Assisting “Bad Paper” Veterans

Discharge Upgrades & Character of Discharge Determinations

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Overview

1. Who are “bad paper” veterans?

2. Character of Discharge Determination
   - How to help a veteran through the COD process

3. Discharge Upgrades
   - How to help a veteran through the DU process

4. How to pick?: COD or DU or Both
Who are "Bad Paper" veterans?
“Bad Paper” Risk

Between 2000 and 2013 more than 600,000 service members received a less than honorable discharge — roughly one out of every four veterans.

Causes of Bad Paper...

Mental Health
PTSD diagnosis - 1x more likely

Retaliation
MST report - 35% more likely

Differences between branches
Marines 10x more likely than Airmen

Changing pattern between eras
Post-9/11 - 3x more likely than during Vietnam Era

…and the Consequences

Suicide
2x suicide rate

Suicidal Ideation
3x higher

Homelessness
7x homelessness rate

Incarceration
50% higher rate

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Racial Disparities In Military Justice

Protect Our Defenders Report from 2017:

- **USAF**: Black airmen 71% more likely to face court martial or NJP than white airmen.
- **USMC**: Black marines 32% more likely than white marines to receive a guilty finding at court martial
- **USN**: Black sailors 40% more likely than white sailors to be referred to court martial
- **US Army**: Black soldiers 61% more likely to face a court martial than white peers.

**GAO Report 2019:** Confirmed POD findings; called for better data collection.

**NDAA FY2020:** Directed DoD to improve data collection, set guidelines for identifying, investigating, and addressing bias in military justice.
Character of Discharge Determinations
Who has “veteran status” at the VA?

A person who served in the active military, naval, or air service, and who was discharged or released there from under conditions other than dishonorable.

38 U.S.C. 101(2)

Other than Dishonorable Discharge

1. Statutory Bars
2. Regulatory Bars
<table>
<thead>
<tr>
<th>Discharge Characterizations</th>
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</thead>
<tbody>
<tr>
<td><strong>Honorable</strong></td>
</tr>
<tr>
<td>General</td>
</tr>
<tr>
<td><strong>Uncharacterized</strong></td>
</tr>
<tr>
<td>Due to Entry Level Separation</td>
</tr>
<tr>
<td><strong>Uncharacterized</strong></td>
</tr>
<tr>
<td>Due to Void Enlistment/Dropped from the Rolls</td>
</tr>
<tr>
<td><strong>Other than Honorable</strong></td>
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<tr>
<td>Service record shows some misconduct, but not with a court-martial conviction.</td>
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<tr>
<td><strong>Bad Conduct</strong></td>
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<tr>
<td>From conviction of a Special Court Martial (misdemeanor-level)</td>
</tr>
<tr>
<td><strong>Bad Conduct</strong></td>
</tr>
<tr>
<td>From conviction of a General Court Martial (felony-level court)</td>
</tr>
<tr>
<td><strong>Dishonorable</strong></td>
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</tbody>
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*unless insane at the time of the misconduct
Character of Discharge Determination

STATUTORYBARS:

Benefits are not payable where the former service member was discharged or released under one of the following conditions:

• Conscientious objector or deserter
• General court - martial conviction
• Resignation by an officer for the good of the service
• Absence without official leave (AWOL) for a continuous period of at least 180 days.

This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence.
A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

- In lieu of General Court Martial
- Mutiny or spying
- “Willful and persistent misconduct” unless misconduct was minor and service was otherwise “honest, faithful and meritorious”
- Moral turpitude, usually involving felony conviction
- Homosexual acts involving aggravating circumstances

These regulations are expected to change.

Proposed new rules were published in July 2020.
Assessing Merit of COD

- Mitigation or explanation?
  - Trauma (i.e. combat or MST)
  - Family hardship
  - "Compelling circumstances" for AWOLs over 180 days
- Nature of the misconduct
  - Drugs? Alcohol?
  - AWOL?
  - PTSD-related offense?
- Frequency of misconduct
- Length of service
- Quality of military service outside of the misconduct
- Officer vs enlisted
- During deployment vs stateside
- Post-service life is not considered – which can be a good or bad thing
Character of Discharge Determination

- Usually use service-connection or pension to trigger a COD; VHA also triggers CODs
- (Almost) always request a hearing – helps personalize the claimant
- Personal statements are essential – help them tell their story
- Corroborating evidence from buddies they served with and people who knew them at the time – anyone who can help explain the misconduct and/or establish mitigation
- Help them argue that a bar to benefits doesn't apply to their case
- Previous denials: Same appeal options as other claims
- VA Accreditation required for anyone representing a claimant before VA
Military Discharge Review

OVERVIEW

Discharge review is an administrative law procedure whereby a military board may change the reason for discharge, character of service, or other aspects of military records.

Applications are brought before the military branch's **Discharge Review Board (DRB)** or **Board for Corrections of Military or Naval Records (BCMR/BCNR)**.

If successful, a discharge upgrade or military records correction will result in a new military separation document.
DRB Statute of Limitations:  
15 years from the date of discharge. No exceptions.

BCMR/BCNR Statute of Limitations:  
Three years from the date on which the veteran “discovers the error or injustice.”

The three years may be:
• From date of discharge.
• From most recent DRB denial.
• From actual discovery of error/injustice.

Exception: a waiver in the “interest of justice”
Discharge Review Boards CAN

Upgrade the character of discharge (e.g., from OTH to Honorable).
• **Exception:** not if the veteran's discharge was based on a General Court Martial conviction.

Change a veteran’s narrative reason for separation (e.g., from Misconduct to Secretarial Authority).
• **Exception:** DRBs cannot change a veteran’s Narrative Reason to or from “Medical Retirement.”

Change a veteran’s Re-enlistment code
• **ONLY** if accompanying a change in discharge characterization or narrative reason
Boards for Correction of Military/Naval Records

BCMRs/BCNRs have the same powers as the DRB, plus they can:

- Upgrade a veteran’s Character of Service that resulted from a General Court Martial conviction.
- Change a veteran’s Narrative Reason for Separation to or from “medical retirement”.
- Reinstate a veteran into the military.
- Review applications for veterans discharged more than 15 years ago.
- Review applications for veterans that have been denied at the DRB.
- Make a wide range of changes to a veteran’s service and medical records.
Veterans need to show "substantial credible evidence" proving:

- **Equity** (DRB) / **Injustice** (BCMR/BCNR)
  - Inconsistent with disciplinary standards at time of discharge
  - Policy change since discharge, if serving today, would receive different discharge
  - Quality of service
  - Capability to serve (mitigating factors)

- **Propriety** (DRB) / **Error** (BCMR/BCNR)
  - Error of fact, law, procedure, or discretion occurred
  - A change in policy that is EXPRESSLY retroactive

- **Clemency** (Both)– for Court Martial Convictions
  - Leniency
What do applications have to include?

- DD293 (DRB) or DD149 (BCMR) and DD214

What else do we suggest?

- 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

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If there’s a causal link between misconduct and mental health:

- The applicant should be afforded “liberal consideration“.
- Applies to PTSD, TBI, other mental health conditions, and MST (including sexual harassment)
- In-service diagnosis isn’t required (but evidence of symptoms is required)
- Special consideration for VA determination of service-connected mental health conditions
- Some misconduct (like marijuana use) is considered more minor today than in the past
- Boards shall seek advice, counsel, and advisory opinions from mental health professionals in some circumstances
- Statute of limitations liberally waived at the BCMRs (not DRBs)
CODs vs. DU vs. Both?

Veteran's goal?
- Only VA benefits = COD
- New DD214, employment prospects, dignity concerns, and VA = DU
- GI Bill Eligibility = DU

Which to do first?
- Can do both at once
- CODs take a few months and have a higher likelihood of success
- DUs can take 1-3 years and very few prevail, especially without mental health link
- Consider the client's vulnerability

Key Differences:
- VA / DOD
- COD bars (willful & persistent, moral turpitude, etc.) versus DOD standards (equity, propriety, etc.)
- Post-service contributions (or lack there of) only matters with DUs
- Note: Evidence for both tend to be the same (OMPF, STRs, personal statement, lay evidence)
Swords' Self-Help Guides

Self-Help Guides

- Discharge Upgrades
- Character of Discharge Determinations
- Requesting Court Martial Records
- Requesting Military Records
- Writing PTSD Stressor Statements
- PTSD Statements for Friends & Family

Website:
https://www.swords-to-plowshares.org/resources/self-help-guides