



**BOB WOODRUFF
FOUNDATION**

Investing in the Next Chapter for Our Veterans

**CONNECTICUT
VETERANS
LEGAL
CENTER**



Upgrading Military Discharges

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**Swords to
Plowshares**

VETS HELPING VETS SINCE 1974

DU Training Overview



Goals : The Who, What, Why, When and How of DUs

- ❑ Why? Importance of DUs
- ❑ What? Potential remedies
- ❑ Who? Administrative boards: DRBs and BCMRs
- ❑ How and when can they be corrected post-discharge?
 - Application Overview
 - Standards of Review
 - (Exciting!) New Laws and Regulations

What is a Discharge?



What is a Military Discharge?

- Adopted by the American Articles of War of 1776
- Allows chain of command to expel service members who should no longer be in service
- The upgrade process is the back stop to allow correction of what may have been hasty or uninformed decisions

Why DUs?



Why does discharge status matter?

- VA benefits
 - Medical
 - Disability compensation
 - GI Bill
 - Home loans
- Stigma, employability, re-enlistment
- Recognition of service to the country
- Money damages for wrongful separation under Tucker Act

What? DD Form 214



A veteran's DD214 is their Certificate of Release or Discharge from active duty.

NOTE: Veterans of the National Guard get a DD214 for initial training, and for any time that they were called up for federal Active Duty. However, the Certificate of Release received by National Guard is Form NGB 22, not a DD214.

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES THIS IS AN IMPORTANT RECORD. SAFEGUARD IT. ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY			
1. NAME (Last, First, Middle)		2. DEPARTMENT, COMPONENT AND BRANCH	
3. SOCIAL SECURITY NO.			
4.a. GRADE, RATE OR RANK	4.b. PAY GRADE	5. DATE OF BIRTH (YYMMDD)	6. RESERVE OBLIG. TERM DATE Year Month Day
7.a. PLACE OF ENTRY INTO ACTIVE DUTY		7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)	
8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND		8.b. STATION WHERE SEPARATED	
9. COMMAND TO WHICH TRANSFERRED			10. SGLI COVERAGE Amount: \$ <input type="checkbox"/> None
11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)		12. RECORD OF SERVICE	
		a. Date Entered AD This Period	Year(s) Month(s) Day(s)
		b. Separation Date This Period	
		c. Net Active Service This Period	
		d. Total Prior Active Service	
		e. Total Prior Inactive Service	
		f. Foreign Service	
		g. Sea Service	
		h. Effective Date of Pay Grade	
13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)			
14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)			
15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM		15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT	
16. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION		16. DAYS ACCRUED LEAVE PAID	
17. REMARKS			
19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)		19.b. NEAREST RELATIVE (Name and address - include Zip Code)	
20. MEMBER REQUESTS COPY 4 BE SENT TO		22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)	
21. SIGNATURE OF MEMBER BEING SEPARATED			
SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)			
23. TYPE OF SEPARATION		24. CHARACTER OF SERVICE (Include upgrades)	
25. SEPARATION AUTHORITY		26. SEPARATION CODE	27. REENTRY CODE
28. NARRATIVE REASON FOR SEPARATION			
29. DATES OF TIME LOST DURING THIS PERIOD			30. MEMBER REQUESTS COPY 4 Initials

DD Form 214, NOV 88 Previous editions are obsolete

Remedies – in practice



Two important pieces of information on a veteran's DD 214 are their:

1. Character of Service, and
2. Narrative Reason for Separation

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CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle)		2. DEPARTMENT, COMPONENT AND BRANCH		3. SOCIAL SECURITY NO.	
4.a. GRADE, RATE OR RANK	4.b. PAY GRADE	5. DATE OF BIRTH (YYMMDD)	6. RESERVE OBLIG. TERM. DATE Year Month Day		
7.a. PLACE OF ENTRY INTO ACTIVE DUTY			7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)		
8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND			8.b. STATION WHERE SEPARATED		
9. COMMAND TO WHICH TRANSFERRED				10. SGU COVERAGE Amount: \$ None	
11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)				12. RECORD OF SERVICE	
				a. Date Entered AD This Period	
				b. Separation Date This Period	
				c. Net Active Service This Period	
				d. Total Prior Active Service	
				e. Total Prior Inactive Service	
				f. Foreign Service	
				g. Sea Service	
				h. Effective Date of Pay Grade	
13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)					
14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)					
15.a. MEMBER CONTRIBUTED TO POST-VETERAN CARE VETERANS EDUCATIONAL ASSISTANCE PROGRAM		Yes	No	15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT	
				Yes No	
17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION				16. DAYS ACCRUED LEAVE PAID	
				Yes No	
18. REMARKS					
19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)				19.b. NEAREST RELATIVE (Name and address - include Zip Code)	
20. MEMBER REQUESTS COPY 4 BE SENT TO				22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)	
OR, OF VET AFFAIRS				Yes No	
21. SIGNATURE OF MEMBER BEING SEPARATED					

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION		24. CHARACTER OF SERVICE (include upgrades)	
25. SEPARATION AUTHORITY		26. SEPARATION CODE	27. REENTRY CODE
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DD Form 214, NOV 88

Previous editions are obsolete

TYPES

Administrative Separations

- Honorable
- General
- Uncharacterized
- Other than Honorable

Punitive Separations

- Bad Conduct
- Dishonorable

Narrative Reason



- Sufficient Service for Retirement
- Expiration of Term of Service
- Misconduct
- Pattern of Misconduct
- Personality Disorder
- Alcohol Rehabilitation Failure
- Conscientious Objector

- Misconduct (Serious Offense)
- Alcohol/Drug Rehabilitation Failure
- Reduction in Force
- Hardship
- Homosexual Act
 - no longer a valid narrative reason for separation

Who? Review Boards



WHAT ARE THE REVIEW BOARDS AND WHAT ARE THEIR POWERS

Each branch of the military has two types of Review Boards that can grant discharge upgrades:

1. Discharge Review Board (DRB).
2. Board for Correction of Military Records (BCMR).

NOTE: The Navy calls its Board the Board for Correction of Naval Records (BCNR). *The Marines are a part of the Department of the Navy, so veterans of the Marines apply to the BCNR.*

Discharge Review Boards



10 U.S.C. § 1553

DRBs CAN

- ***Upgrade a veteran’s character of discharge (i.e. from OTH to honorable)***

EXCEPTION: DRBs **cannot** review discharges that were the result of a General Court Martial conviction.

A veteran whose discharge was the result of a Special Court Martial may only request a change in characterization of service, and will only be granted an upgrade on the basis of clemency.

- ***Change a veteran’s Narrative Reason for Separation (i.e.: from Misconduct to Secretarial Authority).***

EXCEPTION: DRBs **cannot** change a veteran’s *Narrative Reason* to or from “*Medical Retirement.*”

Discharge Review Boards



10 U.S.C. § 1553

DRBs CANNOT

- Reinstatement people in the service.
- Make changes to service records aside from changing the *Character of Service* and *Narrative Reason for Separation*.
- Cannot issue an applicant a less favorable discharge than that issued at the time of separation *32 C.F.R. 70.9(a)*

COMPOSITION OF THE BOARD

The *Board* is composed of five officers from the branch of service involved. *10 USC § 1553 (a)*

STATUTE OF LIMITATIONS

15 years from date of discharge. *10 USC § 1553 (a)*

- No exceptions

TWO TYPES OF REVIEW AVAILABLE

DODI 1332.28 E3.2.3

1. Record Review.
2. Personal Appearance Hearing.

If the applicant requests a records review. They may later request a personal hearing. The alternative is not true.

10 USC §1552

BCMRs have the authority to do everything that DRBs can do and much more, such as:

- Upgrade a veteran's Character of Discharge that resulted from a General Court Martial conviction.
- Change a veteran's Narrative Reason for Separation to or from "medical retirement".
- Make a wide range of changes to a veteran's service and medical records.

10 USC §1552

BCMRs have the authority to do everything that DRBs can do and much more, such as:

con't...

- Re-instate someone into the military.
- Review a denial from the DRB.
 - If an applicant can get the remedy they are seeking from the DRB, they must apply to the DRB first.

NOTE:

BCMRs *cannot* issue an applicant a less favorable discharge than that issued at the time of separation.

BCMRs *cannot* expunge a special or general court martial conviction.

STATUTE OF LIMITATIONS: *10 USC § 1552(b)*

Three years from the date on which the veteran “discovers the error or injustice”

Discovery has been construed as “actual knowledge” not constructive knowledge.

(Ridgely v. Marsh, 866 F.2d 1526, 1529 (D.C. Cir. 1989))

However, the Board may excuse a failure to file within three years after discovery if it finds it to be “in the interest of justice”.

10 U.S.C. § 1552(b)

COMPOSITION OF THE PANELS

ABCMR, BCNR, AFBCMR

Civilian members of the respective Departments are appointed by the Secretary of the Department—three members constitute a quorum.

32 C.F.R. §§ 581(c)(1), 723.2(a), 865.1

BCMR for the Coast Guard

Civilian members of the Department of Homeland Security appointed by the Secretary of Homeland Security—two members constitute a quorum.

33 C.F.R. § 52.11(b)

DOCUMENTARY REVIEW

Board decides based on the following records:

- Veteran's application (DD Form 149).
- Advocate's brief (if submitted).
- Any evidence or argument submitted by applicant.

Board will request routine records (personnel and in-service medical records) as well as any other records needed to afford the applicant a "full and fair" review (32 C.F.R. § 581.3 (b)(5)(iii), however, it is ultimately the applicant's responsibility to provide all records necessary to support the alleged error or injustice. See 32 C.F.R. § 581 (b)(4)(iv)

How? The DU Application



What do DU applications have to include?

- DD293 or DD149 and DD214

What else do we suggest?

- Cover letter
- Detailed Brief
- Client Personal Statement
- Copies of all relevant military records
- Copies of all relevant medical records
- Proof of mental health diagnosis, if applicable
- A timeline of major events
- Evidence of positive character
- Other evidence as appropriate

Standards of Review:

DRBs

- Equity 32 C.F.R. § 70.9(c)
- Propriety 32 C.F.R. § 70.9(b)

Clemency

*If the discharge was the result of a SPECIAL court martial conviction
(10 U.S.C. 1553(a))*

BCM/NRs

- Injustice 10 U.S.C. §1552(a)(1)
- Error 10 U.S.C. §1552(a)(1)

Clemency

*If the discharge was the result of a special or general court martial
conviction (10 U.S.C. 1552(f)(2))*

Three statutory reasons for an Equity/Injustice upgrade:

1. Future Policy Change: If, the policy that led to the veteran's discharge has now been changed to such a degree that the veteran would not have been discharged as the policies currently stand. *38 C.F.R. § 70.9(c)(1)*
2. In-service Inconsistencies: If, at the time the veteran was discharged, the discharge was inconsistent with the standards of discipline at that time. *38 C.F.R. § 70.9(c)(2)*
3. Personal Record: If the discharge was inequitable/unjust based on evidence relating to A) quality of service or B) capability to serve. *38 C.F.R. § 70.9(c)(3)*

Two statutory reasons for an Impropriety/Error upgrade:

1. An error of fact, law, procedure, or discretion occurred, and the error was prejudicial to the veteran during the discharge process. *38 C.F.R. § 70.9(b)(1)(i)*
 - *Prejudicial error means there is a “substantial doubt” that the discharge would have remained the same if the error had not been made.*
2. 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. *38 C.F.R. § 70.9(b)(1)(ii)*

(Exciting!) New Directives



- Hagel Memo 2014
- Carson Memo 2016
- Kurta Memo 2017

Hagel Memo - Sept. 4, 2014

- Statute of limitations liberally waived at the BCM/NRs (not the DRBs) for PTSD-related cases
- Liberal consideration for PTSD in service if symptoms in service treatment records or service records
- Special consideration for VA determination of service-related PTSD
- Liberal consideration for civilian provider diagnoses
- (Potential) Mitigation of misconduct

Carson Memo – Feb. 24, 2016

- Time limits waived (not DRB)
- De novo* review of any decision on PTSD-based claim pre-Hagel standards, or any case in which Hagel standards were not applied
- Specific mention of TBI as a condition related to PTSD

Current litigation: *Kennedy v. Speer*, No. 3:16-cv-2010 (D.Conn. Filed Apr. 17, 2017) – Class action involving post 9-11 Army veterans with less than honorable discharges alleging the ADRB systemically fails to implement the Carson/Hagel standards.

Kurta Memo – Aug. 25, 2017

“Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later.”

- ❑ Expands Carson and Hagel to include “mental health conditions, sexual assault, and sexual harassment”
- ❑ Mandates that Carson and Hagel standards apply to DRBs and BCMRs, and to ALL discharges
- ❑ Clarifies that the policy applies to characterization, narrative reason, separation code and re-enlistment code

Kurta Memo – cont.

Gives express guidance on 4 main questions for the boards concerning mental health related DU cases:

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

PRACTICE POINTER:

With the fast pace of change, this area is ripe for both error and injustice arguments. Check federal statutes, DoD instructions, and branch regulations, if your client was discharged after the changes and they weren't followed, you have a propriety argument. If s/he was discharged before the protections, you have an equity argument.

Main Take-Aways



- ✓ Discharge upgrades are life altering – opening the door to robust benefits and reaffirming selfless service.
- ✓ New laws and regulations recognize the impact of invisible wounds on bad paper.
- ✓ Vast majority of veterans don't know about the new policies. Those who do, usually try to upgrade pro se – you can make a huge impact!