Upgrading a Military Discharge

Stephen C. Lessard
Orrick, Herrington & Sutcliffe LLP
Topics Covered

• Background on Military Discharges
• Framework for Review of Discharges
• Discharge Upgrade Procedures
Military Discharges

• A discharge terminates the contract to serve in the military.
  o Only enlisted personnel are discharged.
  o Officers resign their commission.

• Discharges are either Administrative or Punitive

• Characterizations of discharge
  o Honorable
  o General Under Honorable Conditions (a “General”)
  o Other Than Honorable (an “OTH”)
  o Bad Conduct (a “BCD”) – punitive only
  o Dishonorable – punitive only
  o “Type” of discharge generally refers to characterization
Importance of Characterization

• Veterans Benefits
  o Affects both federal and state benefits
  o OTH’s may or may not get medical benefits
  o GI Bill education benefits (only Honorable)
  o Home loans
  o PD is not a compensable disability

• Employment
  o Veterans preferences
  o Stigma, employability
Each branch of service has its own procedures
Handled at the command level
  - Commander is typically an O-4 to O-6 rank
  - Commander has great discretion
Basic Process:
  - Prior counseling and rehabilitative efforts are normally required
  - Report from Commander
  - Notice to service member of rights
  - Optional hearing
    - Hearing may be mandatory based on length of service
Review of Discharges

- Discharge Review Board (DRB)
- Board for Correction of Military Records (BCMR)/Board for Correction of Naval Records (BCNR)
- Each branch has its own DRB and BCMR/BCNR
- The DoD Boards’ Electronic Reading Room
  - Public website containing prior DRB and BCMR/BCNR decisional documents
• DRB reviews the propriety of the discharge (was it “inequitable” or “improper”) / BCMR/BCNR for the “correction of an error or injustice”
  
  o Inequitable means the reason or characterization of the discharge is not consistent with the policies and traditions of the service.
    
    ▪ An inequity might include a discharge based on one isolated incident in four years of unblemished service.
  
  o Improper means that the reason or characterization of the discharge is in error (i.e., is false, or violates a regulation or a law).
    
    ▪ Improper might include a case where the applicant received an OTH for solely an admission of sexual orientation.
Discharge Review Boards (DRB)

• Authority
  o Can change characterization of discharge and reasons for discharge (cannot change reason to physical disability)
  o Cannot review General Court-Martial discharges
    ▪ Can review Special Court-Martial Bad Conduct Discharge

• Process
  o Board of first instance
  o 15 year statute of limitations (strictly enforced)
  o Two types of review
    ▪ Record (documentary) review
    ▪ Personal hearing
      ✓ Must grant personal hearing if requested
DRB Procedures

• Application is made by use of a DD Form 293
  o “Application for the Review of Discharge or Dismissal from the Armed Forces of the United States”

• Veteran’s statement of the issues is important (DD Form 293, Item 6).
  o It should be made in clear terms in Item 6.
  o If an issue is not raised in Item 6, the DRB may not address the issue even if it is discussed in other written submissions or at a hearing.
  o Changes or additions may be made to a DD Form 293 anytime before the DRB closes the review for deliberation.
• The veteran should provide documentation to support his claim (DD Form 293, Item 8).
  o Signed statements from the veteran and witnesses; copies of records that substantiate or relate directly to the issues.
  o Normally, the best evidence is statements from persons who have direct knowledge or involvement.
  o Other helpful documents include character references and medical reports. Generally, the DRB is less interested in the veteran’s behavior or conduct after leaving the military.
  o The DRB will consider all submissions, but will respond only to the issues set forth in Item 6.

• Evidence not in official military records should be submitted to the DRB before the review date.
• Obtain documentary evidence as soon as possible while drafting the DRB request.

• Documentation that should be obtained includes:
  o A complete copy of military personnel records, outpatient medical records, and any in-patient hospital records.
    ▪ Request a copy of personnel and clinical records from the National Personnel Records Center (NPRC)
    ▪ Request a copy of health records from VA
  o A complete copy of the “discharge packet” sent to the separation authority.
  o A complete copy of all files kept by the veteran’s civilian and/or military attorneys.
  o Complete copies of NCIS, OSI, CID, or DIS records if an investigation was made.
DRB Procedures

• Record Review
  o Should be requested first unless SOL is an issue
  o Service record and documentation submitted reviewed by analyst
  o Analyst’s report used by DRB to render a decision

• Personal Hearing
  o Requires submission of new Form DD 293
  o In Washington DC at applicant’s expense
    ▪ AF DRB travels to four regional locations
  o Board of five senior officers
  o No formal rules of evidence
  o Hearing is recorded
DEPARTMENT OF DEFENSE:
• DODI 1332.28 – Discharge Review Board (DRB) Procedures and Standards
• Code of Federal Regulations, Title 32, Part 70

ARMY: http://arba.army.pentagon.mil
• Army Regulation 15-180 - Army Discharge Review Board
• Code of Federal Regulations, Title 32, Part 581, Section 581.2

• SECNAVINST 5420.174D – Naval Discharge Review Board (NDRB) Procedures and Standards
• Code of Federal Regulations, Title 32, Part 724

• DODI 1332.28_AFI 36-3213
• Code of Federal Regulations, Title 32, Part 865, Subpart B

• Code of Federal Regulations, Title 33, Part 51
• Can review in first instance or review appeals from DRBs
• 3 year statute of limitations (usually waived in the interest of justice)
  o After discovery of, or when discovery could have been reasonably made of, the error or injustice
  o Waived if in the interest of justice
• Almost unlimited power including changing discharge dates, giving medical or disability retirement, reinstating in the service
• Record review
  o No right to a personal hearing; rarely granted
• Application is made by use of a DD Form 149
  o “Application for Correction of Military Records”
• Relief requested (DD Form 149, Item 5)
• Veteran’s statement of the issues is important (DD Form 149, Item 6)
  o The statement may also be made on plain paper and attached the Form 149.
  o The brief should be limited to not more than 25 pages.
  o Explain what happened and why it is an error or injustice in simple, direct terms.
• List of evidence submitted (DD Form 149, Item 9)
• Application reviewed by 3-member panel
  o DoD civilians
• Board may solicit advisory opinions
  o Opinion will be forward to applicant for comment
  o 30 days to respond
    ▪ Failure to comment does not imply agreement
  o Board not required to follow advisory opinion
• BCMR/BCNR is the highest level of administrative appeal and provides the final Service decision
  o Next step is to request reconsideration or file a suit in the federal court system
**BCMR/BCNR References**

**DEPARTMENT OF DEFENSE:**
DoD Directive 1332.41 – Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs)

**ARMY:** http://arba.army.pentagon.mil/abcmr-overview.cfm
Army Regulation 15-185 - Army Board for Correction of Military Records
Code of Federal Regulations, Title 32, Part 581, Section 581.3

**NAVY/MARINE CORPS:** http://www.donhq.navy.mil/bcnr/bcnr.htm
SECNAVINST 5420.193 – Board for Correction of Naval Records
Code of Federal Regulations, Title 32, Part 723

**AIR FORCE:** http://www.afpc.af.mil/afveteraninformation/airforceboardforcorrectionofmilitaryrecords/
AF Pamphlet 36-2607 – Applicant's Guide to the Air Force Board for Correction of Military Records (AFBCMR)
AFI 36-2603 – Air Force Board for Correction of Military Records (AFBCMR)
Code of Federal Regulations, Title 32, Part 865, Subpart A

**COAST GUARD:** http://www.uscg.mil/legal/BCMR.asp
Code of Federal Regulations, Title 33, Part 52