleet Reservist Retired (except for transfer to TDRL), Commissioned Officer, Warrant Officer, Midshipman, Cadet
RE-3	Recommended for reenlistment except for disqualifying factor
RE-3A	Alien
RE-3B	Parenthood
RE-3B	Pregnancy
RE-3C	Conscientious Objector
RE-3D	Demonstrated dependency or hardship not meeting criteria specified in Bupersman article C-10308
RE-3E	Erroneous induction
RE-3F	Erroneous enlistment
RE-3G	Condition (not physical disability) interfering with performance of duty
RE-3H	Hardship
RE-3K	Disenrolled from Naval Academy, not considered qualified for enlisted status
RE-3M	Marriage
RE-3N	Importance to national health, safety or interest
RE-3P	Physical disability (includes discharge and transfer to TDRL)
RE-3P	Obesity
RE-3P	Motion sickness
RE-3P	Disqualified for officer candidate training
RE-3S	Sole surviving son
RE-3T	Overweight
RE-3U	Minority
RE-4	Not recommended for reenlistment

AIR FORCE RE CODES

The following codes are recommended for reenlistment: RE-1; RE-12; RE-13; RE-14; RE-3/93. All other codes are ineligible.

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[1] *See* Ch. 9, *infra* at note 132a (procedures for changing reenlistment codes). It is extremely rare to have a reenlistment code changed.

APPENDIX 7C
SPN CODES (ALL SERVICES)[2]

21L	Enlisted personnel — separation for good and sufficient reason when determined by Secretarial authority
21T	Enlisted personnel — release of REP 63 trainees due to emergency conditions (does not apply to active duty)
21U	Separation for failure to demonstrate adequate potential for promotion
28B	Unfitness, frequent involvement in incidencies of a discreditable nature with the military or civilian authorities
28E	Financial irresponsibility
28F	Established pattern for showing dishonorable failure to pay just debts
28G	Established pattern for showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court about support of dependents
28I	Unsanitary habits
38A	Desertion, trial deemed inadvisable (World War II). Rescinded
38B	Desertion, trial deemed inadvisable (Peacetime desertion). Rescinded
38C	Desertion, trial deemed inadvisable (Korean War). Rescinded
41A	Apathy
41B	Obesity
41C	To accept a teaching position
41D	Discharge of enlisted personnel on unspecified enlistment who completed 20 years active federal service, do not submit application for retirement; Commander determines discharge will be in best interests of Government
46A	Unsuitability, apathy, defective attitudes, and inability to expend effort constructively
46B	Sexual deviate
46C	Apathy, obesity
46D	Sexual deviate
70A	Mandatory retirement — 35 years' service/5 years in grade, Regular Army major general
70B	Mandatory retirement — age 62, Regular Army major general
70C	Mandatory retirement — age 60, Regular Army major general whose retirement has been deferred
70D	Mandatory retirement — age 64, Regular Army major general whose retirement has been deferred and each permanent professor and the Registrar of the U.S. Military Academy
70E	Mandatory retirement — 30 years' service/5 years in grade, Regular Army brigadier general
70F	Mandatory retirement — 30 years of service/5 years in grade, Regular colonels
70G	Mandatory retirement — 28 years' service/Regular lieutenant colonels
70J	Mandatory retirement — age 60, regular commissioned officers below major general
70K	Mandatory retirement — more than 30 years' active service, professors U.S. Military Academy
70L	Mandatory retirement — 30 years' or more active service, Regular warrant officers
70M	Mandatory retirement — age 62, Regular warrant officers
77E	Mandatory retirement — surplus in grade after 30 years' service, removal from active list (Regular Army)
77J	Voluntary retirement — placement on retired list at age 60
77M	Mandatory retirement — permanent retirement by reason of physical disability
77N	Mandatory retirement — placed on Temporary Disability Retired List
77P	Voluntary retirement — in lieu of or as a result of elimination board proceedings. Regular Army and Reserve commissioned officers and warrant officers
77Q	Mandatory retirement — Temporary Disability Retirement in lieu of or as a result of elimination proceedings
77R	Mandatory retirement — permanent disability retirement in lieu of or as a result of elimination proceedings
77S	Voluntary retirement — Regular Army and Reserve commissioned officer
77T	Voluntary retirement — Regular Army and Reserve warrant officers
77U	Voluntary retirement — Regular Army commissioned officers with 30 or more years of service
77V	Voluntary retirement — enlisted personnel, voluntarily retired as a commissioned officer
77W	Voluntary retirement — enlisted personnel, voluntarily retired as a warrant officer
77X	Voluntary retirement — warrant officer voluntarily retired as a commissioned officer
77Y	Mandatory retirement — retirement of Director of Music, USMA, as the President may direct
77Z	Mandatory retirement — Regular Army commissioned officers with WWI service
78A	Mandatory retirement — formerly retired other than for disability, who while on active duty incurred a disability of at least 30%

[2] Over the years some of these codes and/or their meanings were changed.

78B	Mandatory retirement — formerly retired for disability, who while on active duty suffered aggravation of disability for which individual was formerly retired
79A	Voluntary REFRAD — as USAR warrant officer (aviator) to accept USAR commission (aviator) with concurrent active duty
79B	Resignation — as RA WO (aviator) to accept USAR commission (aviator) with concurrent active duty
201	Expiration of term of service (ETS)
202	Expiration of term of enlistment
203	Expiration of term of active obligated enlistment
205	Released from active duty; transferred to reserves
210	Separation for failure to demonstrate adequate potential for promotion
212	Honorable wartime service subsequent to desertion
213	Discharge for retirement as officer
214	To accept commission as officer in the Army, or to accept recall to active duty as Army Reserve
215	To accept appointment as Warrant Officer in the Army, or to accept recall to active duty as Army Reserve Warrant Officer
217	To accept commission in the Armed Forces of the United States (except Army)
219	Erroneous induction
220	Marriage, female only
221	Pregnancy
222	Parenthood
225	Minority/under age
226	Dependency
227	Hardship
229	Sole surviving son and surviving family members
230	Retirement after 20, but less than 30, years active Federal Service
231	Retirement after 30 years active Federal Service
238	Service retired in lieu of other administrative action
240	Unconditional resignation of enlisted personnel on unspecified enlistment
241	Resignation of enlisted personnel on unspecified enlistment in lieu of reduction for misconduct or inefficiency
242	Resignation of enlisted personnel on unspecified enlistment for good of service
243	Resignation of enlisted personnel on unspecified enlistment in lieu of board action when based on unfitness
244	Resignation of enlisted personnel on unspecified enlistment in lieu of board action when based on unsuitability
245	Resignation of enlisted personnel on unspecified enlistment in lieu of separation for disloyalty or subversion
246	Discharge for the good of the service
247	Unsuitability/multiple reasons
248	Unsuitability
249	Resignation (Class II homosexual) of personnel on unspecified enlistment
250	Punitive discharges, Class I homosexual, general court martial
251	Punitive discharge, Class II homosexual, general court martial
252	Punitive discharge, Class I homosexual, special court martial
253	Discharge as a result of board action (Class II homosexual). Rescinded
255	Retirement in lieu of discharge under AR 635-89 (homosexuality). Rescinded *OR* Punitive discharge, Class II homosexual, special court martial
256	Acceptance of discharge (Class II homosexual) in lieu of board action. Rescinded
289	Unsuitability, alcoholism
290	Desertion (court martial)
291	Alcoholism
292	Other than desertion (court martial)
293	General court martial
294	Special court martial
257	Acceptance of discharge as a result of board action (Class II homosexual) *OR* Unfitness, homosexual acts (getting caught)
258	Unfitness, multiple reasons
260	Unsuitability — inaptitude
261	Inaptitude — illiterate *OR* Psychiatric or psychoneurotic disorder
262	Unsuitability — enuresis
263	Enuresis (bed-wetting)

264	Unsuitability, character and behavior disorders
265	Character disorders
270	Placed on temporary disability retired list
271	Permanently retired by reason of physical disability
273	Physical disability with entitlement to receive disability severance pay
274	Physical disability resulting from intentional misconduct or willful neglect or incurred during period of unauthorized absence. Not entitled to severance pay
276	Release from EAD and revert to retired list prior to ETS
277	Physical disability, EPTS (existing prior to service) established by medical board and individual made application for discharge by reason of physical disability (not entitled to receive disability severance pay)
278	Physical disability, EPTS, established by physical evaluation proceedings (not entitled to receive disability severance pay)
270	Release from EAD and revert to retired list at ETS
280	Misconduct, fraudulent entry (enlistee not revealing criminal record)
281	Desertion, trial barred by 10 U.S.C. 843 (Art. 43, U.C.M.J.). Rescinded *OR* Unsanitary habits
282	Misconduct, prolonged unauthorized absence for more than one year (desertion)
283	Misconduct, AWOL, trial waived or deemed inadvisable
284	Convicted or adjudged a juvenile offender by a civil court during current term of active military service
285	Initially adjudged a juvenile offender by a civil court during current term of active military service. Rescinded
286	Repeated military offenses not warranting court martial
287	Unclean habits, including VD repeated times
288	Habits or traits of character manifested by anti-social amoral trends
311	Alien without legal residence in the United States
312	Separation of members of Reserve components on active duty, who, due to age, would be precluded from obtaining eligibility for retired pay as provided by title 10 U.S.C. sections 1331-1337
313	To immediately enlist or reenlist
314	Important to national health, safety, or interest
316	Release, lack of jurisdiction, writ of habeas corpus
318	Conscientious objection
319	Erroneous enlistment
320	To become a policeman
333	Discharge of Cuban volunteers upon completion of specified training. Rescinded
344	Release of Cuban volunteers upon completion of specified training. Rescinded
361	Homosexual tendencies
362	Unsuitability, homosexual tendencies, desires or interest without overt homosexual acts, (Class II homosexual) (Processed under AR 635-89)
367	Erroneous enlistment *OR* Aggressive reaction
368	Anti-social personality
369	Cyclothymic personality
370	Released from EAD (entry on active duty) by reason of physical disability and revert to inactive status for the purpose of retirement under the provisions of title 10 U.S.C. sections 1331-1337, in lieu of discharge with entitlement to receive disability severance pay
381	Desertion, trial deemed inadvisable (Spanish-American War or World War I). Rescinded
383	Criminalism
384	Unfitness, drug addiction or the unauthorized use or possession of habit-forming narcotic drugs or marijuana
385	Pathological lying
386	Unfitness, an established pattern for shirking
387	Habits or traits of character manifested by misconduct
388	Unfitness, sexual perversion, including but not limited to lewd and lascivious acts, indecent acts with or assault upon a child, or other indecent acts or offenses
411	Early separation of overseas returnee
412	Enlisted members of medical holding detachments who, upon completion of hospitalization, do not intend to immediately enlist or reenlist in regular army
413	To enter or return to college, university, or equivalent educational institution
414	To accept or return to employment
415	Early release of inductees who have served on active duty prior to their present tour of duty
416	Physical disqualifications for duty in MOS

418 Discharge of enlisted personnel who complete 30 years active federal service and do not submit application for retirement
419 Discharge of enlisted personnel over 55 years of age who have completed 20 years active federal service and do not submit application for retirement
420 Discharge or release of individuals with less than 3 months remaining to serve who fail to continue as student (academic failure) at service academies
421 Early release at Christmas will be issued as appropriate by Army and has been included in separation edit table. Rescinded
422 Early release at original ETS of enlisted personnel who have executed a voluntary extension. Rescinded
423 Early release after original ETS of personnel serving on a voluntary extension. Rescinded
424 Separation at ETS after completing a period of voluntary extension. Rescinded
425 Discharge (inductee) to enlist for Warrant Office Flight Training
426 Discharge (inductee) to enlist to attend critical MOS school
427 Discharge of inductee to enlist in Regular Army for purpose of attending OCS
428 Separation of enlisted personnel for failure to complete OCS
429 Discharge for failure after enlistment to qualify medically for flight training
430 Early separation of personnel denied reenlistment under qualitative management program
431 Enlisted personnel may be discharged or released from active duty, as appropriate, prior to the expiration of their terms of service or periods for which order to active duty (under title 10 U.S.C. section 1169)
432 Early release, enlistment inactive Army National Guard of U.S. Army Reserve units
433 Involuntary release of personnel on compassionate assignment
434 Early out from Vietnam. Rescinded
436 Reduction in strength, USASA option/first term
437 AUS, RA first term, exempted from 90 day suspension of Early Release Program for reasons of intolerable personal problems
440 Separation for concealment of serious arrest record
460 Emotional instability reaction
461 Inadequate personality
462 Mental deficiency
463 Paranoid personality
464 Schizoid personality
469 Unsuitability
480 Personality disorder
482 Desertion, trial barred by 10 U.S.C. section 843 (Art. 43, U.C.M.J.). Rescinded
488 Unsuitability, general discharge separation
489 Disloyal or subversive (Military Personnel Security Program)
500 Resignation — hardship
501 Resignation — national health, safety, or interest
502 Resignation — completion of required service
503 Resignation — enlistment in the Regular Army — Regular Officer
504 Resignation — withdrawal of ecclesiastical endorsement
505 Resignation — serving under a suspended sentence to dismissal
508 Resignation — to attend school
509 Resignation — in lieu of elimination because of substandard or unsatisfactory performance of duty
510 Resignation — interest of national security (in lieu of elimination)
511 Resignation — in lieu of elimination (homosexuality)
518 Resignation — in lieu of elimination because of unfitness or unacceptable conduct
522 Resignation — in lieu of elimination because of conduct triable by courts-martial or in lieu thereof
524 Resignation — unqualified or other miscellaneous reasons
528 Resignation — marriage
529 Resignation — pregnancy
530 Resignation — parenthood (minor children)
536 Voluntary discharge (substandard performance of duty)
537 Involuntary discharge — unfitness (unacceptable conduct)
539 Voluntary discharge — termination of RA or AUS warrant or member serving on active duty in RA or AUS warrant to retire in commissioned status
545 Involuntary discharge — failure of selection for permanent promotion (commissioned officers)
546 Involuntary discharge — failure of selection for permanent promotion (warrant officer)
550 Involuntary discharge — reasons as specified by HDQA
551 Involuntary discharge — administrative discharge, GCM
552 Dismissal — general court-martial (homosexuality)
554 Dismissal — general court-martial

555 Involuntary discharge — failure to complete basic, company officer, or associate company officer course — USAR officers
556 Failure to complete basic, company officer, or associate company officer course — ARNGUS officers
558 Voluntary discharge — conscientious objection
586 Involuntary discharge — for reasons involving board action or in lieu thereof (homosexuality)
588 Involuntary discharge — reasons involving board action, or in lieu thereof — unfitness or unacceptable conduct
589 Voluntary discharge — reasons involving board action, or in lieu thereof, due to substandard performance of duty
590 Involuntary discharge — interest of national security
595 Involuntary discharge — pregnancy
596 Involuntary discharge — parenthood (minor children)
597 Voluntary discharge — administrative
599 Voluntary REFRAD — lack of jurisdiction
602 Voluntary REFRAD — national health, safety, or interest
603 Involuntary REFRAD — due to disapproval of request for extension of service
604 Voluntary REFRAD — hardship
606 Voluntary REFRAD — dual-status officer to revert to regular warrant officer
609 Voluntary REFRAD — to attend school or accept a teaching position
610 Voluntary REFRAD — marriage
611 Officer, expiration of active duty commitment, voluntarily serving on active duty
612 Voluntary REFRAD — expiration of active-duty commitment, involuntarily serving on active duty
616 Voluntary REFRAD — selection for entrance to a service academy
618 Voluntary REFRAD — in lieu of serving in lower grade than Reserve grade
619 Discharge by request, includes MC or DC officers
620 Voluntary REFRAD — interdepartmental transfer of other than medical officers
621 Voluntary REFRAD — in lieu of unqualified resignation
623 Voluntary REFRAD — interdepartmental transfer of medical officers
624 Voluntary REFRAD — release from ADT to enter on 24 months' active duty
625 Voluntary REFRAD — annual screening, voluntary release prior to 90th day subsequent to receipt of notification
627 Involuntary REFRAD — maximum age
631 Involuntary REFRAD — failure of selection for permanent Reserve promotion (discharged)
632 Involuntary REFRAD — failure of selection for permanent Reserve promotion (commission retained)
633 Involuntary REFRAD — failure of selection for promotion, temporary
640 Involuntary REFRAD — commissioned officer under sentence of dismissal and warrant officer under sentence of dishonorable discharge awaiting appellate review
644 Voluntary and Involuntary REFRAD — convenience of government, or as specified by Secretary of the Army
645 Involuntary REFRAD — annual screening, release on 90th day subsequent to receipt of notification
646 Involuntary REFRAD — maximum service, warrant officers
647 Involuntary REFRAD — maximum service, commissioned officers
648 Involuntary REFRAD — completion of prescribed years of service
649 Involuntary REFRAD — withdrawal of ecclesiastical endorsement
650 Involuntary REFRAD — physically disqualified upon order to active duty
651 Involuntary REFRAD — release of Reserve unit and return to Reserve status
652 Involuntary REFRAD — release of unit of NG or NG(US) and return to state control
655 Involuntary REFRAD — revert to retired list, not by reason of physical disability
657 Involuntary REFRAD — physical disability. Revert to inactive status for purpose of retirement under Chapter 67, 10 U.S.C., in lieu of discharge with entitlement to receive disability severance pay
660 Physical disability discharge — entitlement to severance pay
661 Physical disability discharge — disability resulting from intentional misconduct, or willful neglect, or incurred during a period of unauthorized absence. Not entitled to receive disability severance pay
662 Physical disability discharge — EPTS, established by physical evaluation board. Not entitled to disability severance pay
668 Dropped from rolls — AWOL, conviction and confinement by civil authorities
669 Dropped from rolls — AWOL, desertion
672 Involuntary REFRAD — medical service personnel who receive unfavorable background investigation and/or National Agency Check
681 Voluntary REFRAD — to accept employment with a legally established law enforcement agency
685 Resignation — failure to meet medical fitness standards at time of appointment
686 Involuntary discharge — failure to resign under Chapter 16, AR 635-120, when determined to be in the best interests of the government and the individual

689 Voluntary REFRAD — reduction in strength, voluntary release prior to 90th day subsequent to receipt of notification
690 Involuntary REFRAD — reduction in strength, release on 90th day subsequent to receipt of notification
701 Early release of personnel assigned to installations or units scheduled for inactivation or permanent change of station
741 Mandatory retirement — failure of selection for promotion, established retirement date, commissioned officer
742 Discharge and reenlistment for purpose of meeting length of service requirement for overseas movement of dependents. Rescinded
743 Release of units of the ARNG or ARNGUS from active federal service and return thereof to state control
744 Mandatory retirement — failure of selection for promotion, early retirement date, commissioned officers
745 Mandatory retirement — failure of selection for promotion, early retirement date, warrant officers
747 Mandatory retirement — failure of selection for promotion, retained for retirement, commissioned officer
748 Mandatory retirement — failure of selection for promotion, retained for retirement, warrant officer
749 Early release of Puerto Rican personnel who fail to qualify for training
753 Release of unit of USAR and return thereof to Corps control
764 Release of REP 64 enlisted personnel upon completion of MOS training
771 Mandatory retirement — commissioned officers, unfitness or substandard performance of duty
772 Mandatory retirement — warrant officers, unfitness or substandard performance of duty
941 Dropped from rolls, as deserter
942 Dropped from rolls, as military prisoner
943 Dropped from rolls, as missing or captured
944 Death, battle casualty
945 Death, non-battle (resulting from disease)
946 Death, non-battle (resulting from other than disease)
947 Current term of service voided as fraudulently enlisted while AWOL from prior service
948 To enter U.S. Military Academy
949 To enter any of the service academies (other than USMA)
971 Erroneously reported as returned, from dropped from rolls as deserter (previously reported under transaction_____)
972 Erroneously reported as restored to duty, from dropped from rolls as military prisoner (previously reported under transaction code C3)
973 Erroneously reported as returned, from dropped from rolls as missing or captured (previously reported under transaction code CC)
976 Minority, void enlistment
979 Erroneously reported as enlisted, inducted, or ordered into active military service
982 Release from active duty upon demobilization of National Guard units (applicable only to members of National Guard units who, upon relief from active duty, will be reordered to ACDUTRA for completion of ACDUTPA)
985 Released from military control and dropped from the Army rolls (by authority of Department of the Army letter)
986 Retired Regular Army enlisted personnel serving on active duty in USAR status, who are released at expiration of period of service for which ordered to active duty (or period of service as extended) and revert to USAR status. Rescinded
987 Retired Regular Army enlisted personnel serving on active duty in USAR status, who are released prior to expiration of period of service for which ordered to active duty (or period of service as extended) and revert to USAR retired status. Rescinded

CHAPTER 8
GENERAL CASE PREPARATION TECHNIQUES

8.1 INTRODUCTION

This chapter will analyze the practical aspects of case preparation and conduct of the hearing. Most discharge upgrade cases are won on the facts. Accordingly, factual development is extremely important and encompasses locating witnesses, obtaining documentation of good post-service conduct, preparing the veteran for testimony, and presentation of his/her case at the hearing. The essential elements in case preparation are:

- Obtaining all relevant military records that exist outside the veteran's personnel file;
- Locating and obtaining witness and/or character statements;
- Developing a theory of the case;
- Writing a brief and contentions;
- Deciding whether to apply to a Discharge Review Board (DRB), or a Board for the Correction of Military Records (BCMR), and whether to request a hearing;
- Preparing the veteran for a hearing, should one be requested.

8.2 RECEIPT OF MILITARY RECORDS

The first step in case preparation is a thorough review of the veteran's military personnel file, which can be ordered from the National Personnel Records Center (NPRC). Upon receipt of the file, check it for completeness,[1] then organize it chronologically according to the type of record, *i.e.*, personnel actions, disciplinary actions, discharge records, and medical records. Take advantage of the lengthy processing time for discharge upgrade cases by making a chronological summary of the veteran's military service, with legally relevant matters noted.[1a] A chronology is useful in case preparation and at the hearing.

Next, examine the records, with the veteran's help, to double check for completeness. The information given by the veteran will often conflict with the official record. This may be true for several reasons:

- The veteran might have misunderstood the discharge process; thus, the veteran might believe that (s)he received an Undesirable Discharge, as the result of a court-martial with no notice, but the record may show that an administrative discharge board, on short notice, issued the UD;
- The veteran may not remember the events; lack of memory may result from the passage of time, or even the desire to repress unpleasant memories; or
- The veteran may never have been aware of certain occurrences, as for example the decisions made up the chain of command in his/her case.

Re-examination of the record can also serve to refresh the veteran's recollection of favorable information, (*e.g.*, the record may not reflect that the veteran received an award or medal to which (s)he was entitled).

A fairly complete picture of the veteran's military service should emerge after reviewing the record with your client.

It is important, however, to determine what, if any, additional supporting documentation is needed. This may include:

- Presentment to the Board of any good post-service conduct;
- Such information includes statements by clergy, teachers, family members, employers, law enforcement personnel, and drug or al-

[1] *See* § 7.6 *supra* (checklist of the contents of military personnel files).

[1a] *See* App. 8A *infra*.

cohol counselors. Statements from employers and general character references should be typed on appropriate letterhead stationery, notarized if possible. Each letter should state the relationship between the writer and the veteran and the length of their association;[1b]

- Statements from the attorney who represented the veteran when (s)he was in the military or from former military personnel;[2]
- Statements from family, friends, doctors, or counselors if the case involved family or medical problems, if the veteran was a conscientious objector, or if the case involved drug or alcohol abuse;
- Letters from parole, probation, or case officers if the veteran has been or is incarcerated; or
- Court-martial transcripts, military criminal investigative reports, pay records, unit diaries, military hospital records or other military records that might exist.[3]

Each witness's statement should be as complete as possible to avoid the appearance of a pro forma submission. Because most witnesses will not want to appear at a hearing, their statements, as appropriate, should contain:

- A complete description of who they are;
- A description of any program in which the veteran was enrolled with dates and places;
- A complete evaluation of the veteran's performance, character, medical or other problems; and
- Opinion as to the veteran's general reputation.

Determine which application form to file after reviewing all the above information.

8.3 WHICH FORM TO FILE

The Boards generally operate on a first-come-first-served basis and have a great backlog. Therefore, the appropriate form should be filed as soon as the attorney has all the records in the possession of the NPRC. The application form can be filed without a complete submission of evidence or a brief. If the application is filed prior to receipt of all the records from NPRC, the records will be sent to the Board and will have to be requested from the Board.[4] There is no need to await receipt of court-martial transcripts or records ordered from sources other than NPRC.

The following rules apply in determining which application to file:

- If a General, Undesirable or Bad Conduct Discharge (from a special court-martial) was issued less than 15 years ago, and the veteran has had no personal appearance hearing prior to March 31, 1978, file DD Form 293 for a DRB review;[5]
- If an Undesirable or Blue Discharge, no matter how old, *or* a General or Bad Conduct Discharge from a special court-martial (in the case of the latter two there must be a denial of relief by a DRB prior to March 31, 1978), *and* the veteran in each of these cases has taken advantage of the waiver of the statute of limitations (in effect at this writing until April 1, 1981), file DD Form 293;[6]
- If a Bad Conduct or Dishonorable Discharge issued from a General Court-Martial, always file DD Form 149 for a Correction Board review;
- In any other case file DD Form 149 for a Correction Board review.

Once the proper form has been selected it is important to determine whether to request a personal appearance hearing before a DRB. This decision is easier for those advocates with experience in discharge review.[6a] If relief is probable on a records-only review, don't request a personal appearance hearing. Records-only reviews are conducted faster than regional hearings outside of Washington, D.C. can be scheduled.[7] In making this decision, consider: ability to predict results, urgency of the need for the upgrade, and whether the veteran can afford to attend a personal appearance hearing before a traveling DRB panel within several hundred miles of his/her home or before the permanent Board in Washington, D.C. If the discharge will not be 15 years old after the records-only review, and an HD is denied, the veteran can request a personal appearance hearing.

If the Navy Board detects that an upgrade is warranted in a personal appearance request case, it will usually offer the veteran an upgrade by letter to avoid the waste of time of a hearing. The other Boards may adopt similar procedures in the future. Whether personal appearance cases are processed faster than records-only requests under the new Navy system is unclear; accordingly, we are uncertain as to whether a personal appearance hearing should always be requested under this newly devised system.

8.4 DEVELOPMENT OF CASE THEORY

The theories of the case are decided upon after copies of the relevant regulations[8] are obtained or the legal issues determined.[9] Generally, there is no problem in making alternative arguments, particularly when issues of equity (fairness of the discharge) and

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[1b] *See* App. 6C *supra* (sample "To Whom It May Concern Letter" used to solicit such statements).

[2] *See* § 6.7 *supra* (instructions on how to locate former military members and the location of other military records).

[3] *Id.*

[4] Until recently, the Boards would not provide copies of the records to applicants. *See* Ch. 6, note 8, *supra*.

[5] A Clemency Discharge under the 1974-75 Clemency Program (*see* Ch. 23 *infra*) replacing a BCD or DD from a GCM must go to a BCMR. Otherwise, it is treated like any other UD.

Rehearings may be possible if there is new evidence or the applicant now has a lawyer. *See* § 9.2.16 *infra*.

[6] DoD has waived the normal 15 year statute of limitations until April 1, 1981 (as of this writing). Persons writing in response to the 1980-81 DoD outreach program have 6 months to apply after contact with DoD even if this extends beyond April 1, 1981.

[6a] *See* Ch. 2 *supra* (checklist of easy records-only cases).

[7] *See* § 9.2.7 *infra* (further discussion of these options).

[8] *See* Ch. 10 *infra* (discussion of obtaining relevant regulations).

[9] *See* § 12.10 *infra* (legal error checklist); Ch. 5 *infra* (summary of the procedural rights available under the discharge regulations).

questions of propriety (legal error) are raised. Boards are more inclined to upgrade if they feel that the veteran is a decent person or was treated unfairly; Boards are less inclined to accept exotic legal arguments. Moreover, Boards rarely have lawyers sitting on the panels and frequently pay only passing attention to legal errors other than obvious and serious regulatory violations or other long-accepted errors. Errors that are not likely to result in a grant of relief should be dealt with merely to make a record for appeal. A careful reading of the regulation involved in the veteran's separation is essential in all cases because that might trigger an approach to the case that is not apparent from the regulatory summary.[9a] If the equities are strong in one aspect of the case, then the greatest emphasis should be placed on developing that issue. Anything detracting from that approach should be de-emphasized or eliminated altogether.

When formulating the case theory, include the following steps:

- Discuss with the client why (s)he thinks (s)he was treated unfairly;
- Review the checklist of "easy" cases;[9b]
- Review the propriety checklist;[9c]
- Review the regulatory summary of the appropriate regulation;[9d]
- Review the actual regulation in effect at the time of the applicant's discharge;
- Review the current regulation governing discharge for this reason and the checklist of possible approaches to raising the "current standards and procedures argument";[9e]
- Consult the appropriate chapter of this manual that discusses the specific reason for the veteran's discharge;
- Consult the discussion of equitable approaches;[9f]
- Research similar DRB cases;[10]
- Consider what evidence is available to support potential theories, including the quality of the veteran's testimony;
- Consider whether the applicant's testimony alone is sufficient to overcome the presumption of administrative regularity invoked when a fact in a military record is challenged or when unsupported allegations of command misconduct are made.[11] Remember that as a general rule every aspect of the veteran's story which is not corroborated by available military records should, if possible, be supported by other evidence or by the formulation of an argument that makes acceptance of the veteran's story tenable, as for example reference to a commonly accepted fact or inference.

[9a] *See* Ch. 5 *supra*.
[9b] *See* Ch. 2 *supra*.
[9c] *See* § 12.10 *infra*.
[9d] *See* Ch. 5 *supra*.
[9e] *See* Ch. 21 *infra*.
[9f] *See* Ch. 22 *infra*.
[10] *See* Ch. 10 *infra* (discusses researching Review Board decisions).
[11] The basis for the DRB's use of the "presumption of regularity" is codified at 32 C.F.R. § 7.5(b)(12)(vi).

8.5 FILING A BRIEF AND THE CONTENTIONS OF FACT AND LAW

In cases where the outcome is obvious, such as a simple case of possession of drugs that qualifies under the Laird Memo program, it may not be necessary to submit anything other than a statement that "the applicant clearly qualifies under the Laird Memo Program in that his sole reason for separation was possession of a small amount of drugs for his personal use prior to July 7, 1971."[12] Other categories of cases can be treated summarily, but the vast majority of cases are more difficult and will require a more detailed written submission.

Since 1977, the Boards must respond in writing to all material contentions advanced by an applicant.[12a] Thus, the necessity of submitting a cogent written statement of the case has increased in importance. Not only do these recent changes require Boards to pay more careful attention to arguments, but they also permit development of a record for appeal. Moreover, written submissions become particularly important in cases in which the Board must be persuaded to offer relief without a hearing, or where there has been an application to the Board for Correction of Military Records (where a personal appearance hearing is rarely granted).

Carefully written briefs assume greater importance because all Review Boards are overloaded with work. Normally, only one Board member will carefully screen the applicant's military records for the relevant data. In practical terms the advocate is in the best position to influence the DRB's summary of the veteran's case by describing the facts in a light most favorable to the client. The Boards also consider a good written submission to be an aid in understanding the applicant's case.

The brief and application form need not be filed simultaneously. The brief, however, should be filed well in advance to permit the Board member primarily responsible for reviewing the file to read and digest the arguments. Although the brief may be filed as late as the end of the hearing, this should be avoided.[13] Furthermore, four extra copies of the brief should be available to ensure that each Board member will have an opportunity to consider it carefully. Remember that the Board, which hears as many as eight cases a day, will not want to wait while each Board member reads a brief, particularly a lengthy one.

The brief[13a] should be more akin to a trial brief than an appellate brief. It should be primarily factual, because, in almost all cases, reliance will be on an equitable argument. Rarely are the Board members lawyers, hence, string citing of cases will mean very little to them. And while they will understand arguments that the veteran may have been prejudiced by a violation of the appropriate regulation, it is of little assistance to cite federal court cases standing for a

[12] *See* Ch. 15 *infra* (discussion of drug-related discharges).
[12a] *See* § 9.1.3.1 and Ch. 11 *infra*.
[13] *See* § 9.2.10.1 *infra*.
[13] *See* App. 8C *infra* (sample brief).

similar proposition. The authors do not advocate abandoning citation of legal authority, but do suggest that emphasis be placed on factual development and discussions of how the violation of the regulation actually did, or could have, prejudiced the applicant. It is recommended that citations to legal authority be in footnotes unless a particular case is central to the contention. Elements of a good Review Board brief include:

Statement of Facts. The most important part of the brief is a concise and complete statement of the facts. These facts should be developed chronologically beginning with any pre-service environment that affected the veteran's behavior while in the military. It should include the veteran's reasons for entering the armed forces and then discuss the veteran's military career.

Do not hide disciplinary actions that are present in the record. Disciplinary actions can be explained using the veteran's version of the events, noting that the events were minor or isolated, or conceding that they happened but arguing that the character of discharge awarded was too harsh. Give citations in the service records for all important facts.

The statement of facts should tell the veteran's story in the most favorable manner possible and should make the reader feel sympathetic toward the veteran.

Statement of Material Contentions[13b] Contentions made in cases in which legal arguments are presented differ from contentions made in cases in which equitable arguments are presented. The primary reason for this difference is that precise factual findings may be necessary to support the contention on appeal that a regulatory violation occurred and was prejudicial as a matter of law. Equitable contentions can be more generalized, for example, "the applicant's family hardship evidenced by X, Y, and Z should be a factor considered when determining whether the applicant's AWOL warranted an Undesirable Discharge." When the affect of a complex regulatory violation is not obvious, it may be necessary to use a series of building block contentions thereby carefully laying a factual predicate that leads to the desired ultimate conclusion.

Clear contentions should be made for all issues you want the Board to address. Otherwise, the Board may not only misunderstand the case but also will not be required to respond with a statement of findings, conclusions, and reasons that can be challenged in a subsequent forum.

Argument. Each contention should be accompanied by a discussion and argument. All important factual allegations should be followed by a reference to the record. Very often factual contentions will resemble proposed findings of facts. When the facts alleged might be disputed, it will be necessary to amplify in an argument why each conclusion of fact is appropriate.

The advocate is the person most familiar with the veteran's record; a busy adjudicatory body cannot become completely familiar with the record. Thus, the argument should be concise, direct, and should not stress the obvious.

Reference to Prior DRB Decisions. Some advocates feel that prior DRB decisions can be used as precedent, but the Boards have not stated such a rule.[14] Until the Boards decide, the authors recommend that little emphasis be placed on using DRB decisions as precedent if other approaches to the case exist.

8.6 PREPARATION FOR AND CONDUCT OF THE HEARING

The preparation for the hearing is as important as preparing documentary evidence.[15] While hearings are generally informal, some Board members may assume a prosecutorial demeanor to test an applicant's credibility. Therefore, careful preparation of the applicant's testimony is essential. [15a]

Make the applicant aware that, although it is not mandatory that (s)he testify and be subject to cross-examination, the authors know of no instances in which applicants appeared and did not testify under oath. Thus, there may be some hesitation about confronting a panel of five senior military officers because most applicants had an unpleasant experience while in the military. This fear can be diminished, however, by assuring the applicant that there is nothing to lose at the hearing. The applicant's discharge cannot be further downgraded and (s)he cannot be returned to military service. The applicant can also be assured that the Boards are generally sympathetic to applicants who are treated unfairly and who present a straightforward and credible statement. Moreover, a discharge review is private and no one, other than counsel and the Board, can find out about the application or hearing. The Boards are prohibited, under the Privacy Act, from disseminating information about the applicant learned during the discharge review process.

Before the hearing, one Board member will prepare a summary (sometimes called a brief) of the veteran's case, identifying any issues not raised by the applicant which the member thinks the Board should consider. Additionally, there may be a medical or legal advisory opinion accompanying the summary. Counsel and applicant will have an opportunity to view this document at the hearing site selected by a traveling panel prior to the hearing, or by going to the Board's permanent site in Washington, D.C. Counsel in the field should be able to obtain a copy of this document prior to the hearing by requesting one from the Board. There may be some difficulty obtaining a copy of the summary, however, because Boards usually arrive at the regional hearing site the night before the hearing. For that reason, there might not be enough time to make a thorough review.

[13b] *See* Ch. 11 *infra* (details on how to make contentions).

[14] *See* Ch. 11 *infra* (contentions to be used when citing prior Board decisions).

[15] The Army DRB uses a hearing examiner mode where one officer conducts and videotapes a hearing to be heard by a full panel in Washington, D.C. The strategies remain the same in these cases. *See* Ch. 9 *infra* (conduct of the hearing).

[15a] *See* § 9.2.11 *infra* (rules for conduct of the hearing).

It is also essential that the Board's copy of the applicant's record be carefully reviewed. Counsel must do this to be certain that the NPRC has forwarded a complete set of records (*e.g.,* penciled-in remarks often are not reproduced when the records are copied). It is therefore essential to arrive early at the hearing site. Additionally, counsel should determine which Board member prepared the summary, because that person usually will be the Board member best informed about the case. A discussion with this person may give counsel an idea as to how the Board will likely view the case.[16] Counsel may not receive all Board correspondence. For this reason the client should be instructed to inform counsel of all correspondence received from the Board because, among other reasons, the applicant will be requested to inform the Board whether (s)he will attend and whether counsel will appear.

Keep in mind that the Boards do not like to grant last minute continuances and have been known to begin the hearing even if the applicant is not on time. If a continuance is necessary, counsel should provide a detailed reason for the request.

The best way to prepare an applicant is to describe the procedures to be followed at the hearing. The applicant should practice the testimony as it will occur, including all difficult questions that can be predicted. Remember that the Boards want to hear the applicant's story, not counsel's version; therefore, make it clear to the applicant that it will be his/her story to tell. Most of the testimony will be a chronological description of the relevant events in the applicant's life and should be relatively easy for him/her to relate. One technique that has been successful is to inform the applicant that a checklist will be kept of all important facts. If the applicant should forget any important fact, counsel can direct the applicant's attention to it. Because the hearing procedures are not formal, it is easy to do this at any time.

The hearings are normally set in an informal atmosphere. Counsel and the Board members may even be seated around one table in a small room. The participants generally include five Board members, the applicant and counsel, someone who will transcribe the proceedings, and occasional observers learning Board procedures. Members of the public are not permitted unless the applicant so requests (nonwitness family members, by their mere presence, can be highly supportive).

Prior to the hearing, the applicant and counsel will be briefed on hearing procedures by a Board staff member. Such procedures include:

- *Opening Rites.*[17] This generally involves identification of the applicant and counsel, an explanation of the applicant's rights, swearing in of the Board members and the applicant, an opportunity to challenge any member for cause (almost never utilized), and ascertaining whether the applicant is ready to proceed. If the applicant knows any of the Board members and feels that a challenge for cause might be appropriate, counsel should ask for a brief recess to discuss this with the applicant.
- *Counsel's Opening Statement.* This should be a *brief* statement of the theory of the case, how the case will be presented, and what counsel will seek to prove at the hearing.
- *Testimony and Presentation of Evidence.* Counsel should have the applicant begin to tell his/her story chronologically. Ideally, counsel's questions should be nothing more than "what happened next." The applicant should be cautioned never to say "the military did so and so," but rather "sergeant X did this to me." At this stage, the Board members usually will not interrupt to ask questions; however, if they do, counsel should not object.
- *Cross-Examination.* Examination by the Board members will proceed, one at a time, with the junior member going first. This is not formal courtroom-style cross-examination; however, an earnest search for the truth may occur. Therefore, the applicant should be prepared for intense and detailed questioning, particularly if his/her story has no support in the record.
- *Redirect Examination.* At this stage, counsel has an opportunity to clarify or bring out any further matters. Frequently, the applicant will not have understood the Board's questions or will have not given a complete answer. One way to deal with this situation is to say "Mr. so and so, Board member X asked you a question about Y. I do not think that you gave them the complete answer that we discussed the other day. Will you please answer that question again?" If necessary, counsel should use leading questions aimed directly to the point.
- *Further Questioning.* The redirect may prompt further questioning from the Board. Because the procedures are informal, this may continue until no one has any further questions. Should the applicant begin to ramble or go off the issue during the hearing, counsel can assist by interjecting an observation that the applicant should direct his/her testimony to the issue at hand. Board members usually have many hearings to conduct each day and will appreciate such assistance from counsel.
- *Presentation of Other Witnesses or Evidence.* At this stage, counsel should bring in any other witnesses or evidence. The Boards normally will not permit a witness to sit in on the hearing. Evidence is introduced by asking the president of the Board to admit it with no other formal procedures.
- *Suspension of the Proceedings.* If during the course of the proceedings it becomes apparent that further evidence will be necessary, the Board can be asked to suspend the proceedings for a reasonable period of time to await such evidence. If a minor matter is involved, delaying the decision may not be worthwhile, particularly when the applicant appears to have made a favorable impression

[16] *See* § 9.2.11.1 *infra* (hearing scheduling and routine correspondence from the Boards).
[17] *See* App. 8B *infra*.

on the Board. This impact might be lost a month later, when the Board meets again to deliberate.

- *Closing Statement.* Counsel's closing statement should summarize the important elements of the case and explain in detail all of his/her contentions. Counsel should invite questions from the Board if the contentions are not clear or if the Board desires amplification. Counsel should not engage in any lengthy analysis of case law nor exhibit hostility to the Board or the military service. Counsel should refer to portions of the record that support his/her position, and to the portions of the brief that relate to the argument in question.
- *Closing Rites.* This involves ascertaining whether the applicant has anything further to add, whether (s)he feels that the hearing was fair, and the adjournment of the Board.
- *Deliberation.* The Board will deliberate the case with counsel and the applicant being asked to remain to answer any further questions that arise. The applicant normally is given no indication of the results of the hearing; however, a favorable result sometimes will be transmitted informally, particularly in a case where there is urgent need for relief.

There usually is nothing for counsel to do at the post-hearing stage, except in Navy and Marine cases when the decision of the Board might be reviewed by the designee of the Secretary of the Navy.[17a]

8.7 CASE PREPARATION CHECKLIST

Counsel should review the following checklist to ensure that all the appropriate steps in case preparation have been taken:

- Complete military personnel file received;
- Applicant reviews service records;
- Applicant completes questionnaire and provides a personal history statement;
- Military records placed in order and summarized; case processing sheet prepared;
- Veterans told to notify counsel whenever any correspondence is received from the Board;
- Likely date and place of hearing ascertained;
- Applicant told to make arrangements to appear at hearing site;
- Determine whether a rehearing should be requested before a DRB, instead of a BCMR application;
- Other evidence from the government received, such as court-martial transcripts, pay records, investigative reports, hospital records, relevant VA files, prior Review Board actions, and records from unit diaries or histories;
- Determine the need for locating witnesses to events that occurred in service;
- Request any other essential witness statements;
- Request character references, school transcripts, and any other documentary proof of the veteran's standing in the community;
- Application form filed *after* receipt of records from the NPRC;
- Decision made as to whether a personal appearance hearing or records-only review will be requested;
- Inquiry made whether hearing pending and whether a continuance is necessary;
- Determination made whether applicant should travel to Washington, D.C. or to a regional site, for a hearing;
- Determine whether a claim is pending at the VA, or should be filed simultaneously with the VA. A VA claim filed simultaneously normally will fix the date for payment of benefits at the time of the filing; therefore, when current VA benefits are an issue, this step should be considered. In cases where the discharge was for an AWOL of 180 or more days, involved a conscientious objector who refused to follow orders or wear the uniform, or involved an officer who resigned in lieu of general court-martial, there might be a statutory bar to veterans benefits; and a VA adjudication may be necessary even if a discharge upgrade occurs;[18]
- Statute of limitations considered: 6 years from discharge for backpay claim in court or 15 years since discharge for a DRB application unless the veteran is covered by the waiver of the 15-year period;
- Relevant regulations ordered;
- DRB decisions researched and ordered;
- Checklist of "easy" cases consulted;[18a]
- Consideration given to appealing any court-martial conviction in the record;
- Chapter relating to the reason for type of discharge consulted;
- Equitable approaches considered;[18b]
- Checklist of common procedural errors consulted;[18c]
- Brief and statement of material contentions submitted in advance of the hearing;
- Review of the service records in the custody of the Board prior to the hearing;
- Review of any advisory opinions received by the Board prior to the hearing;
- Discussion of the case with the Board member assigned to prepare the case brief;
- The applicant's testimony practiced, with counsel asking questions that would likely occur to the Board members;
- Board procedures (*e.g.*, importance of being on time for the hearing, and difficulty in obtaining continuances), explained to applicant.

[17a] *See* § 9.2.15.1 *infra* (discusses options at this stage).

[18] *See* Ch. 26 *infra*.
[18a] *See* Ch. 2 *supra*.
[18b] *See* Ch. 22 *infra*.
[18c] *See* § 12.10 *infra*.

APPENDIX 8A
SAMPLE CASE CHRONOLOGY

To ensure that all potential arguments are found, list all important facts in chronological order. The list should include the following:

- Family background, pre-service problems, reason for entering service, aspirations.
- Contract promises, assignments, transfers.
- Training and job specialities.
- Decorations, commendations, promotions, and reductions.
- All disciplinary actions, interrogations, and arrests.
- Facts leading to discharge.
- How the veteran was discharged.
- The type of discharge and regulation used.
- Veteran's explanation of problems leading to . . . ?

A sample follows:

G. I. Joe

FAMILY BACKGROUND	
June 8, 1949	Born in Washington, D.C.; father died when eleven; problems in school and with alcohol. Juvenile arrests involving alcohol. Dropped out of school in ninth grade at age 16. Enlisted to learn a skill and to straighten out life. [Get mother's affidavit.]
June 22, 1966	Enlisted for (3) three years at age 17 with parental consent. Promised training in communications. AFQT 31, GT 68, Mental Cat. III.
June 22, 1966-August 8, 1966	BCT Fort Leonard Wood, MO; C & E-Good.
July 4-5, 1966	One day AWOL (6:00 p.m.-8:00 a.m. — 14 hours) one night.
July 9, 1966	Art. 15; One day AWOL; 14 days extra duty and restriction to post.
August 10,1966-November 28, 1966	AIT, Ft. Gordon, Georgia; Lineman; C & E-Excellent; Training Co. Q.
August 12, 1966	Promoted to PV 2.
September 18, 1966	Transfer (recycled) to Training Co. R; C & E-Excellent.
November 12, 1966	Promoted to PFC (E-3).
November 28, 1966-August 8, 1967	Co. A, 142nd Sig. Bn. Ft. Hood, Texas; C & E-Satisfactory.
December 3-4, 1966	One day AWOL (6:00 p.m.-2:00 p.m. — 20 hours) night and ½ day.
December 8, 1966	Art. 15; One day AWOL; Reduced to Pvt (E-2).
February 9, 1967	Promoted to PFC (E-3).
Almost 14 months Pre-Vietnam	Two minor Art. 15s for one day AWOLs (one at night, one missed less than full day duty).
VIETNAM	
August 8, 1967-December 8, 1967	Republic of Vietnam (4 months duty); A Co., 142nd Sig. Bn. Chu Lai; C-Poor; E-Unsatisfactory.
September 5-7, 1967	Two days AWOL (7:00 p.m.-6:00 p.m. two days later). One month in country.
September 12, 1967	Art. 15; two days AWOL plus failure to do door guard duty at 8:00 p.m. September 7; reduction to PV 2; $40.00 fine; 14 days extra duty and restriction to post.

October 8, 1967	Shrapnel in left arm close to "Sat Cong" tattoo; Purple Heart. Best friend killed — "seemed to upset him tremendously."
November 26-28, 1967	Two days AWOL (8:00 p.m.-1:00 a.m. — 29 hours — one duty day).
December 8, 1967	Counseling by Capt. Smith, A Co. CO; last day in Vietnam.
END VIETNAM	
December 9, 1967-March 16, 1968	Ft. Hood, Texas, Co. A, 142nd Sig. Bn.; C-Poor; E-Unsatisfactory.
December 9-10, 1967	One day AWOL plus bar fight in Kileen, Texas (7:00 a.m.-2:00 a.m. — 20 hours).
December 12, 1967	Restricted to Post.
December 16, 1967	Charges preferred and referred to special court-martial. Art. 86 — Nov. 26-28, 1967 — Vietnam; Dec. 9-10, 1967 — Ft. Hood. Art. 128 — Dec. 10, 1967 — Hit civilian Bobbi Sams in face and chest with fists; threatened to hit M.P. with beer bottle.
December 29, 1967	Special court-martial. Plea — Guilty to all but hitting civilian. Findings — Guilty to all. Sentence — 30 days confinement at hard labor; reduction to PV 1; ⅔ pay for two months.
January 3, 1968-February 2, 1968	Confinement at hard labor, Ft. Hood Stockade.
February 2, 1968	Counseled by Capt. Smity, A. Co. CO.
February 13, 1968	Medical treatment record; acute ETOH (alcohol) intake; brought in unconscious.
February 29, 1968	Counseled by Chaplain Major Cross.
March 2-3, 1968	One day AWOL (8:00 p.m.-3:00 a.m. — 7 hours at night).
March 4, 1968	Charges preferred — case referred to summary court-martial.
March 8, 1968	Summary court-martial. Art. 86 (7 hours at night). Plea — Guilty. Sentence — 30 days confinement at hard labor; $45.00 fine.
March 9, 1968	142 Sig. Bn. CO Col. Jackson suspended confinement at hard labor until May 9, 1968.
March 16, 1968	"Rehab" transfer to B Co., 142nd Sig. Bn. Counseled by Capt. Elrod, B Co. CO.
March 16, 1968-May 16, 1968	C-Poor; E-Unsatisfactory.
March 21, 1968	Counseled by Capt. Elrod, B Co. CO.
March 24, 1968	Counseled by Lt. Moody, B Co. Executive Officer (was A Co. Executive Officer while Joe was there).
March 31, 1968	Cap. Elrod, B Co. CO recommends discharge under AR 635-212 (Unfit/frequent involvement, in unit for two weeks.)
April 16, 1968	Notice to appear before Administrative Discharge Board.
April 26, 1968	1 Lt. Huffnagle, JAGC, assigned by LTC Sweeney as counsel.
April 29, 1968	SM chooses to exercise all rights.

May 1, 1968	Maj. Gen. Wright certifies Huffnagle unavailable; 2nd Lt. Cronkhite appointed; "Officer of mature judgment has served on 2 court-martial panels."
May 3, 1968	Report of Medical Examination: Inadequate personality. Report of Medical History: Depression; excessive worry; nervous trouble; periods of unconsciousness; cramps in legs; frequent indigestion; shortness of breath; palpitating or pounding heart. Psychiatric Evaluation (Capt. Macy): "History of marked social inadaptability prior to and during service; cannot adjust to further military service." Diagnosis: Inadequate personality.
May 5, 1968	2nd Lt. Cronkhite vs. Capt. Fakian (Recorder outranks defense). Lt. Moody — A & B Co. Executive Officer testifies, though not listed among witnesses on notice. Testimony: Capt. Elrod — B Co. CO — Late for formation; lax in carrying out duties; missed morning formation twice on March 22 and 23; missed bed check March 22. Capt. Smith — A Co. CO — Counseled to straighten up or face discharge (after release from stockade). "I don't think he could be a good soldier." Pvt. Joe: "It's as though my mind is in another place sometimes — I want to soldier — I'd like to transfer to another post." Recommendation: Undesirable Discharge.
May 16, 1968	Undesirable Discharge.
POST SERVICE	
1968	Mother: "When he came home, I hardly recognized him. He seemed to have aged so much." [Get mother's affidavit.] Held odd jobs and continued drinking.
1969	Arrest for drunk and disorderly. [Get arrest records and reports.]
1970	Arrested for driving while intoxicated.
1972	Simple assault (Barroom fight). Pre-trial diversion to alcoholic rehab. program at St. Elizabeth's Hospital — Dr. Harper. [Get statement from Dr. Harper.] 6 weeks in-patient (intensive psychotherapy). 8 months total in program.
1973	Work at Righteous Brothers Wholesale Liquor Warehouse to present. Got GED (High School Equivalency Diploma). [Get employer's statement and copy of GED.]
Late 1973	Married; one child. [Get wife's statement.]
1976	VA denies education benefits; now in carpenter training program.

APPENDIX 8B
TYPICAL DRB OPENING RITES

Q: Do you feel that you are now ready to proceed with your appeal?
A: Yes, sir.

Q: (after explanation of applicant's rights and procedures during the hearing) Do you understand?
A: Yes, sir.

Q: (after explanation of applicant's right to challenge any board member for cause) Do you understand?
A: Yes, sir.

Q: The Army DRB Panel is ready to proceed with the case of (name of applicant). Is that your correct name?
A: If name is correct, answer: Yes, sir.
If name is incorrect, answer: No, sir.
My correct name is _____.

Q: You have a right to object for cause to any panel member sitting in your case. Do you object to any member I have just named?
A: If no objection for cause, applicant answers: No, sir. Counsel adds: No objection.

An objection for cause should be made where:
(1) Board member participated in separation proceedings leading to client's discharge.
(2) Client served under board member and received punishment from or had other adverse encounter with Board member.

Q: Have you and your counsel had an opportunity to examine the [DRB] brief and records in your case and are you ready to proceed with the consideration of your appeal?
A: Yes, sir.

Q: Are you now prepared to proceed with the consideration of your appeal?
A: Yes, sir.

APPENDIX 8C
SAMPLE DISCHARGE UPGRADING BRIEF

BEFORE THE UNITED STATES ARMY
DISCHARGE REVIEW BOARD

STATEMENT OF FACTS

Applicant enlisted in the Army in February, 1963, at the age of seventeen. He received excellent marks in training and was assigned to the infantry in Korea. He accumulated 5 Art. 15s, 1 Summary and 1 Special Court-Martial in his initial company. He was transferred under a suspended sentence to another company in the same Battalion at the same camp. Shortly after this transfer he went AWOL for almost two months. He received another Special Court-Martial and was administratively discharged under the provisions of AR 635-208 for unfitness in November, 1964.

STATEMENT OF MATERIAL CONTENTIONS

A. Adequate Rehabilitation Efforts Were Not Made

1. At the time of Applicant's discharge, AR 635-208, ¶2(a) required that: "Action will be taken under these regulations only when it is clearly established that (a) despite reasonable attempts to rehabilitate or develop the individual as a satisfactory soldier, further effort is unlikely to succeed."

2. Applicant was assigned to Company C, 1st Battalion, 32nd Infantry, from August, 1963, to May, 1964, where he accumulated five Art. 15s, one summary and one special-martial.

3. Applicant was transferred to Company A, 1st Battalion, 32nd Infantry, on May 18, 1964, while he was under a suspended sentence.

4. Company A was in the same compound as Company C at Camp Hovey, a small camp where servicemembers interacted frequently.

5. The Commanding Officer of Company A stated in his CO's Report that this transfer was the only rehabilitation attempt.

6. This one attempt was inadequate within the meaning of AR 635-208, ¶2(a) to "clearly establish" that "reasonable attempts" had been made in that:

a. Applicant remained in Company C too long when his record of misconduct indicated rehabilitation should have been attempted earlier.

b. Transfer to Company A was ineffective as a "reasonable attempt" because: (1) Applicant was under a suspended sentence, which violated the concept embodied in AR 635-208, ¶2(a), that the rehabilitative transfer provide a "fresh start"; and (2) Applicant was transferred to another company within the same compound, which was too close to Applicant's old unit to afford him a fresh start.

c. No other reasonable attempts were made.

7. This failure to follow the requirement of AR 635-208, ¶2(a), as described in Contention 6, constitutes prejudicial error within the meaning of 32 CFR §70.6.

8. The facts described in Contentions 2-5 indicate that Applicant's discharge was inequitable.

B. The CO Had No Basis To Conclude That Further Attempts Would Be Unlikely To Succeed.

C. Applicant Should Have Been Discharged Under AR 635-209.

D. The CO Should Have Recommended Discharge Under AR 635-209.

E. The CO's Report Was Used Improperly.

F. The Content Of The CO's Report Is Inaccurate.

G. Applicant Received Inadequate Counseling.

H. Applicant's Waiver Was Invalid.

I. Current Regulations Require Equitable Relief.

ARGUMENT

A. Adequate Rehabilitation Efforts Were Not Made.

Applicant contends that he was improperly discharged under AR 635-208 (in effect in 1964) because attempts to rehabilitate him were not made. Applicant was given only a single transfer from one company to another company. Even this single transfer was tainted, because he was still under the "cloud" of a suspended sentence. Had proper rehabilitation been effected, Applicant would have become a good soldier given the abilities he demonstrated and awards received while in the Army. This failure to rehabilitate Applicant violated AR 635-208, ¶2(a). Therefore, an upgrade of Applicant's discharge is warranted on either propriety or equitable grounds.

In asserting that no rehabilitation attempts ever afforded him a meaningful chance to improve himself, Applicant acknowledges that he was transferred from Company C, 1st Battalion, 32nd Infantry, to Company A, 1st Battalion, 32nd Infantry, on May 18, 1964. However, Applicant maintains that the mere formal existence of the transfer can in no way satisfy the requirements of AR 635-208. The transfer was, in short, too little and much too late.

Applicant contends that this single transfer was plagued by infirmities that undermine its qualification as being "reasonable." Applicant was transferred from Company C to Company A. Both were located at Camp Hovey and were within the same battalion. Although his transfer supposedly was designed to give him a fresh start, Applicant remained under the same battalion commander and in close proximity to his old unit. In AD 78-01018A, the Board stated that a transfer of this kind makes "rehabilitation not possible" and concluded that such a transfer "violates the intent of the regulation."

This judgment, that transfers within the same battalion fail to give the servicemember an opportunity to improve himself, has been incorporated into the current regulations which supersede AR 635-208. [AR 635-200, ¶13-7(b), May 1, 1980]. In addition, Applicant asserts that this transfer did not give him the "fresh start" intended by rehabilitative transfers. Applicant was transferred while he was still under a suspended sentence. Because this "cloud" was still hanging over him when he was transferred,his transfer could not give him the clean slate intended by the rehabilitation requirement. His transfer was, therefore, defective as a rehabilitation attempt.

B. No Basis In Fact Supported The Commanding Officer's Conclusion That Further Rehabilitation Effort Would Be Unsuccessful.

Applicant further contends that he was improperly discharged under AR 635-208 because the second prerequisite to discharge action, like the first, was never met. AR 635-208, ¶2(a) required Applicant's Commanding Officer (CO) to establish clearly that "further effort [to rehabilitate or develop him] is unlikely to succeed." This conclusion was to be based on an individual evaluation of Applicant, as provided by AR 635-208, ¶5(g).

The CO failed to establish the probable effectiveness of future rehabilitation efforts, as is evident by reading item 10 of

his report: "I believe that further rehabilitation efforts would be ineffective. Subject EM has appeared before a Psychiatrist. The report of the Psychiatrist is attached as inclosure 3."

Applicant contends that this bare assertion hardly rises to the level of *clearly* establishing probable failure of rehabilitation, as required by the regulation. The CO's assertion is without sound basis. In view of its language, AR 635-208 contemplated that previous rehabilitation attempts would provide the basis for making the required determination. In this instance, the CO was unable to base his conclusion on previous rehabilitation attempts, because only a single attempt, and one of dubious value, had been made.

Applicant's record of infractions committed while assigned to Company C clearly subjected him to possible elimination through administrative procedures. Yet, prior to any such discharge, Applicant's Commanding Officer was obliged to undertake efforts to improve Applicant's behavior and performance, as required by AR 635-208, ¶2(a).

The facts of Applicant's discharge demonstrate that neither the letter nor the spirit of AR 635-208 were met in his case. Because only one inadequate attempt was made, Applicant contends that reasonable rehabilitation attempts were not made in his case. Because the determination regarding further rehabilitation attempts was made without support and because no individual assessment was made of him, Applicant contends that AR 635-208 was not followed, thereby prejudicing his case.

This failure to comply with regulations is grounds for awarding Applicant relief. Case law firmly establishes the principle that rehabilitation efforts must precede administrative discharge. [*See, e.g.*, AD 78-03148.]

C. Applicant Should Have Been Discharged Under AR 635-209.

Applicant contends, in the alternative, that he should have been discharged under AR 635-209 [for unsuitability], rather than under AR 635-208 [for unfitness]. Applicant recognizes that it is inconsistent to argue that rehabilitation was called for, yet also alleges that a discharge for unsuitability was appropriate. However, in all cases, there is a fine line in determining which is more appropriate, retention for possible rehabilitation or separation for unsuitability. In this case, if the Board finds that Applicant was not amenable to rehabilitation, it should at the very least decide that separation under AR 635-209 was appropriate.

Section 208 applies to soldiers who refuse to adapt their behavior to Army standards and not to those who are unable to adapt (*i.e.*, "could but wouldn't"). By contrast, section 209 applies to soldiers who are simply unable to conform their behavior to Army standards (*i.e.*, "would but couldn't"). Thus, if a servicemember's disciplinary problems derive from a personality disorder, rather than willful misconduct, he or she should be separated under AR 635-209.

The policy underlying these two regulations apparently prefers separation under section 209 to separation under section 208. AR 635-208, ¶2(c) explicitly requires "disposition under other regulations" when appropriate. Even more specifically, AR 635-208, ¶7(f) requires the CO to state why disposition under AR 635-209 is not appropriate in *any* instance where a 208 discharge is recommended.

In this case, disposition under section 208 was clearly appropriate. The Staff Psychiatrist diagnosed Applicant as suffering from "3210. Emotional Instability" and recommended separation under section 209. "Emotional Instability" is a personality disorder.

D. The CO Should Have Exercised His Discretion By Recommending Separation Under AR 635-209, In Conformity With The Psychiatrist's Report.

Applicant contends that his CO had ample evidence to support separation under AR 635-209 and should have recommended that disposition in conformity with the psychiatrist's diagnosis and recommendation.

While recognizing that the CO has discretion to recommend discharge under AR 635-208 or AR 635-209, Applicant asserts that this discretion is somewhat limited by regulation. [AR 635-208, ¶7(f) and AR 635-208, ¶2(c)].

Once the CO received the psychiatrist's report, he should have reevaluated his recommendation. The psychiatric diagnosis of Emotional Instability and 209 recommendation constituted strong evidence that separation under 209 was appropriate. To disregard the technical advice of the doctor, the CO should have presented even stronger evidence to justify a different recommendation.

In this case, however, the CO failed to present countervailing evidence. The CO stated that 209 was inappropriate because "this individual has the mental capacity to absorb training, and can do a credible job if and when he personally desired to do so." This statement flatly contradicted the psychiatrist's evaluation. The psychiatrist's report clearly stated that applicant suffered from "Emotional Instability" and that this "condition is not amenable to medical or psychiatric treatment in the military setting."

While Applicant's acts might have buttressed a 208 recommendation if no disorder was diagnosed, they are placed in a different light given the psychiatric diagnosis. In this light, the acts suggest a person under increasing stress and unable to adapt to the environment of Army life in Korea. The acts also suggest that Applicant could not control his reactions due to his underlying personality disorder. As such, the CO should have recomended separation under 209.

Army DRB decisions also bolster Applicant's contention that he should have been separated under 209. The DRB has found impropriety in cases where the CO overruled the psychiatdrist's recommendation for a 209 discharge. In AD-78-02246, the Board stated that "the command should have so stated in the discharge action why the applicant's psychiatrist's evaluation was not addressed and the psychiatrist's diagnosis and recommendation adhered to." Similarly, in AD-77-06745, the Board found the CO acted improperly when he did not state why a 209 discharge was not pursued when a psychiatrist diagnosed a C&B disorder and recommended action under 209. These cases constitute regulatory interpretation of this issue and should apply to this case.

E. The Use Of The CO Report Prejudiced Applicant.

Applicant contends the CO's report was used improperly because Applicant was not shown this document before he waived his rights, as required by AR 635-208, ¶7(l)(1). The servicemember must see the CO Report before waiving any rights for two separate but equally important reasons. First, seeing the report enables the servicemember to correct any inaccuracies. Second, access to the report assists the servicemember in deciding whether to challenge the CO Report and/or the entire discharge proceeding.

In the instant case, Applicant contends that he never saw the CO Report at all prior to executing his waiver. Applicant admits that he signed the waiver, which did state, albeit in "boilerplate" fashion, that he had seen the CO Report. However, Applicant maintains that he signed the statement in response to a promise of early release from the stockade.

This contention is buttressed by the record which indicates that the CO Report in fact was prepared three days after Applicant waived his rights.

F. The CO Report Contained Serious Inaccuracies Prejudicial To Applicant's Interests.

Failure to give the Applicant the opportunity to review the report and to correct any inaccuracies therein is particularly prejudicial in the instant case. The CO Report contains a good deal of information that is simply erroneous. Some of it is vague, but much of it misrepresents the quality of Applicant's service and his ability to adapt to military life.

If Applicant had seen the CO Report prior to executing the waiver, he could have requested further clarification regarding

the specific offenses deemed to constitute "frequent breaches of conduct and discipline." [*See* AR 635-208, ¶7(c).]

The CO Report inaccurately described the rehabilitation efforts. He stated that "*numerous attempts* [had] been made to rehabilitate this individual and all have met with failure" (emphasis supplied). Since only one rehabilitative attempt was in fact made, this statement is false on its face and misrepresented to the Discharge Authority that Applicant had been afforded more attention than in fact he had received. He could have questioned his CO about why it was neither "feasible" nor "appropriate" that he be processed under the provisions of AR 635-209, when there was ample evidence to indicate it was both feasible and proper to do so.

Finally, had Applicant seen the CO Report prior to signing the waiver, he could have challenged the CO's Conduct and Efficiency ratings as incomplete. Unmentioned in the CO Report are the excellent ratings Applicant earned during Basic and Advanced Training. When all of these defects are taken together, the inescapable conclusion is prejudice to the Applicant.

G. Applicant Received Insufficient Counseling

The counseling Applicant received was defective because of an insurmountable conflict of interest. Applicant's CO counseled Applicant in the stockade on September 26, 1964. This same CO had already concluded that Applicant was not worthy of retention or further rehabilitation.

This conflict of interest runs contrary to the intention of AR 635-208. Although the regulation failed to specify who might serve as counsel for waiver purposes, AR 635-208, ¶11(b)(3) makes clear that "counsel" at actual board hearings should serve as an advocate on behalf of the affected individual and underscores the importance of the independence of counsel. Applicant asserts that responsible counsel is as important when rights are waived as when they are actually exercised: both are critical points in determining disposition of a case. Therefore, Applicant should have been counseled by an officer at least aware of this obligation. Current AR 635-200, ¶1-3(d) recognizes this point explicitly.

H. Applicant's Waiver Was Invalid

Applicant contends that his election to waive his rights to counsel, a board hearing, and to make statements in his own behalf was invalid because (1) it was not made knowingly because of the inadequate counseling afforded him, and (2) it was not made voluntarily because of the circumstances surrounding his execution of the form.

The waiver was not executed knowingly because the conflict of interest outlined above with the CO serving as both Applicant's CO and counsel, prevented Applicant from acting with a full understanding of the consequences. In addition, Applicant was 18 years old, had only an eighth grade education, and was suffering from Emotional Instability. Applicant was not shown the CO Report or other relevant documents, and his options were described to him in a way which left no real choice. Applicant was led to believe that waiving his rights carried with it no lasting detriment, because he was told an upgrade could be obtained easily. All these factors indicate Applicant's limited ability to understand the effect of the waiver. Therefore, his execution of the waiver form cannot be considered to be knowing.

Applicant also contends that the circumstances surrounding his waiver undermined the voluntariness of his choice. At the time of the waiver, Applicant had been confined for 110 days and faced approximately 90 more. Applicant was counseled in prison, an inherently coercive setting. *See, Miranda v. Arizona,* 384 U.S. 436 (1966). His foremost desire was to leave the stockade as soon as possible. Applicant signed the waiver on the basis of the CO's advice and a veiled threat of prolonged confinement, if he did not. He signed the waiver the same day he was counseled; in fact he signed it within ten minutes of seeing it. Given these exigent circumstances, it is clear that Applicant's execution of the waiver was not voluntary.

Furthermore, today's regulations require that a servicemember be afforded at least 72 hours to consider the consequences of waiving fundamental rights. AR 635-200, ¶1-18(a)(6). This provision ensures that the waiver is voluntary and knowing, by providing adequate time for Applicant to consider his choice. Had this requirement been in force at the time of Applicant's waiver, he could have more intelligently responded to the situation confronting him.

I. Because Applicant's Rights Are Substantially Enhanced Under Current Army Standards, Equity Requires An Upgrade.

Had today's AR 635-200 been in effect at the time of Applicant's discharge, his rights would have been significantly enhanced. Applicant would have enjoyed very different treatment and might not have been discharged by administrative procedures at all. Therefore, this Board should apply standards of equity and upgrade Applicant's discharge.

Current regulations would have benefited Applicant at an early stage of his enlistment period. Had AR 635-200, ¶13-6 been in effect, Applicant would have been provided with sound counseling regarding his behavior.

Moreover, had AR 635-200, ¶13-7(b) been in effect, Applicant would have been given at least one rehabilitative transfer that could have given him a "fresh start." If elimination proceedings had been instituted in conformity with current regulations, he would have been counseled by a lawyer. AR 635-200, ¶1-3(d).

Had AR 635-200, ¶1-18 been in effect, Applicant would have been notified in writing of the specific allegations against him and been advised of his rights to counsel at a hearing. If he chose to waive his rights, he would have been given at least 72 hours to reconsider this decision.

CHAPTER 9
THE DISCHARGE REVIEW SYSTEM

9.1 GENERAL OVERVIEW OF THE DISCHARGE REVIEW SYSTEM

Although Congress has never specifically authorized the military services to issue discharge certificates administratively that have character of service designations,[1] it has created two sets of administrative forums with authority to upgrade less than honorable discharges:

- Discharge Review Boards (DRBs), which have jurisdiction to review and change all discharge characterizations except those issued by general courts-martial (GCMs);[2] and
- Boards for Correction of Military Records (BCMRs), which are composed of civilians and have jurisdiction to alter any military record as "necessary to correct an error or remove an injustice."[3]

Discharge review is the process by which the reason for a service discharge, the procedures followed in producing the discharge, and the characterization of service contained in it are reevaluated to determine whether or not the discharge should be changed.[4] The BCMRs review appeals from the DRBs and have primary jurisdiction to review those discharges (Bad Conduct Discharges issued by a GCM and Dishonorable Discharges) over which the DRBs lack jurisdiction. The BCMRs, however, require applicants to apply first to a DRB, if that forum has jurisdiction to review the discharge at issue.

9.1.1 STATUTES GOVERNING DRBS AND BCMRS

The DRB enabling statute[5] provides that:

- DRBs must base their decisions "on the records of the armed forces concerned and such other evidence as may be presented to the Board";[5a]
- The DRB applicant and other witnesses may present evidence before the Board at a hearing or by affidavit;
- The applicant has a right to be represented by counsel; and
- The decisions of the DRB are reviewable by the Secretary of the service concerned, although review is not required.

The BCMR enabling statute[6] is the same in all major respects as the DRB enabling statute, with the following exceptions:

- Board members who decide BCMR applications are *civilian* employees of the military department (military personnel decide DRB applications);
- The time period provided in the BCMR statute for filing an application differs from that of the DRBs;[6a] and
- BCMRs are not required to grant the applicant a hearing and in practice rarely do so.

The DRBs and BCMRs are "agencies" within the Administrative Procedure Act and must follow many APA requirements.[7]

The DRBs and BCMRs share trial and appellate features. Like a trial-type body, and DRBs and BCMRs create a record, receive evidence, and make findings of fact to support their decisions. Like appellate bodies, DRBs and BCMRs review agency actions previously taken to determine their legality and equity.[8]

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[1] *See* Giles v. Secretary of the Army, 475 F. Supp. 595, 597 n.1, 7 MIL. L. REP. 2524 (D.D.C. 1979), *aff'd*, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980). *See generally* Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L.L. REV. 227 (1974). The military departments rely on 10 U.S.C. §§ 1163, 1168, 1169 as authority to issue graded discharge certificates. The cited Comment discusses why such reliance is misplaced.

[2] In other words, the DRBs have jurisdiction to review a General (Under Honorable Conditions Discharge), an Undesirable (Under Other Than Honorable Conditions) Discharge, or a Bad Conduct Discharge issued by sentence of a Special Court-Martial. *See* § 301, Serviceman's Readjustment Act of 1944, 58 Stat. 284 10 U.S.C. § 1553.

Although DRBs have jurisdiction to change the reason for discharge, it is not clear whether they have jurisdiction to review an application that requests a change in reason for, but not a change in the character of, discharge.

[3] 10 U.S.C. § 1552. BCMRs and DRBs were created to relieve the burden on Congress of handling numerous private bills. BCMRs have authority to consider applications concerning almost any dispute arising from an individual's military service. Applications for discharge upgrading constitute only a part of their caseload. *See generally* Glosser & Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 AM. U.L. REV. 391 (1974).

[4] *See* 32 C.F.R. § 70.3(i).

[5] 10 U.S.C. § 1553 (reproduced in App. 9A *infra*).

[5a] 10 U.S.C. § 1553(c).

[6] 10 U.S.C. § 1552 (reproduced in App. 9B *infra*).

[6a] *See* §§ 9.2.3, 9.4.3 *infra*.

[7] In Roelofs v. Secretary of the Air Force, 628 F.2d 594, 8 MIL. L. REP. 2138 (D.C. Cir. 1980), the U.S. Court of Appeals ruled that the DRBs and BCMRs are "agencies" within the meaning of the APA. 5 U.S.C. §§ 551-706.

It appears that the DRBs are subject to the trial-type adjudicatory procedures mandated by §§ 554, 556 and 557 of the APA, which apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). Because the DRBs are required by statute to provide an applicant with an opportunity for a hearing and must decide an application based on the record, the DRBs arguably must comply with the §§ 554, 556, and 557 procedural requirements.

In two federal lawsuits, the military departments have not contested that these provisions are applicable to DRB proceedings. In Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civ. No. 76-0530, 4 MIL. L. REP. 6012 (D.D.C. Jan. 31, 1977), and Attard v. Secretary of the Navy, Civ. No. 76-1701, 5 MIL. L. REP. 2325 (D.D.C. Aug. 5, 1977), the plaintiffs sought to compel the DRBs to comply with procedural requirements contained in § 557, a provision of the APA which applies only "when a hearing is required to be conducted in accordance with Section 556." 5 U.S.C. § 557(a). Section 556, in turn, applies only "to hearings [covered] by section . . . 554."

In *Urban Law Institute*, the military agreed to change the practices of the DRBs in order to comply with the opinion writing requirements of APA § 557(c). *See generally* Stichman, *Developments in the Military Discharge Review Process*, 4 MIL. L. REP. 6001 (1976). In *Attard*, the Navy DRB changed its regulations to provide applicants with an opportunity to view the DRB's findings and reasons and to submit, for the Secretarial reviewing authority's consideration, rebuttals or additional arguments relating to the Board's decision, thereby complying with § 557(c).

BCMRs are not required by statute to provide a hearing, and do not appear to be subject to the procedural requirements of §§ 554, 556, 557 of the APA. The U.S. Court of Appeals for the District of Columbia has ruled that BCMRs are subject to § 555 procedural requirements. *Roelofs*, 628 F.2d at 599-601, 8 MIL. L. REP. at 2140, 2142.

[8] The Army DRB, for example, operates under guidance which states that "[i]t is the essence of discharge review to act as an 'equalizing agency' to ensure that the application of the discharge

A discharge review proceeding is not, however, an adversary proceeding; the military department is not represented against the applicant's interests. Only the applicant appears before or presents evidence to the Board.

The burden of proof is on the applicant to prove a specific fact or the validity of a specific contention. Nonetheless, the military departments interpret 10 U.S.C. § 1553 to mean that the DRBs have an affirmative duty to determine whether, in light of the applicant's record of military service, an applicant's discharge is proper and equitable, despite the fact that an applicant presents no evidence with the application.[9]

9.1.2 LIMITS ON THE MILITARY'S STATUTORY AUTHORITY TO GRADE DISCHARGES

Federal courts have limited the military's statutory authority to characterize a discharge as less than honorable by requiring that the discharge accurately reflect the nature of military service rendered. The military generally cannot validly base a derogatory discharge upon conduct which does not result in deficient performance of military duties nor have a direct impact on military service.[9]a

9.1.3 HISTORICAL DEVELOPMENT OF THE DISCHARGE REVIEW PROCESS

The historical information presented here, while not crucial to the representation of an individual client, is useful in understanding the DRBs and BCMRs, and would benefit anyone wishing to understand the standards and procedures evolved by the Boards.

From their inception in the 1940s until 1977, DRBs and BCMRs operated in ways that significantly set them apart from other administrative agencies:

- The Boards usually did not record explanations of their decisions or of the facts on which they were based.
- Findings, reasons, and dissenting opinions, when they were recorded, and the votes of Board members in all cases, were available upon specific request to the applicant and counsel involved, but not to the general public.[10]
- The Boards operated under few substantive rules and policies. Their published regulations provided a minimal description of the discharge review process. The Boards typically considered each case *ad hoc*; prior cases were never used for precedent or guidance.[11]
- Such rules, policies, guidelines, and interpretations as the Boards did have were not published in the *Federal Register* or made a part of Board regulations.[12]

These practices caused inequities in the discharge review process:

- Without publicly available discharge review standards or statements of findings and their bases, it was impossible to know why applicants were granted or denied relief in the past and to tailor present arguments according to past successful ones. Consequently, effective representation of applicants before the Boards was extremely difficult.
- A Board's failure to explain denial of an upgrade made assessment of an applicant's prospects of success on further administrative or judicial review more difficult.
- The failure of the Boards to explain their decisions made a reviewing court's job extremely difficult.[13]

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[8] (continued)

process remains a relatively uniform procedure with uniform standards irrespective of the location of the unit or the commander at the time of discharge. . . ." 44 Fed. Reg. 25,046 (April 27, 1979) (Army Discharge Review Board: Standard Operating Procedures (SOP) (para. IA.2.)).

In Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2518 (D.C. Cir. 1980), the Court of Appeals stated that the review given by a DRB occurs "at an appellate level." 627 F.2d at 558-59. The court contrasted the DRB appellate review with an administrative separation proceeding. If there is error in the proceeding leading to a derogatory discharge, the Court held that the only way the military could sustain the derogatory discharge classification is through a new administrative separation proceeding "instituted *ab initio, i.e.*, not at the Discharge Review Board level, with the full complement of procedural protections normally afforded a servicemember prior to administrative separation." *Id.*

[9] *See* 44 Fed. Reg. 25,097 (April 27, 1979) (Army DRB's SFRB, Memo # 10-78, at para. 4 (Aug. 28, 1978) (an Army DRB guideline which states that 10 U.S.C. § 1553 places the "burden of determining the 'propriety' and 'equity' on the Board and that even should the applicant remain silent and the entire case is predicated on a presumption of regularity, there must clearly exist sufficient cause to establish that the presumption of regularity is valid in the case being considered."); Letter from Assistant General Counsel (Manpower, Health and Public Affairs) Robert L. Gilliat to Deputy Assistant Secretary of Defense (MPP), OASD (MRAL) at 2 (July 6, 1978) (subject: Implementing Instructions for Discharge Review) (on file with National Veterans Law Center) ("if an individual submits an application with no supporting documentation, the Board remains responsible to review available official records and matters raised therein to determine whether the discharge was equitable and proper. Likewise, if the applicant submits evidence on a limited number of issues, the Board remains responsible for reviewing the full range of issues that may be implicated by available official records and matters raised therein.").

[9a] *See* § 12.4 *infra*.

[10] *See* Stichman, *Developments in the Military Discharge Review Process*, 4 MIL. L. REP. 6001, 6002-04 (1976).

[11] *See* Stichman, *supra*, note 10, at 6005.

[12] Thus, for example, the so-called Laird Drug Memorandum, which makes it easier for a servicemember discharged prior to July 1971 for drug abuse to get an upgrade in discharge, was not published as part of DRB regulations. In addition, for many years the Army DRB's Standard Operating Procedures, which were used to train and guide Board members in adjudicating applications, were not published for public scrutiny in any form.

[13] As the Supreme Court has emphasized, "the orderly functioning of the process of review requires that the grounds on which the administrative agency acted be clearly disclosed and adequately sustained." SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). Board practices left reviewing courts the task of determining the propriety of an upgrade denial without any guidance as to a Board's reasoning or the evidence it relied upon. The reaction of the courts was often to remand the case to the Boards for a proper statement of findings and reasons. *See, e.g.*, Roelofs v. Secretary of the Air Force, 628 F.2d 594, 8 MIL. L. REP. 2138, (D.C. Cir. 1980); Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967); Martin v. Secretary of the Army, 455 F. Supp. 634, 5 MIL. L. REP. 2412, (D.D.C. 1977). *Cf.* Beckham v. United States, 183 Ct. Cl. 619, 392 F.2d 619 (1968); Harris v. Middendorf, Civ. No. 75-1159-E, 4 MIL. L. REP. 2456 (S.D. Cal. Aug. 23, 1976), *on further review*, 4 MIL. L. REP. 2608 (S.D. Cal. Sept. 23, 1976).

- The Boards' practices produced inconsistency in DRB and BCMR decision-making. Evidence of individuals with similar records of military service receiving dissimilar discharge characterizations is extensive.[14] The result in a discharge review application rested unduly upon the personal inclinations and arbitrary viewpoints of the Board members assigned to the applicant's case.

Developments began in 1977 as a result of which applicants are now able to prepare cases effectively and to restrict somewhat the discretion of the Boards in deciding individual cases.

9.1.3.1 The *Urban Law Institute* Case

In this class action lawsuit, a group of veterans sought to compel DRBs and BCMRs to prepare statements of their findings and the reasons for their decisions. The lawsuit also sought to compel each Board to index and make publicly available the votes of its members and the opinions accompanying their decisions.

A settlement was reached and approved by the district court on January 31, 1977, in the form of a Stipulation of Dismissal.[15] The most important consequences of the settlement are:

- For every decision granting or denying relief, DRBs must prepare a detailed statement of findings, conclusions, and reasons.
- For every decision denying the complete relief requested, BCMRs must prepare a statement of the grounds for denial.
- These DRB and BCMR statements are automatically sent to the applicant and counsel, along with any dissenting opinions. The votes of Board members are either included with the notice of decision or made available upon request.
- All DRB and BCMR statements and the votes of Board members are made available for public inspection and copying at a reading room on the Pentagon Concourse in Washington, D.C. Identifications of the applicant and other individuals are deleted from these public documents.
- All publicly available DRB and BCMR decisions are indexed to enable an applicant (or anyone else) to identify cases presenting issues similar to those in the applicant's case. These indexes are prepared quarterly and made available for public inspection and sale at the Pentagon's DRB/BCMR reading room and at numerous regional locations throughout the country. Copies of cases from the reading room are also obtainable by mail.[15a]

9.1.3.2 The Department of Defense's Special Discharge Review Program

In April 1977, shortly after settlement of the *Urban Law Institute* case, the Department of Defense (DoD) announced a Special Discharge Review Program (SDRP), as part of President Carter's amnesty program.[16] The SDRP, which had an application period of six months, enabled many Vietnam-era veterans to obtain discharge upgrades from DRBs.

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[14] *See, e.g.,* REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, PEOPLE GET DIFFERENT DISCHARGES IN APPARENTLY SIMILAR CIRCUMSTANCES, (FPCD-76-46 April 21, 1976) (concluding that the criteria for assigning GDs and UDs for misconduct and unfitness varied among the services and within each service); REPORT OF THE GENERAL ACCOUNTING OFFICE , URGENT NEED FOR A DEPARTMENT OF DEFENSE MARGINAL PERFORMER DISCHARGE PROGRAM at 12 (FPCD-75-152, April 23, 1975) (concluding that "important inconsistencies and inequities exist among the services' marginal performer programs, including the types of discharges, the consent and appeal procedures, the specificity of criteria and the length of evaluation period."); REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL, IMPROVING OUTREACH AND EFFECTIVENESS OF DOD REVIEWS AND DISCHARGES GIVEN SERVICE MEMBERS BECAUSE OF DRUG INVOLVEMENT at 34 (B-173688, Nov. 30, 1973) (concluding that "[i]nconsistencies in the policies and practices followed by the services in the action taken immediately following either the approval or denial by their Discharge Review Boards of requests for discharge recharacterizations appear to result in inequitable [treatment] of applicants, depending on the branch in which the individual served."); REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL, ATTRITION IN THE MILITARY — AN ISSUE NEEDING MANAGEMENT ATTENTION at 23 (Feb. 20, 1980) (concluding that DoD "needs to establish more definite criteria for discharge to insure that servicemembers are being treated consistently").

In 1977, the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) ordered creation of a Joint-Service Administrative Discharge Study Group to study and submit a definitive, objective analysis of the entire administrative characterization system. The Study Group's final report notes the disparities in results among the services, and states:

> The principal cause for the wide disparity of results among the Services as reflected in Chapter 3 [of the REPORT], both in the reasons for and characterization of service, is that the control DoD directives over the years have contained insufficient definition and policy guidance. By design they have provided merely a broad framework within which the Military Services were able to fashion their relatively independent implementing instructions. The Study Group concluded that because of many factors, a greater degree of uniformity is needed.

DEPARTMENT OF DEFENSE FINAL REPORT OF THE JOINT-SERVICE ADMINISTRATIVE DISCHARGE STUDY GROUP (Aug. 1978).

After reviewing these reports and other facts, GAO concluded in 1980 that "[b]oth discharge review and correction boards add to the disparities in the discharges held by individuals with similar service records" and that these agencies "through the years developed different philosophies and systems." REPORT TO CONGRESS BY THE COMPTROLLER GENERAL, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARTIES: CONGRESSIONAL REVIEW IS NEEDED at 74 (FPCD-80-13, Jan. 15, 1980). Even though the services published uniform discharge review standards in 1980, GAO concluded that "broad discretion remains in making upgrading decisions, and interservice variations continue in the rates of discharges upgraded." *Id.* at 75.

[15] Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civ. No. 76-0530, 4 MIL. L. REP. 6012 (D.D.C. Jan. 31, 1977).

See Stichman, *Developments in the Military Discharge Review Process*, 4 MIL. L. REP. 6001 (1976) (detailed description of the *Urban Law Institute* case).

[15a] *See* § 10.1 *infra* (discussion of how to obtain and use the index of DRB and BCMR decisions).

[16] The SDRP went further than the actions of President Ford did. On September 16, 1974, President Ford had directed that discharges of veterans who were wounded in combat or who received decorations for valor in combat and who had applied to the Presidential Clemency Program must be identified by DoD and given upgrades to GDs absent compelling reasons to the contrary. *See* 2 MIL. L. REP. 4501 (1974).

The Ford Directive only affected several hundred veterans, whereas the SDRP attracted over 40,000 applicants, 20,000 of whom received upgrades. *See* Ch. 23 *infra* (fuller description of the SDRP).

The SDRP was the first military program to publish standards for DRBs to follow in deciding whether or not to upgrade an applicant's discharge. If an applicant met one of the "primary criteria," an upgrade to at least a General Discharge was mandated unless one of the specific "compelling reasons" for denying such relief existed. The SDRP also created "secondary criteria," which DRBs had to consider in mitigation of an offense leading to discharge, but which did not individually mandate an upgrade.

9.1.3.3 Public Law 95-126

In reaction to the SDRP, Congress enacted legislation in October 1977, which further altered the discharge review process. The following provisions have had a long-term impact on discharge review:

- No benefits under laws administered by the VA are allowed to result from a DRB upgrade unless the upgrade occurs "under published uniform standards . . . and procedures . . ." that are "historically consistent" with past discharge review criteria. In effect, this provision forced DoD to promulgate uniform discharge review standards and procedures.[17]
- The military departments were required to open a new discharge review program for the benefit of certain older veterans, effectively waiving the normal requirement that a DRB application be filed within 15 years of the date of discharge. The deadline for applications from older veterans was April 1, 1981.[18]
- DRBs were required to review, during 1978, all UDs upgraded under the Ford Presidential Memorandum of January 19, 1977 or the SDRP.[19]

9.1.3.4 The Department of Defense's Uniform Discharge Review Standards and Procedures

On March 31, 1978, DoD promulgated the uni-

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[17] The full text of the amendment is as follows:

> Notwithstanding any other provision of law, (A) no benefits under laws administered by the Veterans' Administration shall be provided, as a result of a change in or new issuance of a discharge under section 1553 of title 10, except upon a case-by-case review by the board of review concerned, subject to review by the Secretary concerned, under such section, of all the evidence and factors in each case under published uniform standards (which shall be historically consistent with criteria for determining honorable service and shall not include any criterion for automatically granting or denying such change or issuance) and procedures generally applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditions; and (B) any such person shall be afforded an opportunity to apply for such review under such section 1553 for a period of time terminating not less than one year after the date on which such uniform standards and procedures are promulgated and published.

38 U.S.C. § 3103(e)(1).

The legislative history of this provision indicates that Congress required uniform discharge review standards in order to eliminate the lack of uniformity in DRB decision-making, to eliminate the DRB practice of operating under unpublished discharge review guidelines, and to eliminate the use of vague discharge review guidelines.

The uniform standards provisions first appeared in unpublished amendment 765 to S. 1307 — an amendment first introduced to the Senate on the day of passage and which formed the Senate bill as passed. The official statement prepared for the Senate, in lieu of a new Senate report, to accompany and analyze clause by clause the previously unpublished amendment states in pertinent part:

> For several years, the discharge-review process has been criticized for the great disparities in the results among the Services. [T]he requirement of "uniform standards" will be very beneficial in this regard. The guidelines for discharge-review determinations have, in the past, been set forth in internal memorandums and have not been codified and published. Thus in the case of the Army Discharge Review Board for example such guidelines have, at least in part, been set forth in an unpublished document from the Board's president entitled "President's Guidance, Army Discharge Review Board Standard Operating Procedure." [S]uch discharge-review guidelines have been unpublished and have been rather vague and lacking in specificity.

123 CONG. REC. S14338 (daily ed. Sept. 8, 1977).

The House accepted the requirement of uniform standards in S. 1307 as amended, without alteration, as part of a compromise agreement reached in conference. Representative Hammerschmidt, ranking minority member of the House Committee on Veterans' Affairs and member delegated to manage the House bill in conference, noted in his statement supporting passage of the compromise that "the only other major substantive change [in the compromise agreement that was not in the original House bill] calls for published, uniform standards to be applied uniformly in the future for the upgrading of administrative discharges under other than honorable conditions." 123 CONG. REC. H9964 (daily ed. Sept. 23, 1977).

The uniform discharge review standards contemplated by Pub. L. No. 95-126 also were required to be "historically consistent with criteria for determining honorable service and shall not include any criterion for automatically granting and denying such change or issuance." 38 U.S.C. § 3103(e)(1). The prohibition against automatic discharge review criteria came in reaction to the SDRP's use of criteria mandating upgrades not otherwise required by law. The legislation does not prohibit all types of automatic criteria, however. For example, by virtue of Lipsman v. Brown, Civ. No. 76-1175 (D.D.C. Feb. 8, 1978), the Army DRB must automatically upgrade to an HD any discharge for a character and behavior disorder in which there was no diagnosis by a medical doctor trained in psychiatry. See 44 Fed. Reg. 25,093 (April 27, 1979); *see also* Ch. 16 *infra*. Moreover, despite Pub. L. No. 95-126, the Court of Appeals in Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980) ruled that the Army must automatically upgrade to HDs the discharges of thousands of former Army servicemembers who were issued less than honorable discharges in administrative proceedings in which the Army introduced evidence from compelled urinalyses, in violation of U.C.M.J. Art. 31, 10 U.S.C. § 831. *See* Ch. 15 *infra*.

[18] Pub. L. No. 95-126 required that the DRBs waive the normal 15-year application period for older veterans issued UDs for at least a one-year period after promulgation of the uniform standards. When DoD promulgated the uniform standards required by Pub. L. No. 95-126, it extended the waiver of the 15-year limitation period until January 1, 1980, and provided that veterans issued GDs or BCDs by sentence of special courts-martial could obtain reconsideration of previous DRB decisions, as long as they applied to the DRBs before January 1, 1980. *See* 43 Fed. Reg. 13,568, 13,570 (1978), 32 C.F.R. §§ 70.1(a)(4), 70.5(b)(8)(vi) (1979). *See also* note 26 *infra*. After considering a petition for an extension filed by the National Veterans Law Center, DoD extended the January 1, 1980 deadline to April 1, 1981. *See* 44 Fed. Reg. 76,486, 32 C.F.R. §§ 70.1(a)(4), 70.5(a)(2), 70.5(b)(8)(vi) (1980). Later, DoD refused to extend the deadline beyond April 1, 1981. *But see* § 9.2.16 *infra* (rehearings by DRB).

[19] The purpose of this review was to determine whether these UDs merited upgrades under the published uniform discharge review standards. The review was not to affect the upgraded discharges received as a result of the Presidential Memorandum or the SDRP. It was only to affect whether such veterans were eligible for veterans benefits from the VA. *See* Comment, *Effect of Public Law 95-126 on the Special Discharge Review Program and the Discharge Review Boards*, 6 MIL. L. REP. 6001 (1978) (detailed descriptions of Public Law 95-126); § 23.3.3. *infra*; § 26.4, § 26.6.2 *infra*.

form discharge review standards and procedures contemplated by Public Law 95-126.[20] The new regulations generally require a DRB to upgrade an applicant's discharge if it concludes that the applicant would have received a higher grade of discharge under present policies and procedures for separation than under those governing at the time of discharge.[21]

9.1.3.5 The Reopening of the *Urban Law Institute* Case

In August 1978, the plaintiffs in the *Urban Law Institute* case filed a motion in district court[21a] to reopen the case to secure compliance with the settlement agreement, claiming that DRBs had systematically violated many of the provisions of the agreement. The plaintiffs claimed that DRBs were not preparing detailed statements of findings, conclusions, and reasons and meaningful index of DRB decisions as required by the agreement.

On August 23, 1978, the court ordered DoD to consider complaints by any member of the public that a specific DRB statement of findings, conclusions and reasons violates the *Urban Law Institute* settlement agreement. If DoD determines that a violation exists, the Court Order requires the DRB to prepare a new, complete statement and to send it to the person who complained, to the applicant, and to the applicant's counsel. The court further ordered the military departments to inform applicants about this complaint procedure by sending certified mail letters to the nearly 50,000 discharge review applicants who had been denied a complete upgrade in discharge since the effective date of the settlement agreement (April 1, 1977).[21b]

This complaint procedure is now permanent, allowing individuals to obtain a complete explanation of any case.[21c]

9.2 DRB PROCEDURES

9.2.1 REGULATIONS AND GUIDELINES GOVERNING DRB PROCEEDINGS

There are several types of regulations, guidelines, interpretations, and policies which govern DRB operations and decision-making. These are:

- DoD uniform discharge review standards and procedures (first published on March 31, 1978);[21d]
- DRB regulations;[21e]
- DRB rules, guidelines, interpretations, and policies published in the Federal Register, but not codified in the Code of Federal Regulations;[22] and
- Unpublished DRB guidance.[23]

9.2.2 JURISDICTION AND POWERS OF THE DRBS

DRBs have power both to upgrade the character of discharges (*e.g.*, change a UD to a GD) and to change the reason for discharges (*e.g.*, change "unfitness/shirking" to "unsuitability/inability to expend efforts constructively").[24]

DRBs do *not* have power to:

- Lower the character of discharges;
- Revoke or void discharges or reinstate veterans;
- Change the reason for discharges to physical disability;
- Change the reenlistment codes of veterans (the Air Force DRB formerly had this power);
- Compel the attendance of witnesses; or
- Pay veterans for any expenses incurred in presenting their cases.[25]

9.2.3 ELIGIBILITY TO APPLY

A veteran must meet two requirements in order to be eligible to apply to a DRB for a discharge upgrade.

First, the veteran must have one of the following types of discharges:

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[20] *See* 32 C.F.R. Part 70, 43 Fed. Reg. 13,564 (1978), DoD Dir. 1332.28 (reproduced in App. 9C *infra*). In National Association of Concerned Veterans v. Secretary of Defense, 487 F. Supp. 192 (D.D.C. 1979), the district court held that the regulations promulgated by DoD fulfilled the statutory requirement that military regulations be uniform. Plaintiffs did not appeal.

[21] *See* 32 C.F.R. § 70.6(c)(1), 43 Fed. Reg. 13,572-73 (Mar. 31, 1978). *See also* § 9.3.2.1 (detailed discussion of this provision); Ch. 21 *infra* (checklist of instances in which changes in policies and procedures have resulted in upgrades).

[21a] Plaintiffs' Motion to Reopen to Secure Compliance with the Stipulation of Dismissal in This Lawsuit, filed on Aug. 11, 1978, in Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, No. 76-0530 (D.D.C.).

[21b] Order of Aug. 23, 1978 in *Urban Law Institute*.

[21c] *See* Ch. 11 *infra* (fuller description of the complaint procedure established by the Aug. 23, 1978 Court Order).

[21d] *See* 32 C.F.R. Part 70, 43 Fed. Reg. 13,564, DoD Dir. 1332.28 (reproduced in App. 9C *infra*).

[21e] These regulations repeat the DoD uniform standards and procedures, adding interpretive glosses to matters such as standards for continuances and to areas unique to each service's DRB. *See* 32 C.F.R. § 581.2, AR 15-180 (Army DRB regulations); 32 C.F.R. § 724, SECNAVINST 5420.174 (Naval DRB regulations); 32 C.F.R. § 865, AFR 20-10 (Air Force DRB regulations).

[22] The most important of these materials are the Army DRB's Standard Operation Procedures (SOP) and the supplemental memoranda to it issued by the President of the Army DRB. The Army DRB has been operating under the SOP since August, 1975. It appears at 44 Fed. Reg. 25,046 (Apr. 27, 1979). Amendments to the Army SOP appear at 45 Fed. Reg. 15,234-16,310 (Mar. 13, 1980).

The Army DRB's SOP was published as a result of National Association of Concerned Veterans v. Secretary of Defense, 487 F. Supp. 192 (D.D.C. 1979). In that case, the plaintiffs sought to compel the DRBs to publish material such as the SOP in the Federal Register pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(1). After the plaintiffs filed a motion for a preliminary injunction, requesting the court to order the military to publish these matters, the Army published much of the SOP; parts of it remain unpublished. Subsequent changes will be reported in the *Veterans Rights Newsletter* and the *Military Law Reporter*.

The Navy DRB and Air Force DRB guidelines are not nearly as elaborate as those in the Army DRB's SOP.

[23] All DRBs seem to operate under some unpublished guidelines. The Naval DRB, for example, receives documents called Administrative Bulletins from the Director of the Naval Council of Personnel Boards. Through 1979, these bulletins have primarily been devoted to describing what information must be included in a DRB's statement of findings, conclusions, and reasons. The various unpublished guidelines of the DRBs are usually valueless to members of the public, as they tend to cover matters of internal DRB management.

[24] *See* 32 C.F.R. § 70.5(d)(4)(iii).

[25] *See* 32 C.F.R. § 70.5(b)(4).

- A General (Under Honorable Conditions) Discharge (GD);
- An Undesirable (Under Other Than Honorable Conditions) Discharge (UD);
- A Clemency Discharge, which did not replace a discharge issued by sentence of a general court-martial (GCM); or
- A Bad Conduct Discharge (BCD) issued by sentence of a special court-martial (SPCM).

Thus, a veteran with a Dishonorable Discharge (DD), a Clemency Discharge which replaced a discharge issued by sentence of a GCM, or a BCD issued by sentence of a GCM is ineligible to apply to a DRB. Such a veteran is, however, eligible to have a BCMR review his/her discharge.

Second, the veteran must apply within 15 years of the date of discharge. Some DRBs, however, will adjudicate applications filed more than 15 years after discharge by certain veterans who have previously applied to them.[25a] Another exception to the 15-year application period allowed certain veterans to obtain DRB review of their discharges if they filed applications or wrote to a specially created discharge upgrade information point before April 1, 1981.[25b] Two categories of veterans were affected:

- Veterans with UDs (or the so-called Blue Discharge issued by the Army until 1948), no matter when issued, could obtain a DRB review with a timely application; and
- Veterans with GDs or BCDs issued by sentence of SPCMs who applied to and were denied an Honorable Discharge (HD) by a DRB before March 31, 1978, could obtain DRB review with a timely reapplication.[26]

If a veteran who is otherwise eligible to apply to a DRB is now dead or incompetent, the veteran's discharge will still be reviewed if an application is filed by the surviving spouse, next-of-kin, attorney, or legal representative of the veteran.[27]

[25a] A veteran who was discharged over 15 years ago, has applied previously to a DRB, and has not had a DRB review since March 31, 1978 may receive review under the DRB's reconsideration provisions. NVLC does not know which DRBs will apply this policy nor what precise category of veterans is eligible. As this manual was being published, DoD was reviewing DRB practices in this area in order to develop a uniform policy for DRBs.

[25b] As a result of the settlement agreement in Veterans Education Project v. Secretary of the Air Force, Civ. No. 79-0210 (D.D.C. Oct. 17, 1980), each of the military departments agreed to conduct an outreach program by advertising the existence of a post office box from which veterans could receive discharge upgrading application forms and other information. The military departments also agreed that anyone subject to the April 1, 1981 application deadline would be considered to have met the deadline if (1) a written request for information was received at the post office box before April 1, 1981 (a copy of the postcard or letter received is placed in the veteran's military personnel file) and (2) the veteran filed an application received within 180 days of the letter responding to the post office box request. Thus, if a veteran were to write a postcard or letter requesting information that was received at the post office box on April 1, 1981, and were to receive a response dated May 1, 1981, the veteran would have until November 1, 1981 to submit an application in order to meet the deadline.

[26] *See* 32 C.F.R. §§ 70.5(a)(2), 70.5(b)(8)(vi). While these sections do not clearly state that the second category of veterans above is eligible for a DRB review if applications are received before April 1, 1981, DoD interprets them to mean this. *See* Letter from the Office of the Assistant Secretary of Defense to the Veterans Education Project (July 27, 1978) on file with the National Veterans Law Center).

[27] *See* 32 C.F.R. § 70.3(c).

9.2.4 HOW TO APPLY

In order to apply to a DRB, a veteran must send a DD Form 293 (Application for Review of Discharge or Separation from the Armed Forces of the United States) to the appropriate address given on the DD 293 Form.[28] An application should not be filed until after a request for the veteran's military personnel and medical records has been mailed and an answer received. These records may be requested by using a Standard Form 180.

It is usually not necessary to prepare the case fully before filing an application, since DRBs generally decide cases in the order in which applications are received, and since it often takes several months for a DRB to review a case after the application is filed. The quickest way to get a decision is to file an application right away and to send other material to the DRB later, after the case has been prepared.[28a]

Various types of information are required on the DD 293 application form. Most of the information is straightforward, but a few matters require careful consideration.

9.2.4.1 Type of Corrective Action Requested

Applicants should always request an HD, even if they can realistically expect only a GD; a tactical retreat, if necessary, can always be made at the hearing.

The veteran can also ask that the reason for discharge be changed to a different reason, although the request here depends upon the theory of the applicant's case. If the veteran is going to argue, for example, that the military should not have issued a discharge prior to the normal expiration of term of service, the applicant should request that the reason for discharge be changed to "expiration of term of service."[29]

9.2.4.2 Type of Proceeding the Applicant Desires

A veteran may request a documentary review without hearing, or a personal hearing in Washington, D.C., or one before a traveling regional board or (in the Army) before a hearing examiner with a video tape.[29a]

[28] The address for former Army servicemembers is: CO, USARCPAC, 9700 Page Boulevard, St. Louis, MO 63132.

For former Navy or Marine Corps servicemembers, the address is: Naval Discharge Review Board, 801 N. Randolph Street, Arlington, VA 22003.

For former Air Force servicemembers, the address is: National Personnel Records Center, GSA, (Military Personnel Records), 9700 Page Boulevard, St. Louis, MO 63132.

For former Coast Guard servicemembers, the address is: Commandant (CED), US Coast Guard Headquarters, Washington, DC 20591.

[28a] *See* § 9.2.7 *infra* (discussion of when to file an application).

[29] DRBs are somewhat reluctant to change the reason for discharge to "expiration of term of service," even when they conclude that the applicant should not have been discharged prior to the normal expiration of term of service. In such cases, they often change the reason for discharge to "by reason of Secretarial Authority."

[29a] *See* § 9.2.7 *infra* (discussion of factors to be considered in deciding what type of proceeding to request).

9.2.4.3 Reason for Review and Supporting Documents

The application form also requests the applicant to state the "reason for review of discharge" and to identify "supporting documents."

If the applicant is requesting a hearing and wants to submit the application quickly, the applicant should write, for example, "*see* brief and statement of contentions, to be filed in the near future," in both places provided on the form. The applicant and counsel can wait until receiving notice of the hearing before submitting a brief and statement of contentions in support of the application. These documents, however, should be filed in time to allow the DRB to refer them to a lawyer or doctor for an advisory opinion, as it deems appropriate.

If the veteran is requesting a documentary review, a brief and statement of contentions should be filed with the application form or separately within a few months afterward. If the explanatory documents are to be filed after the application, the DRB should be alerted of that fact in the boxes provided on the application form.

The application form should be accompanied by a cover letter requesting that, at least one month *before* the DRB considers the case, it mail the applicant a copy of (1) the case brief or summary, (2) any legal or medical advisory opinions, and (3) any FBI reports or other evidence the Board obtains, and explaining that these documents are needed in order to prepare the applicant's case fairly and effectively. The request may be repeated when the applicant's brief and statement of contentions are filed, if this is done separately.[29b]

9.2.4.4 Applicant's Counsel/Representative

The name and address of the applicant's counsel or representative should be recorded as provided on the application form before its filing. Documents such as the notice of hearing, notice of decision, and other important information will then be sent to the representative's address. If the applicant changes or acquires counsel after application has been made, the new counsel should submit his/her retainer to the DRB along with a statement of designation from the applicant.

In order to get a DRB review, veterans who have previously applied to a DRB and been denied complete relief must file a new DD 293 application form.

9.2.5 REVIEWS CONDUCTED ON A DRB'S OWN MOTION WITHOUT AN APPLICATION BEING FILED

All DRBs have power to review discharges on their own motion without the veteran's consent;[30] the Army DRB has conducted such reviews without the veteran's knowledge or presence. The Navy DRB sends notice to the veteran's last known address, advising the veteran of his/her rights to appear at the review in person, to have counsel, and to present evidence to the Board.

The Naval DRB has also initiated classwide reviews when Navy officials are persuaded that regulations were misapplied in a class of cases.[31] The Army DRB has conducted reviews of veteran's discharges on its own motion while lawsuits challenging the character of the discharges were pending in federal court.[32]

9.2.6 ACCESS TO DOCUMENTS THAT THE DRB WILL REVIEW

There are three types of documents that an applicant (and representative) should review before the DRB considers the case: the applicant's personnel and medical records, the military administrative discharge regulations, and the predecisional documents and evidence developed or gathered by the DRB.[32a]

9.2.6.1 Applicant's Military Personnel/Medical Records

The applicant may obtain these records by filing a Standard Form 180, which should be sent before mailing the application form.

9.2.6.2 Military Administrative Discharge Regulations

According to DoD's uniform discharge review standards and procedures, a DRB must review the administrative discharge regulations in existence at the time the applicant was discharged in order to determine whether the discharge was then proper and equitable. In addition to checking these regulations for discrepancies with the actual handling of the applicant's case, the applicant should note any changes in the administrative discharge regulations occurring since the applicant's separation. Generally, if the applicant would have received a better type of discharge under current standards, the discharge will be upgraded.[33]

Finally, there may be military regulations which do not govern administrative discharges but which may be helpful in arguing that an applicant's discharge should be upgraded. For example, regulations describing military entrance requirements may

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[29b] *See* § 9.2.6 *infra*.

[30] *See* 32 C.F.R. §§ 70.1(a)(1), 70.3(c), 70.5(a)(8)(i).

[31] *See* §§ 12.5.7.3, 12.5.7.7 *infra*.

[32] *See* Carter v. United States, 213 Ct. Cl. 727, 729 n.1, 5 MIL. L. REP. 2056, 2057 n.1 (1977) (referring to such an Army DRB review as "a very questionable *ex parte* proceeding, instigated after both motions for summary judgment had been filed, by an officer in the Litigation Division of the Office of the Judge Advocate General"); Maness v. Department of the Army, Civ. No. 77-2164 (D.D.C. May 25, 1978); AD 78-00059.

After the Supreme Court decision in Harmon v. Brucker, 355 U.S. 579 (1958), which held that basing a derogatory discharge on preservice activities exceeded the military's statutory authority, the DRBs reviewed, on their own motion, a whole class of cases that were affected by this decision.

[32a] *See* Ch. 6 *supra* (obtaining records); Ch. 10 *infra* (obtaining regulations).

[33] *See* 32 C.F.R. § 70.6(c)(1). *See generally* Ch. 21 *infra* (discussion of current standards rule, with accompanying list of important changes occurring in administrative discharge regulations).

be useful in arguing that an applicant should not have been accepted for enlistment in the first place.

9.2.6.3 Predecisional Documents and Evidence Developed or Gathered by the DRB

The DRB prepares certain documents before its members meet to deliberate on an applicant's case.

9.2.6.3.1 The DRB's Brief of the Case

In order to assist Board members in their review of an applicant's case, each DRB has some type of case summary prepared in advance. The Air Force DRB calls this a "summary of the available military records of the applicant."[34] The Naval DRB calls it "a brief of pertinent facts extracted from the service and health records prepared by the NDRB recorder."[35] The Army DRB prepares the most extensive predecisional brief and has detailed instructions for its contents.[36]

The summary is prepared after the applicant's brief, contentions, or written evidence are submitted, but before any DRB hearing is held. It is then placed in the applicant's service record folder.

Predecisional briefs often contain errors or unfavorably slanted comments or information and require close scrutiny by the applicant. Common errors include mistakes as to the applicant's age or test scores, and misrepresentations of the applicant's brief or contentions. Sometimes records of punishments are emphasized, while good points or mitigating factors are not included.

9.2.6.3.2 Advisory Opinions

The DoD uniform standards allow DRBs to request legal and medical advisory opinions from staff officers in their military departments. These opinions are commonly requested as a result of contentions advanced by an applicant; they are advisory in nature and not binding on the DRB's decisionmaking process.[37]

Advisory opinions significantly affect a Board's view of the case. Reviewing advisory opinions before the Board considers the case enables the applicant to draw the Board's attention to any errors in them; the applicant's statement of material contentions may be amended to address allegations (erroneous or not, in law or fact) contained therein. Revised contentions frequently increase an applicant's chance of obtaining an upgrade.

9.2.6.3.3 FBI Reports and Other Evidence Obtained by the DRB From Other Sources

DRBs are empowered to review evidence gathered from sources outside the military services.[38] The most common source of external evidence obtained by a DRB is the FBI report (rap sheet), which records the servicemember's brushes with civilian authorities, including arrests without convictions, since the time of discharge. FBI reports are not obtained by DRBs in most cases, but they can be damaging, particularly since they rarely contain the disposition of an incident after arrest; mitigating the information on an FBI report (for example, by showing that charges were dropped in a recorded arrest) is the applicant's responsibility.

9.2.7 METHODS OF PRESENTING A CASE: HEARING VERSUS DOCUMENTARY REVIEW

At the time the applicant applies to a DRB, (s)he must choose the DRB's method of discharge review from among four alternatives.

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[34] 32 C.F.R. § 865.109(a)(4).

[35] 32 C.F.R. § 724.801(a)(5). The recorder of the Naval DRB usually serves as one of the Board members that decides the applicant's case and, consequently, is the member most familiar with the facts of the case.

[36] The contents of this brief is discussed in the Army DRB's SOP at 44 Fed. Reg. 25,075-76 (Apr. 27, 1979). Specifically, the SOP states that this document is prepared by a prereview officer whose task is "to prepare what is, in effect, a case brief, after thoroughly reviewing the evidence of record, the applicant's appeal (including contentions) and any supporting documentation submitted by the applicant." *Id.* at 25,075. The prereview officer also includes in the brief an evaluation of "issues of propriety identified by the analyst . . . as well as any potential issues of equity identified . . . during . . . review of the file." *Id.* at 25,076. The brief also includes a "summary of the contents of all documents including counsel's brief." *Id.*

The Army DRB's SOP provides that opinions of the prereview officer (PRO) contained in the brief are not "binding on the panel." *Id.* The PRO's role "is to call to the Panel's attention all significant information in the file and documents submitted by the applicant. The PRO is not a decision maker and will not include any conclusions in the overall assessment; the panel will draw the conclusions on the interpretations of the facts." *Id.*

[37] *See* 32 C.F.R. § 70.5(c)(10). The Army DRB's SOP indicates that the decision to seek an advisory opinion is usually made during the prereview process by the DRB staff. It provides that

> [i]f any developed issues or contentions surface a requirement for specific Medical/Legal Advisory opinion, refer the case to the appropriate member of the advisory staff. . . . The [prereview officer] should frame the specific question that [(s)he] believes the panel which hears the case would ask if the Medical/Legal Advisory were present in the board room.

44 Fed. Reg. 25,075 (Apr. 27, 1979).

The regulations of the Naval DRB provide that

> [i]n the event that a legal Advisory opinion is deemed appropriate by the NDRB such shall be obtained routinely by reference to the senior Judge Advocate assigned to the Office of the Director, Naval Council of Personnel Boards. In unusual circumstances, the NDRB Traveling Panel may request advice from the Officer in Charge of the nearest Naval Legal Service Office. In addition the NDRB may request advisory opinions from staff offices of the Department of the Navy, including, but not limited to the General Counsel in the Judge Advocate General.

32 C.F.R. § 724.704.

[38] 32 C.F.R. § 70.5(b)(9)(iv) provides that a DRB:

> may take steps to obtain additional evidence material to the discharge review under consideration beyond that found in the official military records or submitted by the applicant, if a review of available evidence suggests certain aspects of the review would be incomplete without the additional information or when the applicant presents testimony or documents which require additional information to evaluate properly. Such information shall be made available to applicant, upon request, with appropriate modifications regarding classified material.

9.2.7.1 Hearing in Washington, D.C.

This method of discharge review normally requires the applicant to pay for a trip to Washington, D.C. for the hearing. A hearing attended and presented solely by the applicant's representative is also possible, but usually is useful only if purely legal issues are present; at this type of hearing, counsel can present an oral argument and respond to any questions of the Board.[38a]

9.2.7.2 Hearing Before a Traveling/Regional Panel of the DRB

In 1975, DoD directed each military department's DRB to hold hearings in regional locations;[39] this duty is performed by panels of each DRB. Where and how frequently the hearings occur depend upon the number of applications received by the DRB from each area.[40] The Coast Guard DRB only holds hearings in Washington, D.C.

The Army DRB's policy on scheduling traveling panel hearings is as follows. When the Army DRB receives a number of applications requesting a traveling panel in one general location, it sends the applicants notice of a proposed hearing date at the regional location. If 72 or more applicants agree to the date and location, the Army DRB sends a traveling panel to the location as proposed. The Army DRB prefers to schedule six hearings per day over a period of two weeks. If only 50 applicants agree to appear, the Army DRB will send only a hearing examiner to the location, and a veteran desiring a hearing before a traveling panel must wait until a sufficient number of other applications can be accumulated again.[41]

In general, the Naval DRB likes to have one or two weeks of traveling panel hearings in one location, with ten hearings scheduled per day. The Air Force DRB schedules eight hearings per day for a four- or five-day week.[42]

A recent General Accounting Office Report found that in all Army DRB cases the panel members are experienced in discharge review, whether the Board sits in Washington, D.C. or at a regional DRB location. When the Air Force and Naval DRBs conduct reviews in locations other than Washington, D.C., however, panels include only two or three experienced Board members. Other members are selected for temporary duty from military installations near the regional locations.[43]

9.2.7.3 Hearing Examination (Army Only)

Although DoD's uniform discharge review regulations define the hearing examination method of review,[44] only the Army provides applicants the opportunity for one. A hearing examination is videotaped and conducted in conformity with a panel-type hearing by one senior DRB member, called a hearing examiner. The videotaped proceeding is then played before a panel of Board members in Washington, D.C., after which the panel votes on the case.[45]

This procedure allows the Army, with the same number of Board members, to travel to more remote locations around the country. The option of a hearing examination also has enabled the Army DRB to give incarcerated veterans the opportunity to present their case in prison before a hearing examiner.[46] The DD

[38a] Washington, D.C. hearings are conducted at the following locations:

Army DRB, Pentagon, Arlington, Va.; Air Force DRB, Wilson Blvd., Arlington, Va.,; Navy/Marine Corps DRB, 801 N. Randolph Street, Arlington, Va.

[39] *See* 41 Fed. Reg. 34,328 (Aug. 13, 1976).

[40] The DD 293 application form states that personal appearance hearings are scheduled before traveling boards in various cities throughout the 48 contiguous states as the population of requests on hand requires. If a request is made for a hearing before the traveling board, it will be scheduled after the case is prepared and when the traveling board is next in the applicant's area.

The application form states that an applicant will ordinarily not have to travel more than 300 miles for a traveling board hearing. In the Army, with the addition of the possibility of a hearing before a hearing examiner, no Army applicant will have to travel in excess of 200 miles for a hearing.

The Air Force DRB sent a traveling panel to the following cities in Fiscal Year 1980: Atlanta, Chicago, Denver, Fort Worth, Los Angeles, New York, and San Francisco.

The Naval DRB usually sends a traveling panel to the following cities at least once a year (if a traveling panel usually appears in the city more than once a year, this is indicated in parentheses): Albany, New York; Albuquerque, New Mexico; Atlanta (four times a year); Bismark, North Dakota; Boise, Idaho; Boston (four times a year); Chicago (four times a year); Columbus, Ohio; Dallas (four times a year); Denver (twice a year); El Paso; Flagstaff; Great Falls, Montana; Kansas City (four times a year); Memphis (twice a year); Minneapolis (four times a year); New Orleans (twice a year); Portland, Oregon (twice a year); Reno, Nevada; St. Louis; Salt Lake City (twice a year); San Diego (four times a year); San Francisco (four times a year); Seattle; Tampa (twice a year); and Wichita.

The Army DRB sends a traveling panel to San Francisco and Los Angeles about once every two months. An Army DRB traveling panel also usually goes at least once a year to the following cities: Boston; Buffalo; Charlotte, North Carolina; Cincinnati; Columbus, Ohio; Dallas-Fort Worth; Denver; Hartford; Houston; Kansas City; Miami; Milwaukee; Minneapolis; Montgomery, Alabama; Nashville; New Orleans; Norfolk, Virginia; Portland, Oregon; St. Louis; Salt Lake City; Seattle; Syracuse; Tampa-St. Petersburg.

The Army DRB has usually sent a Hearing Examiner to the following locations at least once a year: the California, Connecticut, and Wisconsin Prisons Systems; the Navaho Indian Reservation in Arizona; Albany, New York; Albuquerque; Augusta, Maine; Birmingham, Alabama; Boise, Idaho; Charlotte, North Carolina; Charlottesville, Virginia; Columbia, South Carolina; Des Moines; El Paso; Green Bay; Harrisburg, Pennsylvania; Honolulu; Jackson, Mississippi; Jacksonville; Louisville; Madison; Minneapolis; New Orleans; Phoenix; Providence, Rhode Island; Salt Lake City; San Antonio; San Diego; San Juan, Puerto Rico; and Spokane.

All DRBs, especially the Army DRB, are flexible as to the locations to which they send traveling panels or hearing examiners. An

[40] (continued)

applicant can influence where these locations will be by organizing a group of applicants in a particular location and by lobbying the DRB to send a traveling panel or hearing examiner there.

[41] *See* Discharge Upgrading Newsletter, Jan. 1979, at 7.

[42] *Id.*

[43] REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED at 78-79 (FPCD-80-13 Jan. 15, 1980). *See also* 32 C.F.R. §§ 865.123(a), (b), 724.332(b).

[44] 32 C.F.R. § 70.3(f).

[45] *See* 32 C.F.R. § 581.2 (app. B, para. 1.k(1); 44 Fed. Reg. 25,050 (Apr. 27, 1979).

[46] The conditions which the Army DRB normally requires before it will provide a hearing examination at a prison are as follows:

a. The incarcerated applicant must agree to present sworn testimony and be cross-examined by the Hearing Examiner;

293 application form requires that any applicant at a hearing examination be accompanied by a counsel or representative.

Occasionally, the Army DRB tries to influence applicants who have requested a traveling panel to request instead a hearing examination. The applicant is presented on such occasions the dilemma of having to wait for a long, sometimes indefinite period of time for a traveling panel to be sent somewhere nearby or having to accept a hearing examination, which the applicant might not prefer, but which would offer the opportunity for an earlier decision. Because there are no legal requirements governing the applicant's access to a traveling panel, avoiding this dilemma may be difficult.

9.2.7.4 Documentary or Record Review

The final option for an applicant is a documentary or record review. Under this method, the DRB does not hold a hearing; its decision is based on the applicant's military and medical records, any evidence the DRB may gather, and any written submissions from the applicant.

9.2.7.5 Selecting A Method of Case Presentation

There are a number of factors which an applicant should consider before deciding on a method of case presentation.

9.2.7.5.1 The Upgrade Rates

The difference in upgrade rates among the various types of hearings, while significant, is not as great as the difference in upgrade rates between hearings of all kinds and record reviews. In 1979 and 1980, for example, applicants who had hearings were about twice as successful in getting upgrades as applicants who had only record reviews.[47]

The statistics of the Army DRB show that an applicant's best chance of an upgrade is before a traveling panel. The statistics of the Naval DRB also indicate that an applicant who has a hearing before a traveling panel has a better chance of success than an applicant who has a hearing in Washington, D.C.[48]

9.2.7.5.2 The Length of Time the DRB Will Need to Decide the Case

The applicant's method of case presentation greatly affects the length of time required to produce a decision on the application. The quickest way to get a decision is to apply for a record or documentary review. The next quickest method is to request a hearing in Washington, D.C., and the slowest method (usually) is to request a traveling panel hearing or a hearing examination. The instructions on the back of the DD 293 application form reflect this. The actual amount of time required to produce a decision in any case depends upon how large the backlog is.

9.2.7.5.3 Prospects for Reconsideration

If a record review results in denial of an HD, the veteran can successfully apply for an entirely new

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[46] (continued)

b. There must be a sufficient number of applicants geographically contiguous to each other to justify the expense involved in sending the hearing examiner to the institution or series of institutions under the same political jurisdiction; and

c. The Army DRB must be invited by the institution head (*e.g.*, Warden, Director of Prisons, Federal Bureau of Prisons) to conduct hearing examinations within the facility.

Discharge Upgrading Newsletter, Oct. 1979, at 6.

[47]

FISCAL YEAR 1979

	Non-Hearing Reviews		Reviews With Hearing	
DRB	No.	% Upgraded	No.	% Upgraded
Army	7,233	25%	1,805	46%
Navy/Marine Corps	3,340	8%	1,372	21%
Air Force	979	32%	366	71%

OCTOBER 1979 TO MARCH 1980

	Non-Hearing Reviews		Reviews With Hearing	
DRB	No.	% Upgraded	No.	% Upgraded
Army	3,896	30.0%	121*	38.8%
			446**	55.1%
			468***	22.4%
Navy/Marine Corps	3,652	7.7%	854	19.9%
Air Force	417	15.0%	94	45.0%

[47] (continued)

APRIL-SEPTEMBER 1980

	Non-Hearing Reviews		Reviews With Hearing	
DRB	No.	% Upgraded	No.	% Upgraded
Army	4,358	38.3%	139*	46.7%
			538**	55.0%
			180***	51.1%
Navy/Marine Corps	1,669	13.0%	596	18.3%
Air Force	274	11.0%	125	22.0%

OCTOBER 1980 TO MARCH 1981

	Non-Hearing Reviews		Reviews With Hearing	
DRB	No.	% Upgraded	No.	% Upgraded
Army	3,820	34%	1,233	48%
Navy/Marine Corps	1,537	6.8%	415	14.9%
Air Force	211	12%	87	28%

*D.C. Board; **Traveling Panel; ***Hearing Examiner

These statistics reflect regular DRB cases — that is, they exclude SDRP cases, and cases of veterans who were discharged more than fifteen years before the date of application, but received reviews due to the temporary waiver of the normal application period required by Public Law 95-126. *See* Discharge Upgrading Newsletter, Sept. 1979, at 2, May-June 1980, at 2.

The large difference between upgrade rates for record reviews and for personal hearings reflected in Tables 1 and 2 is not unusual. Analysis of the previously unreviewed discharges upgraded in Fiscal Year 1978 shows that a veteran had a 52% chance of receiving an upgrade in discharge when appearing in person before the DRB, whereas an applicant who had a record review had only a 33% chance of getting a discharge upgraded. *See* REPORT TO THE CONGRESS OF THE COMPTROLLER GENERAL, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED at 78 (FPCD-80-13 Jan. 15, 1980).

[48] *See* Discharge Upgrading Newsletter, Jan. 1979, at 6.

hearing review.[49] On the other hand, if the veteran is denied upgrade at a hearing, there is normally no opportunity for reapplication.[50]

9.2.7.5.4 Choosing the Best Method of Case Presentation

The retained option to apply for a DRB hearing in the event of an unsuccessful record review is significant. For example, if a veteran wants to receive a quick decision (for example, within six months) and the veteran's discharge seems to deserve an upgrade whether or not a hearing is held (for example, a discharge for homosexuality), there is strong reason to request a record review.

If the veteran's arguments for an upgrade are based primarily on factors which are readily apparent from the military personnel records, the advantage of a hearing is not as great as in the average case, and request of a record review may be seriously considered. If, on the other hand, the veteran's only chance to gain an upgrade is through a hearing at which testimony of the veteran or other witnesses will supplement or refute the evidence appearing in the military records, the advantage of a hearing is decisive.

9.2.7.5.5 Tender Letters

In 1980, the Naval DRB reinstituted practice of a unique type of review in which, if a preliminary review of the records indicates that an upgrade is probably warranted, the DRB will offer to conduct a formal review based on the records. There are three possible consequences if the applicant accepts the DRB's offer:

- If the Board upgrades the discharge to an HD after formally reviewing the records, the case will be closed and the expense of a hearing will have been avoided;
- If the Board denies any upgrade in discharge after a review of the record (which is unlikely), a hearing will automatically be scheduled as the applicant originally requested (though presumably slightly later than it would have been scheduled had the applicant refused formal record review); and
- If after a review of the records, the Board upgrades the discharge to a GD, rather than an HD, the applicant can still obtain a personal hearing, but will have to file a new application form and will be put to the end of the line under the DRB's first filed, first scheduled method of scheduling hearings.

The applicant can reject the DRB's offer of formal record review and be scheduled for a hearing as originally requested. However, the only arguable harm that can result from acceptance is the time loss involved in the third scenario described above.

9.2.8 COMPOSITION OF DRB PANELS

The members of a DRB sit on panels as designated by the Secretary of each military department, although, in practice, the President of the DRB selects who sits on a panel. By statute,[51] a panel deciding a discharge review application must consist of five members. The uniform discharge review procedures provide that all Board members will be military officers;[52] the members are in fact career military officers.[53]

Naval DRB panels hear cases from former Navy and Marine Corps members, and usually consist of both Navy and Marine officers. At least three of the five panel members must belong to the service (either Navy or Marines) from which the applicant who is under review was discharged.[54]

One member of every DRB panel serves as the presiding officer.[55] Each DRB's regulations require that the presiding officer be the senior officer on the panel.[56] The presiding officer is responsible for the conduct of the discharge review proceeding.[57] In the Army and Air Force, the presiding officer is normally a colonel (06); and in the Navy/Marine Corps, normally a captain/colonel (06). Sometimes a general or admiral will serve as presiding officer.

The presiding officer's responsibilities in the Army DRB are specified in the Army DRB's SOP.[58] The presiding officer's role has no practical effect on the applicant or counsel, although (s)he may influence the other panel members.

Only the Army DRB has published guidelines concerning removal of a DRB panel member for cause.[59] These guidelines are:

- Applicants have a right to challenge panel members for cause in Army DRB hearings;
- The fact that a panel member was also a panel member in a previous DRB review of the applicant's case is *not* sufficient cause for removing the member from the present panel;

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[49] *See* 32 C.F.R. § 70.5(b)(8)(ii).

[50] *See* § 9.2.16 *infra* (criteria for obtaining reconsideration of a case in which the applicant was previously denied relief after a hearing).

Although DRB regulations do not indicate the weight a DRB should place on the decision against an applicant at record review when the applicant appears at a hearing, DRBs seem to ignore the previous decision. Approximately 50% of the applicants who requested SDRP hearings were granted upgrades that had been denied at previous record reviews.

[51] 10 U.S.C. § 1553(a).

[52] *See* 32 C.F.R. § 70.5(b)(1). The Air Force DRB used to have enlisted personnel serve as members of DRB panels.

[53] *See, e.g.*, 32 C.F.R. § 724.710.

[54] *See* 32 C.F.R. § 724.710(d). Violation of a regulation regarding the composition of a DRB panel is grounds for reconsideration. In Harvey v. Secretary of the Navy, Civ. No. 76-1761, 6 MIL. L. REP. 3003 (D.D.C. Oct. 31, 1978), the court ruled, in a class action on behalf of 150 Marine Corps applicants to the Naval DRB, that because the DRB violated its regulation requiring a Marine officer to be the presiding officer, the Navy must notify all members of the class of their right to new DRB hearings, with a Marine officer presiding. The Naval DRB sent notifications to the last known address of veterans who had hearings between 1974 and 1977.

[55] The uniform discharge review procedures provide that the President of a DRB (or another officer) may serve as presiding officer, as prescribed by the Secretary of the military department. *See* 32 C.F.R. § 70.5(b)(1).

[56] *See* 32 C.F.R. §§ 581.2(d)(2)(i), 724.106, 865.107(a).

[57] *See* 32 C.F.R. § 70.5(c)(2).

[58] ADRB SOP, para. II.B., 44 Fed. Reg. 25,047 (Apr. 27, 1979).

[59] *See* ADRB SOP, Annex E-1, para. 7, 44 Fed. Reg. 25,050 (Apr. 27, 1979); ADRB SOP, Annex G-1, para. 1(i), 44 Fed. Reg. 25,074 (April 27, 1979).

- A challenged panel member must inform the presiding officer of the member's capacity to participate impartially in the hearing, after which the presiding officer rules whether or not the member may sit for the case; and
- If there is doubt, the challenge for cause should result in the panel member's being removed.

Although the regulations of the other DRBs do not indicate whether an applicant has a right to challenge a panel member, the applicant should make a challenge for impartiality on the record if there is good reason to believe that the panel member's participation will prejudice the applicant's case. Voir dire of the panel is rare and, under most circumstances, should not be attempted.

The other individual(s) involved in a panel hearing is the Secretary/Recorder.[60] The Secretary/Recorder's duties vary somewhat from DRB to DRB. At the Army DRB, the Secretary/Recorder team is not composed of Board members and is supposed to assist applicants before the hearing and do reporting at the hearing.[61]

In contrast, the Naval DRB's Secretary/Recorder is usually a voting member of the panel that hears the applicant's case.[62] Often, the Recorder has contact with the applicant (and counsel) before the hearing, without revealing his/her membership on the DRB. In addition to having access to unguarded conversation with unsuspecting applicants, the Naval DRB's Recorder may attempt to persuade applicants to alter, summarize, or otherwise reword their contentions. Applicants should not be intimidated by these requests, as it is frequently inadvisable to follow the Recorder's suggestions.[62a]

9.2.9 COUNSEL/REPRESENTATIVE

A counsel/representative of a DRB applicant is defined as an individual or agency designated by the applicant who agrees to represent the applicant in a case before the DRB.[62b] No regulations require special qualifications of an individual in order to represent an applicant before a DRB.

The only statutory restriction affecting Legal Services advocates is that they may not take part in proceedings arising out of desertion, which means that *convicted* deserters may not be represented.[62c] Unless "inconsistent with the faithful performance of his official duties," any government employee may act, without compensation, as a representative of a DRB or BCMR applicant.[62d]

Historically, service organizations chartered by Congress (*e.g.*, American Red Cross, American Legion, Disabled American Veterans, Jewish War Veterans of the U.S.A., Veterans of Foreign Wars, etc.), have represented DRB applicants, free of charge, at DRB proceedings held in Washington, D.C. (although not before traveling panels). These organizations are listed on the back of the DD 293 application form. Officers of these organizations normally have large case loads and are not legally trained.[63]

DRB applicants represented by legally trained counsel have an upgrade rate that greatly exceeds the rate for all other applicants.[64] In recognition of this fact, the uniform discharge review procedures until recently provided that a veteran with access to a counsel/representative could obtain reconsideration of a discharge if the veteran was not represented by a counsel/representative in any previous consideration of the case by the DRB.[65]

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[60] *See* 32 C.F.R. § 70.5(b)(10).

[61] The President of the Army DRB has stated that

> we use the Secretary/Record team as a means of assisting applicants and counsel preliminary to the hearing to enable them to better present their case by helping them through their military records, to understand some of the terminology, different documents, their numbers, what format might be best used in presenting contentions and so forth. Because the Secretary/Recorder team is by definition not a member of the voting panel itself, it is truly impartial; that is, its function is to insure the presentation of all facts, and a fair and equitable opportunity for the applicant and counsel to make their presentation by assisting them to the degree necessary prior to the actual beginning of the hearing. During the hearing, they are exclusively accommodating a reportorial and reporting function.

Deposition of Col. William E. Weber, National Association of Concerned Veterans v. Secretary of Defense, Civ. No. 79-0211 (D.D.C. June 9, 1979) (on file with National Veterans Law Center).

[62] *See* 32 C.F.R. § 724.703.

[62a] *See* Ch. 11 *infra*.

[62b] See 32 C.F.R. § 70.3(d).

[62c] *See* Ch. 1, note 36 *supra*.

[62d] 18 U.S.C. § 205 prohibits federal government employees from representing an individual in a claim against the federal government under certain circumstances. The Attorney General has interpreted representation at BCMR not to violate 18 U.S.C. § 205 absent unusual circumstances. Letter from William Rehnquist, Assistant Attorney General, to J. Fred Buzhardt, General Counsel of DoD (Aug. 9, 1971). This opinion responding to a DoD request concerning Judge Advocates assisting with BCMR applications was later interpreted to include the DRBs. Letter from Leon Ulman, Dep. Assistant Attorney General to Washington Lawyers' Committee for Civil Rights Under Law April 5, 1976. Thus, it appears that JAG lawyers can follow up their cases with DRB appeals and at least are obligated to learn enough about this appellate process to make a record for their clients and provide referrals.

[63] All DRB applicants appear to have a right to effective representation before the DRB. *See* Rodriguez v. Marine Corps League, C.A. No. 79-98-A, (E.D. Va. July 19, 1979). In the Rodriguez case, the plaintiff sued the Marine Corps League for malpractice in his DRB case because his Marine Corps League representative told the panel of Board members at the plaintiff's DRB hearing that he (the representative) saw no reason an upgrade should be granted. The Marine Corps League agreed as part of a settlement of the case to pay the plaintiff $1,000 plus costs, to adopt a code of ethics which would be binding upon it and its respresentatives whenever they served as counsel to an applicant at DRBs, BCMRs, or the VA, and to provide training and supervision of its representatives to insure that the code of ethics would be followed. After the case was settled, Rodriguez received an upgrade to an HD at a hearing at which he was represented by legally trained counsel.

As a result of the *Rodriguez* case, some service organizations have provided fewer individuals to serve as an applicant's representative, thereby creating a dearth of counsel in some areas. Others such as the American Legion have participated as observers in Legal Services Corporation training conferences.

[64] *See* REPORT TO CONGRESS REQUIRED BY SECTION 1007(h) OF THE LEGAL SERVICES CORPORATION ACT OF 1974 AS AMENDED at app. A-52 to A-56. The Washington Lawyer's Committee for Civil Rights Under Law conducted a military discharge review project in which volunteer lawyers represented DRB applicants at no charge. The results of that project were that 82% of the applicants represented received an upgrade in discharge. This rate of success is similar to that experienced by Georgetown University Law Center's Clinical Program (Project on Property Rights and the Administrative Process) in which supervised law students represented DRB applicants, and by the

9.2.10 DOCUMENTS THAT THE APPLICANT SHOULD SUBMIT

The only document that an applicant is required to submit is an application form, but an applicant's chances for a discharge upgrade greatly increase if the applicant submits:

- A brief;
- A statement of material contentions (that is, of arguments why the applicant deserves an upgrade in discharge); and
- Evidence of good postservice conduct.

It is advisable to submit these three documents whether the applicant requests a hearing or a record review.

9.2.10.1 A Brief

There is no special form that a brief in support of an application must take.[65a] Basically, it should be clear and concise, emphasizing good aspects of the applicant's military and postservice record, noting relevant personal and situational factors that tend to mitigate disciplinary and other problems the applicant had while in service, and concluding with a summary of basic reasons why an upgrade is warranted. Citations to the applicant's military record in support of statements in the brief will lend credibility to the brief and aid the panel in understanding the applicant's reasoning.

The brief should be submitted at least 30 days before the hearing date, or, in the case of a record review, at least a month before the Board convenes to consider the case.[66] A brief can be submitted at the time of the hearing, if need be, but this may lead to delays in the hearing process if the DRB determines that a legal or medical advisory opinion is necessary before continuing. Copies of the brief and all exhibits should be given to each of the five Board members, for their review. Usually, only one member of the Board reads the brief prior to the hearing. However, panel members (or the applicant) may wish to refer to its contents at the hearing.

9.2.10.2 A Statement of Material Contentions

A statement of material contentions, while not defined in DRB regulations, is useful in getting a DRB to prepare findings, conclusions, and reasons in response to all of the applicant's arguments for an upgrade.

Before settlement of the *Urban Law Institute* lawsuit,[67] DRBs tended to ignore the applicant's contentions and usually did not explain why they rejected them. The settlement agreement requires the Board to explain in detail its reasons for accepting or rejecting all contentions that are stated "clearly and specifically."[68]

A statement of material contentions should, if possible, be written similar to the proposed findings of fact and conclusions of law that are often submitted to other administrative agencies.[68a] It should be submitted at the same time as the brief is submitted. Contentions can be added, subtracted, or reworded at any time before the close of the hearing.[69]

9.2.10.3 Evidence of Good Postservice Conduct

Boards rarely state that an upgrade was based solely on an applicant's good postservice conduct; however, the factor appears to be significant to them.[70] Evidence of post- or preservice conduct is only reviewable when it constitutes a positive factor in an applicant's record: the Supreme Court has ruled that a DRB has no statutory authority to consider such evidence to the applicant's detriment.[71]

Submissible evidence of good postservice conduct may come from various areas of the applicant's life:

- Standing in the community, as established by general character references from people in the community — clergy, teachers, or family members;[71a]
- Employment, verified and characterized in letters from employers;
- Education, evidenced by copies of certificates, diplomas, transcripts, etc.;
- Absence of a criminal record, evidenced through a police clearance indicating no civilian arrests or convictions;

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[64] (continued)
American Civil Liberties Union's National Military Discharge Review Project.

[65] *See* 32 C.F.R. § 70.5(b)(8)(v) (1980).

[65a] *See* App. 8C, *supra* (sample brief in support of application).

[66] An application for a record review should be accompanied by a request that the DRB not decide the case before a brief is submitted by the applicant. The normal DRB processing time for a request for a record review is not delayed if the brief is submitted within two months of the filing of an application. The Army BCMR requires that any brief be filed seven days before a hearing.

[67] In Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civ. No. 76-0530, 4 MIL. L. REP. 6012 (D.D.C. Jan. 31, 1977), the plaintiffs sought to compel the DRBs to comply with the opinion-writing requirements of the Administrative Procedure Act, 5 U.S.C. § 557(c). On January 31, 1977, the District Court approved a settlement agreement requiring the DRBs to prepare detailed statements of findings, conclusions, and reasons in all cases, and requiring them to prepare findings, conclusions, and reasons on each of an applicant's contentions if an HD is not granted. *See generally* Stichman, *Developments in the Military Discharge Review Process*, 4 MIL. L. REP. 6001 (May-June 1976).

[68] *See* 32 C.F.R. § 70.5(b)(13)(i).

[68a] *See* Ch. 11, *infra* (discussion of how to prepare a statement of material contentions).

[69] Although DRB regulations do not state that an applicant has a right to amend the statement of material contentions, the settlement agreement in the *Urban Law Institute* case provides this right. Paragraph 5A(1)(e) of the January 31, 1977 Stipulation of Dismissal states that the applicant's contentions "must be completed or amended prior to the Board's decision."

[70] The uniform discharge review standards state that Boards may consider "outstanding postservice conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is subject of the discharge review." 32 C.F.R. § 70.6(c)(3)(i). *See* Ch. 20 (effect of postservice conduct in BCMR punitive discharge cases), Ch. 22 *infra*.

[71] *See* Harmon v. Brucker, 355 U.S. 579 (1958). *See generally* § 12.4 *infra*.

[71a] Letters submitted as character references should preferably be on letterhead stationary and notarized. Each letter should state the length of time the writer has known the applicant and the context in which they have been associated. *See* App. 6C *supra* (request for letter).

- Rehabilitation, indicated by participation in a drug or alcohol rehabilitation program, etc.;
- Family responsibility, development and stability, documented by birth and marriage certificates; and
- Awards, achievements, etc.

9.2.10.4 Cases in Which the Applicant's Military Records Have Been Destroyed

In July 1973, a fire at the National Personnel Records Center in St. Louis damaged or destroyed the military personnel and medical records stored there of:

- Army personnel discharged between November 1, 1912 and December 31, 1959 (2.5 million of these 20 million veterans have salvageable records);
- Air Force personnel discharged between September 25, 1947, and December 31, 1963, whose last names begin with the letters "I" through "Z" (423,000 of these 1.4 million veterans have salvageable records); and
- Army personnel discharged between January 1, 1973 and July 1973 (314,000 of these 316,000 veterans have salvageable records).

Where an applicant's records have not been totally lost, the National Personnel Records Center has attempted to reconstruct them from portions preserved there and at other agencies, like the Veterans Administration. If the applicant's military personnel and medical records have been totally or mostly destroyed, the DRB will usually inform an applicant of the situation and ask the applicant to submit as much of the applicant's records as the veteran has retained.[72]

There is a natural temptation for an applicant who has received a request for replacement records to send the DRB only positive or neutral documents and withhold damaging ones. The applicant must recognize that the DRB will expect that the original discharge had some facial justification when issued and will be very suspicious of the documentation it receives unless it reveals both good and bad parts of the applicant's military record.[73]

In a destroyed records case, it is especially appropriate for the applicant to request and attend a hearing, or, where that is impossible, to submit a sworn statement. Indeed, in some such cases the DRB has asked applicants to attend hearings even though applicants had only sought record reviews. In other destroyed records cases in which reviews without hearings were requested, DRBs have denied upgrades solely because of the presumption of regularity, even though the applicants submitted sworn statements presenting prima facie cases for upgrades.

9.2.10.5 Other Documents

In different situations (for example, discharges for homosexuality, drug abuse, or failure to pay just debts), different types of additional documents are important.[74]

9.2.11 HEARING PROCEDURES

A DRB upgrade review hearing is a relatively informal proceeding. It is not adversary; no representative from the military appears before the Board to argue against upgrading.

9.2.11.1 Advance Notice of the Hearing Date

Applicants (and counsel) are given at least 30 days advance notice of the scheduled date of a hearing. In the Army DRB, the amount of advance notice depends upon the type of proceeding requested. For hearings before traveling panels and for hearing examinations, the Army DRB sends two notices by mail: One giving 120 days advance notice of the proposed month of hearing, and one giving 30 days notice of the proposed date. For hearings in Washington, D.C., it attempts to provide 90 days advance notice of the scheduled hearing date.

The amount of advance notice given by the Naval and Air Force DRBs is usually somewhat less for each type of hearing. If the hearing is scheduled at an inconvenient time for an applicant or counsel, the applicant should request a postponement.[74a]

9.2.11.2 Who Can Attend a Hearing

A DRB hearing is usually attended only by the applicant, counsel/representative, witnesses the applicant intends to have testify, Board members, and DRB recording staff (normally one or two people). The applicant's witnesses normally are excluded from the hearing room until they testify. Hearings in Washington, D.C., traveling panel hearings, and hearing examinations are required to be conducted with recognition of each applicant's right to privacy.[74b]

The presence at hearings of individuals other than those whose attendance is necessary is limited to persons authorized by the Secretary concerned or expressly requested by the applicant, subject to reasonable limitations based upon available space.[74c] If, in the opinion of the presiding officer, the presence of such persons would be prejudicial to the interests of the applicant or Government, a hearing may be

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[72] The Naval DRB's regulations, for example, mandate a period of not less than 30 days during which the applicant may submit such documents after being notified of the situation. *See* 32 C.F.R. § 724.308.

[73] The DRB's regulations provide that there is a presumption of regularity in the discharge process and that this presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption. *See* 32 C.F.R. § 70.5(b)(12)(vi). A Board may rely on this presumption in a destroyed records case to deny an upgrade, even when the only evidence before it supports an upgrade. In such a case, the Board will conclude that there has not been "substantial credible evidence" presented. *See e.g.* 32 C.F.R. § 724.310(d). *See generally* § 9.3.3 *infra*.

[74] The Air Force DRB states in its regulations the types of evidence appropriate to particular upgrade cases. *See* 32 C.F.R. § 865.124.

[74a] *See* § 9.2.12 *infra*.

[74b] *See* 32 C.F.R. § 70.5(b)(11).

[74c] *Id.*

held in closed session, regardless of the applicant's wishes.[74d] This aspect of the regulation is of doubtful legality.[75]

The Army DRB's SOP specifies that the President of the Army DRB may authorize the presence of official observers (usually new DRB Board members in training) at a hearing. An applicant's objection to their presence must be referred to the President of the Army DRB for resolution. Unofficial observers may attend a hearing only with the applicant's permission.[76]

9.2.11.3 Prehearing Procedures

On the day of a hearing, before it begins, the applicant (and counsel) are given an opportunity to review the official military personnel and medical records of the applicant obtained by the DRB from the National Personnel Records Center. The applicant is also allowed to review the military regulations under which (s)he was originally discharged.

Personal access to these materials before the hearing date may be arranged by phoning the site at which the traveling panel is hearing the case, or the Board in Washington, D.C. if the hearing is to be held there.

The applicant should not hesitate to ask the Secretary/Recorder for information about the hearing procedures. Sometimes the Secretary/Recorder will offer helpful hints about the case if (s)he feels sympathetic towards the applicant.

9.2.11.4 Conduct of the Hearing

Formal rules of evidence are not applied in DRB proceedings. The presiding officer rules on matters of procedure and is charged with maintaining reasonable bounds of relevance and materiality in the taking of evidence and presentation of witnesses.[77]

At the beginning of the hearing, the applicant will be asked if (s)he will testify under oath,[78] which normally should not present a problem. The same question is asked of the applicant's witnesses. So far as is known, testimony given at a DRB hearing is not disclosed to other agencies.

After the DRB completes the opening formalities,[78a] the conduct of the hearing is left to the applicant.

The following format is suggested:

- Counsel should make a *short* opening statement describing how the applicant's case will be presented and summarizing the reasons the applicant's discharge should be upgraded;
- Counsel should formally introduce the applicant's brief, statement of material contentions, and other exhibits or affidavits into evidence;
- Counsel should question the applicant as in a direct examination, chronologically covering preservice, inservice, and postservice matters;
- Counsel should invite the Board to ask the applicant any questions that it has;
- Counsel should ask follow-up questions of the applicant in order to clarify answers or rehabilitate damage that occurred during the Board's examination of the applicant;
- The same procedures should be followed for any witness presented by the applicant; and
- Counsel should make a closing argument, summarizing once more the evidence and the reasons supporting an upgrade, with particular emphasis placed on the applicant's contentions.

A hearing usually takes from half an hour to two hours but can be even longer. There is no reason to repeat information to the Board; it appreciates brevity.

The DRBs have no subpoena power. Any expenses incurred by applicant and counsel will not be borne by the military.

9.2.11.5 How the Hearing Is Recorded

DRBs have the option to keep their records of hearing testimony in verbatim, summarized, or recorded form.[78b] In an Army DRB hearing, the Secretary/Recorder summarizes, often in very skeletal outline, the proceedings; this account is printed in the DRB's decisional document. In a Navy or Air Force DRB hearing, a tape recording of the entire proceeding is made; however, a transcript of the tape is not provided to the applicant, even upon request. These DRB practices are of questionable legality.[79]

The surest way for an applicant to come away from a hearing with a verbatim record of what happened is to bring in and use his/her own tape recorder. This is perfectly acceptable in Naval and Air Force DRB proceedings; it is acceptable at Army DRB hearings so long as the taping does not interfere with the DRB's operation.[80] The Air Force and Naval DRBs do provide copies of the official tape of an applicant's hearing upon request (the former DRB does this without charge, the latter upon receipt from the applicant of sufficient blank 60-minute cassettes to reproduce the originals), but the low quality of equipment at some DRB hearings makes dependence upon official tapes risky.

9.2.12 WITHDRAWALS, POSTPONEMENTS, AND CONTINUANCES OF AN APPLICATION OR HEARING

After an application is filed, there are three

[74d] *Id.*

[75] *See* Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972) (Civil Service hearing); Pechter v. Lyons, 441 F. Supp. 115 (S.D.N.Y. 1977).

[76] *See* ADRB SOP, Annex G-1, para. 1.K., 44 Fed. Reg. 25,075 (Apr. 27, 1979).

[77] *See* 32 C.F.R. § 70.5(b)(12)(ii).

[78] *Id.* at .5(b)(12)(iii).

[78a] *See* App. 8B, *supra* (typical dialogue occurring at start of a DRB proceeding).

[78b] *See* 32 C.F.R. § 70.5(f)(2).

[79] The Administrative Procedure Act, 5 U.S.C. § 556(e), provides that the "transcript of testimony and exhibits . . . on payment of lawfully prescribed costs shall be made available to the parties." Although no court has expressly ruled on this, the DRBs appear to be subject to this APA provision. *See* note 7 *supra*.

[80] *See* ADRB SOP, Annex G-1, para. 1.G., 44 Fed. Reg. 25,074 (Apr. 27, 1979).

methods of stopping or changing the schedule of the normal decision-making process.

9.2.12.1 Withdrawals

An applicant can withdraw an application, without prejudice to the right to have his/her discharge reviewed at a subsequent date, at any time before the scheduled review.[81]

9.2.12.2 Postponements

A request for postponement is a request to postpone a scheduled hearing date, without withdrawing and forcing the applicant to reapply or be set back in line. In a traveling panel case, postponement may mean waiting until the panel returns to the applicant's regional location at a subsequent date. In a hearing scheduled in Washington, D.C., it may mean a delay of only a few days. A postponement will only be granted for demonstrated good and sufficient reason set forth by the applicant in a timely manner or for the convenience of the government.[82]

Application of the standard for granting a postponement varies a great deal from DRB to DRB. The Air Force DRB will grant a postponement almost without fail, regardless of the applicant's stated reason for requesting it, unless the request is made shortly before the scheduled hearing.[83]

The Board least willing to grant postponements is the Navy DRB.[84] Illness and incapacitation are considered good and sufficient reasons for a postponement; that the applicant's counsel was too busy with other cases to prepare adequately for the scheduled hearing is generally not.[85]

The Army DRB's policy on postponements falls somewhere between those of the other two Boards. The Army normally accepts counsel's claim that a postponement is necessary to prepare adequately for a case.

If the request for postponement is denied, the applicant should consider requesting a withdrawal in order to avoid being penalized for failure to appear for a hearing.

9.2.12.3 Continuances

A continuance is a request by an applicant for time and permission to submit additional documentation in a hearing that is about to start, is underway, or has just ended, but in which the Board has not yet reached a decision. It may be authorized by the President of the DRB or the presiding officer of the sitting panel provided that it is of reasonable duration and is essential to the achievement of a full and fair hearing. If a proposal for a continuance is indefinite, the pending application will be returned to the applicant with the option to resubmit it when the case is fully ready for review.[86]

In an Army DRB hearing, the applicant should specify the purpose a continuance would serve in the presentation of his/her case. If a real benefit to the applicant is implicated, the DRB will grant the continuance.

9.2.13 PENALTY FOR FAILURE TO APPEAR AT A SCHEDULED HEARING

If the applicant fails to appear at a hearing at the appointed time, either in person or by representative, and has not made a prior, timely request for a continuance or withdrawal of the application, the uniform discharge review procedures provide a penalty:

- The applicant waives the right to a personal appearance at the scheduled hearing;
- The DRB completes its review of the discharge based upon the evidence of record; and
- A hearing requested by the applicant at a later time will not be granted unless the applicant can demonstrate that the prior failure to appear or to request a continuance or a withdrawal of the application was due to circumstances beyond the applicant's control.[87]

9.2.14 DRB'S DECISION AND POSSIBLE APPEALS FROM A DENIAL OF AN UPGRADE

After a hearing, the panel deliberates in closed session. The final decision of the DRB is not normally revealed on the day of the hearing, although occasionally the applicant is informally told about the decision. The applicant and counsel each receive official notice of the decision, usually within six weeks of the hearing, in a mailing that includes a statement of findings, conclusions, and reasons justifying the decision.[88] Sometimes this mailing also includes a notice that the DRB's decision will be reviewed by the Secretary of the appropriate service or by an official

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[81] *See* 32 C.F.R. § 70.5(b)(5).

[82] *Id.* at .5(b)(7)(ii).

[83] The President of the Air Force DRB has stated that

> It is not a serious problem [to obtain a postponement] unless it occurs at the eleventh hour prior to launch [of] the Board, or traveling board, or something like that. The thing that concerns us, of course, is the launching of the traveling board [*i.e.*, sending a traveling panel out to a regional location] which involves some expense . . . if nobody shows up. So the closer it gets to that, the more critical we are in evaluating the need for the request and the timeliness of the request. Having said that, absent [a request for a postponement at the eleventh] hour, our position is pretty liberal. . . . If he's not ready, we certainly don't want to force him [to go ahead with the hearing] . . . unless we're boxed in.

(Deposition of General Archer [President, Air Force DRB], National Association of Concerned Veterans v. Secretary of Defense, Civ. No. 79-0211 (D.D.C. 1979) (on file with National Veterans Law Center).

[84] At least before the Naval DRB, a request for a postponement should state exactly how long a postponement is desired, and should include the reasons the postponement is necessary.

[85] *See* Deposition of Rear Admiral John M. De Largy [President, Naval DRB], National Association of Concerned Veterans v. Secretary of the Defense, Civ. No. 79-0211 (D.D.C. 1979) (on file with the National Veterans Law Center).

[86] *See* 32 C.F.R. § 70.5(b)(7)(i).

[87] *See* 32 C.F.R. § 70.5(b)(6). The original proposed regulation permitted no exception to the rule that a penalty attaches if an applicant fails to appear. *See* 32 C.F.R. § 70.5(b)(6) as proposed in 42 Fed. Reg. 62,935-36 (Dec. 14, 1977). The exception of "circumstances beyond the applicant's control" was added when the uniform standards and procedures were finalized.

[88] *See* 32 C.F.R. § 70.5(e).

(s)he designates (the Secretarial reviewing authority).[88a] In most cases, however, there is no Secretarial review of the DRB's decision.

An applicant whose application for an upgrade to HD is denied should immediately review the Board's statement of findings, conclusions, and reasons to see if the grounds for denial were properly explained. It is important that the applicant have a complete explanation of the DRB's decision, which will enable the applicant to:

- Determine whether the DRB's decision is legally supportable;
- Assess the likelihood of a successful appeal; and
- Show how the DRB's decision was wrong, if the applicant decides to appeal.[88b]

If the DRB statement of findings, conclusions, and reasons is complete and the applicant's case is not going to be reviewed by the Secretarial reviewing authority, the applicant has three options:

- Apply to the DRB for reconsideration, if qualified.[88c]
- Apply to the appropriate service's Board for Correction of Military Records (BCMR), which will review the veteran's discharge with little or no deference to the DRB's denial of an HD. (This option is particularly advisable for Navy and Marine Corps veterans, since the Navy's BCNR presently has a significantly higher discharge upgrade rate than the Naval DRB.)
- Seek a discharge upgrade in federal court.

9.2.15 REVIEW OF THE DRB'S DECISION BY THE SECRETARIAL REVIEWING AUTHORITY

All DRB decisions are "subject to review by the Secretary concerned,"[89] which means that such review is optional, not mandatory.

The uniform discharge review standards and procedures allow each military department to decide what types of cases to review under Secretarial authority and what procedures to use in such cases.[90] The provision of these discretionary powers is of questionable legality.[91]

Army and Air Force DRB decisions are rarely reviewed. In contrast, the Navy's Secretarial reviewing authority (the Secretary of the Navy has delegated his authority to review DRB decisions to an Assistant Secretary) reviews Naval DRB decisions fairly commonly.

9.2.15.1 Secretarial Review of Naval DRB Decisions

Naval DRB regulations provide that the following categories of cases "are subject to the review of the Secretary of the Navy":[92]

- All cases in which a minority of the Naval DRB panel considering the case request that it be forwarded for Secretarial consideration;
- Particular types of cases in which the Secretary has an interest;
- Any specific case in which the Secretary has an interest; and
- Any case that the President of the Naval DRB, in his sole discretion, believes is of significant interest to the Secretary.[93]

This regulation does not specify the actual types of cases that the Navy's Secretarial reviewing authority will review. Even when the minority of the Naval

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[88a] *See* § 9.2.15 *infra* (description of the Secretarial review process).

[88b] *See* § 11.2 *infra* (required material in a DRB statement of findings, conclusions, and reasons); § 11.5.1 *infra* (description of complaint process established by DoD for inadequate DRB statements).

[88c] *See* § 9.2.16 *infra* (description of prerequisites for application to a DRB for reconsideration).

[88d] In some circumstances, it is advisable to go directly to federal court following a DRB denial, rather than applying next to a BCMR. *See* Ch. 24 *infra* (discussion of litigation matters).

[89] 10 U.S.C. § 1553(d).

[90] 32 C.F.R. § 70.5(g) does provide that cases reviewed by the Secretary of the military department concerned, or by the designated reviewing authority, shall be considered under the discharge review standards set forth in § 70.6.

[91] The different practices among the military services do not appear to comply with the intent of Pub. L. No. 95-126, 91 Stat. 1106 (1977),

[91] (continued)

which requires that the standards and procedures for discharge review must be uniform among the services. The requirement of uniformity has helped to remove some differences that previously existed, but apparently the situation is still in a state of flux. For example, a July 6, 1978 memorandum to the Deputy Assistant Secretary of Defense (Manpower Reserve Affairs and Logistics) (an official who, according to 32 C.F.R. § 70.4(b), is responsible for insuring uniformity in the rights afforded discharge review applicants among the military departments) from the Assistant General Counsel of DoD (on file with National Veterans Law Center), recognized that uniformity in the Secretarial review process was required and did not yet exist. The memorandum states, at page 5:

> Mandatory Secretarial Review of Discharges For Homosexuality. Automatic review at the Secretarial level provides applicants in the Navy with a procedural right unavailable to applicants in the Army and Air Force. The services have reported they are unable to resolve this difference — the Navy does not intend unilaterally to drop its provision for automatic review, neither the Army nor the Air Force agree that such cases should be subjected to automatic Secretarial review. The [Uniform Discharge Review Standards and Procedures] requires uniformity in the rights afforded applicants. See 38 U.S.C.A. 3103(e) (Supp. 1978). The Assistant Secretary of Defense (MRA&L) has the following options:
>
> (1) Direct the Army and Air Force to provide for mandatory review of such cases by the Secretary or an authorized designee; (2) Direct the Navy to drop its provision; (3) Develop an alternative uniform plan for review of such cases. So long as the concept of uniformity is preserved, there is no legal preference as to which option is selected. This is a policy matter to be resolved by Assistant Secretary.

The lack of uniformity in Secretarial review of discharges for homosexuality has not clearly been resolved. One aspect that is now uniform among the services deserves mention. Although the Naval DRB used to extend the right to applicants, the regulations of the DRBs do not provide applicants the right to petition for Secretarial review. (If an applicant and counsel believe that a DRB's decision was particularly egregious, however, they may write to the Secretary of the military department requesting that the decision be changed.)

[92] 32 C.F.R. § 724.319(b).

[93] In practice, the President of the Naval DRB has much to do with whether a case gets reviewed by the Secretarial reviewing authority. In addition to cases that are automatically reviewed, the NDRB President reviews approximately 30 to 40 Naval DRB decisions a day. If he significantly disagrees with a decision, or otherwise believes the case should be reviewed, he exercises his authority to designate the case as one for Secretarial review. Usually in such cases he will write a statement of recommendation to the Secretarial reviewing authority. *See* Deposition of Rear Admiral John M. De Largy, National Association of Concerned Veterans v. Secretary of Defense, Civ. No. 79-0211 (D.D.C. 1979) (on file with National Veterans Law Center).

DRB requests Secretarial review, the case is only subject to Secretarial review. The current practice of the Navy appears to be to review all Naval DRB decisions in cases involving discharges for homosexuality, cases producing nonunanimous decisions, and cases involving discharged officers. The 1977 Naval DRB regulations expressly required Secretarial review of such cases.

The Navy formerly precluded the applicant (and counsel) from participating in the Secretarial review process.[94] Current Naval DRB regulations require the Navy to:

- Inform the applicant that the Secretarial reviewing authority will review the applicant's case;
- Include with this notice the Naval DRB's decisional document in the case and any recommendation by the President of the Naval DRB to the Secretarial reviewing authority as to what the decision on review should be; and
- Provide the applicant an opportunity to submit for the Secretarial reviewing authority's consideration a statement rebutting any of the findings, conclusions, and reasons of the majority or minority of the Naval DRB or of the President of the Naval DRB.[95]

Naval DRB regulations relating to the applicant's statement to the Secretarial reviewing authority require that:

- The statement be *received* within 25 days of the date on which the notification of the Naval DRB's decision was *mailed* to the applicant (the date that the statement must be received is called the suspense date); and
- Material received after the suspense date not be considered unless the applicant has obtained, before the suspense date, an extension of time, for good cause shown, from the President of the Naval DRB.[96]

9.2.15.2 Secretarial Review of Army DRB Decisions

The Army DRB's decisions are rarely reviewed by a Secretarial reviewing authority. Army regulations provide for Secretarial review in cases in which the members of a DRB panel disagree on whether or not to upgrade and the minority files an opinion requesting referral to the Secretary.[97] The application of Secretarial review to other cases is uncertain.[98]

The Army DRB's regulations do not state that an applicant has the right to review the DRB's decisional document and the President of the DRB's recommendation before Secretarial review, and to submit for the Secretarial reviewing authority's consideration a statement rebutting the DRB's decision or the President of the DRB's recommendation. Failure to provide these rights, however, may be illegal.[99]

9.2.15.3 Secretarial Review of Air Force DRB Decisions

Air Force DRB regulations provide for Secretarial review in cases in which a formal minority opinion is submitted requesting such review and citing findings, conclusions, and reasons upon which the minority opinion is based. In such a situation, the complete case, with the majority and minority recommendations, is submitted to the Director, Air Force Personnel Council, who forwards the case with his/her recommendation to the Office of the Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) for final resolution.[100] Fewer

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[94] In Attard v. Secretary of the Navy, Civ. No. 76-1701, 5 MIL. L. REP. 2325 (D.D.C., filed Sept. 10, 1976) (discussed in Discharge Upgrading Newsletter, Nov. 15, 1976, at 5), the plaintiffs brought a class action lawsuit challenging, *inter alia*, the Navy's practice of reviewing DRB decisions without allowing the applicant an opportunity to review the DRB's decision beforehand and to submit for the Secretarial reviewing authority's consideration arguments as to why the DRB's decision should be accepted or rejected. The class consisted of the 63 Naval DRB applicants who over the years had received favorable DRB decisions only to have them reversed by the Secretarial reviewing authority without an opportunity to participate.

The plaintiffs in the *Attard* case claimed that the Navy's failure to provide such an opportunity violated the Administrative Procedure Act, 5 U.S.C. § 557, and the due process clause of the fifth amendment. In response, the Navy amended its regulations to provide such an opportunity. *See* 32 C.F.R. § 724.501(q). The District Court on August 5, 1977 ordered the Navy to reconsider all the class members' cases under the new amended regulations.

[95] *See* 32 C.F.R. § 724.501(g).

[96] *Id.* at. .321(d).

[97] *See* 32 C.F.R. § 581.2(j)(1). This regulation also provides that the President of the Army DRB will review such cases and forward them with his/her recommendation to the Office of the Assistant Secretary of the Army for final resolution.

[98] The Army DRB's SOP leaves some confusion as to the possibility of the Office of the Assistant Secretary of the Army reviewing cases other than those discussed in 32 C.F.R. § 581.2(j)(1) (those in which a formal minority opinion requests Secretarial review). ADRB SOP, Annex D-1, 44 Fed. Reg. 25,049 (Apr. 27, 1979) states that

> the following cases require Secretarial notification:
>
> a. All cases containing a formal minority report (not merely a minority opinion) submitted by one or more members of the panel hearing the case.
>
> b. All officer discharge review cases.
>
> c. All cases containing unusual circumstances which appear to warrant Secretarial interest, as determined by the President, ADRB.

The SOP further provides that any case in category c. "will be brought to attention of the President, ADRB, by the presiding officer of the panel hearing the case or the pre-reviewing officer before the case is heard. The President will make the final determination on the disposition of all type cases."

What is unclear from the SOP is whether cases that are referred for Secretarial "notification" are to be automatically reviewed by the Secretarial reviewing authority (who is to issue a new decision in each such case), are to be reviewed sometimes (with occasional new decisions to be issued, depending upon the results of the Secretarial notification), or are never to be reviewed to the extent of issuing new decisions (the requirement for Secretarial notification merely enabling the Office of the Assistant Secretary of the Army to become aware of the Army DRB's decision in such cases). The last possibility is probably not the practice of the Army since 32 C.F.R. § 581.2(j)(1) states that cases in category a. of the part of the SOP quoted above, are automatically given Secretarial review. But whether or not, for example, DRB decisions involving officer applicants (category b.) automatically receive formal Secretarial review remains unclear.

[99] Specifically, it would appear to violate the Administrative Procedure Act, 5 U.S.C. § 557, and the due process clause of the fifth amendment. *See* Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1052 (1979); *see also* note 94 *supra*.

[100] *See* 32 C.F.R. § 865.113(h). Although not confirmed in the Air Force DRB regulations, the Director of Air Force Personnel Council has stated that he has latitude to refer any case to the Secretary that he believes the Secretary should review. *See* Deposition of Major General Earl J. Archer, Jr. [Director, Air Force Personnel Council], National Association of Concerned Veterans v. Secretary of Defense,

than five cases have received Air Force Secretarial review in the last three years.[101]

Air Force DRB regulations do not state that an applicant has an opportunity to review the DRB's decisional document and formal minority opinion, and the recommendation of the Director of the Air Force Personnel Council, before the Secretarial reviewing authority decides the case, or to submit for Secretarial reviewing authority consideration a rebuttal or statement concerning the DRB's decision and the Director's recommendation. Failure to allow such an opportunity may be illegal.[101a]

9.2.15.4 What Should Be Done if the DRB's Decision Will Be Reviewed

The following information is addressed to Naval DRB Secretarial review. Army and Air Force regulations indicate that applicants in those services will not find out about Secretarial review until after the Secretarial reviewing authority has already rendered his/her decision;[102] if an opportunity for participation is provided to them, such applicants may follow the same general guidelines.

9.2.15.4.1 Deciding Whether To Submit a Statement

An applicant, once informed that the DRB's decision will be reviewed, may choose not to submit a statement, in which case the DRB's decision will be reviewed based on the record of proceedings, consisting of:

- The DD 293 application form;
- A summary of the hearing testimony (this summary is usually contained in the DRB decisional document);
- All the documents submitted by the applicant (including affidavits, statement of material contentions, and brief);
- Advisory opinions considered by the DRB;
- The DRB's statement of findings, conclusions, and reasons, including any minority opinions; and
- Any recommendations by the Director of the Naval Council of Personnel Boards.[103]

In deciding whether or not to submit a statement for the Secretarial reviewing authority's consideration, the applicant must carefully consider the DRB's statement of findings, conclusions, and reasons and the recommendation of the Director of the Naval Council of Personnel Boards. If the DRB unanimously concluded that the applicant's discharge should be upgraded, and the Director, Naval Council of Personnel Boards' recommendation agreed with the DRB's decision, the applicant will be able to do little to strengthen the case unless an obvious and powerful basis for upgrade has been omitted from the official documents.

When, however, the DRB majority, the DRB minority, or the Director of the Naval Council of Personnel Boards states that an upgrade is not warranted, the applicant may greatly benefit by filing additional material explaining why any adverse position is incorrect and bolstering the position of officials who support an upgrade.

9.2.15.4.2 Obtaining the Record of the Hearing

An applicant who decides to submit additional material must either obtain a record of the DRB hearing or accept the summary of the hearing contained in the DRB's decisional document as authoritative. DRB summaries are rarely complete and normally reflect the Secretary/Recorder's judgment of what facts were important.

To produce a transcript, an applicant can either transcribe from a privately made recording of the DRB hearing[103a] or obtain a copy of the official recording of the hearing by sending an appropriate number of 60-minute cassettes to the Naval DRB.[103b]

9.2.15.4.3 Requesting an Extension of Time To Submit a Statement

The Navy allows applicants to request extensions of the 25-day period provided for submitting material to the Secretarial reviewing authority, although the Director of the Naval Council of Personnel Boards does not readily grant requests. A request based on an asserted need for more time in order to prepare a transcript of the DRB hearing has a fairly good chance of meeting with the Director's approval.

An example of a request for extension of time is:

> An extension of the suspense date until _____ is requested. The decisional documents in this case were received by me on _____. Prior to preparing a statement for the Secretarial reviewing authority, it is necessary that I obtain and transcribe a record of the proceedings in order to resolve inconsistencies between the summary of the hearing and the applicant's recollection of the hearing. Due to this factor and the complicated nature of the case, it is impossible to submit a meaningful statement before the date until which an extension is requested.

A request for a time extension should be submitted immediately after receipt of the Naval DRB's decision. If the request is submitted at the eleventh hour, the Director may deny it as untimely.

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[100] (continued)

Civ. No. 79-0211 (D.D.C. 1979) (on file with the National Veterans Law Center).

[101] *Id.*

[101a] *See* note 99 *supra*.

[102] If this occurs, the applicant may consider filing a lawsuit in federal court, based on the same theory as in Attard v. Secretary of the Navy, Civ. No. 76-1701, 5 MIL. L. REP. 2325 (D.D.C., filed Sept. 10, 1976) (discussed in Discharge Upgrading Newsletter, Nov. 15, 1976, at 5), alleging that the failure to provide an opportunity to review the DRB's decision and to submit for the Secretarial reviewing authority's consideration a rebuttal or statement concerning the DRB's decision violates the Administrative Procedure Act and the due process clause of the fifth amendment.

[103] *See* 32 C.F.R. § 724.810.

[103a] *See* § 9.2.11.5 *supra* (making a private recording of a hearing).

[103b] The address to which cassettes should be sent is: Executive Secretary, Naval Discharge Review Board, 801 N. Randolph Street, Arlington, VA 22230.

If an early request for an extension is denied, enough of the 25-day period will remain to allow the applicant to compose and submit a statement of some kind in lieu of the transcript. This statement should be preceded by, or should include, a complaint to the Secretarial reviewing authority about the failure of the Director to grant the requested time extension. Complaints may also be sent to the General Counsel of the Department of the Navy, the Secretary of the Navy, the applicant's Congressperson, and the Naval DRB (so that it will not return the applicant's records to the National Personnel Records Center).

9.2.15.4.4 Preparing Applicant's Statement or Brief Advocating an Upgrade and Rebutting Adverse Board or Director Opinions

Presumably, a brief and statement of material contentions were submitted to the DRB by the applicant. The applicant's follow-up brief to the Secretarial reviewing authority should, according to Naval DRB regulations, argue why the adverse opinion(s) or recommendation (at the DRB level) is "erroneous on the facts, against the substantial weight of the evidence, or contrary to law or governing regulations."[104] The brief should state the error(s) in the opinion and explain the correct view of the law or facts. In the latter case, the applicant's explanation must show how the opinion accepted facts "against the substantial weight of the evidence." Citations to the applicant's military record and to hearing testimony are necessary to establish that the weight of the evidence favors the applicant.

Important documents should be attached to the applicant's statement to the Secretarial reviewing authority. If they are not attached, the Secretarial reviewing authority will have to look through a voluminous record to find documents to which references are made.

9.2.15.4.5 Preparing Another Statement of Material Contentions

Although a statement of contentions was prepared for the DRB, another statement of material contentions should be prepared for Secretarial review, especially where an opinion or recommendation at the DRB level opposing an upgrade was submitted to the Secretarial reviewing authority. The contentions should derive from arguments in the applicant's brief to the Secretarial reviewing authority and should be directed against adverse opinions in much the same way.[104a] Submission of a new list of material contentions prevents the Secretarial reviewing authority from adopting without comment one of the adverse opinions of the DRB or Personnel Boards Director.

9.2.16 RECONSIDERATION BY A DRB

In most branches of military service,[104b] the upgrade rate is higher at the DRB than at the BCMR. Veterans who are eligible for reconsideration by a DRB may therefore prefer to reapply to the appropriate DRB rather than to try the BCMR, particularly when many years have intervened since their last DRB review. The DRBs are generally more liberal and operate under more liberal standards today.

By regulation,[105] a veteran who has previously applied to a DRB for a discharge upgrade has a right to an entirely new DRB review of the discharge if any of the following situations exist:

- The only previous review of the veteran's discharge was instigated by the DRB, without the veteran having filed an application;
- The previous DRB review(s) of the veteran's discharge did not involve a personal hearing, and the veteran now requests a hearing (not applicable if the veteran previously requested a hearing but failed to appear at the appointed time in person or by representative without having made a prior timely request for a continuance or withdrawal, unless the veteran can show that such failure was due to circumstances beyond his/her control);
- Since the last DRB review of the veteran's case, the military department has changed the policies and procedures under which the veteran was discharged, giving servicemembers substantially more rights than the veteran had when discharged;
- The most recent DRB decision in the veteran's case was dated before April 1, 1978, *and* the veteran reapplied before April 1, 1981, *or* reapplies within 15 years of the date of discharge; or
- The veteran presents new, substantial, relevant evidence that was not available to the veteran at the time of any previous DRB review(s).

In order to obtain reconsideration, a veteran must be eligible to apply to a DRB.[105a] Most eligible veterans seeking reconsideration by a DRB can meet one of the broad provisions above.

An applicant seeking reconsideration should state on the DD 293 application form that reconsideration is warranted and should cite whatever provisions of 32 C.F.R. § 70.5(b)(8) seem applicable. In addition, if the only reconsideration provision that the applicant meets is the one for new policies and procedures or the one for new evidence (or both), the applicant should submit with the application form a brief and statement of material contentions showing

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[104] 32 C.F.R. § 724.501(i).

[104a] *See* § 9.2.15.4.4 *supra*; § 11.4.3 *infra* (preparing a statement of material contentions for Secretarial review).

[104b] The exception is the Navy/Marine Corps, where the DRB rate of upgrade as recently as 1979 (14%) was substantially lower than the BCNR rate.

[105] *See* 32 C.F.R. § 70.5(b)(8).

[105a] *See* § 9.2.3 *supra*. At the time of publication of this manual, the Department of Defense published a proposed revision of the reconsideration provisions that would increase the number of veterans eligible for DRB reconsideration. *See* 46 Fed. Reg. 42876-77 (Aug. 25, 1981). If the proposed revision is adopted, certain veterans who meet a reconsideration provision will be eligible for another DRB review even if they apply more than 15 years after the date of discharge. The outcome of this rule-making will be reported in the *Veterans Rights Newsletter*.

that the applicant meets these reconsideration provisions.

An applicant seeking reconsideration by the Army DRB should include a cover letter with the application, requesting the Records Center to send the case to the DRB (and not the BCMR) for a determination of whether or not reconsideration is appropriate.

9.3 DRB STANDARDS OF REVIEW

The uniform discharge review standards used by the DRBs to review discharges[105b] do not contain specific guidelines as to what character of discharge is appropriate when a veteran's record indicates a certain number of disciplinary infractions or a certain level of conduct and efficiency performance marks. Inclusion in the standards of a list of general factors to be considered[105c] does provide a broad framework for DRB practice, but the factors are not assigned particular weights or values. If a DRB determines that a UD or a BCD should be upgraded, for example, the standards offer no guidance as to whether the upgrade should be to a GD or to an HD.

According to the uniform discharge review standards, the two objectives of a discharge review are to determine the discharge's propriety (that is, whether the decisions to separate prematurely and to characterize the discharge derogatorily are legally justified or not) and to determine its equity (that is, whether the discharge's character and the premature separation are fair or not).[106] Even if an applicant's discharge is found improper and/or inequitable, the DRB is not required to upgrade it; rather, the DRB must base its upgrade decision upon the administrative separation regulations of its branch of service.[107] In practice, a DRB finding of impropriety or inequity usually results in an upgrade.

A few administrative separation regulations contain specific discharge grading criteria.[108] For the

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[105b] 32 C.F.R. § 70.6.

[105c] For example, under the uniform standards addressing the equity of a discharge, the DRB is required to consider the following, among other, factors:

> Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative).
>
> Awards and decorations.
>
> Letters of commendation or reprimand.
>
> Combat service.
>
> Wounds received in action.
>
> Records of promotions and demotions.
>
> Level of responsibility at which the applicant served.
>
> Other acts of merit that may not have resulted in a formal recognition through an award or commendation.
>
> Length of service during the service period which is the subject of the discharge review.
>
> Prior military service and type of discharge received or outstanding post-service conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review.
>
> Convictions by court-martial.
>
> Records of nonjudicial punishment.
>
> Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in Military Service records.
>
> Records of periods of unauthorized absence.
>
> Records relating to a discharge in lieu of court-martial.

32 C.F.R. § 70.6(c)(3)(i).

[106] *See* 32 C.F.R. § 70.6(a).

[107] 32 C.F.R. § 70.5(c)(6)(i) provides that

> When a DRB determines that an applicant's discharge was improper (§ 70.6(b)), the DRB will determine which reason for discharge should have been assigned based upon the factors and circumstances properly before the discharge authority in view of the Service regulations governing reasons for discharge at the time the applicant was discharged. Unless it is also determined that the discharge was inequitable (§ 70.6(c)), the provisions as to characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

In addition, 32 C.F.R. § 70.5(c)(6)(ii) provides that "[w]hen the DRB determines that an applicant's discharge was inequitable (§ 70.6(c)), any change will be based on the evaluation of the applicant's overall record of service and relevant regulations of the Military Service of which the applicant was a member."

Read literally, these provisions permit a DRB to determine that the applicant's discharge should not be upgraded even if the discharge was illegal. For example, if a DRB determines that a discharge was improper in a case in which the applicant was separated with a UD for drug abuse (either because procedural rights were violated or there was not enough evidence of drug abuse), the DRB could still determine that the veteran should have been discharged for another reason, like "frequent involvement of discreditable nature" and leave the discharge a UD (which is permitted for a separation on these grounds). *See* MD 79-03129 (applicant's discharge for good of the service found improper because Marine Corps regulations prohibited such discharge under the circumstances involved, but applicant's UD not upgraded because basis for discharge should have been unfitness because of frequent involvement of a discreditable nature with military authorities).

This theory was raised in Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980), in which the Army argued that a DRB could legitimately deny an upgrade to a veteran who was illegally discharged for drug abuse, if the DRB determined that the veteran could have been discharged for a different reason. The court of appeals rejected this argument, stating that

> [s]uch a procedure would be grossly unfair because it would allow the Army to belatedly raise charges against a [former service] member even though those changes were never contemplated or raised in the original discharge proceedings. For another thing, under the Army's proposal, the review of [the former service] member would occur at an appellate level, in a proceeding conducted by the Army Discharge Review Board. To allow such procedure would be to deny the servicemember the safeguards that are otherwise available in an administrative discharge proceeding.

627 F.2d at 558-59. *See also* Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977); Mulvaney v. Stetson, 493 F. Supp. 1218, 1224-25 (N.D. Ill. 1980), 8 MIL. L. REP. 2628. Despite this rejection of the Army's substitute-cause argument, the DRBs apparently continue to operate under standards that allow reasoning of the same type.

[108] For example, the standard for determining the character of discharge for Army veterans discharged at expiration of the normal term of service between December 6, 1955 and May 19, 1975 (contained in AR 635-200, para. 1-9(d)(2)) was:

> A member's service *will* be characterized as honorable by the commanding officer authorized to take such action or higher authority when a member is eligible for or subject to separation and it has been determined that he merits an honorable discharge under the following standards:
>
> (a) Has conduct ratings of at least "Good."
>
> (b) Has efficiency ratings of at least "Fair."
>
> (c) Has not been convicted by a general court-martial.
>
> (d) Has not been convicted more than once by a special court-martial.

[Emphasis added.]

most part, however, the separation regulations provide only the following general guidance:

- An individual separated for a category of unfitness, misconduct, or in lieu of court-martial should normally receive a UD, although a GD or an HD is possible (the circumstances in which a GD or an HD is appropriate are not given); and
- An individual separated for unsuitability should receive a GD or an HD (without specific guidance as to when it is appropriate to issue one or the other).

The generality of the applicable regulations and standards leaves DRBs broad discretion in upgrading discharges. The only effective way that applicants have to limit a DRB's discretion is to cite past DRB decisions that are similar to the applicant's case and contend that due process requires that the DRB exercise its discretion in a consistent manner by reaching the same decision in the applicant's case as it did in the cited case(s).[109]

9.3.1 PROPRIETY OF THE DISCHARGE

32 C.F.R. § 70.6(b) provides that a DRB should find a discharge improper if either of two conditions exist.

9.3.1.1 Prejudicial Error in the Discharge

A discharge is improper if prejudicial error occurred in the process by which the applicant was discharged. To find prejudicial error, the DRB must determine that:

- An error of fact, law, procedure, or discretion occurred in the process by which the applicant was discharged; and
- Such error was prejudicial, in that "there is substantial doubt that the discharge would have remained the same if the error had not been made."[110]

The DRBs have used the above definition of prejudicial error as a license to speculate freely as to whether an error in the discharge process was ultimately harmful or harmless to a veteran. For example, DRBs have regularly denied upgrades to applicants who claimed prejudicial error in the failure (against regulations) of the military to provide administration separation hearings prior to such applicants' original discharge, concluding that the applicants still would have received UDs if trial-type administrative separation hearings had been conducted.[111]

In cases involving serious and fundamental violations of legal entitlements (such as failure to provide a hearing opportunity or access to counsel), DRB decisions not to upgrade are unjustified because a finding of prejudicial error is automatically required by law.[112] An applicant's arguments against a denial of upgrade based upon Board speculation that an error was not ultimately harmful should emphasize factors raising "substantial doubt that the discharge would have remained the same if the error had not been made."

The Army DRB's SOP specifies some instances in which prejudicial error may exist in a case:[113]

- Where unrebutted, clearly substantiated allegations of command influence are found in the record;
- Where regulations requiring a transfer, or observation and counseling, prior to initiation of discharge proceedings were intentionally violated;

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[108] (continued)
The word "will" in this provision is definite, meaning that a servicemember who meets the four criteria must receive an HD. *See* ADRB SOP Annex 0-1, SFRB Memo # 3-79, 44 Fed. Reg. 25,098 (Apr. 27, 1979).

[109] *See* Ch. 11 *infra* (how to make due process contentions).

[110] 32 C.F.R. § 70.6(c)(1).

[111] *See* MD 7X-00057; MD 7X-05684; MD 7X-03028; MD 7X-06714. In each of these cases, the DRB stated that "[a]lthough an error occurred in this case, . . . an A[dministrative] D[ischarge] B[oard] would have recommended discharge as Undesirable. Therefore, the error did not prejudice the outcome in this case."

[112] One reason DRBs cannot legally speculate about what would have happened but for a serious, fundamental error of law derives from the fact that they are essentially appellate bodies reviewing trial-type administrative proceedings. The regulations of all the military services have long provided that in an administrative discharge proceeding in which the servicemember is subject to a UD, the servicemember has a number of procedural rights, including rights (1) to have notice of the basis for the separation proceeding; (2) to have a hearing before an administrative discharge board of officers; (3) to have free appointed counsel (normally a lawyer); (4) to compel the attendance of material witnesses who are reasonably available; and (5) to confront any witnesses who appear before the board. At such a proceeding, the burden of proof is on the military department and the findings of the board must be supported by substantial evidence. (In the Army, regulations have also required that these rights be accorded to servicemembers discharged in a proceeding in which they are subject to a GD. 32 C.F.R. § 41 sets forth DoD's minimum procedural requirements for all three military departments).

At a DRB proceeding, none of these rights is available to an applicant. *See* Giles v. Secretary of the Army, 627 F.2d 554, 558-59, 8 MIL. L. REP. 2318 (D.C. Cir. 1980). In addition, the uniform standards provide that in DRB reviews "[t]here is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial creditable evidence to rebut the presumption." 32 C.F.R. § 70.5(b)(12)(vi).

Some DRB cases, however, have recognized that a DRB cannot validly engage in this sort of speculation. In cases involving individuals discharged for character and behavior or personality disorders, the Army DRB currently operates under a guideline which recognizes that the DRB cannot be a substitute for an administrative discharge board. This guideline, which appears at 44 Fed. Reg. 25,093-94 (Apr. 17, 1979), is a result of the litigation in Lipsman v. Brown, Civ. No. 76-1175, 6 MIL. L. REP. 2061 (D.D.C. Feb. 6, 1978). In the *Lipsman* case, the Army agreed to change its regulations to require that in order to discharge a servicemember for such a disorder, the servicemember must first be diagnosed by a medical doctor trained in psychiatry. The Army DRB was directed to apply this change in regulations retroactively to Army DRB applicants discharged before the date of the *Lipsman* settlement. The guideline states that

> [a]pplicants for relief who were not diagnosed by a medical doctor trained in psychiatry shall be entitled to have their discharges upgraded to honorable. (This provision is essential because there is no way to determine today the extent to which more serious mental disorders might have affected the applicant's behavior while in the service.)

See § 16.7.2 *infra*.

Besides the court in *Giles v. Secretary of the Army*, the courts in Carter v. United States, 213 Ct. Cl. 727, 5 MIL. L. REP. 2056 (1977), and Mulvaney v. Stetson, 493 F. Supp. 1218, 1224-25 (N.D. Ill. 1980) recognized that a discharge review agency cannot validly engage in speculation that a less than honorable discharge would have been issued, even if an error of law had not occurred.

[113] *See* ADRB SOP, Annex F-1, para. 2.A., 44 Fed. Reg. 25,069 (Apr. 27, 1979).

- Where the applicant was given inadequate notice of the reason for separation prior to waiving his/her right to a hearing;
- Where the applicant was not given a full opportunity to rebut adverse evidence at an administrative separation proceeding;
- Where the record considered in characterizing service included references to disciplinary actions that, by regulation, should not have been in the file;
- Where the record considered in characterizing service referred to preservice activities (unless these were legitimately part of the basis for discharge, such as fraudulent entry into service); and
- Where the applicant was separated from service in lieu of court-martial but could not legally have been sentenced by a court-martial to a punitive discharge.[113a]

9.3.1.2 Favorable Current Standards That DRBs Are Required To Apply Retroactively

A discharge is also improper if "a change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge."[114]

9.3.2 EQUITY OF THE DISCHARGE

32 C.F.R. § 70.6(c) provides that a DRB may find a discharge inequitable by any of three methods.

9.3.2.1 Retroactive Application of Favorable Current Standards

The most important method of upgrading discharges on equitable grounds is to apply more favorable current standards retroactively to such discharges. By this method, a discharge is found inequitable if:

- A change in the policies and procedures under which the applicant was discharged has occurred since the applicant was discharged;
- The change in policies or procedures was "substantial" and gives servicemembers more rights than they had before; and
- There is "substantial doubt" that the applicant would have received the same discharge if current policies and procedures had been applicable at the time the applicant was discharged.[115]

Numerous changes in policies and procedures governing administrative discharges have occurred over the years, substantially enhancing the rights of servicemembers. An applicant should carefully review such changes to see if they constitute an equitable basis for upgrade in the applicant's case.[115a] Retroactive application of favorable current standards, while common in DRB cases, is by no means an automatic consequence of there having been procedural and policy changes since an applicant's discharge; this is because, in each case, the DRB must decide whether or not the changes that have occurred raise substantial doubt as to the equity (under present standards) of the old discharge before fully reassessing the discharge under present standards. The DRB's preliminary decision is often the product of extensive speculation.[116]

9.3.2.2 Type of Discharge Issued Is Lower Than Type Normally Issued for Particular Conduct

A second method of applying equitable considerations is for a DRB to compare the character of discharge the applicant received with the character of discharge normally received at that time in the same service for the conduct that led to the applicant's discharge. If the applicant's discharge is abnormally low, an upgrade on equitable grounds may be justified.[117]

This method is not easy to use successfully. Because administrative separation regulations rarely do more than state the range of appropriate discharge characterizations for a particular class of conduct, it is normally difficult for an applicant to prove what a normal discharge for such conduct is.[118] Despite the

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[113a] *See* § 12.5 *infra* (more complete listing of instances in which prejudicial error may exist).

[114] 32 C.F.R. § 70.6(b)(2). The Laird Drug Memorandum (*see* § 15.2 *infra*) and the settlement of the *Lipsman* case (*see* § 16.7.2 *infra*) are the only current standards that the DRBs are required to apply retroactively.

[115] *See* 32 C.F.R. § 70.6(c)(1).

[115a] *See* Ch. 21 *infra* (checklist of major changes in policies and procedures over the years; amplification of equity standard). Important changes in various areas of policy and procedure are noted in the sections discussing each area.

[116] That this equity rule allows a great deal of speculation was made clear in Giles v. Secretary of the Army, 627 F.2d 554, 8 MIL. L. REP. 2318 (D.C. Cir. 1980), when the Army represented to the court how the Army DRB would apply the rule to cases in which Army discharge policies had substantially changed since the time of discharge. Since 1975, Army administrative discharge regulations have required that servicemembers receive an HD if they were separated in an administrative discharge proceeding in which evidence of compelled urinalysis was introduced. The Army represented to the court that this change in policies and procedures produced a substantial enhancement of the rights afforded a respondent, thereby meeting the first prong of the equity rule (32 C.F.R. § 70.6(c)(1)(i)). But the Army stated that, in determining whether there would be substantial doubt under the second prong of the equity test, the DRB would decide whether the discharge authority would have submitted evidence of compelled urinalysis in an administrative discharge proceeding had (s)he known at the time that this would require an HD (that is, whether the discharge authority would have foregone use of the results of the compelled urinalysis in order to pursue a separation of the servicemember with a less than honorable discharge).

[117] *See* 32 C.F.R. § 70.6(c)(2), which provides that a discharge is inequitable if "[a]t the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member. . . ."

[118] The only further guidelines concerning types of discharge normally issued are (1) the regulations governing the appropriate type of discharge for a servicemember discharged at expiration of the term of service (*see* § 5.4 *supra*), and (2) the Navy administrative separation regulation (BUPERSMAN 3420180, para. 3.b.) stating that

> [an Undesirable] discharge normally is appropriate for: drug sale/trafficking; drug abuse subsequent to warning, rehabilitation, etc.; fraudulent enlistment based upon a prior discharge under other than honorable conditions or for an offense committed prior to enlistment which would normally result in an other than honorable discharge; civil conviction or action

difficulties of proof, an applicant whose discharge is suspiciously low for a particular class of conduct should not hesitate to argue for equitable relief using this method.

9.3.2.3 General Fairness in View of the Applicant's Overall Record

A third method of deciding a claim for upgrade on equitable grounds is for the DRB to appraise the applicant's overall service record and other relevant evidence presented to it. This method, which introduces a multiplicity of factors for DRB consideration, allows the DRBs more discretion than any other equitable method. It is the method used in the majority of cases in which upgraded discharges are awarded.[118a]

The uniform discharge review standards name five primary areas to be considered by a DRB conducting a general appraisal of an applicant's record.

9.3.2.3.1 Quality of the Applicant's Service

The uniform discharge review standards list the following factors for a DRB to weigh in determining whether an applicant's overall service record warrants an upgrade:

- Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative);
- Awards and decorations;
- Letters of commendation or reprimand;
- Combat service;
- Wounds received in action;
- Records of promotions and demotions;
- Level of responsibility at which the applicant served;
- Other acts of merit that may not have resulted in formal recognition by award or commendation;
- Length of service during the service period under DRB review;
- Prior military service, types of discharge previously received, and outstanding postservice conduct insofar as they help to explain the applicant's performance during the period of service under DRB review;
- Convictions by court-martial;
- Records of nonjudicial punishment;
- Convictions by civil authorities during the applicant's term of military service, as reflected in discharge proceedings or as otherwise noted in Military Service records;
- Records of periods of unauthorized absence; and
- Records relating to a discharge in lieu of court-martial.[119]

9.3.2.3.2 Applicant's Ability To Serve Satisfactorily and To Adjust to Military Service

The second area that DRBs must consider is the individual's ability to serve satisfactorily and to adjust to military service. Some people enlisted or drafted into the military, although well-intentioned, do not have the inherent capacity to serve satisfactorily. The Army DRB calls an individual in this situation a "Would but Couldn't."[120] In evaluating whether a veteran could have served satisfactorily, DRBs consider such matters as:

- The age of the applicant while in military service;
- The educational level of the applicant while in the service;
- The applicant's aptitude scores; and
- Whether the applicant met the service's entrance requirements.[121]

9.3.2.3.3 Family and Personal Problems

Another area that DRBs must consider is the veteran's personal or family situation at the time of discharge.[122] A DRB will often view family and personal problems leading to or affecting the conduct for which the applicant was discharged as tending to mitigate such conduct. For example, if an applicant was discharged for a series of AWOLs for which family and personal problems may have been responsible, the DRB will consider evidence presented by the applicant to this effect and may conclude that the discharge issued was unduly low under the circumstances.

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[118] (continued)

taken which is tantamount to a conviction for violent offenses, felony convictions, offenses against minors or confinement as the result of a conviction of any other offenses for which the maximum penalty under the Uniform Code of Military Justice is death or confinement for one year or more; homosexual acts with minors, all sex deviate offenses involving a minor of any sex, acts consummated by coercion, flagrant cases of frequent military involvement and or a pattern of continued minor civil offenses. Military offenses should normally include at least one court martial conviction; however, extreme cases of continued NJP action will be considered.

[118a] *See* Ch. 22 *infra* (detailed discussion of cases upgraded for general fairness, and specific factors involved).

[119] *See* 32 C.F.R. § 70.6(c)(3)(i).

[120] Army DRB guidance on the concept of "Would but Couldn't" appears in ADRB SOP, Annex F-1, para. 3.i., 44 Fed. Reg. 25,071 (Apr. 27, 1979), as follows:

> Some individuals are error prone, others clearly were mistakes of the procurement process and should never have been inducted or enlisted into the Army. These individuals could properly be called victims of the trauma associated with attempting to meet critical personnel requirements during RVN within the political, economic and social constraints that detracted from efficient operation. It is inevitable that some would have had difficulty with the military system. Key to consideration of their cases is the determination as to whether or not they were sincerely trying to conform versus whether or not there was deliberate intent not to conform. The panel may grant relief if, in its opinion, there was intent but no ability to be a good soldier.

[121] *See* 32 C.F.R. § 70.6(c)(3)(ii)(A); *see also* § 12.6.3 *infra* (discussion of personnel who were improperly enlisted or inducted).

[122] *See* 32 C.F.R. § 70.6(c)(3)(iii)(B).

9.3.2.3.4 Abuse of Authority by Others Contributing to Discharge

The DRBs are also required to consider any action by an individual in authority that constitutes a "clear abuse of such authority" and that may have contributed to the decision to discharge the servicemember or to issue a particular character of discharge.[123] An example of abuse of authority is an officer who has particular animosity towards a subordinate treating that person unfairly, and thus helping to incite the conduct for which the subordinate is eventually discharged. The Army DRB's SOP indicates that unjust denial of an in-service application for a conscientious objection, hardship/dependency, or medical discharge can also be grounds for finding a subsequent discharge inequitable.[123a]

9.3.2.3.5 Discrimination Against the Applicant

The final area that DRBs must consider involves actions taken against an applicant (while (s)he was in service) that were motivated by discrimination.[124]

9.3.3 PRESUMPTION OF ADMINISTRATIVE REGULARITY

The uniform discharge review standards include a codified presumption (known as the presumption of administrative regularity) that the military acted properly in any given case; substantial credible evidence is required to rebut this presumption.[125] The proper scope of the presumption is addressed only in advisory memoranda to the DRBs from DoD.[126] It cannot be used to presume administrative compliance with a regulation that requires separate administrative verification when such verification is absent.[126a]

9.4 BCMR PROCEDURES AND STANDARDS

From a practical point of view, there are three significant differences between a discharge review conducted by a BCMR[126b] and one conducted by a DRB:

- BCMRs do not operate under any significant published discharge review standards;[127]
- There is no right to a hearing at a BCMR, and in practice BCMRs rarely grant hearings to applicants; and
- All BCMR reviews are conducted in Washing-

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[123] *Id.* at .6(c)(3)(ii)(C).

[123a] *See* ADRB SOP, Annex F-1, para. 2.a.(5), 44 Fed. Reg. 25,069 (Apr. 27, 1979).

[124] *See* 32 C.F.R. § 70.6(c)(3)(ii)(D).

[125] *Id.* at .5(b)(12)(vi).

[126] In a May 18, 1978 memorandum from DoD's General Counsel's Office, the DRBs were advised on the applicability of the presumption in cases involving a discharge for the good of the service (that is, a discharge in lieu of court-martial) as follows:

> 1. If the accused was required to admit the facts contained in the charge sheet, or if the discharge authority was required to find that the facts stated therein were true, then the Discharge Review Board could presume the truth of such facts.
> 2. As to whether preferral of charges would provide a basis for presuming the truth of the facts in the charge sheet, the following guidance was given: Charges may be preferred by any person subject to the Uniform Code of Military Justice. 10 U.S.C. § 830 (1976) (Art. 30). The changes must be signed and sworn to before a commissioned officer authorized to administer oaths, and shall state:
> (i) that the signer has personal knowledge of, or has investigated the matters set forth therein; and (ii) that the charges are true in fact to the best of the signer's knowledge and belief. *Id.* If the discharge in lieu of court-martial requires a valid preferral, the Discharge Review Board may presume that the signer either had personal knowledge of, or had investigated the matters set forth therein, and that the charges were true in fact to the best of the signer's knowledge and belief. The weight to be given the presumption in determining whether the facts stated in the charge sheet are true is a matter to be determined by the Discharge Review Board. To the extent that the discharge proceeding reflects:
> (i) an official determination that the facts stated in the charge sheet are true; (ii) that the accused admitted the facts stated in the charge sheet; or (iii) that the accused admitted guilt of the offense(s), then the presumption is strengthened.

See Memorandum from General Counsel's Office, DoD, to Discharge Review Boards (May 18, 1978) (on file at the National Veterans Law Center).

In a July 6, 1978 memorandum from the Deputy Assistant Secretary of Defense to the DRBs concerning the DRBs' proposed regulations, that official stated:

> The Navy's proposed revision applies the presumption to missing records affecting the propriety of a discharge. The presumption is applicable unless information supplied by the applicant is "sufficient to provide *prima facie* justification for a change in the type or nature of the discharge. . . ." By applying the presumption to a single question — the propriety of the discharge — the Navy's proposed revision takes too narrow a review of the presumption. The broader language in the DoD Directive also covers matters that may relate to the equity of a discharge.
>
> In addition, the presumption may be applied to matters that are preliminary in nature. For example, the presumption, if unrebutted, may be used to determine that a given step in the discharge process was performed correctly. However, the Board may still determine that a later or unrelated step rendered the discharge improper or inequitable. Furthermore, the Navy's proposed instruction incorrectly describes the burden on the applicant; the applicant is not required to provide *prima facie* justification for a change in the discharge in order to rebut the presumption; rather, the presumption of regularity will apply absent substantial credible evidence to the contrary. Thus, the applicant may be able to rebut the presumption of regularity as to a particular document, and have the evidence considered in his or her favor, but may still be denied relief if the evidence does not warrant a change in discharge under the standards set forth in the regulation. Conversely, the applicant may be unable to rebut the presumption as to the missing document, but may nonetheless receive a change in discharge as a result of matters unrelated to the missing document.

See Memorandum from Deputy Assistant Secretary of Defense, to Discharge Review Boards (July 6, 1978) (on file at the National Veterans Law Center).

[126a] *See* ADRB SOP, Annex F-1, para. 2.a.(3), 44 Fed. Reg. 25,069 (Apr. 27, 1979).

[126b] *See* § 9.1 *supra*; §§ 20.2, 20.3 *infra* (general overview of the BCMRs' function within the discharge review system).

[127] The authors of this Manual understand that uniform regulations for BCMRs are being drafted by DoD.

ton, D.C., with no opportunity available for regional BCMR review.

9.4.1 REGULATIONS AND GUIDELINES GOVERNING BCMR PROCEEDINGS

The only published regulations, guidelines, and policies governing BCMR decision-making are contained in the codified regulations of each BCMR.[127a]

9.4.2 JURISDICTION AND POWERS OF THE BCMRS

The statute creating the BCMRs gives them power to "correct any military record" when "necessary to correct an error or remove an injustice."[128] BCMRs thus have authority to resolve almost any dispute that arises between a servicemember and the military. Applications for discharge upgrades are just one variety of controversy aired at a BCMR.[129]

In matters relating to military discharges, a BCMR has power to:

- Upgrade a GD, UD, or BCD issued by sentence of a special court-martial (if the veteran is eligible to apply to the appropriate DRB, and has not done so before, the BCMR will refer to the DRB any application requesting only correction of the character of discharge);[130]
- Upgrade a BCD or DD issued by sentence of a general court-martial (the BCMRs have sole authority to upgrade these discharges);
- Change the reason given for a discharge (if the applicant was administratively discharged), including changing to or from a medical discharge;
- Expunge a conviction by court-martial (under certain circumstances);[131]
- Void a discharge by changing its date of issue to show completion of the normal term of service (this may result in back pay, allowances, and return of forfeitures);[132]
- Reinstate a veteran into military service (this relief is rarely granted);
- Change the veteran's reenlistment code;[132a] and
- Expunge disciplinary actions or change performance marks (a veteran may want to seek this remedy before or at the same time as applying for an upgrade).

A BCMR does *not* have power to:

- Lower the character of a veteran's discharge;
- Compel the attendance of witnesses; or
- Pay the veteran for any expenses incurred in presenting a case.

[127a] *See* 32 C.F.R. § 581.3 (Army BCMR regulations); 32 C.F.R. § 865 (Air Force BCMR regulations); 32 C.F.R. § 723 (Navy/Marine Corps Board for Correction of Naval Records (BCNR) regulations).

[128] *See* 10 U.S.C. § 1552(a).

[129] Discharge upgrading applications constitute about ⅓ of BCMR decision-making. BCMRs also review disputes involving failure to be promoted, involuntary separation from active duty, and disability and longevity retirement benefits. *See generally* Glosser and Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 AM. U.L. REV. 391 (1974).

[130] In this situation, the staff of a BCMR will administratively deny the application, without consideration by a panel of Board members, because the applicant has not exhausted "all effective administrative remedies afforded him by existing law or regulations, and such legal remedies as the Board shall determine are practical and appropriately available to the applicant." 32 C.F.R. §§ 581.3(c)(3), 723.3(c), 865.6.

It is not clear, however, that the BCMRs will administratively deny an application for failure to exhaust administrative remedies, when the veteran has previously been denied relief by a DRB, but could obtain reconsideration at a DRB because (s)he meets one of the DRB reconsideration provisions. An example of this is a veteran who was discharged in 1974, was denied a complete upgrade in discharge by a DRB in 1976, and then applied to a BCMR in 1980. It is possible for this veteran to obtain reconsideration at a DRB under the provision that allows reconsideration for veterans who have not had DRB reviews under the DoD 1978 uniform standards.

[131] BCMRs have taken conflicting positions over the years as to whether 10 U.S.C. § 1552 provides them with authority to expunge a conviction by court-martial. The current position of each of the BCMRs is as follows:

- The Army BCMR will not expunge a court-martial conviction by declaring the conviction erroneous, null, or void *unless* the court-martial did not have jurisdiction. It views such convictions as final. However, it will expunge the record of a court-martial conviction from personnel and administrative files as a means of reducing or removing the adverse effects of a court-martial sentence, on the basis of clemency. *See* DAJA-CL 1978/6227 (Nov. 3, 1978) (an opinion of the Judge Advocate General of the Army).
- The BCNR will not expunge a court-martial conviction under any circumstances. *See* Appellee's Supplemental Brief, filed in Baxter v. Claytor, appeal docketed No. 77-1984 (D.C. Cir. Aug. 1980).

[131] (continued)

- The Air Force BCMR takes the position that it has authority to expunge a court-martial conviction. *See* Denton v. United States, 204 Ct. Cl. 188, 191, 2 MIL. L. REP. 2326 (1974), *cert. denied*, 421 U.S. 963 (1975).

The Court of Appeals for the District of Columbia recently held that "[a]lthough technically [a BCMR] may lack the ability to invalidate or overrule a court-martial conviction, . . . it does have power to remove all traces of an invalid court-martial from a serviceman's record. . . ." Baxter v. Claytor, 652 F.2d 181, 185, 9 MIL. L. REP. 2633, 2634 (D.C. Cir. 1981).

[132] Sometimes a veteran who was prematurely (before the expiration of the normal term of service) separated with a less than honorable discharge has a valid claim for back pay, allowances, and forfeitures. If the veteran is able to show that the premature separation was illegal or unjust, such monetary relief would be appropriate. In this situation, the veteran's case should be handled differently from a normal discharge upgrade case.

The veteran should generally not apply to the DRB, even if the DRB has authority to upgrade the type of less than honorable discharge that the veteran has received. The DRBs do not have authority to change the date of discharge to show completion of service, and therefore no relief can be granted by a DRB that would automatically result in back pay. Of course, if the veteran's main objective is an upgrade in discharge, rather than back pay, there is no reason to avoid the DRB.

The options that remain are to apply to a BCMR or to file a lawsuit in the United States District Court or the Court of Claims. *See* Ch. 24 *infra* (discussion of these options).

[132a] The Board for Correction of Naval Records is generally reluctant to consider requests for a change in reenlistment code, but it has done so in instances in which lawsuits seeking to compel such consideration were filed. *See* Neal v. Secretary of the Navy, 639 F.2d 1029, 1033, 9 MIL. L. REP. 2247 (3d Cir. 1981).

An alternative procedure for obtaining a change in reenlistment code is to appeal to the military service itself (submitting evidence to support the request) at one of the following addresses:

Navy: Commander, Naval Military Personnel Command (N-03), Department of the Navy, Washington, D.C. 20370.

Marine Corps: Headquarters, U.S. Marine Corps CMC (CODE MMCP), Washington, D.C. 20380.

Army: U.S. Army Enlisted Eligibility Activity, 9700 Page Boulevard, St. Louis, Missouri 63132.

Air Force: Headquarters, U.S. Air Force Recruiting (ATC), ATTENTION RSOEA, Randolph Air Force Base, Texas 78148.

9.4.3 ELIGIBILITY TO APPLY

By statute and by regulation, a BCMR can only correct military records if an application is filed within three years of the applicant's discovery of the error or injustice, unless the BCMR excuses this failure in the interest of justice. In practice, however, BCMRs almost never reject an application for failure to file within the three-year time period.[133]

Subject to this time limit, *all* veterans with less than honorable discharges are eligible to apply to a BCMR for an upgrade. However, if a veteran is eligible to apply to a DRB and has not applied to it previously, an application to the BCMR will be referred to that DRB.[134]

If the veteran is deceased or otherwise physically or mentally incapable of filing an application to a BCMR, a spouse, parent, heir, or legal representative of the veteran may do so. Proof of the relationship between the person filing the application and the veteran should be submitted with the application form.[135]

9.4.4 HOW TO APPLY

In order to apply to a BCMR, a veteran must send a DD Form 149 (application for correction of military or naval record) to the appropriate address appearing on the form.[136] An application should not be filed until after a request for the veteran's military personnel and medical records, using Standard Form 180, has been answered.[136a]

Because it usually takes several months for a BCMR to process a case to the point of requesting an advisory opinion, the quickest way to get a decision is to file an application immediately and to send other material to the BCMR later, after the case has been prepared. The order in which the BCMRs decide cases is generally by the date of application.

The application form should be accompanied by a cover letter requesting copies (before the Board meets to decide the application) of:

- Any legal, medical, or other advisory opinions the BCMR has obtained;
- Any military investigative reports (such as OSI or CID reports);
- The examiner's or staff's brief for the Board in the case; and
- In a case involving a BCD or DD, the court-

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[133] 10 U.S.C. § 1552(b).

The BCMRs have not had occasion to interpret when discovery of an error or injustice occurs or what type of circumstances will warrant excusing the failure to file within the three-year application period. This is because the BCMRs always review the substantive merit of every application that is filed, and if the Board determines that relief should be granted, it always determines that it is in the interest of justice to excuse any failure to file within the three-year application period.

As the Executive Secretary of the Army BCMR has testified,

> The majority of the applicants who do not file timely state that they were not aware of the existence of the Board until recently advised and had no knowledge of the requirement of making a timely application. The lack of knowledge by former servicemen regarding the right of appeal and timeliness of application is also apparent from their correspondence. Applicants, and others in their behalf, have generally urged the Board to accept this lack of knowledge as a valid basis for accepting their late application.
>
> Since there is no definitive criteria for the application of the standard, there must be in net effect a complete review of each case on the merits to determine whether it is "in the interest of justice" to excuse the nontimely filing. If review of the merits discloses the existence of probable error or injustice, it is most difficult then to find that it is not "in the interest of justice" to waive the untimely filing.
>
> Further, since a review on the merits has been completed, and even though it has not disclosed probable error or injustice, it is believed more proper to deny relief on that substantive basis rather than on a secondary basis of nontimely filing.

Hearings on H.R. 10267 Before the Special Subcomm. on Discharges and Dismissals of the House Comm. on Armed Services, 89th Cong., 2d Sess. 10,291 (1966).

The Secretary of the Army has further explained the waiver of limitations as follows:

> Experience has shown that since there are no definitive criteria for application of the case on the merits as a prerequisite to a determination (1) whether the failure to file timely should be excused and (2) that error or injustice exists and justice requires a changing of the records. Where the review of the merits discloses the existence of an error or injustice, it is difficult to conceive that it is not "in the interest of justice" to waive untimely filing. Under this situation it is evident that the result the Congress desired to achieve, namely, to make relatively current the applications that could be considered by the correction boards, has not been obtained because of the extreme difficulty of applying the standard relative to the waiver of the provision as to timely filing.

Letter from Stanley R. Resor, Secretary of the Army, to L. Mendel Rivers, Chairman of the House Comm. on Armed Services (Feb. 2, 1968) (quoted in H.R. Rep. No. 1825, 89th Cong., 2d Sess. 3-4 (1966)). The letter further states that

> H.R. 5144 [a bill which would remove the three year statute of limitations] will give many who are now barred under the current statute an opportunity to apply. It would relieve an administrative burden now imposed in determining whether the Correction Boards should accept jurisdiction, and it will more properly reflect the desire of the Department of Defense to correct error or injustice wherever found, without regard to the passage of time.

Id.

[133] (continued)

Since BCMRs began making their decisions available for public inspection in 1977, no application appears to have been denied for failure to meet the three-year application period. The grounds for denial of any application are always grounds related to whether an error or injustice has been demonstrated.

[134] *See* note 130 *supra*. BCMRs also have refused to consider applications for upgrades in discharge filed by certain veterans with BCDs or DDs who claimed that errors of law occurred in the courts-martial which led to their discharge from service. The rationale for this failure to act is that it allows the veterans to exhaust their remedy of petitioning to the appropriate Court of Military Review for extraordinary relief. Although the refusal to consider such applications is made without prejudice, a BCMR's failure to act in such circumstance may constitute a failure to comply with its statutory mandate.

[135] *See* 32 C.F.R. §§ 581.3(c)(iii), 723.3(a)(3), 865.3(a)(3).

[136] The appropriate addresses are:

- Army: CO USARCAP, 9700 Page Boulevard, St. Louis, MO 63132;
- Navy and Marine Corps: Board for Correction of Naval Records, Department of the Navy, Washington, D.C. 20370;
- Air Force: USAFMPC/DPMDOA 1, Randolph AFB, TX 78148;
- Coast Guard: U.S. Coast Guard, ATTN: Senior Member, Board for Correction of Coast Guard Records, Washington, D.C. 20591.

[136a] *See* Ch. 6 *supra* (discussion of how to obtain military personnel and medical records).

martial proceedings leading to such a discharge (in order to prepare a rebuttal).[137]

Various types of information must be provided on the DD 149 application form. Most of the information requested is straightforward; a few matters require careful consideration.

9.4.4.1 Whether or Not To Request a Hearing

The veteran is requested (in box 9 of the application form) to state whether (s)he desires a personal hearing in Washington, D.C. Requesting a hearing may be taken as a sign of the applicant's sincerity and assures that a valuable opportunity is not lost.

BCMRs are not required to grant an applicant a hearing and rarely exercise their discretion to do so. The Army BCMR grants hearings in perhaps 5% of all cases, and the other BCMRs grant hearings even less often. When a hearing is provided (and attended), the veteran's chance for an upgrade is greatly increased. Hearings are held only in Washington, D.C., and the applicant must bear the expense of traveling there. However, continuances can usually be obtained by an indigent veteran in order to save enough money to pay for the trip.

9.4.4.2 Type of Corrective Action Requested

Box 11 of the application form requests that the applicant specify what correction of error or injustice is desired. Applicants should always request an HD, even if they can realistically expect only a GD.

The applicant can also ask that the reason for discharge be changed. If the applicant is going to argue that (s)he should have been allowed to complete a normal term of service, the applicant should request that the reason for discharge be changed to "expiration of term of service" and that the date of discharge be changed to the date that service would normally have ended.

If the applicant is going to argue that (s)he should have been prematurely separated for a different official reason for premature discharge than that actually used (*e.g.*, where a finding of unsuitability/character and behavior disorder, instead of unfitness/frequent involvement of a discreditable nature, was appropriate), the applicant should request that the reason for discharge be changed to the reason that should have been used.

9.4.4.3 Why There Is Error or Injustice

In box 12, which states, "I believe the record to be in error or unjust in the following particulars:" the applicant should write "*see* brief, which will be submitted in the near future." This same statement can be repeated in box 13, which asks what is submitted in support of the application.

9.4.4.4 Date of Discovery of Error or Injustice

In box 14, the applicant is requested to state the date of discovery of the alleged error or injustice and, if more than three years have elapsed since that date, to state "why the Board should find it in the interest of justice to consider this application."[138] The date that the DRB denied an upgrade may be given as the date of discovery of the alleged error or injustice, if the veteran has applied to a DRB before. Lack of knowledge of the BCMR as a remedy should be an adequate reason to justify BCMR consideration of the application.

9.4.4.5 Applicant's Counsel

In box 10 of the application form the applicant should write the name and address of counsel, to insure that counsel receives all relevant communications from the BCMR.

9.4.4.6 Special Instructions for Applicants Who Have Previously Applied to the BCMR

A new application by a veteran who has previously applied to a BCMR and been denied relief may be rejected by BCMR staff personnel without ever being formally considered by a panel of Board members.[138a] The key to getting the Board to consider the new application is to submit some new evidence and/or new arguments *with* the application.

In order to make certain that the evidence and arguments submitted for this purpose were not presented to or considered by the BCMR in any previous review, a copy of the record of proceedings in all previous BCMR decisions must be obtained. Such a record should be included in the applicant's military personnel file, obtainable by filing a Standard Form 180.

9.4.5 COUNSEL TO A BCMR APPLICANT

In practice, there are no criteria that a person has to meet in order to serve as counsel to a BCMR applicant; BCMRs almost always approve the applicant's choice.[139]

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[137] The request should be worded as follows:

> I would appreciate being furnished copies of any (1) advisory opinions (2) staff briefs or memoranda, and (3) military investigative reports (like CID or OSI reports) obtained or prepared for use and consideration by the BCMR on petitioner's application *prior* to consideration by the Board of the opinions, reports, briefs or memoranda. Upon receipt of this material, I will determine if a rebuttal is to be submitted. This request is made pursuant to the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act, 5 U.S.C. § 552.

Current practice varies at the BCMRs as to whether or not a copy of the staff or examiner's brief will be provided prior to the decision.

[138] These requests on the application form are made pursuant to BCMR regulations; they must be completed in order for a late applicant to be granted review. *See* 32 C.F.R. §§ 581.3(c)(2), 723.3(b), 865.4.

[138a] *See* §§ 9.4.9, 9.4.15 *infra*.

[139] Each of the BCMR's regulations define "counsel" to include members in good standing of the Federal Bar or the Bar of any State, accredited representatives of veterans organizations recognized by the Adminis-

9.4.6 DOCUMENTS THAT THE APPLICANT SHOULD SUBMIT

The only document that an applicant is required to submit is an application form. As in the DRB process, however, an applicant's chances for an upgrade are greatly increased if the applicant submits a brief, a statement or material contentions, and evidence of good postservice conduct or other positive aspects of the applicant.[139a]

If the applicant has already been denied relief at a DRB, the brief and statement of material contentions can be reused verbatim in the BCMR application. However, in a case in which a DRB has issued a carefully tailored statement of its reasons for denying a full upgrade, revising the brief and statement of material contentions to address the DRB's findings, conclusions, and reasons is advisable.

Since only three BCMR members review an application initially, only three copies of the above documents should be submitted. If the Board authorizes a hearing, the applicant may want to file two extra copies for use by the five Board members who sit at the formal hearing.

These documents can be submitted when the BCMRs give notice that there are a certain number of days to submit any additional material before the panel of Board members meets to consider the case. Waiting until then, however, may delay the BCMR in reaching a decision because of the time required to prepare an advisory opinion in response to the brief.

9.4.7 COMPOSITION OF A BCMR PANEL

BCMRs are defined as "boards of civilians of the executive part of [the] military department."[139b] BCMR panels are thus composed of high-ranking civilian employees of the military department, often former military servicemembers, assigned on a full- or part-time basis.

BCMR regulations provide that three members of a Board constitute a quorum.[140] The Chairman of each panel, who is designated by the service's Secretary, conducts the hearing when it is authorized.

Applications must be reviewed and voted on by a panel of Board members, except in the following limited categories of cases, which the staff may deny:

- Applications denied for failure to exhaust effective administrative remedies (such as the DRB);
- Applications not filed within three years of discovery of the alleged error or injustice and in which no reasons are offered as to why it would be in the interest of justice to excuse this failure; and
- Applications for further considerations, in which no evidence, material, or argument is presented other than what was in the record before the Board on a previous BCMR review.[141]

A panel of three Board members decides nonhearing cases and authorizes hearings when it considers them appropriate; hearings are attended by five members.

9.4.8 ACCESS TO DOCUMENTS THAT THE BCMR WILL REVIEW

There are three types of documents that an applicant should review before a BCMR considers the case:

- Applicant's military personnel and medical records;
- Military administrative discharge regulations; and
- Predecisional documents created, and evidence gathered, by the BCMR.[141a]

Like DRBs, BCMRs create and gather documents, which a panel of Board members reviews in deciding an applicant's case. First, in each of the BCMRs, a staffmember known as the Examiner prepares a brief of the case. The Examiner's brief describes the facts of the case, the applicant's contentions, and other relevant factors.

Because of their heavy case load, BCMR Board members heavily rely on the Examiner's brief in deciding a case. It is therefore extremely important for the applicant to request and review the Examiner's brief before the Board decides the case. If there are any inaccuracies or incomplete statements in the Examiner's brief the applicant and counsel should file an additional submission which points this out to the Board. Some BCMRs deny access to these briefs

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[139] (continued)

> trator of Veterans' Affairs under Section 3402 of Title 38, United States Code, and such other persons who, in the opinion of the Board, are considered to be competent to present equitably and comprehensively the request of the applicant for correction, unless barred by law.

See 32 C.F.R. §§ 581.3(d)(3), 723.4(c), 865.8(c).

[139a] *See* § 9.2.10 *supra* (description of these documents and their contents in context of a DRB application). A BCMR application should be accompanied by basically the same information as a DRB application, although the extreme unlikelihood of a hearing at a BCMR makes a complete, detailed account of the applicant's story (in affidavit form) especially important there.

[139b] 10 U.S.C. § 1552(a).

[140] *See* 32 C.F.R. §§ 581.3(b)(ii), 723.2(a), 865.2(a).

[141] In the past, BCMR decisions have been overturned in federal court because the staff, rather than a panel of Board members, denied applications filed by veterans who had previously been denied relief by a BCMR, but who had submitted some additional material. *See* Heiler v. Williams, Civ. No. 76-912, 4 MIL. L. REP. 3009 (D.D.C. Dec. 16, 1976); Haber v. United States, 200 Ct. Cl. 749, 1 MIL. L. REP. 2078 (1973).

In the *Heiler* case, the Army BCMR agreed, as part of a settlement in the case, to change its regulations to require that all applications for further consideration (*i.e.*, applications filed by an individual who has previously been denied relief by a BCMR) must be referred to and voted on by a panel of Board members, if they include any evidence, material, or arguments not before the Board in previous BCMR reviews. *See* 32 C.F.R. § 581.3(c)(5)(iii).

Also as part of the settlement of the *Heiler* case, the Army BCMR agreed to have Board members review and vote on hundreds of applications for further consideration that were denied by staff personnel before the date of the *Heiler* settlement. If an applicant believes that his/her application for further consideration (made prior to December 16, 1976) was denied by BCMR staff, (s)he should write to the BCMR, demanding that the application for further consideration to be presented to a panel of Board members for decision, and citing the *Heiler* decision.

[141a] *See* Ch. 6 *supra* (discussion of how to obtain these three types of documents).

before they decide the cases. This practice is probably unlawful.[142]

Another type of document created in some BCMR reviews is a legal or medical advisory opinion.[143] The BCMR may also obtain other evidence (such as FBI reports) or military investigative reports (such as CID or OSI reports), from sources outside the BCMR.[144] Access to any advisory opinions or evidence gathered by the BCMR is important so that the applicant can rebut any unfavorable information in these documents. Failure to honor the applicant's request for these documents normally results in an offer by the BCMR to present the case to a new panel of Board members.

In a case involving a BCD or DD, the record of the court-martial leading to the discharge can also be obtained.[144a]

9.4.9 HOW THE BCMR DECIDES APPLICATIONS: WITH OR WITHOUT A HEARING

Once a BCMR panel has received an application for consideration, regulations provide that "[e]ach application and the available military or naval records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or deny the application without a hearing."[145] Recommended corrections are forwarded to the service's Secretary for final action.[146]

9.4.10 BCMR HEARING PROCEDURES

An applicant is entitled to at least 30 days prior notice of the date of a BCMR hearing, except that an earlier date may be set if the applicant waives this entitlement in writing.[147] After the applicant receives notice of the hearing, the Board must be notified in writing at least 15 days prior to the date set for the hearing, of the applicant's plans to attend the hearing (or not), the name of the applicant's counsel, and the names of the witnesses that the applicant intends to have testify at the hearing.[148]

Three modes of representation are available to an applicant at a BCMR hearing:[149]

- The veteran may appear at the hearing without counsel;
- The veteran may appear at the hearing with counsel; or
- The veteran may not appear at the hearing, but have counsel represent him/her there.

Arrangements for attendance of witnesses at a BCMR hearing must be made by the applicant, at the applicant's expense. BCMRs have no subpoena power.[150]

On the day of the hearing, the applicant (and counsel) is usually given an opportunity to review the applicant's original military personnel and medical records, which have been transferred from the National Personnel Records Center to the Board. The hearing is convened by the Chairman of the Board, who is responsible for the conduct of the hearing and the rulings. BCMRs are not limited by legal rules of evidence, but are required to maintain reasonable bounds of competency, relevance, and materiality.[151]

All testimony before the BCMR is required to be given under oath or affirmation. The proceedings of a Board hearing, and the testimony given, must be recorded verbatim.[152]

The conduct of the hearing is left to the applicant. The same format suggested for DRB hearings is suggested for BCMR hearings.[152a]

Once the applicant has notified the BCMR that (s)he (and/or counsel) will be present at a hearing, the applicant must notify the Board as soon as possible if events occur that will prevent him/her from attending the hearing as expected. If the applicant is absent without good cause and timely notice to the Board, it may then consider the case on the basis of all material then before it, including, but not limited to, the application for correction, any documentary evidence filed in support of the application, any brief submitted, and all available records. The Board is also empowered in this event to make "such other disposition of the case as is indicated under the circumstances."[153]

The Board may continue a hearing on its own motion. A request for continuance by or on behalf of the applicant may be granted by the Board if a continuance appears necessary to insure a full and fair hearing.[154]

If the Board authorizes a hearing, but the applicant does not desire to appear at one, the application will be considered on the basis of the record before

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[142] The failure to provide access to Examiner's briefs before the BCMR decides a case appears to violate the Privacy Act, 5 U.S.C. § 552a(d)(1), and the due process clause of the fifth amendment. Seemingly to avoid a federal court decision on this matter, BCMRs have been known to grant applicants formal hearings in cases in which counsel persist in the request for access to the Examiner's briefs before BCMR consideration of the case. BCMRs always release Examiner's briefs to applicants before formal hearings.

[143] For example, an Army BCMR regulation (32 C.F.R. § 581.3(h)(1)(ii) provides that "[T]he Board is authorized to call upon the Office of the Secretary of the Army and the Department of the Army General and Special Staffs for investigative and advisory services and upon any other Department of the Army agency for assistance, within the specialized jurisdiction of that agency."

[144] Each BCMR's regulations (32 C.F.R. §§ 581.3(f)(1)(i)(b), 723.6(a)(2), 865.12(a)(2)) provide that:

> Whenever, during the course of its review of the case, it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before the Board, the Board may require the applicant to obtain, or the Board may obtain, such further information as it may consider essential to a complete impartial determination of the facts and issues.

[144a] *See* Ch. 6 *supra*.

[145] 32 C.F.R. §§ 581.3(c)(5)(i), 723.3(e)(1), 865.7(a).

[146] *Id.*

[147] The applicant (and counsel) is mailed a notice stating the time and place of the hearing. *See* 32 C.F.R. §§ 581.3(d)(2)(i), 723.4(b)(1), 865.8(b)(1).

[148] *See* 32 C.F.R. §§ 581.3(d)(2)(ii), 723.4(b)(2), 865.8(b)(2).

[149] *See* 32 C.F.R. §§ 581.3(d)(1), 723.4(a), 865.8(a).

[150] *See* 32 C.F.R. §§ 581.3(d)(4), 723.4(d), 865.8(d).

[151] *See generally* 32 C.F.R. §§ 581.3(e)(2), 723.5(b), 865.10(a).

[152] *Id.*

[152a] *See* §§ 8.6, 9.2.11.4 *supra* (suggested format for presenting a case before a DRB).

[153] *See* 32 C.F.R. §§ 581.3(e)(2), 723.5(b), 865.10(a).

[154] *See* 32 C.F.R. §§ 581.3(e)(3), 723.5(c), 865.11.

the Board. The Board's reason for authorizing a hearing is almost certainly to allow for the presentation of further evidence in a close case, in order to determine if an upgrade is warranted. Declining a hearing under these circumstances is tantamount to refusing an opportunity to strengthen a case for upgrade that is hanging in the balance.

BCMRs are flexible about postponements of hearing dates so that applicants can raise enough money to travel to Washington, D.C.

9.4.11 WITHDRAWING AN APPLICATION

BCMR regulations provide that a Board may permit an applicant to withdraw application without prejudice at any time before the Board proceedings are fowarded to the Secretary of the military department involved.[155]

9.4.12 BCMR STANDARDS OF REVIEW

Unlike DRBs, BCMRs have not published the standards they use to review applications.[156] The BCMRs have not stated that they consider themselves bound by DoD's uniform discharge review standards, as to applications for an upgrade in discharge, nor is there any public rule, policy, or other guideline to that effect.

It is true though that BCMR decisions in discharge review cases are indexed according to DRB index categories, which track the uniform standards. Moreover, BCMR practice appears to be to apply current favorable administrative discharge policies in upgrading discharges. BCMRs also rely heavily on postservice conduct as grounds for an upgrade.[156a] In addition, if the DRB improperly applied the DoD uniform standards in the applicant's case, the BCMR should consider it to be an error that may warrant an upgrade.

BCMR regulations do not address the issue of what weight or deference is given to a DRB decision denying the applicant a complete upgrade in discharge. The intent of Congress in creating them was for BCMRs to provide an independent civilian *review* of applications which DRBs had previously denied complete relief.[157]

9.4.13 BCMR'S AND SECRETARIAL REVIEWING AUTHORITY'S DECISIONAL DOCUMENT

The type of decisional document the applicant receives depends in part upon how the BCMR handles the case.

9.4.13.1 Denial Without a Hearing

When the BCMR denies an application without a hearing, it must prepare and promptly mail to the applicant (and counsel) a "brief statement of the grounds for denial."[157a] This statement must include enough of an explanation for the applicant to understand why the Board rejected the applicant's arguments for an upgrade.[158]

9.4.13.2 Partial or Complete Relief Recommended Without a Hearing

When the BCMR decides without a hearing that partial or complete relief should be granted, it prepares a written statement of findings, conclusions, and recommendations. No regulation defines what should be in such a statement. This statement, together with the record of proceedings, is forwarded to the Secretary of the military department or to the Secretary's designee.

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[155] *See* 32 C.F.R. §§ 581.3(f)(1)(d)(iv), 723.6(d), 865.12(d).

[156] Each BCMR's regulations provide that

> The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. The Board will not deny an application on the sole ground that the record was made by or at the direction of the President or Secretary in connection with proceedings other than proceedings of a Board for the Correction of Military [or Naval] Records.

32 C.F.R. §§ 81.3(c)(5)(ii), 723.3(e)(2), 865.7(b).

What the BCMRs consider to be "sufficient relevant evidence" or "material error or injustice" has not been stated except in the context of individual adjudications.

[156a] *See* § 20.3.3.3 *infra* (discussion of the significance of postservice conduct of applicants seeking upgrades from BCDs or DDs).

[157] The Court of Claims has held that BCMRs violate their statutory authority when they base a decision, or unduly rely upon the advice or opinions of military personnel. *See* Proper v. United States, 154 F. Supp. 137, 139 Ct. Cl. 511 (1957). The same principle seems applicable when a BCMR unduly relies upon the decision of a DRB in an applicant's case. Additional authority for the proposition that the BCMRs must conduct a review independent of the DRB decision is the settlement in Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civ. No. 76-0530, 4 MIL. L. REP. 6012 (D.D.C. Jan. 31, 1977). Paragraph 5B(2)(b) of the Stipulation of Dismissal in that case states

> that although the [BCMR] must independently consider the entire record in each application brought before it, in cases previously considered by a Discharge Review Board convened pursuant to 10 U.S.C. § 1553, the [BCMR] and/or reviewing authority may, in whole or in part, incorporate by reference in the Statement of Ground(s) for Denial any statement made by the DRB. . . .

[157a] *See* 32 C.F.R. §§ 581.3(c)(5)(v), 723.3(e)(5)-(6), 865.7(d).

[158] This requirement derives from the settlement in *Urban Law Institute of Antioch College, Inc. v. Secretary of Defense*, and appears in BCMR regulations. According to the settlement in the *Urban Law Institute* case,

> The brief statement of the grounds for denial shall include the reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory and/or regulatory violations rejected, together with all essential facts upon which the denial is based, including, if applicable, factors required by regulation to be considered for determination of the character of and reasons for a discharge. Attached to the statement shall be any advisory staff opinions considered by the Board not fully set forth in the statement and any minority opinions. Counsel and applicant will be informed that the name and final vote of Board members will be furnished or made available upon request.

See 32 C.F.R. §§ 581.3(c)(5)(v), 723.3(e)(5)-(6); *see also* 32 C.F.R. § 865.7(d).

Before the settlement in 1977 in the *Urban Law Institute* case, the only statement prepared by BCMRs in denials of relief without hearing was that the applicant was denied "on the grounds of insufficient relevant evidence to demonstrate the existence of probable material error or injustice." *See* Stichman, *Developments in the Military Discharge Review Process*, 4 MIL. L. REP. 6001, 6002 (1976). *See also* Van Bourg v. Nitze, 388 F.2d 557, 563 (D.C. Cir. 1967); Knehans

9.4.13.3 BCMR Decision When a Hearing Is Granted

When the Board authorizes a hearing, it prepares a statement of findings, conclusions, and recommendations after the hearing. This statement, together with the record of proceedings, is forwarded to the Secretary of the military department or to the Secretary's designee for final action.

9.4.13.4 Secretarial Reviewing Authority's Denial of Complete Relief

On every application which is forwarded to the Secretary or Secretary's designee *and* which thereafter results in a Secretarial decision to deny complete relief (for example, a decision to upgrade a UD to a GD, but not to an HD), the Secretarial reviewing authority's decision must be sent to the applicant and counsel and must include a brief statement of the grounds for denial, except where the reviewing authority expressly adopts wholly or in part any statement of grounds for denial by the BCMR.[159]

9.4.13.5 Secretarial Reviewing Authority's Grant of Complete Relief

When the applicant receives the full upgrade in discharge requested, BCNR and Army BCMR regulations provide that the applicant and counsel are entitled, upon request, to receive a copy of the final findings, conclusions, and recommendations in the case.[160] The regulations of the Air Force BCMR make clear that all decisional documents, including those of the Secretarial reviewing authority and the Board, are to be automatically sent to the applicant (and counsel) with the decision.[161]

9.4.13.6 Requests for Further Consideration or Reconsideration

When the applicant applies for further consideration or reconsideration,[161a] and the case is referred to a panel of Board members for a decision, the same preparation and mailing requirements apply for decisional documents as for original applications.

9.4.14 LACK OF OPPORTUNITY TO PARTICIPATE IN THE SECRETARIAL REVIEW PROCESS

An applicant and counsel do not have an opportunity to view the BCMR's statement of findings, conclusions, and recommendations to the Secretarial reviewing authority before the reviewing authority decides the case. This is in sharp contrast to the procedures of the Navy DRB, where an applicant is provided an immediate opportunity to view the DRB's decisional document, and to submit for the Secretarial reviewing authority's consideration, a statement in further support of the application. It is arguable that the failure of BCMRs to provide such an opportunity is unlawful.[162]

9.4.15 FURTHER CONSIDERATION AND RECONSIDERATION: APPLICATIONS FILED AFTER A PREVIOUS BCMR DENIAL

9.4.15.1 Subsequent Applications After a Denial of Relief Without a Hearing

When a BCMR denies relief without a hearing, the denial is not irreversable. It does not mean that the applicant's case could never show material error or injustice, but that thus far the applicant has presented "insufficient relevant evidence . . . to demonstrate the existence of probable material error or injustice"[163] to allow the Board to grant relief.

Thus, BCMR regulations uniformly provide that an applicant may submit "new relevant evidence" at a later date.[163a] If an applicant previously denied relief without a hearing submits another application form and attaches any evidence or argument that was not reviewed by the Board before, the application will be treated as though it were an original application.[164]

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[158] (continued)

v. Alexander, 566 F.2d 312, 317, 5 MIL. L. REP. 2383 (D.C. Cir. 1977) cases in which the BCMRs used this language in denying the applicant relief without a hearing). After the *Urban Law Institute* case, such unenlightening statements no longer suffice. The statement of grounds for denial must be addressed to the particular circumstances of the individual's case, especially if the applicant has made some contentions why relief should be granted.

[159] *See* Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civ. No. 76-0530, 4 MIL. L. REP. 6012, 6014 (D.D.C. Jan. 31, 1977) (at para. 5B(1)(b)). The definition for what must be included in a Secretarial reviewing authority statement of grounds for denial is exactly the same as that for a BCMR statement of grounds for denial. *See* note 158 *supra*.

[160] *See* 32 C.F.R. §§ 581.3(f)(3)(ii)(b), 723.8(d)(2).

[161] *See* 32 C.F.R. §§ 865.13, 865.14(f).

[161a] *See* § 9.4.15 *infra*.

[162] The Administrative Procedure Act, 5 U.S.C. § 557(c), requires that such an opportunity be provided in certain adjudications in agencies that are required by statute to hold hearings on applications. BCMRs, unlike DRBs, are not required by statute to hold such hearings, so § 557 does not apply to them. However, the due process clause may require that such an opportunity be provided to BCMR applicants. *See* Koniag, Inc. v. Kleppe, 405 F. Supp. 1360, 1370 (D.D.C. 1975), *aff'd*, 580 F.2d 601 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1052 (1979).

[163] These regulations state:

> Denial of an application on the grounds of insufficient relevant evidence to demonstrate the existence of probably material error or injustice is without prejudice to further consideration in the event new relevant evidence is submitted. The applicant will be informed of his privilege to submit newly discovered relevant evidence for consideration.

32 C.F.R. §§ 581.3(c)(5)(ii), 723.3(e)(2), 865.7(b).

[163a] *Id.*

[164] Each of the BCMR's regulations provide:

> All requests for further consideration may be initially screened by the staff of the Board to determine whether any evidence or other matter (including, but not limited to, any factual allegations or any arguments why the relief should be granted) has been submitted by the applicant that was not in the record at the time of any prior Board consideration. If such evidence or other matter has been submitted, the request will be forwarded to the Board for a determination [on the merits]. If no such evidence or other matter has been submitted, the applicant will be informed

Applicants should not hesitate to file a subsequent application requesting further consideration after a denial of relief without a hearing, anytime new evidence or argument presents itself.[164a] If a number of years has passed since the original denial without a hearing, it is particularly advisable to file another application.[165]

9.4.15.2 Subsequent Applications After a Denial of Relief by the Secretarial Reviewing Authority

BCMRs do not have final decision-making authority over applications for upgrades in discharge; the only final decision occurs if there is Secretarial review, which follows either a hearing or a Board recommendation for an upgrade without a hearing.[165a] Once the Secretarial reviewing authority makes a decision, it is final except for the possibility of reconsideration.[166] Presumably, it is more likely that an applicant can obtain relief upon "further consideration" then it is upon "reconsideration."

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[164] (continued)

> that his/her request was not considered by the Board because it did not contain any evidence or other matter that was not in the record at the time of any previous Board consideration.

32 C.F.R. §§ 581.3(c)(5)(iii), 723.3(e)(3), 865.7(c).

[164a] *See* § 9.4.4.6 *supra*.

[165] In Heiler v. Williams, Civ. No. 76-912, 4 MIL. L. REP. 3009 (D.D.C. Dec. 16, 1976), the Army BCMR agreed as part of the settlement in the case to have a panel of Board members consider again applications for upgrades in discharge that were submitted by applicants who had been denied upgrades by the BCMR on first application and denied by BCMR staff personnel on second application, rather than referring the second application to a panel of Board members for a decision. *See* note 141 *supra*. The Army BCMR accomplished its reviews in 1977 and 1978 of cases in which second applications were denied between 1971 to 1976.

The results of these reviews show that passage of time alone can increase the chance of an upgrade at the BCMR. Of the 200 cases reviewed by the Army BCMR pursuant to the Heiler settlement, 113 (56.5%) resulted in an upgrade, even though the first application for an upgrade had been denied. *See* quarterly reports from Army BCMR to counsel for plaintiff in *Heiler* regarding Army BCMR implementation of the *Heiler* settlement (on file with the National Veterans Law Center). Army BCMR personnel admitted that the main reason for this high rate was that the Boards applied current, more liberal standards, rather than because the veteran submitted new, persuasive evidence in the second application.

[165a] BCMR denials of relief without hearings are not technically considered to be final decisions. *See* § 9.4.15.1 *supra*.

[166] Army BCMR and the BCNR regulations provide that

> *Reconsideration*. After final adjudication, further consideration will be granted only upon presentation by the applicant or newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary. . . .

32 C.F.R. §§ 581.3(f)(4), 723.9.

APPENDIX 9A
DISCHARGE REVIEW BOARDS' ENABLING STATUTE
(10 U.S.C. § 1553)

§ 1553. Review of discharge or dismissal

(a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal.

(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veterans' Affairs under chapter 59 of title 38.

Added Pub.L. 85–857, § 13(v)(2), Sept. 2, 1958, 72 Stat. 1267, and amended Pub.L. 87–651, Title I, § 110(a), Sept. 7, 1962, 76 Stat. 509.

APPENDIX 9B

BOARD FOR CORRECTION OF MILITARY RECORDS' ENABLING STATUTE

(10 U.S.C. § 1552)

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

Aug. 10, 1956, c. 1041, 70A Stat. 116; June 29, 1960, Pub.L. 86-533, § 1(4), 74 Stat. 246.

APPENDIX 9C

DISCHARGE REVIEW BOARDS' PROCEDURES AND STANDARDS

(*See also* proposed rules affecting 32 C.F.R. §§ 70.5(b)(8) and (b)(9)(i) (46 FED. REG. 42,876 (Aug. 25, 1981) and 46 FED. REG. 43,186 (Aug. 27, 1981) respectively.)

Sec.
70.1 Purpose.
70.2 Applicability and scope.
70.3 Definitions.
70.4 Policy and responsibilities.
70.5 Discharge review procedures.
70.6 Discharge review standards.

AUTHORITY: Title 10, U.S.C. 1553 and Title 38, U.S.C. 101 and 3103, as amended by Pub. L. 95-126, October 8, 1977.

§ 70.1 Purpose.

(a) This part establishes uniform policies, procedures and standards for the review of discharges or dismissals in accordance with Title 10, U.S.C. 1553. In furtherance of such purpose, this part

(1) Provides for discharge review by application or on motion of a DRB, and the conduct of discharge reviews and standards to be applied in such reviews which are designed to ensure historically consistent uniformity in execution of this function, as required by the provisions of Pub. L. 95-126.

(2) Assigns responsibility for administering the program.

(3) Makes provision for public inspection, copying, and distribution of DRB documents through the Armed Forces Discharge Review/Correction Board Reading Room.

(4) Provides an opportunity for former members administratively discharged under other than honorable conditions to make application to the DRB's without regard to the normal 15-year period in which an application must be made and establishes January 1, 1980, as the date by which such applications must be submitted.

(b) Nothing in this part changes or modifies in any way the portions of the separate service regulations that implement the requirements of Stipulation of Dismissal, Civil Action No. 76-530, United States Court for the District of Columbia "Urban Law Institute of Antioch College, Inc., et al., Plaintiffs v. Secretary of Defense, et al., Defendants," January 31, 1977.

§ 70.2 Applicability and scope.

The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff and, by agreement with the Secretary of Transportation, to the Coast Guard, and to all Reserve Components thereof in the conduct of discharge reviews.

§ 70.3 Definitions.

(a) *Discharge Review Board (DRB).* An administrative board constituted by the Secretary concerned and vested with discretionary authority to review discharges and dismissals under the provisions of Title 10, U.S.C 1553. It may be configured as one main element or two or more elements as designated by the Secretary concerned.

(b) *DRB Panel.* An element of a DRB, consisting of five members, authorized by the Secretary concerned to review discharges and dismissals.

(c) *Applicant.* A former member of the Armed Forces who has been discharged or dismissed administratively in accordance with the directives of the Military Departments or by sentence of a special court-martial under Title 10, U.S.C., 801 *et seq.* (Uniform Code of Military Justice) and, in accordance with statutory and regulatory provisions: (1) Whose case is heard by the DRB concerned at the request of the former member, or, if he or she is dead, the surviving spouse, next-of-kin, or legal representative; or (2) whose case is heard on the DRB's own motion, which includes reviews requested by the Veterans Administration under Title 38, U.S.C. 101 and 3103, as amended by Pub. L. 95-126.

(d) *Counsel/Representative.* An individual or agency designated by the applicant who agrees to represent the applicant in a case before the DRB. It includes, but is not limited to: A lawyer who is a member of the bar of a Federal Court or of the highest court of a State; an accredited representative designated by an organization recognized by the Administrator of Veterans Affairs; a representative from a State agency concerned with veterans affairs; and representatives from private organizations or local government agencies.

(e) *President, DRB.* A person designated by the Secretary concerned and responsible for the supervision of the discharge review function and other duties as assigned.

(f) *Hearing examination.* The process by which a designated officer of a DRB prepares a presentation for consideration by a DRB in accordance with regulations prescribed by the Secretary concerned.

(g) *DRB Traveling/Regional Panel.* A DRB panel that conducts discharge reviews in a location outside the Washington, D.C. area.

(h) *Discharge.* A general term used in this part which includes dismissal and separation or release from active or inactive military status, as well as actions which accomplish a complete severance of all military status. This term also includes the assignment of a reason for such discharge and characterization of service.

(i) *Discharge Review.* The process by which the reason for separation, the procedures followed in accomplishing separation, and the characterization of service are evaluated. This term includes determinations made under the provisions of Title 38, U.S.C. 3103(e)(2).

§ 70.4 Policy and responsibilities.

(a) Under the provisions of Title 10, U.S.C. 1553, the Secretaries of the Military Departments and the Secretary of Transportation for the Coast Guard have the authority for final decision and the responsibility for the operation of their respective discharge review programs.

(b) The Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) is delegated the authority to: (1) Resolve all issues concerning DRBs which cannot be resolved among the Military Departments, (2) ensure uniformity among the Military Departments in the rights afforded applicants in discharge reviews, and (3) modify or supplement this part in a manner consistent with the policies set forth herein.

(c) The Secretary of the Army is designated the administrative focal point for DRB matters. In meeting this responsibility, the Secretary shall:

(1) Effect necessary coordination with other governmental agencies regarding continuing applicability of this Part and resolve administrative procedures relating thereto.

(2) Review suggested modifications to this part, including implementing directives; monitor the implementing directives of the Military Departments; resolve differences when practicable; recommend specific changes; provide supporting rationale to the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) for decision; and include appropriate documentation to effect publication in the FEDERAL REGISTER.

(3) Maintain the DD Form 293, Application for Review of Discharge or Separation from the Armed Forces of the United States, and republish as necessary with appropriate coordination of the other Military Departments, the Secretary of Transportation and the Office of Management and Budget.

(4) Respond to all inquiries from private individuals, organizations or public officials with regard to Discharge Review Board matters. In those instances where the specific Military Service concerned can be identified, such correspondence will be referred to the appropriate DRB for response. An appropriate activity may be further designated to perform this task.

(5) Provide overall guidance and supervision to the Armed Forces Discharge Review/Correction Board Reading Room with staff augmentation, as required, by the Departments of the Navy and Air Force.

(d) The preliminary determinations required by Title 38, U.S.C. 3103(e) shall be made upon majority vote of the DRB concerned on an expedited basis. Such determination shall be based upon the standards set forth in § 70.6

§ 70.5 Discharge Review Procedures.

(a) *Application for Review.* (1) An

applicant may submit a written request for review to the DRB concerned with such other statements, affidavits, or documentation as desired. The request for review shall be made on DD Form 293, Application for Review of Discharge or Separation from the Armed Forces of the United States, which is available at most DoD installations and regional offices of the Veterans Administration.

(2) A motion or request for review must be made within 15 years after the date of discharge or dismissal; except that, in accordance with Pub. L. 95-126, any former member administratively discharged under other than honorable conditions, and otherwise eligible to make application for review may do so without regard to the 15 year limitation period in Title 10, U.S.C. 1553 if such application is received prior to January 1, 1980.

(3) Written notification shall be made to each applicant whose record indicates a reason for discharge that bars receipt of benefits under Title 38, U.S.C. 3103a. This notification will advise the applicant that separate action by the Board for Correction of Military/Naval Records and/or the Veterans Administration may confer eligibility for VA benefits. As regards the bar to benefits based upon the 180 days consecutive unauthorized absence:

(i) Such absence must have been included as part of the basis for the applicant's discharge under other than honorable conditions.

(ii) Such absence is computed without regard to the applicant's normal or adjusted expiration of term of service.

(b) *Conduct of reviews.* (1) Members. As designated by the Secretary concerned, the DRB and panels thereof, if any, shall consist of five members. One member of the DRB shall be designated as the President and may serve as a presiding officer. Other officers may be designated to serve as presiding officers for DRB panels under regulations prescribed by the Secretary concerned.

(2) Locations. Reviews by a DRB will be conducted in Washington, D.C., and such other locations as designated by the Secretary concerned.

(3) Modes of Appearance. An applicant, upon request, is entitled to appear before a DRB in person with or without counsel/representative or to have counsel/representative present the applicant's case in the absence of the applicant.

(4) Applicant's Expenses. Unless otherwise specified by law or regulation, expenses incurred by the applicant, witnesses, or counsel/representative will not be paid by the Department of Defense.

(5) Withdrawal of Application. An applicant shall be permitted to withdraw an application without prejudice at any time before the scheduled review.

(6) Failure to Appear for Hearing. Except as authorized or directed by the Secretary concerned, further opportunity for personal appearance shall not be made available to an applicant who requests a hearing and who, after being duly notified of the time and place of the hearing, fails to appear at the appointed time, either in person or by representative, not having made a prior, timely request for a continuance or withdrawal of the application. In such cases, the applicant shall be deemed to have waived the right to a personal appearance and the DRB shall complete its review of the discharge based upon the evidence of record. Further request for a personal hearing shall not be granted unless the applicant can demonstrate that the prior failure to appear or to request continuance or withdrawal of the application was due to circumstances beyond the applicant's control.

(7) Continuances and Postponements. (i) A continuance of a discharge review hearing may be authorized by the President of the DRB or presiding officer of the panel concerned, provided that such continuance is of reasonable duration and is essential to achieving a full and fair hearing. Where a proposal for continuance is indefinite, the pending application shall be returned to the applicant with the option to resubmit when the case is fully ready for review.

(ii) Postponements of scheduled reviews normally shall not be permitted other than for demonstrated good and sufficient reason set forth by the applicant in a timely manner, or for the convenience of the government.

(8) Reconsideration. A discharge review shall not be subject to reconsideration except:

(i) Where the only previous consideration of the case was on the motion of the DRB;

(ii) When the original discharge review did not involve a personal hearing and a personal hearing is now desired, and the provisions of § 70.5(b)(6) do not apply;

(iii) Where changes in discharge policy are announced subsequent to an earlier view of an applicant's discharge, and the new policy is made expressly retroactive;

(iv) Where the DRB determines that policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that such changes in policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings;

(v) Where an individual is to be represented by a counsel/representative, and was not so represented in any previous consideration of the case by the DRB;

(vi) Where the case was not previously considered under uniform standards published pursuant to Pub. L. 95-126 and such application is made before January 1, 1980 or within 15 years after the date of discharge; or

(vii) On the basis of presentation of new, substantial, relevant evidence not available to the applicant at the time of the original review. The decision as to whether evidence offered by an applicant in support of a request for reconsideration is in fact new, substantial, relevant, and was not available to the applicant at the time of the original review will be based on a comparison of such evidence with the evidence considered in the previous discharge review. If this comparison shows that the evidence submitted would have had a probable effect on matters concerning the propriety or equity of the discharge, the request for reconsideration shall be granted.

(9) Availability of Records and Documents:

(i) Prior to a review, applicants or other designated representatives may obtain copies of military records by submitting a Standard Form 180, Request Pertaining to Military Records, to the National Personnel Records Center (NPRC), 9700 Page Boulevard, St. Louis, Mo. 62132. The individual shall be informed the request must be submitted prior to the time the DD Form 293 is submitted. Once the DD Form 293 is initiated by the applicant and processed by the NPRC, the records will no longer be available at the NPRC for copying and submission to the applicant.

(ii) If the DRB is not authorized to provide copies of documents that are under the cognizance of another Government department, office or activity, applications for such information must be made by the applicant to the cognizant authority. The DRB shall advise the applicant of the mailing address of the Government department, office, or activity to which the request should be submitted.

(iii) In the event that the official records relevant to the discharge review are not available at the agency having custody of the records, the applicant shall be notified of the situation and requested to provide such information and documents as may be desired in support of the request for discharge review. A period of not less than 30 days shall be allowed for such documents to be submitted. At the expiration of this time period, the review may be conducted with information available to the DRB.

(iv) A DRB may take steps to obtain additional evidence material to the discharge review under consideration beyond that found in the official military records or submitted by the applicant, if a review of available evidence suggests certain aspects of the review would be incomplete without the additional information or when the applicant presents testimony or documents which require additional information to evaluate properly. Such information shall be made available to the applicant, upon request, with appropri-

ate modifications regarding classified material.

(v) Prior to initiation of the decision process specified in § 70.5(c), the applicant and/or counsel/representative is entitled to request access to the records to be considered by the DRB in the discharge review.

(A) At a reasonable time prior to the initiation of the decision process, in any case heard on request of an applicant, the DRB shall provide the applicant and/or counsel/representative with notice of the availability of all regulations and documents to be considered in the discharge review, except for documents in the official personnel/medical records and any documents submitted by the applicant. The DRB shall also notify the applicant and/or counsel/representative: (*1*) of the right to examine such documents or to be provided with copies of the documents upon request, (*2*) of the date by which such requests must be received, and (*3*) of the opportunity to respond within a reasonable period of time to be set by the DRB.

(B) When necessary to acquaint the applicant with the substance of a classified document, the classifying authority, on the request of the DRB, shall prepare a summary of or extract from the document deleting all references to sources of information and other matters, the disclosure of which, in the opinion of the classifying authority, would be detrimental to the national security interests of the United States. Should preparation of such summary be deemed impracticable by the classifying authority, information from the classified source shall not be considered by the DRB in its review of the case.

(vi) Regulations of a Military Department may be obtained at any installation under the jurisdiction of the Military Department concerned or by writing to the Armed Forces Discharge Review/Correction Board Reading Room, The Pentagon Concourse, Washington, D.C. 20310.

(10) A secretary/recorder or assistant shall be designated to assist in the functioning of each DRB in accordance with the procedures prescribed by the Secretary concerned.

(11) Personal appearance hearings (including hearing examinations) shall be conducted with recognition of the rights of the individual to privacy. Accordingly, presence at hearings of individuals other than those whose presence is required will be limited to persons authorized by the Secretary concerned or expressly requested by the applicant, subject to reasonable limitations based upon available space. If in the opinion of the presiding officer, presence of other individuals would be prejudicial to the interests of the applicant or the Government, such hearings may be held in closed session.

(12) Evidence and testimony:

(i) The DRB may consider any evidence obtained in accordance with this Part.

(ii) Formal rules of evidence shall not be applied in DRB proceedings. The presiding officer shall rule on matters of procedure and shall insure that reasonable bounds of relevancy and materiality are maintained in the taking of evidence and presentation of witnesses.

(iii) Applicants undergoing personal appearance hearings shall be permitted to make sworn or un- sworn statements, if they so desire, or to introduce witnesses, documents, or other information on their behalf, all at no expense to the Department of Defense.

(iv) Applicants may also make oral or written arguments personally and/or through counsel/representatives.

(v) Applicants who present sworn or unsworn statements and witnesses may be questioned by the DRB. All testimony shall be taken under oath or affirmation unless the applicant specifically requests to make an unsworn statement.

(vi) There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.

(13) Contentions.

(i) Applicants must state clearly and specifically their contentions, and/or the issues of fact, law, or discretion for a written determination to be made in accordance with § 70.5(d)(4)(ii).

(ii) In addition, the DRB shall consider such issues of fact, law, or discretion as are discerned by the DRB in the discharge review process.

(iii) The DRB shall make findings and conclusions with respect to the contentions and issues as required by § 70.5(d)(4).

(14) Decisions. On the basis of its findings and conclusions, the DRB shall record its decision as to whether relief should be granted. The nature of any change shall be specified clearly.

(15) Implementation of Discharge Review Decisions. A written notification shall be issued to implement the decision of the DRB, or that of higher authority, in each discharge review case.

(c) *Decision process.* (1) The DRB or the DRB panel, as appropriate, shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standards set forth in § 70.6.

(2) The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the DRB panel as appropriate and shall maintain an atmosphere of dignity and decorum at all times.

(3) Each DRB member shall act under oath or affirmation requiring careful, objective consideration of the application. DRB members are responsible for eliciting all facts necessary for a full and fair hearing. They shall consider all information presented to them by the applicant. In addition, they shall consider available Service and health records, together with such other records as may be in the files of the Military Department concerned and relevant to the issues before the DRB, and any other evidence obtained in accordance with this part.

(4) If the applicant does not appear in person and the designated counsel/representative does not appear in the applicant's behalf, the DRB shall review the application on the basis of available official records, documentary evidence submitted by or on behalf of the applicant, presentation of the hearing examination, if any, and any other relevant evidence obtained in accordance with this part.

(5) If the applicant appears in person or the designated counsel/representative appears before the DRB in the applicant's behalf, the DRB shall review the application on the basis of testimony on behalf of the applicant, available official records, documentary evidence submitted by or on behalf of the applicant, presentation of the hearing examination, if any, and any other relevant evidence obtained in accordance with this part.

(6) Application of Standards:

(i) When a DRB determines that an applicant's discharge was improper (§ 70.6(b)), the DRB will determine which reason for discharge should have been assigned based upon the facts and circumstances properly before the discharge authority in view of the Service regulations governing reasons for discharge at the time the applicant was discharged. Unless it is also determined that the discharge was inequitable (§ 70.6(c)), the provisions as to characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

(ii) When the DRB determines that an applicant's discharge was inequitable (§ 70.6(c)), any change will be based on the evaluation of the applicant's overall record of service and relevant regulations of the Military Service of which the applicant was a member.

(7) Voting shall be conducted in closed session, a majority of the five members' votes constituting the DRB decision. Voting procedures shall be prescribed by the Secretary of the Military Department concerned.

(8) Details of closed session deliberations of a DRB are privileged information and shall not be divulged.

(9) Minority opinions may be recorded by any member in accordance with procedures prescribed by the Secretary concerned.

(10) DRB's may request advisory opinions from staff offices of their Military Departments. These opinions are advisory in nature and are not binding on the DRB in its decision making process.

(d) *Decisional document.* A decisional document shall be prepared for each review conducted by a DRB. At a minimum this document shall contain:

(1) The date, character of, and

reason for the discharge or dismissal certificate issued to the applicant upon separation from military service, including the specific regulatory authority under which the discharge or dismissal certificate was issued.

(2) The circumstances and character of the applicant's service as extracted from Service records, health records and information provided by other government authority or the applicant, such as, but not limited to:

Date of enlistment.
Period of enlistment.
Age at enlistment.
Length of service.
Periods of unauthorized absence.
Conduct and efficiency ratings (numerical or narrative).
Highest rank achieved.
Awards and decorations.
Educational level.
Aptitude test scores.
Incidents of punishment pursuant to Article 15, Uniform Code of Military Justice (including nature and date of offense or punishment).
Conviction by court-martial.
Prior military service and type of discharge received.

(3) Reference to the written brief, documentary evidence, and testimony presented to the DRB by or on behalf of the applicant.

(4) A statement of findings, conclusions, and reasons consisting of:

(i) Findings on all issues of fact, law, or discretion upon which the decision on the application is based, including those factors required by applicable Service regulations to be considered for determination of the character of and reason for the discharge or dismissal certificate in question.

(ii) Findings and conclusions on all other issues of fact, law, or discretion raised by the applicant in accordance with § 70.5(b)(13)(i), including claims by the applicant that statutory, regulatory, and/or constitutional provisions were violated, and such other claims made by the applicant, which in the opinion of the DRB would have warranted greater relief than that afforded the applicant by the DRB's decision if resolved in the applicant's favor.

(iii) Conclusions as to whether or not any change, correction, or modification should be made in the type or character of the discharge or dismissal and/or the reason and authority for the discharge or dismissal; and, if so concluded, the particular changes, corrections, or modifications that should be made.

(iv) A statement of the reasons for the findings and conclusions made in accordance with subdivisions (i) through (iii) of this subparagraph.

(5) Advisory opinions, including those containing factual information, where such opinions have been relied upon for final decision or have been accepted as a basis for rejecting any of the applicant's claims. Such advisory opinions or relevant portions thereof that are not fully set forth in the statement of findings, conclusions, and reasons shall be incorporated by reference therein. A copy of such opinions shall be appended to the decision and included in the record of proceedings.

(6) A record of the DRB members' names and votes.

(7) The DRB decision and written minority opinions or reports, if any.

(8) A listing of the contentions or issues presented by the applicant, if not included elsewhere.

(9) An authentication of the document by an appropriate official.

(e) *Issuance of decisions following discharge review.* The applicant and counsel/representative, if any, shall be provided with a copy of the decisional document and of any further action in review. Final notification of decisions shall be issued to the applicant with a copy to the counsel/representative, if any, and to the Military Service.

(1) Notification to applicants, with copies to counsel/representatives, shall normally be made through the U.S. Postal Services. Such notification shall consist of a notification of decision, together with a copy of the decisional document.

(2) Notification to the Military Services shall be for the purpose of appropriate action and inclusion of review matter in personnel records. Such notification shall bear appropriate certification of completeness and accuracy.

(3) Actions on review by superior authority, when occurring, shall be provided to the applicant and counsel/representative in the same manner as the notification of the review decision.

(f) *Records of DRB proceedings.* (1) When the proceedings in any review have been concluded, a record thereof will be prepared. Records may include written records, electro-magnetic records, videotape recordings, or a combination thereof.

(2) At a minimum, the record will include the following:

The application for review.
A record of the testimony in verbatim, summarized, or recorded form at the option of the DRB concerned.
Documentary evidence or copies thereof considered by the DRB other than the Military Service record.
Briefs/arguments submitted by or on behalf of the applicant.
Advisory opinions considered by the DRB, if any.
The findings, conclusions, and reasons developed by the DRB.
Notification of the DRB's decision to the cognizant custodian of the applicant's records, or reference to the notification document.
Minority reports, if any.
A copy of the decisional document.

(g) Cases reviewed by the Secretary of the Military Department concerned, or by one to whom the reviewing authority has been delegated, shall be considered in accordance with the standards set forth in § 70.6.

(1) On every decision of the DRB that is reviewed by the Secretary, or by one to whom reviewing authority has been delegated, the decision on review shall be made in writing.

(2) In every case, the decision of the DRB and the reviewing authority, if any, shall include a statement of findings, conclusions, and reasons, (§ 70.5(d)(5)) except where the reviewing authority expressly adopts, in whole or in part, the statement of findings, conclusions and reasons of the DRB. Similarly, where the reviewing authority adopts the DRB's statement of findings, conclusions and reasons, there is no requirement for duplicative publication and indexing under terms of § 70.5(i).

(h) *Final disposition of the record of proceedings.* The original record of proceedings and all appendices thereto shall in all cases be incorporated in the Service record of the applicant and the Service record shall be returned to the custody of the NPRC, St. Louis, Mo. Other copies shall be filed and disposed of in accordance with separate Military Service regulations.

(i) *Availability of Discharge Review Board documents for public inspection and copying.* (1) A copy of the decisional document prepared in accordance with § 70.5(d) shall be made available for public inspection and copying promptly after a notice of final decision is sent to the applicant.

(2) To the extent required to prevent a clearly unwarranted invasion of personal privacy, identifying details of the applicant and other persons will be deleted from documents made available for public inspection and copying. Names, addresses, social security numbers, and Military Service numbers must be deleted. Written justification shall be made for all other deletions and shall be available for public inspection.

(3) Any other privileged or classified material contained in or appended to any documents required by this agreement to be furnished the applicant and counsel/representative or made available for public inspection and copying may be deleted therefrom only if a written statement of the basis for the deletions is provided the applicant and counsel/representative and made available for public inspection. It is not intended that the statement be so detailed as to reveal the nature of the withheld material.

(4) DRB documents made available for public inspection and copying shall be located in the Armed Forces Discharge Review/Correction Boards Reading Room. The documents shall be indexed in a usable and concise form so as to enable the public and those who represent applicants before the DRBs to isolate from all these decisions that are indexed those cases that may be similar to an applicant's case and that indicate the circumstances under and/or reasons or which the DRB or the Secretary concerned granted or denied relief.

(i) The reading file index shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason for, and authority for the discharge. It

shall further include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions and reasons.

(ii) The index need be permanently maintained only at permanent DRB regional locations. This index should be made available at sites selected for traveling board hearings or hearings examinations for such periods as the DRB is present and in operation. Applicants at such sites shall be so advised in the notice of scheduled hearings.

(iii) The Armed Forces Discharge Review/Correction Boards Reading Room shall publish indexes quarterly for all Boards. All Boards will be responsible for timely submission to the Reading Room of individual case information required for update of the indexes. These indexes shall be available for public inspection and/or purchase at the Reading Room. This information will be provided to applicants in the notice of scheduled hearings.

(iv) Correspondence relating to matters under the cognizance of the Reading Room (including requests for purchase of indexes) shall be addressed to:

Armed Forces Discharge Review/Correction Board Reading Room, The Pentagon Concourse, Washington, D.C. 20310.

(j) *Privacy Act information.* Information protected under the Privacy Act is involved in the discharge review functions. The provisions of 32 CFR Part 286a will be observed throughout the processing of a request for review of discharge or dismissal.

§ 70.6 Discharge review standards.

(a) Objective of Review. The objective of a discharge review is to examine the propriety and equity of the applicant's discharge and to effect changes, if necessary. The standards of review and the underlying factors which aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service. No factors shall be established which require automatic change or denial of a change in a discharge. Neither a DRB or the Secretary of the Military Department concerned shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the DRB or Secretary of the Military Department concerned shall give a full, fair, and impartial consideration to all applicable factors prior to reaching a decision.

(b) *Propriety.* A discharge shall be deemed to be proper unless, in the course of discharge review, it is determined that:

(1) There exists an error of fact, law, procedures, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby. Such error shall constitute prejudicial error, if there is substantial doubt that the discharge would have remained the same if the error had not been made; or

(2) That a change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

The following applies to applicants who received less than fully honorable administrative discharges because of their civilian misconduct while in an inactive reserve component and who were discharged or had their discharge reviewed on or after April 20, 1971: the DRB shall either recharacterize the discharge to honorable without any additional proceedings or complete a review to determine whether proper grounds exist for the issuance of a less than honorable discharge, taking into account that:

(i) An other than honorable (formerly undesirable) discharge can only be based upon civilian misconduct found to have affected directly the performance of military duties;

(ii) A general discharge can only be based upon civilian misconduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.

(c) *Equity.* A discharge shall be deemed to be equitable unless;

(1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that:

(i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(ii) There 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;

(2) At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member; or

(3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's Service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this subparagraph and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:

(i) Quality of service, as evidenced by factors such as:

Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative).
Awards and decorations.
Letters of commendation or reprimand.
Combat service.
Wounds received in action.
Records of promotions and demotions.
Level of responsibility at which the applicant served.
Other acts of merit that may not have resulted in a formal recognition through an award or commendation.
Length of service during the service period which is the subject of the discharge review.
Prior military service and type of discharge received or outstanding post-service conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review.
Convictions by court-martial.
Records of nonjudicial punishment.
Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in Military Service records.
Records of periods of unauthorized absence.
Records relating to a discharge in lieu of court-martial.

(ii) Capability to serve, as evidenced by factors such as:

(A) *Total Capabilities.* This includes an evaluation of matters such as age, educational level, and aptitude scores. Consideration may also be given to whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to the military service.

(B) *Family/Personal Problems.* This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

(C) *Arbitrary or Capricious Actions.* This includes actions by individuals in authority which constitute a clear abuse of such authority and which, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.

(D) *Discrimination.* This includes unauthorized acts as documented by records or other evidence.

MAURICE W. ROCHE,
Director, Correspondence and Directives, Washington Headquarters Service, Department of Defense.

MARCH 29, 1978.

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NOTE

January 1, 1980 deadline at §§ 70.1(a)(4), 70.5(a)(2) and (b)(8)(vi) was changed to April 1, 1981. *See* 44 Fed. Reg. 76,488 (Dec. 27, 1979).