



# FROM COUNSEL

A Preventive Law Service of The Fort Riley Legal Assistance Office  
*Keeping You Informed On Personal Legal Affairs*

## Life After the Military: Discharge Status Upgrades and Veterans Benefits<sup>1</sup>

There are a variety of reasons why a Veteran may want to upgrade his discharge characterization, such as eligibility for Department of Veterans Affairs (VA) benefits, improved employment opportunities, or removing the stigma of a less than honorable discharge characterization. The process to upgrade one's discharge characterization can be tricky. Therefore, while the purpose of this document is to provide a broad overview of the process, individuals desiring to maximize their chances of success should seriously consider hiring an attorney specializing in this field.

### I. Selecting a Forum

A Veteran may utilize three potential forums. Depending on the Veteran's goals, she may choose to: (1) apply through the VA for a "character of service" determination; (2) file a request to the Discharge Review Board (DRB) of the Veteran's respective service branch; or (3) file a request with the appropriate Board for the Correction of Military Records (BCMR). Many Veterans start with the VA Regional Office (VARO), apply to the DRB after an initial denial of benefits by the VA, and turn to the BCMR as a sort of "appeals court" for DRB decisions.

#### A. VA "Character of Service" Determination

If the only reason the Veteran wants to upgrade his discharge status is to receive certain VA benefits, simply applying to the VA for a character of service determination may be sufficient—provided the Veteran received a certain type of discharge and is not otherwise barred from receiving benefits. Importantly, a successful character of service determination by the VA *does not* alter the original less-than-honorable discharge characterization; it only allows the Veteran to receive certain VA benefits upon the VA's finding that, although the Veteran received a less-than-honorable discharge, the overall character of the Veteran's military service was honorable.<sup>2</sup>

However, only certain Veterans are able to use the VA's character of service determination to receive VA benefits. Veterans with a dishonorable discharge or bad conduct

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<sup>1</sup> The information contained in this informational paper was gleaned from a very informative manual written by the National Veterans Legal Services Program (NVLS). See NVLS, VETERANS BENEFITS MANUAL (Barton F. Stichman et al. eds., 2012 ed.). Although individual citations and quotations were not used in formulating this paper, the information was taken from the above-cited 2012 edition of the Veteran's Benefits Manual, and all credit should go to the NVLS for promulgating such a helpful resource. Veterans interested in more information should also consider reviewing "The American Veterans and Servicemembers Survival Guide" written by the NVLS, which is available at <http://www.nvls.org/images/products/survivalguide.pdf>.

<sup>2</sup> Only Veterans with an "honorable" discharge characterization can receive Post-9/11 G.I. Bill educational benefits. A Veteran with a less-than-honorable discharge characterization (including a Veteran who has received a general discharge) seeking to receive these particular benefits must apply to the DRB or BCMR for an upgrade to an honorable characterization. See 38 U.S.C. 3311(c).

discharge (BCD) from a general court martial are not entitled to a character of service determination, and must resort to either the DRB or BCMR to attempt to upgrade the discharge characterization. As a general rule, then, the character of service determination allows only those with a BCD from a special court martial or those with an other-than-honorable (OTH) discharge to receive VA benefits if the VA determines that the Veteran's overall service was honorable.

In a character of service determination, the VA looks to the facts of the individual's case to determine whether he or she was separated from service under "dishonorable conditions" or "conditions other than dishonorable." The VA reviews the entire period of the individual's service, and the facts and circumstances surrounding the service and any misconduct, to evaluate the quality of service and whether it was good enough to merit receipt of veterans benefits. Initial decisions are rendered at the local VARO. Adverse decisions can be appealed to the Board of Veterans' Appeals and subsequently to the United States Court of Appeals for Veterans Claims (CAVC). However, an adverse decision by the VA is given much deference by the CAVC and is only overturned if the decision was "clearly erroneous."

To begin the process, simply apply for VA benefits at your local VARO. The VA will deny your application pending a character of service determination, and will provide you with information on where and how to submit your evidence. You should acquire all your military files, as well as supporting affidavits from Soldiers you worked with who can attest to your honorable service. A common approach is to demonstrate that an act of misconduct was an isolated incident in an otherwise meritorious period of service.

However, the VA will deny requests for VA benefits in a character of service determination if the *underlying conduct* upon which the discharge was based falls into one of several categories deemed to be dishonorable in nature. These include:

- Accepting an undesirable discharge in lieu of trial by general court-martial
- Mutiny
- Spying
- A felony conviction involving moral turpitude<sup>3</sup>
- Willful and persistent misconduct<sup>4</sup>
- Certain sexual acts involving aggravating circumstances or affecting the performance of duty

Moreover, certain "statutory bars" exist that serve to deny VA benefits to certain individuals, regardless of the person's discharge characterization. These bars include:

- The service member was separated from service as a conscientious objector who refused certain orders
- The release from active duty was by reason of a sentence of a general court-martial

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<sup>3</sup> An offense involves moral turpitude "if it is unlawful, it is willful, it is committed without justification or legal excuse, and it is an offense which a reasonable person would expect to cause harm or loss to person or property." 69 Fed. Reg. at 4827.

<sup>4</sup> A Soldier was found to be engaging in "willful and persistent misconduct" when he was discharged for committing three offenses, two of which received minor non-judicial punishment, over a 21-month period. *Rogers v. Derwinski*, 2 Vet. App. 419 (1992).

- The service member was an officer who resigned for the good of the service
- The service member was a deserter
- The service member was an alien who sought to be released in a time of hostility
- The service member received an OTH discharge as a result of being absent without official leave (AWOL) for at least 180 continuous days, unless “compelling circumstances” warranted the prolonged unauthorized absence

If a statutory bar applies to one’s case, one must apply for a discharge upgrade in an alternate forum, unless the Veteran can prove she was insane at the time of the offense that gave rise to the bar. All discharges upgraded by a service’s BCMR to at least a general discharge will entitle the individual to most VA benefits, notwithstanding the statutory bar. Similarly, discharges upgraded to at least a general discharge by a service’s DRB will remove most, but not all, of the bars to benefits.

### ***B. The Decision Review Board (DRB)***

Each branch of service has its own DRB. In most cases, the DRB has the power to upgrade a Veteran’s discharge characterization so that the Veteran can receive VA benefits and lose the stigma of a less than honorable discharge. However, the DRB does have important limitations.

First, the Veteran must apply to the DRB for a discharge upgrade within fifteen years of the discharge. This time limit cannot be changed or waived, so it is important the Veteran apply within the appropriate time. If the Veteran has not applied within fifteen years, he may still apply to the BCMR. Second, DRBs are prohibited from upgrading certain discharges or making certain changes even if requests are made within the fifteen year timeframe. For example, a DRB cannot upgrade a discharge awarded by a general court-martial. DRBs also cannot upgrade a discharge when a statutory bar (mentioned above) is implicated. Finally, DRBs cannot change reenlistment codes, change a discharge to a medical retirement or medical discharge, reinstate an individual in the service, or make other non-discharge changes in records. If the Veteran’s goals involve any of these limitations of the DRB, the Veteran must use the BCMR.

The main advantage of the DRB is the opportunity to make a personal appearance before the Board. Unlike the VA’s character of service determination and most cases with the BCMR, the DRB does not limit the Veteran to a records review, although the Veteran can request a records review if she desires. In a records review, the DRB considers official military personnel and medical records and any other evidence the Veteran submits. The DRB will seldom obtain other evidence on its own initiative. The DRB reviews the documents and makes a determination about whether to upgrade the Veteran’s discharge characterization. Unless the case is very likely to prevail, it is highly recommended the Veteran request a personal appearance review.

The personal appearance review, by contrast, allows the Veteran to meet the Board face-to-face. It involves an informal hearing before the DRB where the Veteran and his attorney can present arguments, testimony, favorable witnesses, and other evidence for the DRB to consider. The Veteran is usually required to testify under oath and is questioned by the Board. The Board is composed of five high-ranking military officers, usually officers in the pay grade of O-5 and O-6. Personal appearance reviews have a greater success rate than record reviews

because the Veteran and counsel have the opportunity to explain and make arguments in person. Each service branch holds hearings in Washington, D.C., and the Army and Air Force conduct traveling panels in a few major cities<sup>5</sup> around the country. The Veteran is responsible for travel costs associated with attending the hearing, regardless of the outcome. If the Veteran made a prior request for a records review, the Veteran may also ask for a personal appearance review if she is still within the DRB's fifteen year statute of limitations. If the Veteran does not receive redress from the DRB, she may consider "appealing" to the BCMR.

### ***C. The Board for Corrections of Military Records (BCMR)***

Each service branch also has a BCMR, which has broad authority to "correct any military record" when "necessary to correct an error or remove an injustice." Unlike DRBs, the BCMR can upgrade all less than honorable discharges, including a BCD or DD issued by sentence of a general court-martial. The BCMR can also remove statutory bars to veterans benefits, change the basis for a discharge, and reinstate a veteran to military service.

The BCMR often acts as a quasi-appeal court for adverse decisions of the DRB. This result is driven by the BCMR's requirement that a Veteran first exhaust all administrative remedies to correct the alleged error or injustice before seeking redress from the BCMR. Therefore, as a practical matter, applicants must often pursue a favorable outcome through the DRB before resorting to the BCMR.

Like the DRBs, the BCMR has a statute of limitations. A BCMR can correct military records only 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. As a practical matter, the BCMR often waives the statute of limitations, especially if the case appears meritorious, but the Veteran must take the step of requesting that the BCMR waive the statute of limitations.

The BCMRs mostly conduct record reviews of a Veteran's case by reviewing the Veteran's military record, legal brief, and any other supporting documents the Veteran has submitted. Although the BCMRs allow for a personal appearance before the Board in certain situations, the BCMRs rarely grant a request for a hearing. If a request is granted, the hearing will be held in Washington, D.C. and the Veteran is responsible for paying for travel expenses. A three-member-panel usually decides non-hearing cases, with five members typically deciding formal hearings.

If the BCMR denies relief, the Veteran may have a few options remaining. First, the Veteran may request reconsideration of the BCMR denial, but reconsideration often requires the presentation of new argument or new and material evidence not previously considered and not reasonably available at the time of the initial application. Alternatively, the Veteran may seek judicial review of the BCMR denial in federal court. Decisions of the BCMR can be set aside if they are "arbitrary, capricious, or not based on substantial evidence." The rules of procedure involved with seeking relief in federal court are complex, and include important statutes of limitations issues. You will need to consult with a civilian attorney knowledgeable in this field in order to pursue these options.

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<sup>5</sup> Both the Army and Air Force Review Boards travel to Chicago, IL; Los Angeles, CA; and Tampa Bay, FL. The Army also travels to Dallas, TX, while the Air Force also travels to San Antonio, TX; New York, NY; Atlanta, GA; Colorado Springs, CO and occasionally San Francisco, CA.

### **III. Applying to the DRB or BCMR for a Discharge Upgrade**

#### ***A. Legal Standard***

As an initial matter, in order to be successful at the DRB or BCMR, the Veteran must prove that the discharge characterization was either **improper** (illegal) or **inequitable** (unfair). The Boards operate under the presumption that the discharge was properly issued, and the burden of proof is on the Veteran to prove by “substantial credible evidence” that the discharge was improper or inequitable.

There are many ways a Veteran could argue a discharge was improper or inequitable. A common approach is to demonstrate the misconduct that led to the discharge was an isolated and minor event that occurred during a larger period of meritorious service. Moreover, certain reasons for a less than honorable discharge characterization often result in favorable results at a DRB or BCMR. These include, but are not limited to, discharge on the basis of alcoholism or alcohol related misconduct, failure to pay debts or support dependents, and certain types of personality disorders. Prudent Veterans can also research the decisions of DRBs and BCMRs by visiting <http://boards.law.af.mil> and can craft their argument and presentation of evidence based on a similar case in which the Board’s action was favorable to the Veteran.

#### ***B. How to Apply for Relief***

Beginning a case with the DRB or BCMR is simple. A Veteran needs only to file a DD Form 293 to the DRB or a DD Form 149 to the BCMR. On these forms, the Veteran recites a quick background of the case and explains what relief is requested and why relief should be granted. Although the Veteran could simply file the application form, not submit any supporting evidence, and rely solely on the review of her military records the Board must conduct to prove her case, to do so is risky at best. Military records nearly always contain sufficient information for a Board to find the discharge was properly issued. Therefore, to maximize the chances of a favorable outcome at the DRB or BCMR, the Veteran should submit a well-reasoned legal brief explaining why the discharge was improper or inequitable, and provide substantial evidence supporting the contentions in the brief.

#### ***C. Evidence That Should be Presented on Behalf of the Veteran***

The DRBs and BCMRs consider a wide variety of supporting evidence. The evidence submitted should be relevant to the Veteran’s theory of why the discharge characterization was improper or inequitable. The DRBs and BCMRs are motivated by many competing considerations when rendering a decision. Boards will look to how the negative discharge has affected the Veteran, whether it is fair to continue to stigmatize the Veteran with the negative discharge, the public perception of an upgrade, military order and discipline, and the circumstances surrounding the conduct that led to the negative discharge, including any mitigating factors.

Certain types of evidence are very important, such as evidence of rehabilitation and good conduct after discharge. As such, any truthful documentation that shows either of those qualities in the Veteran is extremely helpful in the discharge upgrade process. Some examples of such evidence include:

- Awards, certificates, and letters noting the Veteran's educational, work, and philanthropic achievements (military and otherwise)
- Education achievements or degrees
- Documentation of community service
- Employment history
- Financial information such as tax forms, mortgage papers, or charitable contributions
- Character letters or letters of recommendation
- Marriage license and birth certificates of any children
- A letter written by the Veteran, which details the surrounding facts of the discharge, the Veteran's positive history since discharge, and the reason for wanting a discharge upgrade

Depending on the Veteran's theory of the case, he may want to also consider submitting evidence demonstrating why the charges are incorrect, that legal counsel was ineffective, or the improper role of unit leadership during the discharge process. If the Veteran is alleging that the discharge was unfair, the Veteran should submit a statement explaining how the current discharge status has negatively impacted the Veteran's life.

While the Veteran bears the burden of proof to convince the Board the discharge was improper or inequitable, the Veteran is not bound by rules of evidence. As such, letters and statements from other service members can be used. It cannot be emphasized enough how important it is to have a positive, well-developed track record accompanying a comprehensive and persuasive legal brief. If time allows, the Veteran should gather as much documentation as she can to develop this post-service record, even if that means waiting to file the application. This rings particularly true for recently discharged Veterans. Many times it is preferable to overcome the often one-sided presentation of facts in a military record by waiting to establish more favorable evidence or until post-service accomplishments become impressive.

The Veteran should make sure he has all the information that the Board will take into account. As an initial matter, this means requesting a copy of the Veteran's military records that the Board will review. Records can be requested by submitting an SF-180 form to the National Personnel Records Center. The Veteran should also seek any other information the Board will consider. This can be done by submitting a cover letter to the Board with the application, summarizing the application and requesting the following:

- Any advisory opinions the board obtains;
- Any military investigative reports or other investigative reports;
- Case examiner's memorandum for the board in the case<sup>6</sup>;
- In cases involving a BCD or a DD, a transcript of and all documents related to the court-martial leading to the discharge;
- Any other information the board develops or receives

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<sup>6</sup> This request is generally denied. However, the Veteran should still request it.

Asking for and obtaining this information is the closest thing to “discovery,” or what the Government must give the Veteran, in the whole process. The Veteran ought to be prepared to counter any adverse evidence.

## **V. Additional Information**

### ***A. Realistic Time Frame***

Like most other legal processes, discharge upgrades can be prolonged. The process generally takes anywhere from six to twelve months. However, if hearings need to be scheduled, the entire process can stretch out for as long as two years. If the Veteran has a serious illness, is elderly, or other circumstances exist requiring a swifter decision, those reasons should be stated in the cover letter accompanying any application to the Board. There is no guarantee the Board will grant the Veteran’s request for a speedy hearing, but it does not hurt to ask.

### ***B. Importance of Legal Counsel***

As is probably evident from the information on VA character of service determinations and the DRB and BCMR upgrade processes, this area of the law is tricky. There are important rules of procedure to contend with, and the Veteran must overcome the burden of proof to convince a Board his discharge was improper or inequitable. The risks of attempting to achieve a favorable outcome on your own without legal counsel cannot be stressed enough. A seasoned advocate will be best suited to handle the complex procedural issues and will be best able to craft a persuasive brief and present to the Board the evidence it needs to find in the Veteran’s favor. For these reasons, it is again highly encouraged the Veteran seek the assistance of counsel before moving forward.

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