

Curing "Bad Paper"  
A primer on review of military discharges  
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So your firm has decided to embark on a pro bono project to assist veterans in your area. You agree to be part of the project and have taken some (albeit limited) training in the subject matter. You receive your first case and discover that your potential client has previously applied for veteran's benefits and other services, but has been denied them because his service has been determined to have been "under conditions of dishonor." What does this mean and how can you assist him?

A colleague, who was a lawyer while on active military service and still participates in a local reserve unit, suggests that the decision of the Department of Veterans Affairs<sup>i</sup> indicates that your potential client was a bad soldier (sailor/airman/Marine/coast guardsman). He also tells you that getting the discharge "upgraded" is the only possible solution to the former service-member's problem. Without an "upgrade" the veteran will continue to be ineligible for benefits administered by the Department of Veterans Affairs.

Your firm has taken steps to have the General Counsel of the DVA certify you as a "claims agent."<sup>ii</sup> You receive a file related to the veteran's prior application and find numerous documents including a "DD 214," report of separation from the

Armed forces. In addition to various biographical data, the document indicates that the client was separation "under other than honorable conditions." It also contains various references to the service regulations which seem to indicate the type and basis for separation.

With this limited information, you again consult your former service lawyer colleague, who tells you that the document does indicate that the client was discharged from the service for cause with a negative characterization of his service. However, because the document was not issued by his service, he has little information concerning the regulations cited.

Under these facts what do you do for your client?

The following article is designed as a "primer" on post-service review of military discharges in situations like that described above. It is not intended to be a definitive work, but to provide general guidance to the practitioner who may from time to time undertake representation of a veteran who needs assistance.<sup>iii</sup>

### **Types of Discharges**

There are basically two types of discharge, administrative and punitive. Punitive discharges are issued as the result of a sentence of a court-martial. There are three sub categories, bad conduct, dishonorable, and dismissal.<sup>iv</sup> Dismissals are reserved for commissioned officers and warrant officers in the

grades of W-2 through W-5 along with cadets and midshipmen of the service academies and certain other commissioning programs. They may only be adjudged by a general court-martial (GCM). Bad conduct and dishonorable discharges may be adjudged by a general court-martial, and may be imposed on enlisted personnel and warrant officers (Grade W-1). A special court-martial may impose a bad conduct discharge on an enlisted member of the armed forces. None of these separations may be executed until review is final.

Administrative discharges are those which terminate a service member's, term of service before a period of enlistment is complete. Title 10 United States Code §§ 1161 and 1178 permit the secretaries of the Army, Navy,<sup>v</sup> and Air Force to terminate the service of a member. Title 18 of United States Code grants the same authority to the Secretary of Homeland Security for members of the Coast Guard. There are three grade of discharge, Honorable, Under Honorable Conditions, and "under conditions Other Than Honorable."<sup>vi</sup> There are many specific basis for a discharge ranging from expiration of enlistment (i.e., completion of the service member's obligated service), to misconduct which may include drug abuse, conviction of a civilian offense with a long term of confinement, or repeated military misconduct not warranting a punitive discharge.<sup>vii</sup>

In most cases involving an "other than honorable" discharge, the service member is entitled to a hearing and representation prior to separation. However, if the discharge is based upon the member's request for discharge in lieu of a court-martial or other proceeding, no hearing is required.

Each service has its own regulations regarding discharge. A complete list of those regulations, along with the URL for the regulation, is found at the Appendix to this Article.

After interviewing the client the first step to be taken is to request a copy of the veteran's service and medical records. You should have the veteran complete and sign a Standard Form 180, "request pertaining to military records." The form is available on the Internet at [http://contacts.gsa.gov/webforms.nsf/0/6A748D94A429DE1085256CB10043FB7B/\\$file/sf180\\_e.pdf](http://contacts.gsa.gov/webforms.nsf/0/6A748D94A429DE1085256CB10043FB7B/$file/sf180_e.pdf), and may be completed on line. However, it cannot be saved electronically and should be downloaded and placed in your case file. If a court-martial is involved, and veteran does not have a copy of the record of trial you should contact the Judge Advocate General of the service concerned, for a copy of that record as well. You should insure that you have requested the medical records as well as the service records.

Once you have received the records you should familiarize yourself with them. This will include some self-education.

Each service has its own personnel regulations, and its own system for measuring performance and conduct. Again titles and Internet locations are found in the Appendix. Those systems are often somewhat subjective. However there are certain objective criteria which may require specific entries and/or conduct evaluations. It is suggested that if you are located near a military installation, particularly one of the same branch as you client, that you contact the local JAG office and request help from one of the defense attorneys.

Having thus prepared yourself, where do you go? The Department of Defense has a substantial system for review of previously executed discharges, both as to character of service and as to the basis for the discharge. The two principle reviewing authorities are the Discharge Review Boards in each individual service, and the Boards for Correction of Military and Naval Records.

### **The Discharge Review Boards**

Many discharges are reviewable by the service discharge review boards. These boards and their predecessors (along with the Correction Boards) were established following World War II to review previously issued discharges and to allow former members to challenge the basis for their separation. They were, along with the establishment of the Uniform Code of Military

Justice, a Congressional reaction to the harshness of military justice in war time.

The enabling statute is 10 U.S.C. 1553. These boards may review any discharge that is not the product of a sentence of a general court-martial. The boards consist of military officers, and hold hearings, and at which a former member may appear, at his own expense. Counsel is permitted, but again at the sole expense of the former member.

Application is made on a DD Form 293, available at: [http://www.google.com/#hl=en&q=dd+form+293+download&aq=lsx&aqi=g-slg-sx4g-msx3&aql=&oq=DD+From+293&gs\\_rfai=&fp=3b8c5ebfdaf3b352](http://www.google.com/#hl=en&q=dd+form+293+download&aq=lsx&aqi=g-slg-sx4g-msx3&aql=&oq=DD+From+293&gs_rfai=&fp=3b8c5ebfdaf3b352).

Again the application may be completed on line, but must be downloaded and saved in a paper copy. Hearings are available but generally are held only in the Washington DC area. Travel and other expenses must be born by the applicant.

It should be noted that the statute creates a 15 year statute of limitations for applications. Historically this has been strictly enforced.

After review of the files and any information submitted by an applicant, a discharge review board may recommend that the service secretary recharacterize (i.e. "upgrade" in the more common parlance) a discharge. That is to say it may recommend that the previously issued discharge be changed from one of stigmatizing character (e.g. "other than honorable") to a

nonstigmatizing discharge (either general or honorable). It may also recommend that the basis for the discharge be changed.

There is one caveat to review by these boards. During the amnesty for Viet-Nam era deserters, many returning service members were discharged at their request in lieu of court-martial. President Carter's administration directed that many discharges be reviewed, (even if previously reviewed and denied) under what was perceived as more relaxed criteria. To preclude individuals who received a recharacterization under these programs which would entitle them to benefits and services administered by the (then) Veteran's Administration, Congress enacted, and the VA promulgated a regulation that specifically barred the granting of benefits and services to a former member who had received a discharge in lieu of trial for certain offenses.<sup>viii</sup> The relevant offenses for purpose of this article are desertion or unauthorized absence in excess of 180 days.<sup>ix</sup> Even if a discharge review board recharacterizes a discharge in these circumstances it may not remove the bar to veteran's benefits. That power is restricted to aboard for correction of naval or military records (See below).

To attack a previously issued discharge, one should be aware that the service records are presumed to be correct. There has been historic success in attacking the discharge by showing that the service failed to follow its own regulations in

separating the veteran. However as will all such attacks, the failure must be substantial and have had a prejudicial effect on the veteran's separation. Minor breaches of regulations or the failure to show substantial harm or prejudice is not sufficient. A second fruitful line of attack where available is a demonstration that the former service member was not made aware of his/her deficiencies prior to the commencement of separation proceedings. This is particularly true where the basis for the discharge is a pattern of misconduct, such as repeated minor violations of the UCMJ, or where the discharge is for failure to carry out one's duties. The boards are composed of military officers and are acutely aware of the need to inform the troops of their shortcomings. The failure to do so may weigh heavily in favor of having the discharge changed.

Decisions of the Discharge Review Board may be reviewed by the service Board for Correction of Military or Naval Records. While it might seem fruitless to have a second board appointed by the service secretary be the appeal authority, it must be remembered that different standards apply to the two boards (See below).

**The Boards for Correction of Naval and Military Records.**

As with the discharge review boards, these boards were created following World War II by the Legislative Reorganization Act of 1947. The purpose of the act was to replace Congress as



the source of relief in many cases previously covered by private relief bills. Today the statute is codified at 10 U.S.C. § 1552.

In general the Correction Boards may do anything previously done by Congress in such acts. There is one limitation. Prior to this legislation, Congress could set aside the findings and sentence of a court-martial. For many years a debate raged as to whether the Act transferred that power as well. Congress finally settled the matter by limiting the powers of these boards to the review of sentences alone, not the findings. 10 USC 1552(d).

The boards differ from the Discharge Review Boards in that they are composed of senior civilians (generally in the grades of GS-14 and higher or the equivalent) in the office of the service secretary. They are assigned as members as additional duties for that individuals. The members may or may not have specific active duty military service in their backgrounds.

Application is made on a DD form 149, Application for correction of a military record under 10 U.S. Code, 1552. <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0149.pdf> The application is referred to as a "petition." For review of a discharge the application must be completed either by the veteran or someone having legal standing to act for him/her, e.g. next of kin or an attorney.

The boards' grant of relief is premised on the finding of a probable error or "injustice." This is a wide ranging grant of authority and lends it self to a more equitable attack on the discharge. Showing that the character of the discharge is "too harsh" for the offense in the case of a punitive discharge from a court-martial is a good example. One route, that is not generally successful at the discharge review boards, is showing that there are changed standards. This is particularly true in cases where the member received a undesirable or other than honorable discharge for homosexual conduct unrelated to his or her service and his/her service record is unblemished. Other successful lines of attack include showing that the character of the discharge is not consistent with that of other service members discharged for the same reason, during the relevant time frame, or that the underlying basis is not correct. For instance one might argue that while the veteran was discharged for "misconduct" for repeated minor disciplinary actions, he/she really should have been found "unsuitable" for service because of some innate shortcoming. Careful reading of the service regulations and the veteran's personnel records is essential to success in this arena.

Within Section 1552 is a three year statute of limitations from the date of the discovery of the error or injustice sought to be corrected. However, the statute permits the boards to

entertain the application and grant relief in "the interests of justice." This has been interpreted in various ways. In some cases it has been strictly applied. In others it has been applied to run from the date of a decision of a discharge review board, and still others to extend to 18 years (15 years for review of the discharge by the DRB and an additional three years beyond that). While a discharge is arguably continuing disability, and its effects may not have been discovered by the veteran or his heirs until long after the date of separation, it is always best to address this question in the application.

As with the Discharge Review Boards, the correction boards meet in the Washington DC area. Most cases are decided on the basis of existing records and written evidence submitted by the applicant or his/her counsel. Although hearings are permitted, they are in the discretion of the board and are rarely granted. Again if a hearing is granted, any travel or other expense including the travel of any witnesses permitted by the board is at the applicant's expense.

One further note: The boards' regulations all allow for reconsideration of a decision. Reconsideration is premised on the production of new and relevant evidence not previously considered. In all cases this is done by the staff of the board and the case is not submitted to the voting members of the boards. The Army board has a further limitation - that

evidence must be submitted within in one year of the date of a decision by the board. If it is not submitted within one year the request for reconsideration is simply returned to the petitioner and/or his/her counsel.

#### Special Cases

Homosexuals DoD Directive 1332.14.

Discharges in Lieu Wilson v. McHugh

Fraudulent separations

#### Judicial Review

Judicial review of the decisions of these boards is limited. The veteran may seek review either at the Court of Federal Claims or in the local federal district court under the "Little Tucker Act" 28 U.S.C. § 1346(a)(2).<sup>x</sup> A plaintiff must demonstrate that the decisions of the board (denominated as the secretary in these cases) was arbitrary and capricious or an abuse of discretion. This is a difficult burden, and has met with limited success by unsuccessful applicants. So long as the written decision of the board has some rational basis, the veteran is unlikely to prevail. In many cases even where review in the court is successful, it results only in a remand to the board for further proceedings.

An additional caveat is worth noting. In general the boards are viewed as being an administrative remedy to be sought

prior to filing suit. However, there is a general six year statute of limitations in pursuing a claim against the United States under the Tucker Act. However several courts have held that time spent pursuing review before the service boards does not toll the statute. Therefore one is caught in a somewhat circular process where a veteran must exhaust his/her remedies, but may be barred by limitations while doing so. It is not clear whether simultaneous filing is a solution.

Helping a veteran is a very rewarding experience. Many who have served well came to grief because of issues beyond their control, e.g. substance abuse. To assist veterans in seeking review of the discharge which may prevent them from receiving the benefits and services to which they may be entitled is to carry out the charge from our greatest lawyer President, Abraham Lincoln "to care for him who shall have borne the battle and for his widow and his orphan." <sup>xi</sup>

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<sup>i</sup> Although the Veterans Administration became a cabinet level department, (i.e., The Department of Veterans Affairs) in 1989, many veterans and their advocates still refer to it at the Veterans Administration or "VA." For purposes of this article it will be referred to as the "DVA."

<sup>ii</sup> In what many believe is an anomaly, a statute still limits attorneys, not certified by the DVA, from providing advice or accepting fees for assisting veterans. See 38 U.S.C. 50. Certification must be obtained from the General Counsel of the DVA using VA form 21a, which is available on the Internet at <http://www4.va.gov/OGC/docs/Accred/VA21a.pdf>.

<sup>iii</sup> A good general guide to military law and procedure including administrative discharges is Service Member's Legal Guide. Tomes et al. Stackpole Books, Mechanicsville Pa 2005.

<sup>iv</sup> In certain circumstances the President, under his authority as commander in chief, may order a commissioned officer "dismissed" for misconduct. These circumstances usually involve extended unauthorized absence or a conviction by civilian court which results in a sentence of greater than one year. In time of peace the officer has the right to demand trial by court-martial for the underlying misconduct. However these instances are extremely rare/

<sup>v</sup> For many legal purposes, the Marine Corps is a part of the Department of the Navy and subject to regulations issued by the Secretary of the Navy.

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<sup>vi</sup> Until the late 1970s, the last named was called an “undesirable discharge.”

<sup>vii</sup> If you are dealing with an older veteran, i.e. one from the Viet-Nam era or before, he/she may have been discharged for “unfitness.” That general basis has been eliminated and several of the reasons for discharge for “unfitness” have been subsumed by the category of misconduct.

<sup>viii</sup> See 38 C.F.R. 312 (c)(6).

<sup>ix</sup> Articles 85 and 86. U.C.M.J. 10 USC §§ 885 and 886.

<sup>x</sup> Essentially this is a claim for back pay and allowances. Please note that the Court of Veteran’s Claims does not review these actions.

<sup>xi</sup> From the Second Inaugural address.