

VETERANS LAW

Discharge Upgrades



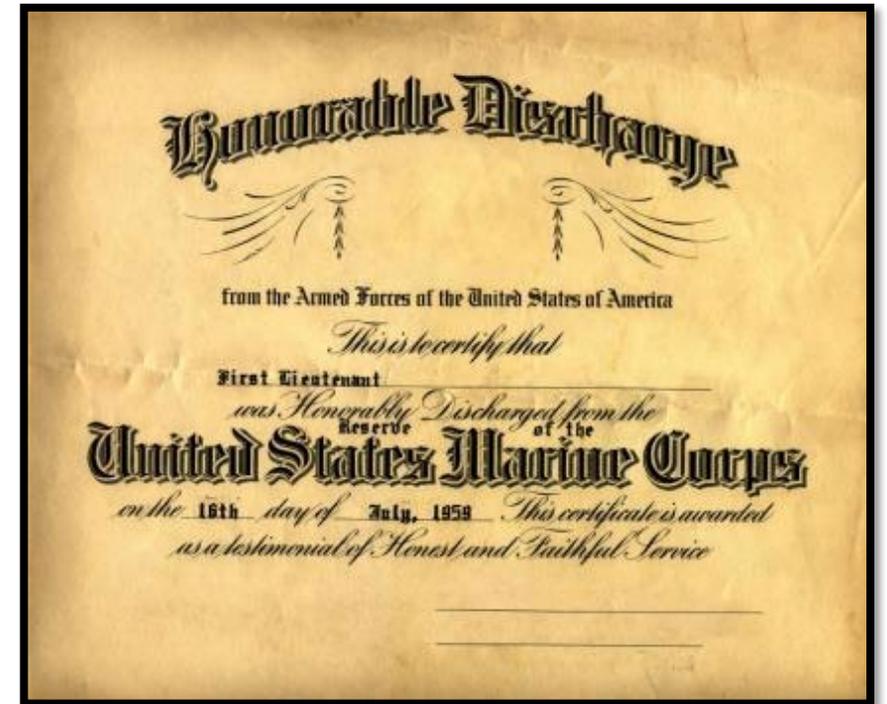
“To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors”



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Discharge Upgrades

- What is a Discharge Upgrade
- Discharge Review Boards
- Boards of Correction
- Policy Memos
- Common Cases
- Where to Get Assistance





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Bad Paper Trends

- “Bad Paper” Discharges: Rate Increasing
 - WW II Era: 1.7%
 - Vietnam Era: 2.8%
 - Gulf War Era: 6.5% (1% statutory/5.5% discretionary)
 - Over 125K (33K deployed to Iraq & Afghanistan)
- Service Differences
 - USMC - 10 times more likely to get a bad paper discharge than Air Force



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Impacts of “Bad Paper” Discharges

- May prevent access to federal and state benefits
 - VA Character of Discharge Determination
 - Statutory and Regulatory Bars to Benefits
- May hurt employment and educational opportunities
- Damage to reputation and self esteem
 - Not “veterans” per 38 USC § 101(2)



Eligibility for Disability Benefits

Is Service Other Than Dishonorable?

| | | |
|----------------------------|-------|-----------|
| • Honorable | Yes | Statutory |
| • General (UHC) | Yes | Statutory |
| • Other than Honorable | Maybe | COD |
| • Bad Conduct (SCM) | Maybe | COD |
| • Bad Conduct (GCM) | No | Statutory |
| • Dishonorable / Dismissal | No | Statutory |



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Discharge Upgrade

- Seeking a **formal change** to the DD-214
 - Character of Service
 - Narrative Reason for Separation
 - Reentry Code
 - Separation Code
- Medical Retirement
- Eligibility for VA Benefits
 - GI Bill – Must Have “Honorable” Discharge
 - Other – service characterized as “other than dishonorable”



Discharge Upgrade

- Two Boards – Both are administered by the applicant's former military service
 - Army, Navy/USMC, USAF/Space Force
 - USCG – Dept of Homeland Security
- 1. Discharge Review Boards (DRB)
- 2. Board of Correction of Military/Naval Records (BCMR)



Discharge Review Boards

- Discharge Review Boards –
 - Comprised of 3-5 active-duty officers
 - Psychiatrist, psychologist or medical doctor trained in mental health when PTS/TBI/MST is diagnosed
 - Jurisdiction to review discharges issued within 15 years of date of application (DD Form 293)
 - Nonwaiverable Statute of Limitations
 - Veteran, spouse, next of kin may request
 - Right to an attorney at own expense





Discharge Review Boards

- Power to upgrade an applicant's characterization of service
- **Cannot:**
 - Review punitive discharges from a **GCM**
 - Undo a court- martial conviction
 - Change a reenlistment code
 - Reinstate applicant to active service
 - Issue a less favorable discharge than originally issued



Discharge Review Boards

- Applicant **entitled** to a personal appearance - Virtual
 - Non-adversarial hearing (no government prosecutor)
 - No rules of evidence / may submit sworn or unsworn statement / introduce witnesses and evidence
 - Panel members will ask questions – pointed and direct
- Alternative is records review only
 - Application/OMR/STRs/applicant statement/evidence
- Right to legal counsel at own expense
- Burden is on the applicant



Discharge Review Boards

- Applicant must convince the DRB that their discharge reason or characterization was “inequitable or improper”
 - Inequitable means the reason or characterization of the discharge is not consistent with the policies and traditions of the service
 - Improper means that the reason or characterization of the discharge is in error (i.e., is false, or violates a regulation or a law) – presumption of regularity
- “Clemency” required to upgrade a punitive discharge (BCD/DD)



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Board of Corrections of Military/Naval Records

- Composed of 3 civilian members / seeks expert opinions when needed
- Jurisdiction – three years from discovery of alleged error or injustice, but...frequently waived in the interest of justice (DD Form 149)
 - Waiver “in the interest of justice”
 - When error or injustice “discovered”



BCMR

- Power to:
 - Upgrade discharge characterization – including punitive discharges adjudged by a General Court Martial
 - Change narrative reason for separation
 - Change reentry codes
 - Reinstate applicant into the service
 - Medically retire the applicant
- Cannot issue a less favorable discharge characterization



BCMR

- **Records review only**
 - No right to hearing
 - Application/OMR/STRs/applicant statement/evidence/**legal brief**
- Applicant must seek redress from DRB first if it is available
 - Less than 15 years since separation
 - Not involving GCM, medical retirement, narrative or reentry codes



DRB v. BCMR

- BCMR action is final and binding on the VA and can set aside both statutory and regulatory bars to benefits
- **DRB actions sets aside only regulatory bar**
 - Seek BCMR action if statutory bar applies



General Guidance

- **Wilkie Memo (2018):** directs Review Boards to consider the importance of fundamental fairness, **clemency**, and rehabilitation
 - Gives weight to **taking responsibility** for past misconduct and to character and rehabilitation;
 - Honorable discharge **does not require** “**flawless military service;**”
 - May consider **facts outside of the military service record;**
 - Veteran’s sworn statement alone may be enough; and
 - Acknowledges that service members receive disparate punishments



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DoD Policy – Mental Health

- **Hagel Memo** (Sep 2014) – Boards must give “liberal consideration” to upgrade requests based on PTSD
- **Carson Memo** (Feb 2016) – Expands Hagle Memo to include TBI
- **Kurta Memo** (Aug 2017) – Further expands Hagel Memo to include all mental health conditions, including PTSD, TBI, MST. Adds substance abuse (self medicating) due to a mental health condition.
 - **Four questions for Boards to consider**



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DoD Policy – Mental Health

- Kurta Questions:

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



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DoD Policy – Mental Health

- So, what does “liberal consideration” mean?
 - Focus on mental health conditions linked to service
 - Recognizes that mental health inherently affects behavior and choices
 - Misconduct can result from mental health conditions and can be evidence of a mental health condition
- Settlements: DRBs to review less than Honorable discharges of service members deployed to Iraq and/or Afghanistan (2001-2021)(2001-2023 USAF) and suffers from PTSD or TBI
 - *Manker v. Del Toro* (2021) – Navy / USMC (and Reserves)
 - *Kennedy v. McCarthy* (2021) – Army (Reserves and ANG)
 - *Johnson v. Kendall* (2023) – USAF, Space Force (Reserves and ANG)



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DoD Policy - DADT

Homosexual Conduct/Orientation

- 1993 – DADT implemented – bars openly LGB service members
- 2011 – Policy repealed – allows LGBTQ to serve
- **Stanley Memo (2011)**
 - Instructs boards to change discharge statuses, narrative reasons, and other derogatory information where veteran was:
 - (1) Discharged under Don't Ask, Don't Tell or similar prior policies; **and**
 - (2) No aggravating circumstances



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DoD Policy - DADT

Farrell v. DoD Settlement (2025) Class Action Settlement

- Veterans whose DD-214s reference sexual orientation with a discharge characterization of Honorable or Uncharacterized/Entry level may request a new DD-214 that does not reference sexual orientation, through an administrative change process
- Veterans whose DD-214s reference sexual orientation and have a General (Under Honorable Conditions) or Under Other Than Honorable Conditions discharge characterization may request an upgraded service characterization and a new DD-214 that does not reference sexual orientation



DoD Policy - DADT

President Biden Pardon (June 2024)

- Full, complete, and unconditional pardon to persons convicted of **unaggravated** offenses based on consensual, private conduct with persons age 18 and older under former Article 125 of the Uniform Code of Military Justice (Sodomy)
- Full, complete, and unconditional pardon to persons convicted of attempts, conspiracies, and solicitations to commit unaggravated Sodomy
- *Effect: Provides evidence of a probable material error or injustice which could be used to request an upgrade of the characterization of service*



DoD Policy – COVID Vaccine

- **Secretary of Defense Directive (2021)** for all service members receive the COVID-19 vaccination
 - ~ 8,000 involuntary separations
 - Unknown voluntary separations to avoid vaccination
- **Austin Memo (2023)** ended the requirement for vaccinations and stated that Service members who received general discharges for failing to obey orders to get vaccinated may petition their service's discharge review board or board for correction of records to upgrade their discharge characterizations



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DoD Policy – COVID Vaccine

- **Hurst Memos** (Apr 2025, May 2025)
 - Service members discharged for refusing to receive a Covid-19 vaccination pay pursue reinstatement and are eligible to receive backpay
 - BCM/NR should grant discharge upgrades request when Covid-19 vaccine refusal was sole basis for separation
 - Discharge should normally be “Honorable,” narrative reason should read “Secretarial Authority,” reentry code changed
 - If multiple reasons for discharge exist – BCM/NR should apply existing policies



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Types of Cases

Administrative Discharges (OTH, General)

- Homosexual orientation / conduct
- Misconduct linked to TBI, PTS, MST
- Misuse of drugs/opioids after injury
- Vaccine refusal
- Psychological issues / Suicide attempts on AD

Punitive Discharges (BCD, DD)

- After all appeals exercised - Clemency



Review Boards – Mental Health January – March 2025

| Review Boards | Claims Adjudicated | Relief Granted | Percent | Relief Includes an Upgrade | No Relief Granted | Percent |
|---------------|--------------------|----------------|---------|----------------------------|-------------------|---------|
| AFDRB | 66 | 5 | 7.6% | 1 | 61 | 92.4% |
| AFBCMR | 73 | 8 | 11.0% | 0 | 65 | 89% |
| ADRB | 315 | 164 | 52.1% | 150 | 151 | 47.9% |
| ABCMR | 103 | 43 | 41.7% | 31 | 60 | 58.3% |
| NDRB | 300 | 130 | 43.3% | 122 | 170 | 56.7% |
| BCNR | 293 | 43 | 14.7% | 20 | 250 | 85.3% |



Review Boards – Sexual Assault January – March 2025

| Review Boards | Claims Adjudicated | Relief Granted | Percent | Relief Includes an Upgrade | No Relief Granted | Percent |
|---------------|--------------------|----------------|---------|----------------------------|-------------------|---------|
| AFDRB | 16 | 0 | 0.0% | 0 | 16 | 100.0% |
| AFBCMR | 26 | 6 | 23.1% | 0 | 20 | 76.9% |
| ADRB | 45 | 31 | 68.9% | 26 | 14 | 31.1% |
| ABCMR | 13 | 10 | 76.9% | 10 | 3 | 23.1% |
| NDRB | 72 | 28 | 38.9% | 27 | 44 | 61.1% |
| BCNR | 79 | 19 | 24.1% | 13 | 60 | 75.9% |



Review Boards – Other Than MH/SA

January – March 2025

| Review Boards | Claims Adjudicated | Relief Granted | Percent | Relief Includes an Upgrade | No Relief Granted | Percent |
|---------------|--------------------|----------------|---------|----------------------------|-------------------|---------|
| AFDRB | 20 | 10 | 50.0% | 6 | 10 | 50.0% |
| AFBCMR | 289 | 114 | 39.4% | 5 | 175 | 60.6% |
| ADRB | 137 | 89 | 65.0% | 89 | 48 | 35.0% |
| ABCMR | 238 | 78 | 32.8% | 39 | 160 | 67.2% |
| NDRB | 253 | 156 | 61.7% | 139 | 97 | 38.3% |
| BCNR | 321 | 66 | 20.6% | 35 | 255 | 79.4% |



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Where to Go for Help

NVLSP: Lawyers Serving Warriors®

<https://www.nvlsp.org/what-we-do/lawyers-serving-warriors/assistance-with-discharge-upgrades-for-veterans-from-all-eras/>

1. Veteran should complete the NVLSP Intake Form
<https://nvlsp.my.salesforce-sites.com/WhatWeDo/>
2. **VSO** should contact **Lou George** via email to notify us your client is inquiring – he'll alert our DU team of experts
3. DU team will access records in VBMS (based on POA) and review case
4. Will take case and match with *pro bono* attorney if upgrade basis exists



Where to Go for Help

When NVLSP cannot assist:

1. Swords to Plowshares

<https://www.swords-to-plowshares.org/guides/upgrading-your-discharge>

2. Legal Aid Clinics

3. Law Schools

4. Private Attorneys (\$\$)



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