

REPRESENTING VETERANS IN DISCHARGE UPGRADES: A STEP-BY-STEP PRO BONO TRAINING

MAY 22, 2018



Boston Bar
ASSOCIATION

Table of Contents

Agenda	1
Speaker Biographies	2
Discharge Upgrades: Step by Step – PowerPoint – Dana Montalto	4
Common Challenges in Discharge Upgrade Cases – PowerPoint – Betsy Gwin	44
Faring the Choppy Waters of Discharge Upgrading – PowerPoint – Evan Seamone	62
Memorandum re: Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code	80
Memorandum re: Supplemental Guidance to Military Board for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder	82
Memorandum re: Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming Post Traumatic Stress Disorder or Traumatic Brain Injury	86
Memorandum re: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment	87
Military Discharge Upgrade – Procedural Error Checklist	92
Wilhelmus v. Green, 796 F.Supp.2d 157 (D.D.C. 2011)	97



AGENDA

Representing Veterans in Discharge Upgrades Pro Bono Training **Discharge Upgrades: Step by Step**

Boston Bar Association | May 22, 2018 | 3 p.m. – 5:30 p.m.

- | | |
|-------------|---|
| 3:00 – 3:05 | Welcome |
| 3:05 – 4:20 | Discharge Upgrades: Step by Step
Dana Montalto
<i>Veterans Legal Clinic, Legal Services Center of Harvard Law School</i> |
| 4:20 – 4:30 | Break |
| 4:30 – 5:10 | Common Challenges in Discharge Upgrades
Betsy Gwin
<i>Veterans Legal Clinic, Legal Services Center of Harvard Law School</i> |
| 5:10 – 5:30 | Recent Developments in Discharge Upgrade Law
Evan Seamone
<i>Veterans Legal Clinic, Legal Services Center of Harvard Law School</i> |
| 5:30 – 7:00 | Reception with Commissioner Giselle Sterling, City of Boston Veterans' Services |

Speaker Biographies

Betsy Gwin

Associate Director

Veterans Legal Clinic at the Legal Services Center of Harvard Law School

Betsy Gwin joined the Legal Services Center as Attorney and DAV Charitable Service Trust Fellow for the Veterans Legal Clinic in 2014 and currently serves as the Associate Director of the Clinic. Previously, Betsy was a Staff Attorney in the Child and Family Law Division of the Committee for Public Counsel Services. Betsy received her law degree from Georgetown University Law Center in 2011. While in law school, Betsy was Editor-in-Chief of the Georgetown Journal on Poverty Law and Policy and worked as a research assistant in the Federal Legislation and Administrative Law Clinic. She completed internships during law school at the Legal Aid Society of D.C., the Poverty and Race Research Action Coalition, and the American Bar Association's Center on Children and the Law.

Prior to law school, Betsy served as an AmeriCorps Paralegal at Cambridge and Somerville Legal Services, where her work focused primarily on disability benefits advocacy. She previously volunteered as a grant-writer to raise funds for children of fallen soldiers in Massachusetts and assisted patients at a veterans' treatment program in Syracuse, NY. She graduated in 2006 with a B.A. in Anthropology summa cum laude from Syracuse University, where she completed her Honors Thesis on veteran culture.

Dana Montalto

Attorney and Clinical Instructor

Veterans Legal Clinic at the Legal Services Center of Harvard Law School

Dana Montalto is an Attorney and Clinical Instructor in the Veterans Legal Clinic at the Legal Services Center of Harvard Law School. She represents veterans with less-than-honorable discharges in seeking military discharge upgrades and federal and state veteran benefits. Dana also founded and directs the Veterans Justice Pro Bono Partnership, which connects veterans who wrongfully received less-than-honorable discharges with *pro bono* attorneys seeking to give back to those who served. She authored *Underserved: How VA Wrongfully Excludes Veterans with Bad Paper* on behalf of Swords to Plowshares and the National Veterans Legal Services Program and co-authored *With Malice Toward None: Revisiting the Historical & Legal Basis for Excluding Veterans from "Veteran" Services*, 122 Penn. St. L. Rev. 69 (2017).

Dana received her bachelor's degree, *magna cum laude* and Phi Beta Kappa, from Wellesley College and her law degree from Yale Law School, where she participated in the Veterans Legal Services Clinic and the International Refugee Assistance Project. She joined the Legal Services Center in 2014 as an Arthur Liman Public Interest Fellow after completing a clerkship for the Honorable F. Dennis Saylor IV of the U.S. District Court for the District of Massachusetts.

Evan Seamone
Attorney
Veterans Legal Clinic at the Legal Services Center of Harvard Law School

Evan joined the Veterans Legal Clinic in May 2017. He represents veterans in a variety of matters, including appeals for VA disability benefits and military discharge upgrades. Prior to joining the Clinic, Evan was a professor at Mississippi College School of Law where he directed the Legal Writing Program and helped to start the school's monthly program to assist veterans with legal matters. He also serves as a Major in the Army Reserve Component with duties as a Senior Defense Counsel. Recently, he ended a twelve-year career as an active duty judge advocate. His most recent assignment was service as a Prosecutor in the Office of Chief Prosecutor of Military Commissions where he was responsible for cases involving terrorism and the acts of unprivileged enemy belligerents tried at Guantanamo Bay, Cuba. In other military assignments, Evan supervised prosecuting attorneys and several civilian and military paralegals in some of the busiest criminal jurisdictions in the Army. During his tours in Iraq, Germany, and at domestic military installations, Evan participated in sexual assault, complex death penalty, and other felony criminal cases involving PTSD as a prosecutor and defense attorney.

Evan has written extensively about treatment-based sentencing alternatives for veterans and active duty service members, including Veterans Treatment and Mental Health Problem-Solving Courts. As the Vice Chair of the Military Issues Committee of the National Council of Juvenile and Family Court Judges, he is actively involved in the development of a standardized curriculum to assist family court judges in better understanding the unique needs of military families. Evan is a member of the Bar of the U.S. Supreme Court, the District of Columbia Court of Appeals, the U.S. Court of Appeals for the Armed Forces, and the U.S. Court of Appeals for Veterans' Claims.

Discharge Upgrades: Step by Step

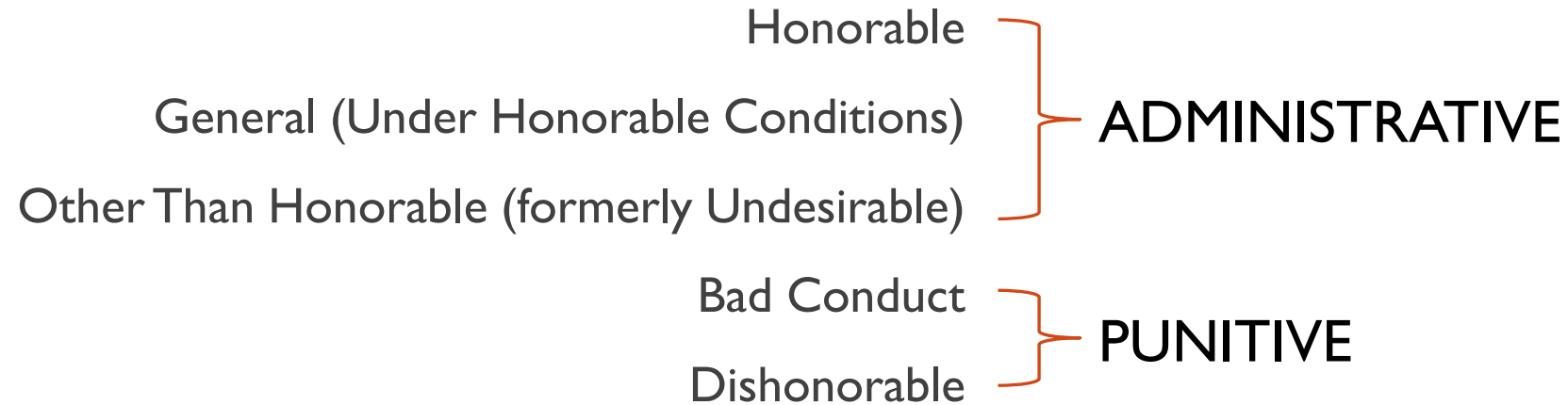
DANA MONTALTO, ATTORNEY & CLINICAL INSTRUCTOR
VETERANS LEGAL CLINIC, LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
BOSTON BAR ASSOCIATION, 22 MAY 2018



Step by Step

1. Meet with veteran
2. Gather documents
3. Research law
4. Get letters of support
5. Draft memorandum
6. Submit application to the Board
7. Hearing (if applicable)
8. Wait ...
9. Get decision and evaluate next steps

Step 0: Discharge Status & Narrative



NARRATIVE REASON EXAMPLES:

- Completion of Required Active Service
- Misconduct (Pattern of Misconduct, Drug Abuse, Serious Offense)
- In Lieu of Court-Martial
- Personality Disorder
- Homosexual Act, Homosexual Admission (formerly)



Step 0: The Military Review Boards

DISCHARGE REVIEW BOARDS

Army Discharge Review Board

Navy Discharge Review Board

Air Force Discharge Review Board

Coast Guard Discharge Review Board

RECORDS CORRECTION BOARDS

Army Board for Correction of Military Records

Board for Correction of Naval Records

Air Force Board for Correction of Military Records

Coast Guard Board for Correction of Military Records

Important!

1. Boards are within DOD *not* VA.
(There is no such thing as a “VA upgrade.”)
2. There are no automatic upgrades!
(A veteran must apply. Success is not guaranteed.)



Step 0: Procedure

	Discharge Review Boards	Records Correction Boards
Application Form	DD 293	DD 149
Members	5 military officers	3 civilian employees
Voting	Majority vote	Majority vote
Deadline	15 years from date of discharge	Within 3 years of discovery of the “error or injustice” that requires correction (but waivable in the interest of justice)
GCM Discharge	Cannot change discharge by GCM	Can change discharge by GCM
Hearing	Right to a personal hearing	No right to a hearing, may request
Reconsideration	Allowed under circumstances 32 CFR 70.9	Allowed if new and material evidence
Mental Health	If veteran has PTSD/TBI & served in contingency operation, 1 member is mental health doctor	May request medical advisory opinion



Step 0: Law

DISCHARGE REVIEW BOARDS

- “Propriety” or “Equity”
- For BCD: “Clemency”

RECORDS CORRECTION BOARDS

- “Error” or “Injustice”
- For BCD: “Clemency”

PROPRIETY OR ERROR → ILLEGALITY

EQUITY, INJUSTICE OR CLEMENCY → UNFAIRNESS

Presumption of government regularity.
Can rebut the presumption with
substantial evidence.

For more information
about specific arguments,
see 2016 & 2017 discharge
upgrade pro bono trainings.

Step 1: Meet with veteran

Have a conversation with the veteran about:

- What happened during the veteran's military service
 - Review total service history from enlistment to discharge
 - Discuss in detail the events that led up to discharge
 - Consider carefully how to address any trauma history
 - Also ask what the veteran has been doing since discharge
- Why the veteran wants a discharge upgrade
 - Any prior attempts to upgrade discharge
- Who might be willing to write letters of support for application
- Permission (written) to request various records
- Plan for representation going forward
- Questions veteran has about discharge upgrades





Step 1: Meet with veteran

Common questions veterans ask about discharge upgrades

- How long will it take to put together an application?
- How long will it take for the Board to make a decision?
- Who are the Board members?
- If there is a hearing, where is it and how am I supposed to get there?
- What is the likelihood of success?
- If the Board denies my application, what happens next?
- What can I be doing to make my application stronger?
- Can I access any veteran benefits in the meantime?



Step 2: Gather documents

Government records

- ***Official Military Personnel File: Standard Form 180
- Service Treatment Records: Standard Form 180
- DOD Mental Health or In-Patient Treatment Records: DD Form 2870
- VA Claims File: Privacy Act Waiver Form or VA Form 3288
- VA Medical Records: VA Form 10-5345
- Other military or service records: Freedom of Information Act Request with Privacy Act Waiver
- Criminal records check: Massachusetts CORI Request or FBI Check or local police department

ADVOCACY TIP!

Congressional district offices can help with obtaining records.

Step 2: Gather documents

Non-Government records

- Private medical records
- Letters or correspondence
- Government or NGO reports
- Diaries
- Photographs





Step 2: Gather documents

Selected relevant NGO & government reports:

Government Accountability Office, *Actions Needed to Ensure Post Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations*,
<https://www.gao.gov/assets/690/684608.pdf>

Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors*,
https://www.hrw.org/sites/default/files/report_pdf/us0516_militaryweb_1.pdf

Veterans Legal Clinic, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*,
<https://www.swords-to-plowshares.org/wp-content/uploads/Underserved.pdf>

YLS Veterans Legal Services Clinic, *Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem*,
https://law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf

YLS Veterans Legal Services Clinic, *Unfinished Business: Correcting "Bad Paper" for Veterans with PTSD*,
<https://law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf>



Step 2: Gather documents

Do not need to gather all of the types of records listed above.

Think about what will **support** your arguments for an upgrade and make the application **stronger**.

Review the **Official Military Personnel File** carefully.

The Board will have its own copy of the OMPF.

A good advocate will address the “bad” parts of the OMPF, will fill in any gaps, and will build a more complete record of the veteran’s service.

Step 3: Research law

Military Review Board decisions

- Available online: <http://boards.law.af.mil/>
- BCMR decisions available on Lexis

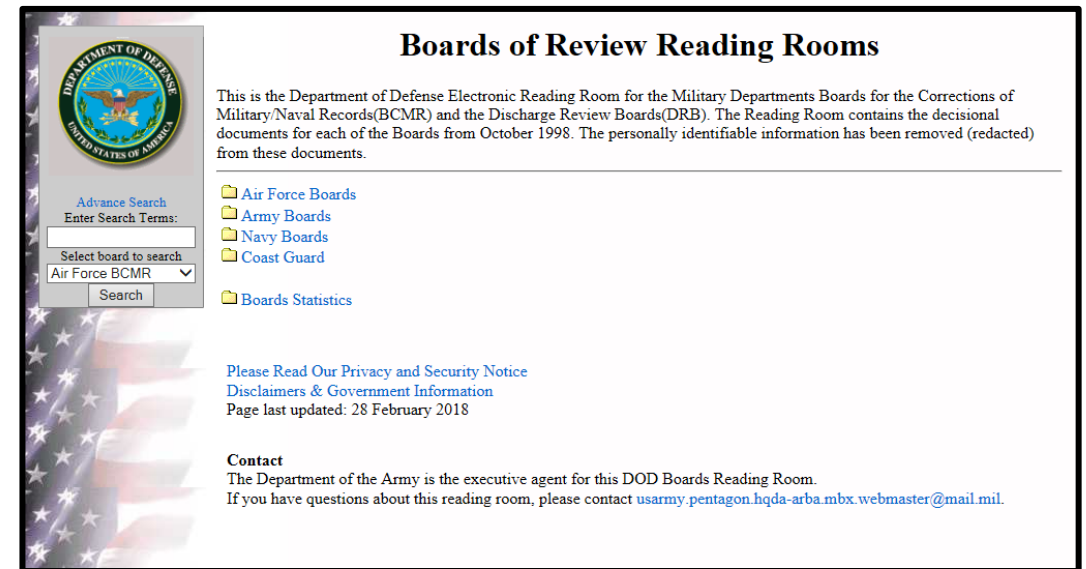
Military Review Board regulations & memoranda

- 32 C.F.R. 70.9 Discharge Review Board regulations

Military regulations

- Separation regulations (current and past)
- Other applicable regulations

Federal statutes and federal court decisions

The screenshot shows the "Boards of Review Reading Rooms" website. On the left is a search interface with the Department of Defense seal, an "Advance Search" link, a text box for "Enter Search Terms:", a "Select board to search" dropdown menu (currently set to "Air Force BCMR"), and a "Search" button. On the right, the title "Boards of Review Reading Rooms" is followed by a paragraph explaining the room's purpose. Below this are links for "Air Force Boards", "Army Boards", "Navy Boards", "Coast Guard", and "Boards Statistics". At the bottom, there are links for "Please Read Our Privacy and Security Notice", "Disclaimers & Government Information", and a "Page last updated: 28 February 2018". A "Contact" section at the very bottom identifies the Department of the Army as the executive agent and provides an email address: usarmy.pentagon.hqda-arba.mbx.webmaster@mail.mil.



Step 3: Research law

May find a legal error:

- New law or policy that is expressly **retroactive**.
- **Violation** of law that **prejudiced** the servicemember.

Therefore, see whether separation process violated Constitution, statute, or regulation.

May find a law-based injustice:

- New law or policy that represents a **substantial enhancement of rights** such that there is substantial doubt that veteran serving today would receive same discharge.



Step 3: Board decisions

Reading past decisions of the Boards may **provide information** about what arguments and evidence are persuasive (or not).

Past decisions of the BCMRs have **some precedential effect**.

Wilhelmus v. Geren, 796 F. Supp. 2d 157 (D.D.C. 2011): the BCMRs must adhere to its own precedent in adjudicating cases, because to do otherwise would constitute arbitrary & capricious action in violation of the Administrative Procedures Act.

In memorandum, **cite** any persuasive, helpful, and substantially similar past decisions of the relevant Board, highlighting similarities between that case and present application, and **include** copies of decisions as exhibits.

Step 3: Separation regulations

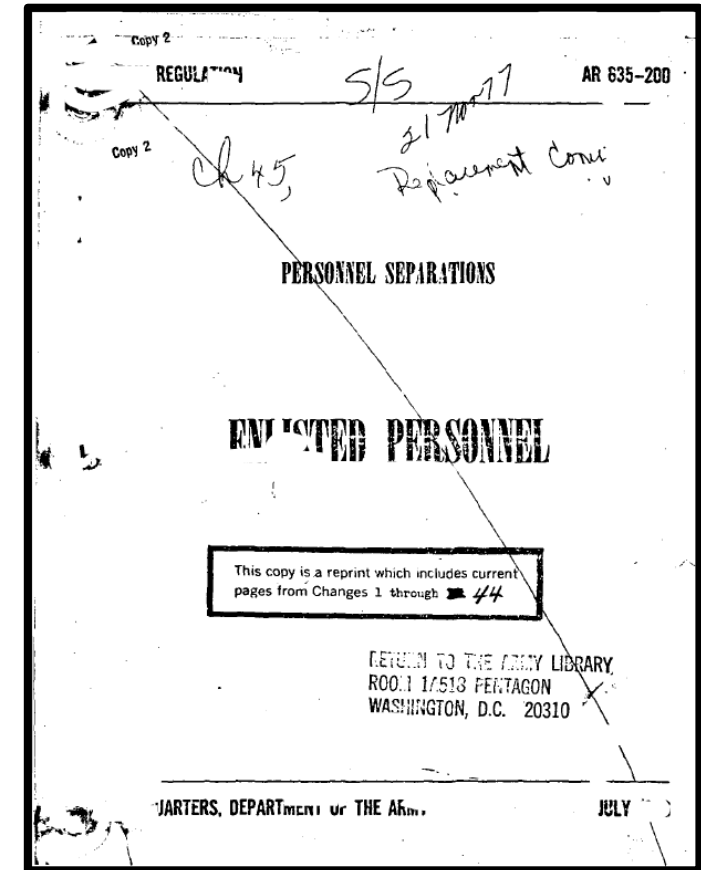
Look at the separation regulations for the particular service branch that applied at the time of the veteran's discharge.

Regulations often online. If not, write to the service branch to request them under the Freedom of Information Act.

NOTE

There have been significant changes in regulations affecting servicemembers who:

- Are being discharged for *Personality Disorder*
- Have been diagnosed with *PTSD* or *TBI* and *deployed* in support of a contingency operation
- Have been diagnosed with *PTSD* or *TBI* and experienced *Military Sexual Trauma*
- Are being discharged on account of their *sexual orientation*





Step 3: Board Memoranda

A few key DOD memoranda from recent years:

Stanley Memo: on occasion of repeal of Don't Ask, Don't Tell, instructs Boards to change discharge statuses, narrative reasons, and other derogatory information where veteran (1) discharged under DADT or prior policies and (2) no aggravating circumstances

Hagel Memo: instructs Boards to give “liberal consideration” of applications of Vietnam veterans with PTSD or related conditions that contributed to misconduct leading to OTH discharge; applied broadly to all eras of service, all types of discharge, and all review Boards

Carson Memo: provides for liberal waiver of statute of limitations period at BCMRs for applications based on Hagel Memo

Kurta Memo: expressly expands “liberal consideration” to veterans of all eras, with any mental health condition, with any discharge characterization, before all Boards; look for “markers” of mental health disorder



Step 3: DU Manuals

Addlestone & Ettlinger, *Military Discharge Upgrading* (1990), https://ctveteranslegal.org/wp-content/uploads/2012/12/MilitaryDischargeUpgrading_lr.pdf

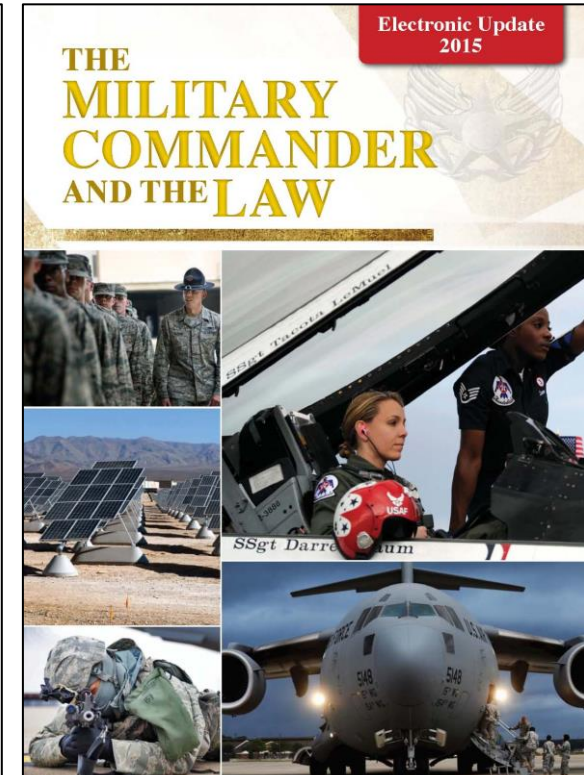
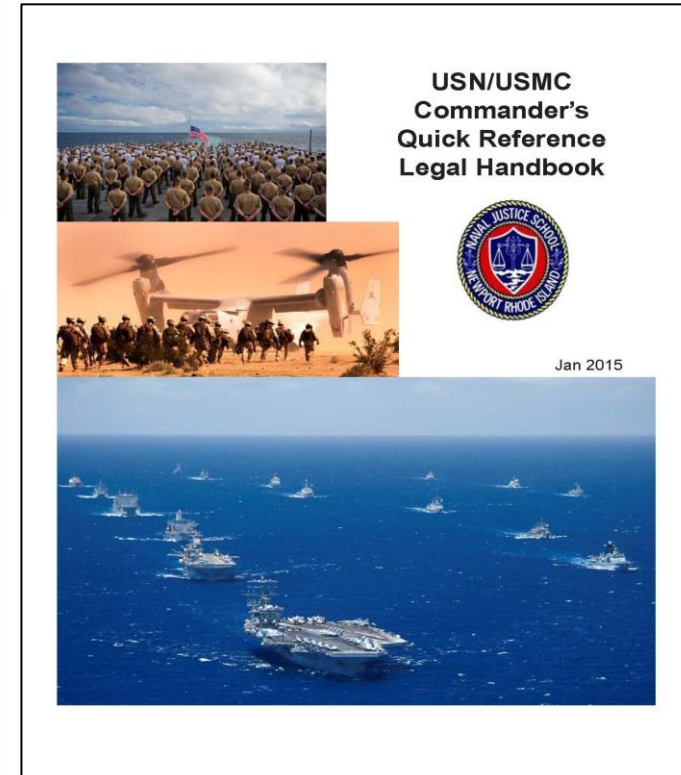
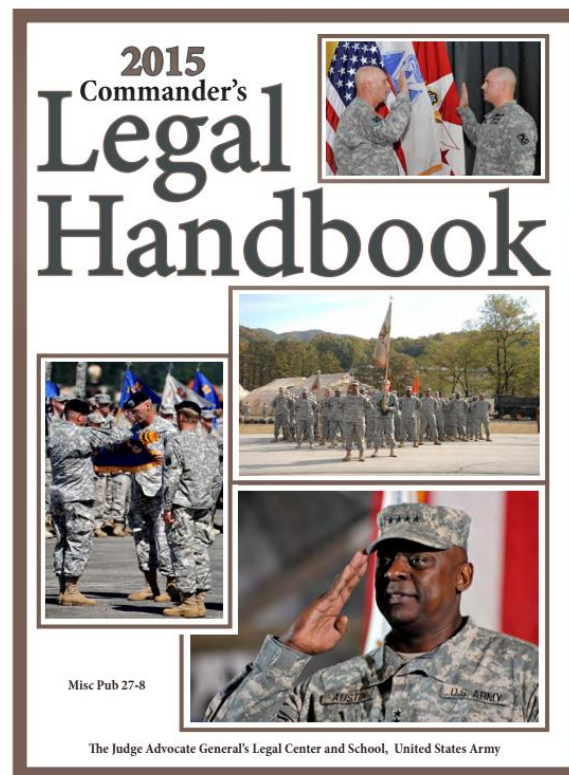
Self-Help Materials:

Swords to Plowshares, *Upgrading Your Military Discharge & Changing the Reason for Your Discharge*, <https://www.swords-to-plowshares.org/wp-content/uploads/Upgrading-Your-Discharge-I.pdf>

YLS Veterans Legal Services Clinic, *Applying for a Discharge Upgrade When You Have PTSD*, https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_PTSDdischargeUpgradeSupplement.pdf

Step 3: Legal handbooks

Commander's Legal Handbooks





Step 4: Get letters of support

Two main categories:

1. Fact witnesses: people who saw important events and will talk about them
2. Character references: people who will say nice things about the veteran

Possible supporters

- Fellow servicemember
- Family member
- Friend
- Employer
- Clergy member
- Community service organization
- Teacher or professor
- Social worker or case manager



Step 4: Get letters of support

A strong letter of support might include the following:

- Who the writer is (including whether s/he served in or is connected to the military)
- How the writer knows the veteran
- (for fact witnesses) What the writer witnessed
- Any stories that exemplify important attributes of the veteran or shed light on his/her true character
- Expression of why the Board should upgrade the veteran's discharge
- The writer's signature and contact information



Step 4: Get letters of support

Tips for getting strong letters of support

- Determine first whether it makes most sense for the veteran or for the advocate to obtain the letter
 - Depends on many factors including: who the writer is; how well the writer knows the veteran; the likelihood that the writer will express strong support; the value of the writer's information to the case; whether the veteran has the writer's contact information; etc.
- In most cases, it is best if the veteran reaches out first before the advocate
- The advocate can interview the potential writer and then offer to draft a letter based on the conversation for the writer to review, edit, supplement as needed

Step 4: Get letters of support

Even more potential supporters ...

- Mental health professionals: treating doctor or medical expert
 - If the veteran's service or discharge was impacted by a mental health condition, it is critical to get medical evidence to support the application
 - The Boards want proof of a **mental health diagnosis** and a **nexus** between the mental health condition and the conduct leading to discharge
 - A strong letter from a medical professional would include information about how the doctor knows the veteran, whether the veteran met the criteria for a mental health disorder in service, and whether (in the doctor's professional medical opinion) the mental health disorder contributed to the conduct leading to discharge
 - Best if the mental health professional is a psychologist, psychiatrist, or medical doctor with mental health specialty
- Other medical professionals
- Congressional representative



Step 4: Mental health experts

A strong **expert report** from a mental health professional can be key to a successful discharge upgrade petition

They are particularly important in cases where:

- the veteran does not have a strong or long history of mental health treatment;
- the veteran served a long time ago; or
- the veteran's current treatment providers are unwilling to write letters

Best practices for engaging a mental health expert

- To start, have a conversation with the potential expert to learn about his/her background and qualifications and to share requirements for and objective of the report
- Provide a referral letter that provides relevant facts and legal framework and clearly states the referral questions



Step 4: Mental health experts

Example referral questions for a mental health expert:

- Whether in your professional medical opinion Mr. Jones met the standards for any mental health disorder(s) upon his entry into the military in January 2006.
- Whether in your professional medical opinion Mr. Jones met the standards for any mental health disorder(s) from January 2009 through January 2012, and if so, for which disorder(s).
- Whether in your professional medical opinion there exists a nexus or causal link between any mental health disorder(s) and the conduct leading to discharge.
- Whether the diagnosis Mr. Jones received in service were appropriate.
- Whether the treatment Mr. Jones received in service was adequate.



Step 4: Congressional offices

Tips for working with congressional offices

- Every Representative and Senator provides assistance to constituents in dealing with federal agencies
- Constituent services caseworkers usually work out of the district offices (i.e., in Mass., not DC)
- Can assist in obtaining government records (including military personnel files, service treatment records, court-martial records, etc.)
- Can make inquiries of federal agencies about case status
- Call office and ask to speak with caseworker who specializes in veterans issues
- Be prepared to provide a Privacy Act Waiver signed by veteran-client (preferred form is on congressperson's website)



Step 5: Draft memorandum

Basic components of a memorandum:

- Introduction: basic overview of the case, why the Board should upgrade, relief sought (one page)
- Statement of Facts: what happened, in detail
- Arguments: grounds for an upgrade
- Conclusion



Step 5: Draft memorandum

Introduction

Robert Miller was an accomplished young Soldier, a promising leader, and a Specialist with a Ranger Tab. He endured a year-long deployment to Afghanistan. His conduct during that deployment earned him praise and awards. His separation with a General discharge therefore came as a shock to almost everyone, including fellow Soldiers, superiors, and himself.

Returning from deployment with troubling memories of combat, during which he killed a young teenage boy, Mr. Miller on three occasions acted in a manner unlike his normal character but typical of those suffering from Post-Traumatic Stress Disorder and Traumatic Brain Injury. Overcome by anger, he twice struck other Soldiers. Rather than recognize the actions as symptomatic and refer him to treatment, his commanding officer initiated court-martial and separation proceedings. Despite Mr. Miller's in-service diagnoses of PTSD and TBI, that officer improperly concluded there was no nexus between Mr. Miller's mental-health conditions and his misconduct. In the push to separate him, Army regulations were not strictly and carefully followed. The discharge went through eleven days before his ETS date.

Since his discharge, Mr. Miller has received treatment at a VA Medical Center for service-connected PTSD and TBI and has pursued a college degree. His future is promising, but the stain and burden of a General discharge stand as a barrier to his full recovery and success. He requests the Board consider the following contentions:

A. Because the Separation Process Was Flawed, the Resultant Discharge Is Improper and Inequitable. The reasons provided for administrative separation in the separation packet varied, in violation of AR 635-200, ch. 2-2a. The Major General's approval relied upon an incorrect regulatory provision for separation. The requirement under ch. 14-2a to attempt to rehabilitate a Soldier was not followed.

B. The Determination That Mr. Miller's Misconduct Was Unrelated to PTSD and TBI Was Incorrect, Rendering the Resultant General Discharge Improper and Inequitable. The commanding officer and command surgeon concluded that Mr. Miller's diagnosed PTSD and TBI were not a direct or substantial cause of the misconduct that triggered administrative separation. That conclusion contradicts contemporary medical evidence. An expert psychologist has concluded that the conduct leading to discharge was caused by Mr. Miller's mental health conditions.

C. In Light of Mr. Miller's Service and Post-Service Accomplishments, a General Discharge is Inequitable. Many of his superiors testify to his excellent qualities as a Soldier. He is currently excelling as a junior at the University of Massachusetts Amherst. A discharge less than fully Honorable is unjust.

Accordingly, Mr. Miller requests that the Board change the character of service to Honorable; change the narrative reason for separation to Completion of Required Active Service, or alternatively to Secretarial Authority; and change the re-enlistment code to RE-1.



Step 5: Draft memorandum

Statement of Facts

- Chronological (unless very good reason not to be)
- Quote from records, letters of support, other evidence

Arguments

- State arguments clearly (numbered headers are helpful!)
- Match supporting law to supporting evidence
- Often more persuasive to have a few strong arguments than a bunch of so-so arguments
- At BCMR, include an argument about timeliness: why it is within 3 years of discovery of error or injustice *and/or* why the 3-year limit should be waived in the interest of justice

Step 5: Draft memorandum

EXAMPLE 1

- I. The Conduct That Led to Mr. Baker's Discharge Were Caused by his Undiagnosed and Untreated PTSD, and Thus the Resulting Discharge is Unjust.
- II. Under Current Army Regulations, Mr. Baker Would Receive Treatment for War-Related PTSD Rather than Issued a Bad Discharge, and His Discharge Is Therefore Unjust.
- III. Mr. Baker Served Commendably in One of the Most Dangerous Battle Zones of the Vietnam War and Has Suffered from PTSD for Almost 50 Years. In Light of His Service and His Post-Service Accomplishments, the Resulting Discharge Is Unjust.
- IV. This Application Is Timely, or Alternatively the Statute of Limitations Period Should Be Waived in the Interest of Justice.

EXAMPLE 2

- I. SSG James Was Denied Fundamental Rights in the Separation Process, and Therefore the Discharge Is Improper and Inequitable.
- II. Discharging SSG James After 14 Years of Service and Assigning a Less Than Fully Honorable Characterization Is Unfair and Unjust.



Step 5: Supporting affidavit

If submitting application for records review, also draft an **affidavit** on behalf of the veteran testifying to necessary facts and including any other important information.

If submitting application for personal hearing, can submit an affidavit or can state facts in memorandum, footnote that those facts are what veteran is expected to testify to at a hearing, and have veteran sign brief under pains & penalties of perjury.



Step 6: Submit application

- Cover Letter
- Application Form (DD 149 or DD 293)
- Memorandum
- Exhibits

IMPORTANT

Be clear about the grounds for requesting an upgrade.

Support your arguments with evidence.

Submit a paper copy to the Board (or file online for the Army Boards).

Should receive letter confirming receipt of application within 4-6 weeks.

May receive Advisory Opinion or Notice of Records from BCMR, soliciting input.

Step 6: Where should I apply?



IMPORTANT

Go to the DRB if you can. The opportunity for a personal hearing is invaluable. If the veteran is getting close to the 15-year deadline, be sure to get the DD 293 Form filed!



Step 7: Hearing

Can request a hearing at the Records Correction Boards, but very rarely granted.

Have a right to a personal hearing at the Discharge Review Boards.

Discharge Review Board Hearings

- Hearings are held in/around Washington, D.C. (occasional travel boards for some branches)
- Can ask to appear by telephone (veteran, advocate, and/or witnesses)
- Can call witnesses
- Opportunity to present arguments and testimony

IMPORTANT

If close to 15-year deadline and have never applied before, ask for a personal hearing.

Step 8: Wait ...

Records Correction Boards have to decide 90% of cases within 10 months and 100% of cases within 18 months.

Generally plan on waiting the full 18 months.

Discharge Review Boards have no time limit for action.

Generally plan on waiting 10 to 16 months.





Step 8: Wait ...

Can ask to expedite cases.

BCMRs generally require evidence of terminal illness to expedite matter.

Discharge Review Board: expedited resolution of applications by veterans who deployed in support of a contingency operation and were later diagnosed with PTSD or TBI and whose applications are based on matters relating to PTSD or TBI. 10 U.S.C. § 1553.



Step 9: Get decision

Once receive decision from Board ...

If favorable, may receive DD 214 with decision or DD 214 may arrive separately in a few weeks.

If unfavorable (or less than fully favorable), right to appeal.

- DRB Records Review: ask for personal hearing (or go to BCMR or federal court)
- DRB Personal Hearing: go to BCMR or federal court
- BCMR: seek judicial review in federal court

Pay attention to deadlines!



Rates of Success at Boards

Historically, rates of success at Boards have varied considerably.

Currently, rates of success are pretty low (single digits) but higher for certain categories of applicants.

Applications under the Hagel Memorandum (PTSD/TBI) have higher rates of success. For 2017, data are:

- Army 47%
- Navy 31%
- Air Force 38%

NOTE

It's not easy to "go get an upgrade."
But preparation and legal representation increase
chances of success.



Questions?



Contact Information

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Common Challenges in Discharge Upgrade Cases

Betsy Gwin, Esq.

Associate Director, Veterans Legal Clinic
Legal Services Center of Harvard Law School

Discharge Upgrades are hard.



Getting around roadblocks



“It’s taking forever to get my client’s records.”



CHALLENGES

- Wait times >120 days for Official Military Personnel File (OMPF) & Serve Treatment Records (STR) requests using SF180
- Private medical providers ignore record request
- VA does not respond to request for VA claims file
- Only partial records provided

TIPS

- After 45-60 days, send follow up request letter
- After 60 days or longer, make a phone call and ask to expedite the request
- Set calendar reminders to prompt follow up
- Seek assistance from congressional office
- Use private medical provider’s own release forms
- On SF180, check all boxes and request “full and complete military personnel and medical records”

“My client is missing!”

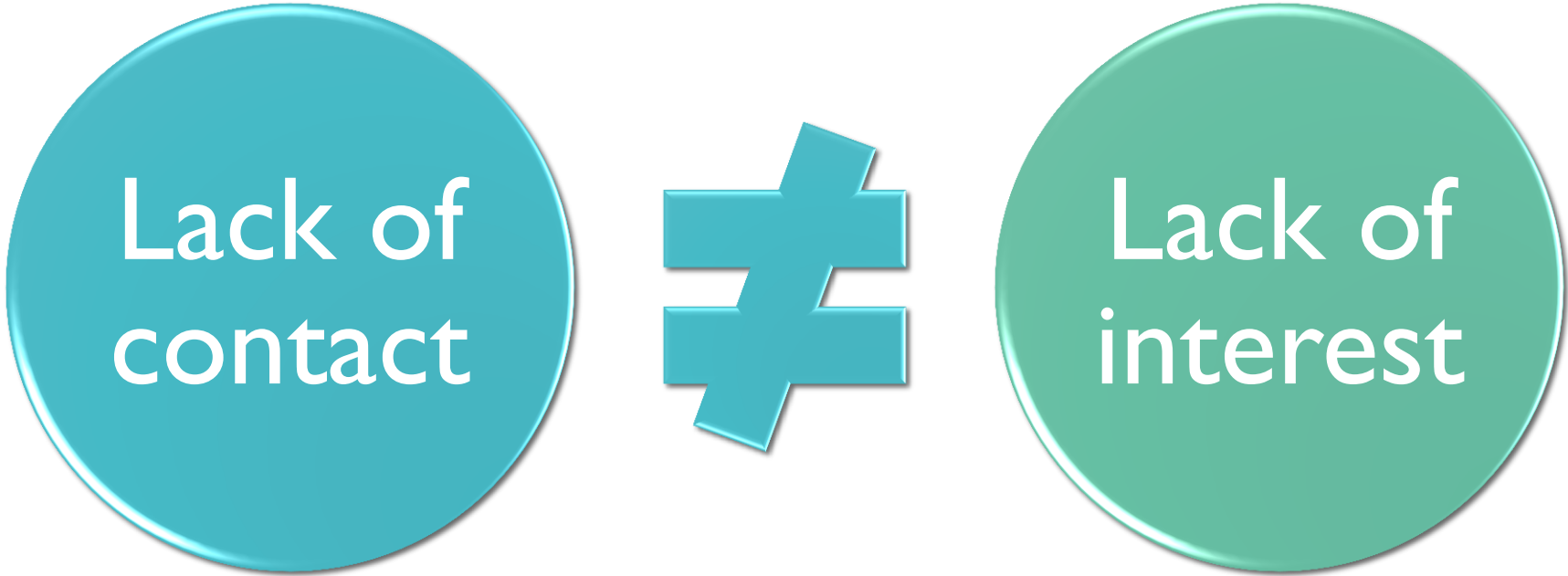
CHALLENGE



TIPS

- Don't stop calling
- Use multiple forms of communication
- Reach out to family members & friends
 - Best practice: ask client about support network at beginning of representation, and obtain permission ahead of time to contact family or friends if client is unreachable
- Offer client support and resources

“My client is missing!”

A diagram consisting of two circles and a central symbol. The left circle is teal and contains the text 'Lack of contact'. The right circle is a darker teal and contains the text 'Lack of interest'. Between the two circles is a large, stylized teal symbol that is a combination of an equals sign and a not sign, indicating that the two concepts are not equal.

Lack of
contact

Lack of
interest

“I can’t find any useful precedent.”

CHALLENGE

- Board websites are hard to navigate and search for cases
- Law is sparse
- Changes on the horizon: recent passage of Amendment #42 to the National Defense Authorization Act (NDAA) will require the Boards of Correction of Military Records (BCMRs) to publish their decisions with indices and summaries



“I can’t find any useful precedent.”

Tips:

- Search using a single keyword
- Where possible, search by number (e.g. separation regulation)
- Yale Law School lawsuit resulted in settlement requiring DOD to disclose, on a quarterly basis, reports on: 1) the number of discharge upgrade applications submitted to the boards; 2) the number of such applications granted and denied by each board; and 3) the docket number for each. See YLS website for reports with case numbers:
<https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/vva-and-nvclr-v-dod-ptsd-upgrade-foia-suit>
- Board members generally care more about strength of argument than about whether you cite precedent

Why important?

Getting letters of support



- Can speak to client's good character at the time they knew them, whether now or in the past
- Can comment on changes in a client's behavior, demeanor, or health
- Can corroborate and support facts that are not documented, even if just by confirming a timeline of events

Getting letters of support



- Ask client to provide names and contact info for supporters
 - Client should describe their relationship with the supporter and what they know
 - Ask whether client wants to reach out first to let person know you will be contacting them, or if its ok for you make first contact
- Use internet (LinkedIn, Facebook, etc.) to track down as needed – verify identity first
- First conversation does not have to include commitment to write letter, just an interview
 - Take good notes during initial conversation
 - Notes can later be used to write first draft of letter for supporter to reduce time and effort
 - Inquire about willingness to write letter after initial conversation if info is helpful
- Obtain as many statements as practicable
 - Some supporters may not follow through with letter, best to keep multiple irons in fire
 - Numerous letters can make impact on board's view of client
 - Ask supporters who else they recommend to contact → they may have good leads
- Can be sworn statements/affidavits or letters
- The higher in chain of command, the better

Retroactive medical diagnoses

A stethoscope is positioned diagonally across the left side of the slide. To its left is a vertical column of seven white boxes, each containing a large red checkmark.

TIPS

- Request any and all medical records from the time in question
- Consider asking current medical providers for opinion
- When needed, hire a medical expert to provide retrospective opinion
 - Review in-service medical records, and post-service medical records
 - May require client interview
- Compare evidence before and after trauma or incident – focus on identifiable changes

Trauma-Sensitive Interviewing

Trauma = an experience, or experiences, that overwhelm our current coping capacities

- Trauma comes in many forms, and is different for each person
 - Combat trauma
 - Sexual harassment
 - Sexual assault
- Retelling the trauma narrative can cause re-experiencing of symptoms
- Telling one's painful story multiple times can be frustrating to a client

Trauma-Sensitive Interviewing

TIPS

- Ask for “thumbnail” version of the trauma narrative
 - Version that feels safe to tell
 - The client has probably already told others this version
- Consider whether the trauma narrative has already been recorded elsewhere, e.g. medical records, letters, prior written statements, prior applications
- Allow client to choose right time and place to share
- Mirror client’s choice of terminology or phrasing

Supporting clients in crisis

“What are the signs that my client is in crisis?”

- Some veterans in crisis may show behaviors that indicate a risk of harming themselves. Warning signs include:
 - Appearing sad or depressed most of the time
 - Clinical depression: deep sadness, loss of interest, trouble sleeping and eating—that doesn’t go away or continues to get worse
 - Feeling anxious, agitated, or unable to sleep
 - Neglecting personal welfare, deteriorating physical appearance
 - Isolating or withdrawing from friends, family, and society, or sleeping all the time
 - Losing interest in hobbies, work, school, or other things one used to care about
- Frequent and dramatic mood changes
- Expressing feelings of excessive guilt or shame
- Feelings of failure or decreased performance
- Feeling that life is not worth living, having no sense of purpose in life
- Talk about feeling trapped—like there is no way out of a situation
- Feelings of desperation, saying that there’s no solution to their problem

“How can I help?”

Supporting clients in crisis

- **Veterans Crisis Line** provides confidential support 24/7/365
 - **1-800-273-8255** and **Press 1**
 - **Chat online:** <https://www.veteranscrisisline.net/ChatTermsOfService.aspx>
 - Send a text message to **838255** to receive.
 - Support for [deaf and hard of hearing](#) individuals is available.
- Online resources: <https://www.veteranscrisisline.net/>
- Local resources:
 - **SAVE Team**, Department of Veterans' Service
600 Washington St., 7th Floor, Boston, MA 02111
617-210-5743
Toll-free: 1-888-844-2838
Fax: 617-210-5755
save@massmail.state.ma.us
- Self-care is important. Seek advice and support for yourself, too.

Questions?



Best advice:

- Ask for help
- Don't give up
- Be patient



Contact info

Betsy Gwin

Clinical Instructor & DAV Charitable Service Trust Fellow

Associate Director, Veterans Legal Clinic

Legal Services Center of Harvard Law School

122 Boylston Street, Jamaica Plain, MA 02130

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E-mail: bgwin@law.harvard.edu

Faring the Choppy Waters of Discharge Upgrading



**A.M.
KURTA**

Evan R. Seamone

**Clinic Attorney
Veterans Legal Clinic
Harvard Legal Services Center**

Agenda

1

Maximizing the Impact of Under Secretary A.M. Kurta's August 2017 Memorandum

2

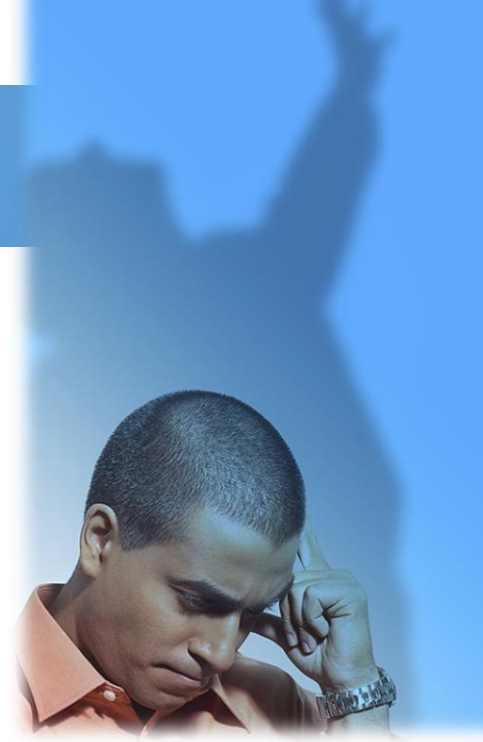
VA 90-Day Emergency Stabilization for OTH Recipients

3

Impact of the Honor Our Commitment Act

4

Noteworthy State Initiatives



Attachment

Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment

“Including”

6. Evidence of misconduct, including any misconduct underlying a veteran’s discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.

2. Requests for discharge relief typically involve four questions:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/ experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?

**Brain Tumor Recently Detected, Which Began
at the Time of Discharge 10 years ago?**



**Ongoing chronic pain from migraine headaches
without tumor or brain damage?**



Was there a condition or experience?

9. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge.
10. Evidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge.
11. A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.
12. Review Boards are not required to find that a crime of sexual assault or an incident of sexual harassment occurred in order to grant liberal consideration to a veteran that the experience happened during military service, was aggravated by military service, or that it excuses or mitigates the discharge.

Did it exist/occur during military service?

13. A diagnosis made by a licensed psychiatrist or psychologist that the condition existed during military service will receive liberal consideration.
14. A determination made by the Department of Veterans Affairs (VA) that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the Department of Defense, is persuasive evidence that the condition existed or experience occurred during military service.
15. Liberal consideration is not required for cases involving pre-existing conditions which are determined not to have been aggravated by military service.

Rule-Out

Does the condition/experience excuse or mitigate the discharge?

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.
17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally

Does the condition/experience excuse or mitigate the discharge?

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.
17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally construed as warranting a change in narrative reason to “Secretarial Authority,” “Condition not a disability,” or another appropriate basis.

Does the condition/experience outweigh the discharge?

18. In some cases, the severity of misconduct may outweigh any mitigation from mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.
19. Premeditated misconduct is not generally excused by mental health conditions, including PTSD; TBI; or by a sexual assault or sexual harassment experience. However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.

Additional Clarifications

20. Unless otherwise indicated, the term “discharge” includes the characterization, narrative reason, separation code, and re-enlistment code.
21. This guidance applies to both the BCM/NRs and DRBs.
22. The supplemental guidance provided by then-Secretary Hagel on September 3, 2014, as clarified in this guidance, also applies to both BCM/NRs and DRBs.
23. The guidance memorandum provided by then-Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness Brad Carson on February 24, 2016, applies in full to BCM/NRs but also applies to DRBs with regards to de novo reconsideration of petitions previously decided without the benefit of all applicable supplemental guidance.
24. These guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations.
25. Unless otherwise indicated, liberal consideration applies to applications based in whole or in part on matters related to diagnosed conditions, undiagnosed conditions, and misdiagnosed TBI or mental health conditions, including PTSD, as well as reported and unreported sexual assault and sexual harassment experiences asserted as justification or supporting rationale for discharge relief.
26. Liberal consideration includes but is not limited to the following concepts:
 - a. Some circumstances require greater leniency and excusal from normal evidentiary burdens.
 - b. It is **unreasonable** to expect the same level of proof for injustices committed years ago when TBI; mental health conditions, such as PTSD; and victimology were far less understood than they are today.

**All
Administrative
Discharges.**



c. It is unreasonable to expect the same level of proof for injustices committed years ago when there is now restricted reporting, heightened protections for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment than ever before.

d. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported.

e. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected.

f. Reviews involving diagnosed, undiagnosed, or misdiagnosed TBI or mental health conditions, such as PTSD, or reported or unreported sexual assault or sexual harassment experiences should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.

g. Veterans with mental health conditions, including PTSD; TBI; or who experienced sexual assault or sexual harassment may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran's life.

h. An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

i. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case. For example, marijuana use is still unlawful in the military but it is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.

j. Service members diagnosed with mental health conditions, including PTSD; TBI; or who reported sexual assault or sexual harassment receive heightened screening today to ensure the causal relationship of possible symptoms and discharge basis is fully considered, and characterization of service is appropriate. Veterans discharged under prior procedures, or before verifiable diagnosis, may not have suffered an error because the separation authority was unaware of their condition or experience at the time of discharge. However, when compared to similarly situated individuals under today's standards, they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care.

Universally applicable.

Marijuana use not severe.

Injustice to undergo separation when diagnosis was not done prior and is currently required.



Supplemental Guide to the *Discharge Upgrade Manual* Observations of the Impact of the Kurta Memorandum

- **Expands liberal consideration protections stated by Hagel and Carson Memoranda**
- **Broadens the pool of applicable veterans to those suffering from “mental health conditions” and effects of MST and sexual harassment, rather than just PTSD or TBI**
- **Applies Hagel and Carson Memos to DRBs**
- **Expands all three memos’ coverage to *all* administrative discharge characterizations, not just Other-Than-Honorables**

June 2017

Emergent Mental Health Care for Former Service Members

- **“Emergent mental health need”**
- **Limited to mental health treatment**
- **Must be service-related**
- **90 days, including inpatient, residential, or outpatient care**
- **Requires VA Provider’s Validation**

HOW CAN I
HELP YOU?



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MURPHY'S 'HONOR OUR COMMITMENT ACT' INCLUDED IN FY18 OMNIBUS APPROPRIATIONS BILL

Bill Will Expand Mental Health Care For At-Risk Combat Veterans And Victims Of Sexual Assault

thursday, march 22, 2018

The Honor Our Commitment Act creates two new categories of VA eligibility for mental and behavioral health care for veterans with OTH or 'bad paper' discharges. The first category covers OTH discharged veterans, including reservists and national guard members, who deployed to a combat zone, zone of hostilities, or operated a drone in a combat zone. The second category covers OTH discharged veterans that were victims of sexual abuse, sexual battery, or sexual assault. The bill also allows veterans to receive care outside of VA facilities if it is clinically advisable or if the veteran lives far from a VA facility.

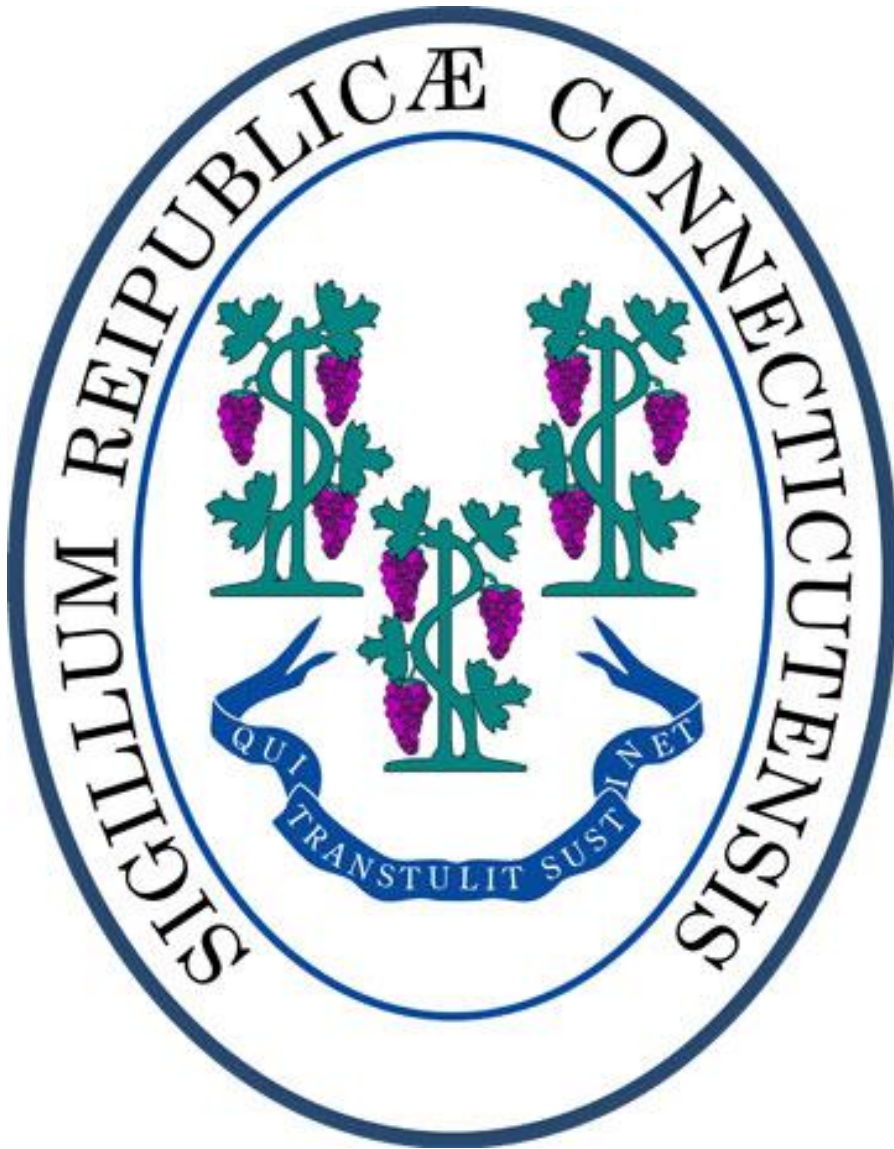
Not physical health care.

Not compensation.

**Not other crucial
benefits.**



Local Wrap-Around Initiatives



Recent legislation awards state veterans' benefits to those with OTH discharges who have PTSD, TBI, or were victims of military sexual trauma.

Such benefits include:

- **Services at the Connecticut Veterans Home and Hospital in Rocky Hill such as substance abuse treatment,**
- **transitional housing and long-term care;**
- **tuition waivers at state colleges;**
- **burial assistance;**
- **and property tax exemptions.**



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

SEP 20 2011

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code

Pursuant to the Don't Ask, Don't Tell Repeal Act of 2010, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have certified that the Department of Defense is prepared for the repeal of section 654 of title 10, United States Code, commonly referred to as Don't Ask, Don't Tell (DADT). Repeal will take effect on September 20, 2011. Upon repeal, some former Service members discharged under DADT or prior policies may request a correction of their military records from either their Service Discharge Review Board (DRB) or their Service Board for Correction of Military/Naval Records (BCM/NR). To help ensure consistency across the Services and to address what may be a large number of similar applications arising from the repeal of DADT, this memorandum provides supplemental policy guidance for DRB and BCM/NR action on such applications. As an initial matter, the repeal of DADT will be considered a sufficient basis to support reconsideration of such requests for applicants who have previously filed with either their Service DRB or BCM/NR.

The Service DRBs, provided for in section 1553 of title 10, United States Code, and governed by Department of Defense Directive (DoDD) 1332.41 and Department of Defense Instruction (DoDI) 1332.28, have a relatively limited scope of review and are authorized to provide only specified remedies. In general, if a DRB finds either an inequity or impropriety in a discharge action, it may change the narrative reason for the discharge, upgrade the character of discharge, or take both actions.

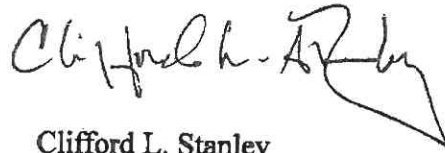
Effective September 20, 2011, Service DRBs should normally grant requests to change the narrative reason for a discharge (the change should be to "Secretarial Authority" (Separation program Designator Code (SPD) code JFF)), requests to re-characterize the discharge to honorable, and/or requests to change the reentry code to an immediately-eligible-to-reenter category (the new RE code should be RE code 1J) when both of the following conditions are met: (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and (2) there were no aggravating factors in the record, such as misconduct. Although each request must be evaluated on a case-by-case basis, the award of an honorable or general discharge should normally be considered to indicate the absence of aggravating factors.

Also effective September 20, 2011, with respect to requests in cases where there were multiple reasons for separation including DADT, Service DRBs normally should apply the policy in the previous paragraph to the DADT reason for separation and apply existing DRB policy to the remaining reason(s).

In contrast to the DRBs, the Service BCM/NRs, provided for in section 1552 of title 10, United States Code, and also governed by DoDD 1332.41, have a significantly broader scope of review and are authorized to provide much more comprehensive remedies than are available from the DRBs. Upon finding an error or injustice, BCM/NRs may fashion the remedy they find necessary and appropriate within applicable legal limits. Although the correction boards have wide latitude in determining what constitutes an error or injustice, it is DoD policy that broad, retroactive corrections of records from applicants discharged under DADT are not warranted. Although DADT is repealed effective September 20, 2011, it was the law and reflected the view of Congress during the period it was the law.

Similarly, DoD regulations implementing various aspects of DADT were valid regulations during that same period. Thus, consistent with what we understand is past board practice on changing standards, DADT's repeal may be a relevant factor in evaluating an application (such as requests to change the narrative reason for a discharge, requests to re-characterize the discharge to honorable, and/or requests to change the reentry code to an immediately-eligible-to reenter category) but the issuance of a discharge under DADT or the taking of an action pursuant to DoD regulations related to a discharge under DADT should not by itself be considered to constitute an error or injustice that would invalidate an otherwise proper action taken pursuant to DADT and applicable DoD policy. Thus, remedies such as correcting a record to reflect continued service with no discharge, restoration to a previous grade or position, credit for time lost, or an increase from no separation pay to half or full separation pay or from half separation to full separation pay, would not normally be appropriate.

This policy does not address situations where a correction board determines that DADT (or other prior policy) as applied under the circumstances of a particular case constituted an error or injustice. Under those circumstances, the BCMR would craft an appropriate remedy. Additionally, the Boards should also consider the guidance provided in my Repeal of DADT and Future Impact on Policy memorandum, dated January 28, 2011, (attached) in determining whether a specific requested record correction is necessary or appropriate.


Clifford L. Stanley

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
Coast Guard, Commandant (CG1)
General Counsel of the Department of Defense



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

SEP 03 2014

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder

Recent attention has been focused upon the petitions of Vietnam veterans to Military Department Boards for Correction of Military/Naval Records (BCM/NR) for the purposes of upgrading their discharges based on claims of previously unrecognized Post Traumatic Stress Disorder (PTSD). In these cases, PTSD was not recognized as a diagnosis at the time of service and, in many cases, diagnoses were not made until decades after service was completed. To help ensure consistency across the Services, this memorandum provides supplemental policy guidance for BCMR/NRs on these applications.

BCM/NRs will fully and carefully consider every petition based on PTSD brought by each veteran. This includes a comprehensive review of all materials and evidence provided by the petitioner. Quite often, however, the records of Service members who served before PTSD was recognized, including those who served in the Vietnam theater, do not contain substantive information concerning medical conditions in either Service treatment records or personnel records. It has therefore been extremely difficult to document conditions that form a basis for mitigation in punitive, administrative, or other legal actions or to establish a nexus between PTSD and the misconduct underlying the Service member's discharge with a characterization of service of under other than honorable conditions.

BCM/NRs are not courts, nor are they investigative agencies. To assist the BCM/NRs in the review of records and to ensure fidelity of the review protocol in these cases, the supplemental policy guidance which details medical considerations, mitigating factors, and procedures for review is provided (Attachment). This guidance is not intended to interfere with or impede the Boards' statutory independence to correct errors or remove injustices through the correction of military records.

This policy guidance, which is intended to ease the application process for veterans who are seeking redress and assist the Boards in reaching fair and consistent results in these difficult cases, shall be accompanied by a public messaging campaign by the Services throughout 2014 and 2015 that is targeted toward veterans groups and leverages existing relationships with the Department of Veterans Affairs.



OSD009883-1482

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days.

Thank you.



Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Personnel and Readiness
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment
Supplemental Guidance to Military Boards for Correction of Military/Naval Records
Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder

Medical Guidance

Liberal consideration will be given in petitions for changes in characterization of service to Service treatment record entries which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions.

Special consideration will be given to Department of Veterans Affairs (VA) determinations which document PTSD or PTSD-related conditions connected to military service.

In cases where Service records or any document from the period of service substantiate the existence of one or more symptoms of what is now recognized as PTSD or a PTSD-related condition during the time of service, liberal consideration will be given to finding that PTSD existed at the time of service.

Liberal consideration will also be given in cases where civilian providers confer diagnoses of PTSD or PTSD-related conditions, when case records contain narratives that support symptomatology at the time of service, or when any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct that caused the under other than honorable conditions characterization of service.

This guidance is not applicable to cases involving pre-existing conditions which are determined not to have been incurred or aggravated while in military service.

Consideration of Mitigating Factors

Conditions documented in the record that can reasonably be determined to have existed at the time of discharge will be considered to have existed at the time of discharge.

In cases in which PTSD or PTSD-related conditions may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.

Corrections Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a characterization of service of under other than

honorable conditions. Potentially mitigating evidence of the existence of undiagnosed combat-related PTSD or PTSD-related conditions as a causative factor in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct.

PTSD is not a likely cause of premeditated misconduct. Corrections Boards will also exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.

Procedures

1. Time limits to reconsider decisions will be liberally waived for applications covered by this guidance.
2. Cases covered by this guidance will receive timely consideration, consistent with statutory timeliness standards.
3. Boards for Correction of Military Records (BCMRs) may obtain advisory opinions from Department of Defense mental health care professionals or otherwise use Department of Defense mental health care professionals or physicians in their consideration of cases to advise them on assessing the presence of PTSD and its potentially mitigating effects relating to the misconduct that formed the basis for the under other than honorable characterization of service.
4. The outreach and messaging plan conditions executed by the Military Departments will include detailed information on the BCMR's guidelines and procedures for handling these cases.



PERSONNEL AND
READINESS

PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

FEB 24 2016

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

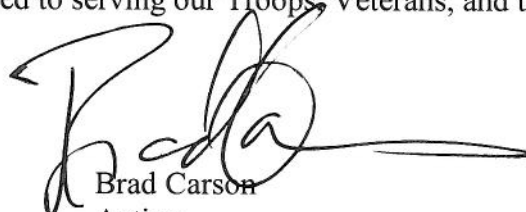
SUBJECT: Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)

On September 3, 2014, the Secretary of Defense issued Supplemental Guidance to Military Boards of Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD or related conditions, such as TBI. The Department has implemented this robust guidance in comprehensive and coordinated fashion, thereby easing the burden on Veterans seeking redress while simultaneously ensuring fair and consistent results in these difficult cases.

This guidance remains exceptionally important, and we must renew and re-double our efforts to ensure that all Veterans who have sacrificed so much in service to our great Nation receive all of the benefits that the Supplemental Guidance may afford. Accordingly, the BCMRs/BCNR will waive, if it is applicable and bars consideration of cases, the imposition of the statute of limitation. Fairness and equity demand, in cases of such magnitude, that a Veteran's petition receives full and fair review, even if brought outside of the time limit.

Similarly, cases considered previously, either by Discharge Review Boards, or by BCMRs or the BCNR, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

The Department remains committed to serving our Troops, Veterans, and their families, with justice, equity and compassion.



Brad Carson
Acting



OFFICE OF THE UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

AUG 25 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment

In December 2016, the Department announced a renewed effort to ensure veterans were aware of the opportunity to have their discharges and military records reviewed. As part of that effort, we noted the Department was currently reviewing our policies for the Boards for Correction of Military/Naval Records (BCM/NRs) and Discharge Review Boards (DRBs) and considering whether further guidance was needed. We also invited feedback from the public on our policies and how we could improve the discharge review process.

As a result of that feedback and our internal review, we have determined that clarifications are needed regarding mental health conditions, sexual assault, and sexual harassment. To resolve lingering questions and potential ambiguities, clarifying guidance is attached to this memorandum. This guidance is not intended to interfere with or impede the Boards' statutory independence. Through this guidance, however, there should be greater uniformity amongst the review boards and veterans will be better informed about how to achieve relief in these types of cases.

To be sure, the BCM/NRs and DRBs are tasked with tremendous responsibility and they perform their tasks with remarkable professionalism. Invisible wounds, however, are some of the most difficult cases they review and there are frequently limited records for the boards to consider, often through no fault of the veteran, in resolving appeals for relief. 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. This clarifying guidance ensures fair and consistent standards of review for veterans with mental health conditions, or who experienced sexual assault or sexual harassment regardless of when they served or in which Military Department they served.

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days. My point of contact is Lieutenant Colonel Reggie Yager, Office of Legal Policy, (703) 571-9301 or reggie.d.yager.mil@mail.mil.

A. M. Kurta

Performing the Duties of the Under Secretary of
Defense for Personnel and Readiness

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment

Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment

Generally

1. This document provides clarifying guidance to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault; or sexual harassment.
2. Requests for discharge relief typically involve four questions:
 - a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
 - b. Did that condition exist/ experience occur during military service?
 - c. Does that condition or experience actually excuse or mitigate the discharge?
 - d. Does that condition or experience outweigh the discharge?
3. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.
4. Evidence may come from sources other than a veteran's service record and may include records from the DoD Sexual Assault Prevention and Response Program (DD Form 2910, *Victim Reporting Preference Statement*) and/or DD Form 2911, *DoD Sexual Assault Forensic Examination [SAFE] Report*), law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, physicians, pregnancy tests, tests for sexually transmitted diseases, and statements from family members, friends, roommates, co-workers, fellow servicemembers, or clergy.
5. Evidence may also include changes in behavior; requests for transfer to another military duty assignment; deterioration in work performance; inability of the individual to conform their behavior to the expectations of a military environment; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; unexplained economic or social behavior changes; relationship issues; or sexual dysfunction.
6. Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.

7. The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.
8. Cases falling under this guidance will receive timely consideration consistent with statutory requirements.

Was there a condition or experience?

9. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge.
10. Evidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge.
11. A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.
12. Review Boards are not required to find that a crime of sexual assault or an incident of sexual harassment occurred in order to grant liberal consideration to a veteran that the experience happened during military service, was aggravated by military service, or that it excuses or mitigates the discharge.

Did it exist/occur during military service?

13. A diagnosis made by a licensed psychiatrist or psychologist that the condition existed during military service will receive liberal consideration.
14. A determination made by the Department of Veterans Affairs (VA) that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the Department of Defense, is persuasive evidence that the condition existed or experience occurred during military service.
15. Liberal consideration is not required for cases involving pre-existing conditions which are determined not to have been aggravated by military service.

Does the condition/experience excuse or mitigate the discharge?

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.
17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally

construed as warranting a change in narrative reason to “Secretarial Authority,” “Condition not a disability,” or another appropriate basis.

Does the condition/experience outweigh the discharge?

18. In some cases, the severity of misconduct may outweigh any mitigation from mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

19. Premeditated misconduct is not generally excused by mental health conditions, including PTSD; TBI; or by a sexual assault or sexual harassment experience. However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.

Additional Clarifications

20. Unless otherwise indicated, the term “discharge” includes the characterization, narrative reason, separation code, and re-enlistment code.

21. This guidance applies to both the BCM/NRs and DRBs.

22. The supplemental guidance provided by then-Secretary Hagel on September 3, 2014, as clarified in this guidance, also applies to both BCM/NRs and DRBs.

23. The guidance memorandum provided by then-Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness Brad Carson on February 24, 2016, applies in full to BCM/NRs but also applies to DRBs with regards to de novo reconsideration of petitions previously decided without the benefit of all applicable supplemental guidance.

24. These guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations.

25. Unless otherwise indicated, liberal consideration applies to applications based in whole or in part on matters related to diagnosed conditions, undiagnosed conditions, and misdiagnosed TBI or mental health conditions, including PTSD, as well as reported and unreported sexual assault and sexual harassment experiences asserted as justification or supporting rationale for discharge relief.

26. Liberal consideration includes but is not limited to the following concepts:

a. Some circumstances require greater leniency and excusal from normal evidentiary burdens.

b. It is unreasonable to expect the same level of proof for injustices committed years ago when TBI; mental health conditions, such as PTSD; and victimology were far less understood than they are today.

- c. It is unreasonable to expect the same level of proof for injustices committed years ago when there is now restricted reporting, heightened protections for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment than ever before.
- d. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported.
- e. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected.
- f. Reviews involving diagnosed, undiagnosed, or misdiagnosed TBI or mental health conditions, such as PTSD, or reported or unreported sexual assault or sexual harassment experiences should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.
- g. Veterans with mental health conditions, including PTSD; TBI; or who experienced sexual assault or sexual harassment may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran's life.
- h. An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.
- i. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case. For example, marijuana use is still unlawful in the military but it is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.
- j. Service members diagnosed with mental health conditions, including PTSD; TBI; or who reported sexual assault or sexual harassment receive heightened screening today to ensure the causal relationship of possible symptoms and discharge basis is fully considered, and characterization of service is appropriate. Veterans discharged under prior procedures, or before verifiable diagnosis, may not have suffered an error because the separation authority was unaware of their condition or experience at the time of discharge. However, when compared to similarly situated individuals under today's standards, they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care.
- k. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

visiting friends on the base, the applicant was informed that the HD was a mistake and that (s)he was being considered for discharge for using drugs.

#. On July 20, 1970, an ADB recommended a GD for drug abuse.

#. [Regulation R] in effect at the time, stated that a discharge was effective at 12:01 a.m. the date after discharge.

#. The applicant was properly discharged at 12:01 a.m. on July 11 and the 10:00 a.m. notification of the new discharge proceedings was improper.

#. [Include appropriate contentions from Section 12.1.2.]

#. The applicant's normal date of expiration of term of service was July 10, 1970.

#. The applicant had no lost time during his enlistment.

#. The applicant was held past his/her ETS to stand trial by court-martial on July 30, 1970.

#. The applicant was acquitted at this CM.

#. The applicant was forced to undergo an ADB on August 10, 1970, for the same charges for which (s)he was acquitted at the CM.

#. The ADB had no jurisdiction to award the applicant a less than honorable discharge because (s)he was beyond his/her ETS and could no longer be kept on active duty, the CM charges having been resolved.

12.10 PROPRIETY ISSUES CHECKLIST

12.10.1 INTRODUCTION

This checklist is designed to catalogue the most common propriety issues. It is not exhaustive. The basic regulation under which the client was discharged should also be reviewed to determine whether other errors could have occurred. The Army DRB has also published a checklist that corresponds to the current version of AR 635-200.⁵²⁹ If no propriety issues are detected, the applicant should concentrate on equity issues.

The checklist is broken down into three sections:

- Propriety issues arising out of common factual situations such as an illegal discharge based on urinalysis testing;
- More general propriety issues, such as a bad discharge as a result of a wrongful denial of a discharge for hardship; and
- Regulatory violations (this category generally tracks the post-1966 discharge process).

The checklist then gives a reference to the appropriate section of this chapter, to the relevant DRB Index category, and any other relevant chapter(s). The authors have tried to list the most logical DRB Index category; however, cases are frequently not indexed as a legally-trained person would expect.

12.10.2 CHECKLIST

12.10.2.1 Frequently Occurring Illegal Discharges

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS- REFERENCE
GD or UD based in whole or in part on urinalysis testing pre-July 1974.	§ 12.5.7.8.4	A01.22 ⁵³⁰	Ch. 15
GD or UD based on urinalysis testing or on voluntary admission to drug treatment program post-July 1974.		A01.30; A94.36	Ch. 15
Marine discharged for civilian conviction where servicemember was improperly permitted to waive ADB (1966-1975).	§ 12.5.5	A02.10	Ch. 17
Marines discharged by Marine Corps Reserve Forces, Hq., Kansas City, from 1966-1976 with an improper certification of the nonavailability of lawyer counsel.	§ 12.5.7.3, n. 145	A02.16	Ch. 17
Marine cases at Second Marine Aircraft Wing, Cherry Point, N.C., Jan.-June 1974.	§ 12.5.7.7		
Marine common errors:			
• Unauthorized delegation of authority to convene ADB.	§ 12.5, n. 129	A01.08	
• Unauthorized delegation of authority to excuse members.	§ 12.5, n. 137	A01.08	
• No notice could receive UD when waived ADB.	§§ 12.5.3; 12.5.5, n. 115	A01.02; A01.04	

⁵²⁹ ADRB SOP Annex H-2-1, 44 Fed. Reg. 25,076 (Apr. 27, 1979).

⁵³⁰ A01.22 includes both A01.21/22. Just the second numbers, indicating a positive finding, are listed to conserve space. See Ch. 10 *supra* (how to use the DRB Index).

CHALLENGING DISCHARGES FOR LEGAL ERRORS

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS- REFERENCE
• ADB finding must recommend retention or discharge, and if the latter, what type. • Improper advice CO will recommend HD or GD but UD resulted. • Civil conviction and no evidence in file; Marine is not going to appeal. • Lawyer counsel at ADB unless GCM authority certifies nonavailability of lawyer and states substitute's qualifications.	§ 12.5.7.10 § 12.5, n. 115 § 12.5.7, n. 147	A02.26 A02.10; A02.08 A61.04 A02.16	Ch. 17
Discharge from retraining unit too early, before rehabilitation possible.	§ 12.7.5		Ch. 22
Where GD for unsuitability, at ETS, or for not-for-cause reasons and ratings qualify member for HD.	§ 12.8.5	A03.00	Ch. 16

12.10.2.2 General Propriety Issues

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS- REFERENCE
Discharge based on conduct having no adverse effect on military service or while veteran was serving in the inactive reserves.	§ 12.4	A92.28	Ch. 14 (homosexuality); Chs. 16 & 17 (bad debts; civilian convictions)
Discharge based on preservice or prior service conduct.	§§ 12.5.7.8.3; 12.7.2.4	A01.12; A01.10	
Servicemember should never have been in or should have been separated for reasons other than cause:			Ch. 22
• Improper induction/enlistment. • Medical discharge. • Conscientious objector discharge or non-combatant status. • Hardship discharge or compassionate reassignment. • Improper transfer from National Guard. • Improper activation of reservist. • Too young to enlist. • Recruiter conduct.	§ 12.6.3.3 § 12.6.2.3 § 12.6.2.1 § 12.6.2.2 § 12.9.5 § 12.6.3.2 § 12.6.3.4 § 12.6.3.5	A06.00; A09.00; A99.05; A99.08 A28.00; A31.00; A93.22 A23.00; A93.26; A99.02; A99.44 A35.00; A93.08; A99.04; A99.12 A34.00 A09.00; A92.28; A62.05	
Disciplinary actions in record improper:	§ 12.7	A01.32	
• Reprimands or admonitions. • Article 15 or nonjudicial punishment:	§ 12.8.3 § 12.7.2	125.03 (BCMR) 126.00; 126.01; 126.02; 126.04 (BCMR)	
(i) Not a U.C.M.J. offense. (ii) Appeal not referred to JAG. (iii) Remote or from another enlistment. (iv) Army Cases (1963-1971) where two years from date of punishment expired or servicemember transferred and one year from punishment had passed. (v) Army cases (1971-present) when two years from date of punishment have passed;	§ 12.7.2.2 § 12.7.2.3 § 12.7.2.4 § 12.7.2.4	A03.06	Ch. 17
• Courts-martial. • Improperly recorded lost time.	§ 12.7.2.4 § 12.7.5		Chs. 4, 20
Improper performance ratings:	§ 12.8	A01.20; A92.02	

CHALLENGING DISCHARGES FOR LEGAL ERRORS

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS- REFERENCE
• Mathematical error.	§ 12.8.3	A01.20	
• No explanation for poor rating or failure to permit comment or rebuttal.	§ 12.8.1, nn. 486 & 489	A01.20	
• Rating given at a time not required by regulation.	§ 12.8.1, n. 485	A01.20	
• Rating motivated by irrelevant matters or not a numerical rating permitted by regulation or supported by misconduct required by regulation.	§ 12.8.1, nn. 487, 488 & 490	A01.20	
• Rating given while member worked outside his/her occupational speciality.	§ 12.8.1, n. 488	A01.20	
Administration process used to avoid court-martial:	§ 12.9	A94.12	Ch. 22
• ADB followed CM where no discharge awarded.	§ 12.9.3, n. 487	A94.12	
• ADB followed CM where acquittal of some or all charges occurred.	§ 12.9.3, n. 488	A94.12	
• Multiple ADBs.	§ 12.9.3, n. 489	A94.12	
• Improper confessions.	§ 12.9.4	A01.22	
Discharge after ETS or after constructive discharge.	§ 12.9.6		

12.10.2.3 Regulatory Errors

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS- REFERENCE
Counseling and rehabilitative efforts:	§ 12.5.2	A24.02; A24.06. <i>See also</i> listings under each reason for discharge.	Ch. 22
• Rehabilitative transfer improperly waived or inadequate.	§ 12.5.2, nn. 84, 86 & 87	A24.02; A24.04	
• Failure to counsel regarding deficiencies.	§ 12.5.2, n. 81	A24.02; A24.04	
• Failure to give adequate opportunity to improve.	§ 12.5.2, nn. 82, 83 & 85	A24.02; A24.04	
Improper notice of discharge proceedings:	§§ 12.5.3; 12.5.5	A01.02; A01.04	
• Basis.	§ 12.5.3, nn. 91, 94 & 96	A01.02; A01.04	
• Rights.	§ 12.5.3, n. 92	A01.02; A01.04	
• Method.	§ 12.5.3, n. 91	A01.02; A01.04	
• Timing.	§ 12.5.3, nn. 92 & 93	A01.02; A01.04	
• Too vague or general.	§ 12.5.3, nn. 95, 96 & 97	A01.02; A01.04	
• Type discharge recommended.	§ 12.5.5, n. 50	A01.02; A01.04	
Medical and/or psychiatric examination not properly completed:	§ 12.5.4	A01.06; A40.06; A40.08; A42.02; A46.06. <i>See also</i> listings under each reason for discharge.	
• By a nonpsychiatrist or nonphysician.	§ 12.5.4, n. 105	A01.06	Ch. 16 (unsuitability)
• When medical problems existed.	§ 12.5.4, nn. 101 & 108-111; § 12.6.2.3		
• Not conducted or too remote.	§ 12.5.4, nn. 102 & 103	A01.06	
• Not sent to DA.	§ 12.5.4, n. 104		
• Improper findings.	§ 12.5.4, n. 106	A01.06	
• Homosexuality.	§ 12.5.4, n. 107	A57.06	Ch. 14

CHALLENGING DISCHARGES FOR LEGAL ERRORS

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS- REFERENCE
Waiver of rights:	§ 12.5.5	A02.10	
• Attempted withdrawal.	§ 12.5.5, n. 122	A02.30	
• Coerced or not intelligent waiver.	§ 12.5.5, nn. 112, 113 & 118-121; § 12.5.10	A02.10	
• For another type of reason for discharge.	§ 12.5.5, nn. 114 & 115	A02.10	
• Based on misadvice of rights or inadequate counsel	§ 12.5, nn. 116, 117 & 121	A02.08; A02.06; A02.04; A02.12; A02.18	
• No waiver or waiver not permitted (Marine civil conviction cases 1966-1975).	§ 12.5.5	A02.10	
• Inadequate time to decide.	§ 12.5.5, n. 121	A02.10	
• Failure of DA to consider servicemember's statement.	§ 12.5.5		
Commanding officer's report:	§ 12.5.6	A01.02. See also listings under each reason for discharge.	
• Improper contents (arrests without convictions, improper conduct ratings, etc.)	§ 12.5.6, nn. 125 & 127; § 12.8 (performance ratings)	A01.20; A01.32	
• Omits favorable information (medals, prior service, mitigating medical report, etc.).	§ 12.5.6, n. 124	A02.02	
• Preservice or prior service conduct or evidence of acquittals.	§ 12.5.6, nn. 125 & 126	A01.10; A01.12	
• No clear reason for discharge or not explanation why not for another reason.	§ 12.5.6, n. 128	A01.14	
Discharge Board Procedures:	§ 12.5.7		
• Properly convened.	§ 12.5.7.1, n. 129	A01.08	
• Proper members.	§ 12.5.7.2, nn. 136-138	A02.14	
• Multiple minor errors.	§ 12.5.7.1, n. 134		
• Legal advisor biased or recorder previously represented servicemember.	§ 12.5.7.2, nn. 139 & 140		
• Improper or inadequate counsel:	§ 12.5.7.3	A02.16	
(i) Post-1965 in cases where UD could be issued, a lawyer required.	§ 12.5.7.3, n. 141	A02.16	
(ii) No counsel.	§ 12.5.7.3, n. 143	A02.16	
(iii) No time to consult.	§ 12.5.7.3, n. 144		
(iv) Failure to certify and state reason for, by proper authority, nonavailability of lawyer where nonlawyer used, and give qualifications for nonlawyer (post-1965).	§ 12.5.7.3, nn. 141 & 145-148	A02.16	
(v) Ineffective or unqualified counsel.	§ 12.5.7.3, nn. 150, 151	A02.18	
• Inadequate notice of hearing date, time to prepare or interview witnesses.	§ 12.5.7.4, n. 153		
• Burden and standard of proof improper.	§ 12.5.7.5-.6		
• Improper command influence or interference.	§ 12.5.7.7	A02.22	
• Evidence at ADB:	§ 12.5.7.8		
(i) Hearsay and lack of opportunity to question witnesses (use of written statements, failure to call witnesses requested by servicemember, etc.).	§ 12.5.7.8.2	A02.20; A01.26; A01.28	
(ii) Irrelevant but damaging evidence (psychiatric statements preservice or prior-service conduct arrest without conviction, etc.).	§ 12.5.7.8.3	A01.32; A01.10; A01.12	
(iii) Illegally obtained evidence (searches, con-	§ 12.5.7.8.4;	A01.24;	Ch. 15 (drugs)

CHALLENGING DISCHARGES FOR LEGAL ERRORS

ISSUE	CHAPTER 12 REFERENCE	INDEX CATEGORY	CROSS- REFERENCE
fessions, compelled urinalysis).	12.9.4	A01.22	
(iv) Psychiatric exam as basis for unsuitability discharge with no Art. 31 warnings.	§ 12.5.7.8.4	A01.22	Ch. 16
(v) Evidence of an offense for which servicemember had been acquitted previously or where it was heard by another ADB.	§§ 12.5.7.8.5; 12.9.3	A01.32	
(vi) ADB finding unsupported by the evidence of record.	§ 12.5.7.10	A02.26	
• No ADB finding why better discharge <i>not</i> appropriate.	§ 12.5.7.10, nn. 213 & 214		
Legal review contains additional adverse matters, misstatements, or omits favorable information:	§§ 12.5.7.9; 12.5.8	A01.18	
• Legal review omitted after an ADB hearing.	§ 12.5.8, n. 218	A01.18	
Discharge Authority's Action:	§ 12.5.9	A01.08	
• More severe than ADB recommendation, or based on subsequent misconduct.		A02.28; A01.32	
• Improperly referred to the new ADB.	§§ 12.5.9; 12.5.7.8.5; 12.9.3		
• UD directed by officer without general court-martial convening authority (usually must be a general, full colonel, or Navy captain) or improperly delegated.	§ 12.5.9, nn. 223, 225 & 226	A01.08	
• Improper vacation of suspended discharge.	§§ 12.5.9; 12.9.3 n. 515	A02.32	
Discharge in lieu of court-martial ("good of service"):	§ 12.5.10		Ch. 19
• Court-martial could not have given a punitive discharge.	§ 12.5.10, nn. 240-243	A70.04	
• Was legally impossible.	§ 12.5.10, nn. 230 & 231	A70.14; A70.16	
• Request resulted from mass counseling in stockade.	§ 12.5.10, n. 228		
• Not intelligently made or a result of duress.	§ 12.5.10, nn. 229 & 234-238	A70.12	
• Without counsel.	§ 12.5.10, n. 232	A70.08	
• Prior to preferral of charges.	§ 12.5.10, n. 233	A70.02	
• Withdrawal or request denied.	§ 12.5.5, n. 122	A70.10	

reason why this Court should consider it now. “Arguments that are not raised before an administrative agency cannot be raised, for the first time, to the reviewing court.” *Stephens v. Dep’t of Labor*, 571 F.Supp.2d 186, 190 n. 4 (D.D.C.2008) (citing *United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242, 1244–45 (D.C.Cir.1997)).

[19] Plaintiff, moreover, readily concedes that “the administrative agency and this court have applied a preponderance-of-the-evidence standard [in debarment proceedings],” Pl. Reply at 23, and notes that “there are no debarment cases in which the clear and convincing evidence [standard] has been applied.” *Id.* at 23 n. 9. “Given the paucity of authority for [Plaintiff’s] position, this Court will follow other debarment cases which have held that debarment need only be supported by a preponderance of the evidence.” *Textor v. Cheney*, 757 F.Supp. 51, 57 n. 4 (D.D.C. 1991). Plaintiff has failed to demonstrate that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law for the ALJ to use a preponderance-of-the-evidence standard. Defendants are thus entitled to summary judgment on this claim as well.

3. *Illegal Search and Seizure*

Count II of Plaintiff’s Complaint alleges that Defendants violated his Fourth Amendment rights to be secure against unreasonable searches and seizures when the University searched his premises and computer during its 2002 investigation. Compl., ¶¶ 66–72. Defendants argue that they are entitled to summary judgment on this count because the University, not Defendants, conducted the search, and, in any event, the search was reasonable. Plaintiff offers no opposition to this argument, nor does he address how such a claim could proceed where the University is not

even a party to this lawsuit. The Court thus finds that Plaintiff has also abandoned Count II, thereby entitling Defendant to summary judgment here as well.

IV. Conclusion

Because the ALJ did not act in an arbitrary and capricious manner, and considered all of the relevant evidence, he did not err in debarring Plaintiff for seven years. The Court will therefore grant Defendants’ Motion and deny Plaintiff’s Motion. A separate Order consistent with this Opinion will issue on this day.



Neil C. WILHELMUS, Plaintiff,

v.

Pete GEREN, Defendant.

Civil Action No. 09–662 (JEB).

United States District Court,
District of Columbia.

July 13, 2011.

Background: Former cadet at the United States Military Academy who was disenrolled because of his repeated failures on the mandatory Cadet Physical Fitness Test brought action seeking review of decision of Army Board for the Correction of Military Records (ABCMR), which upheld the Army’s determination that he owed the government \$137,630 for failing to fulfill his contractual obligations.

Holdings: The District Court, James E. Boasberg, J., held that:

(1) proper standard of review was the arbitrary and capricious standard, and

(2) ABCMR failed adequately to distinguish its own precedent.

Remanded.

1. Armed Services ⇌16

In action by former cadet at the United States Military Academy who was disenrolled because of his repeated failures on the mandatory Cadet Physical Fitness Test, seeking review of decision of Army Board for the Correction of Military Records (ABCMR) upholding the Army's determination that he owed the government \$137,630 for failing to fulfill his contractual obligations, the proper standard of review was the arbitrary and capricious standard set forth in the Administrative Procedure Act (APA), rather than a more deferential standard. 5 U.S.C.A. § 706(2)(A).

2. Administrative Law and Procedure ⇌502

A fundamental norm of administrative procedure requires an agency to treat like cases alike, and an agency must provide an adequate explanation to justify treating similarly situated parties differently.

3. Administrative Law and Procedure ⇌502

Like a court, normally, an agency must adhere to its precedents in adjudicating cases before it.

4. Armed Services ⇌16

Army Board for the Correction of Military Records (ABCMR), in its decision upholding Army's determination that former cadet at United States Military Academy who was disenrolled because of his repeated failures on mandatory Cadet Physical Fitness Test (CPFT) owed government \$137,630 for failing to fulfill his contractual obligations, failed adequately to distinguish its own precedent, a prior case in which, on similar facts, it had recommended correction of applicant's record

to disallow recoupment of tuition fees because it found that his repeated failure of the CPFT was not due to a volitional act or misconduct, and thus, meaningful review by district court was impossible, and remand was required for ABCMR to consider the applicability of the prior case in reaching its decision. 10 U.S.C.A. § 1552(a).

5. Armed Services ⇌5(7)

Even if the Army Board for the Correction of Military Records (ABCMR) is not required to distinguish every similar prior decision, the need to consider relevant precedent becomes especially acute when a plaintiff has pointed to a specific prior decision as very similar to his own situation; in such cases, the ABCMR may not simply ignore such precedent for the sake of expediency.

Raymond J. Toney, The Law Office of Raymond J. Toney, Woodland, CA, David Patrick Sheldon, Law Office of David P. Sheldon, Washington, DC, for Plaintiff.

Kelly Lynell McGovern, Tyler James Wood, U.S. Attorney Office for District of Columbia, Washington, DC, for Defendant.

MEMORANDUM OPINION

JAMES E. BOASBERG, District Judge.

Plaintiff Neil Wilhelmus was a cadet at the United States Military Academy. He struggled throughout his time there with the mandatory Cadet Physical Fitness Test and was eventually disenrolled because of his repeated failures on this test. After being separated from the Academy, the Army determined that he owed the government \$137,630 for failing to fulfill his contractual obligations. He appealed to the Army Board for the Correction of

Military Records (ABCMR), which upheld the Army's decision. He now turns to this Court. Because the ABCMR did not adequately consider its precedents, the Court will remand the matter.

I. Background

On June 30, 1997, Plaintiff entered the Academy and signed an oath of allegiance and a cadet contract. Mot. at 2; Compl., ¶ 12. This contract read, in relevant part: “[I]f I voluntarily fail . . . to complete the period of active duty specified [above], I will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided me as the unserved portion of active duty bears to the total period of active duty I have agreed to serve.” Agreement to Serve, ¶ II f, *quoted in* ABCMR Record at 9. Not a natural athlete, Plaintiff struggled with the mandatory Cadet Physical Fitness Test (CPFT) while at the Academy and was placed on the list of cadets who had repeatedly failed the CPFT by the fall of his sophomore year. Compl., ¶ 15. He failed the running portion of the CPFT on three occasions between December 1998 and May 1999, as well as the sit-up portion of the last test. ABCMR Record at 10–11. In April 1999, his scheduled attendance at the Airborne School was canceled because of his inability to pass the CPFT, and he was advised that he would be recommended for separation if he did not pass the next test. Compl., ¶¶ 16–17. In response, Plaintiff wrote to his superiors to explain the reasons for his failures, citing several injuries, and to request additional time to pass the CPFT. ABCMR Record at 11–12. He was given a physical examination at the Academy on June 22, 1999, and found to be in “excellent health/condition and fit for duty.” *Id.* at 12. The Army then initiated separation paperwork on June 24, 1999, to disenroll Plaintiff from the Academy. Compl., ¶ 19.

This separation was halted when Plaintiff passed the CPFT in August 1999. *Id.*, ¶ 22. On February 22, 2000, Plaintiff received a limited-duty medical excusal for a week due to an ingrown toenail. ABCMR Record at 12–13. On April 3, Plaintiff once again was placed on a no-running profile with a knee injury. *Id.* at 13. Although he was found fit for duty two weeks later, he subsequently failed the May 5 CPFT, this time falling short in both the push-ups and running portions of the test. *Id.* Because of an ingrown toenail, he could not take the retests scheduled between late May and mid-September 2000. Compl., ¶ 25. On October 13, 2000, Plaintiff met with a counselor regarding his physical fitness performance. ABCMR Record at 14. He was informed that he would be recommended for separation once again should he fail the retests. *Id.* He took the CPFT in October 27, 2000, and did not pass either the push-ups or running portion. *Id.* In response, the Army initiated disenrollment proceedings. Compl., ¶ 27. In January 2001, Plaintiff was examined for lower back pain and once again given a limited medical excusal. ABCMR Record at 15.

In April 2001, Plaintiff was disenrolled from the Academy. Compl., ¶ 31. His separation from the Army was finalized two years later, on April 28, 2003, when he was honorably discharged. *Id.*, ¶ 6; ABCMR Record at 16. After Plaintiff left the Academy, the Army determined that he owed the government \$137,630 for his failure to fulfill his contractual obligations. Compl., ¶ 37. Plaintiff has thus far repaid \$6,000 through wage and federal income tax garnishment. *Id.*, ¶ 39. Plaintiff subsequently requested that the ABCMR correct his records to show that he did not owe this debt to the government. *Id.*, ¶ 40. On July 26, 2007, the ABCMR denied his petition. See ABCMR Record.

This decision is what the present suit asks the Court to overturn.¹

II. Legal Standard

Summary judgment may be granted if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a); *see also* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C.Cir.2006). The mere existence of a factual dispute, by itself, is insufficient to bar summary judgment. *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505. To be material, the factual assertion must be capable of affecting the substantive outcome of the litigation; to be genuine, the issue must be supported by sufficient admissible evidence that a reasonable trier of fact could find for the non-moving party. *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C.Cir.1987); *Liberty Lobby*, 477 U.S. at 251–52, 106 S.Ct. 2505 (holding that the court must determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law”).

Although styled Motions for Summary Judgment, the pleadings in this case more accurately seek the Court’s review of an administrative decision. The standard set forth in Rule 56(c), therefore, does not apply because of the limited role of a court in reviewing the administrative record. *See* *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 89–90 (D.D.C.2006) (citing *National Wilderness Inst. v. United States Army Corps of Eng’rs*, 2005 WL 691775, at

*7 (D.D.C.2005); *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 105 (D.D.C.1995), *amended on other grounds*, 967 F.Supp. 6 (D.D.C.1997)). “[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Id.* (internal citations omitted). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review. *See* *Richards v. INS*, 554 F.2d 1173, 1177 & n. 28 (D.C.Cir.1977), *cited in* *Bloch v. Powell*, 227 F.Supp.2d 25, 31 (D.D.C.2002), *aff’d*, 348 F.3d 1060 (D.C.Cir.2003).

The Administrative Procedure Act “sets forth the full extent of judicial authority to review executive agency action for procedural correctness.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct. 1800, 1810, 173 L.Ed.2d 738 (2009). It requires courts to “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This is a “narrow” standard of review as courts defer to the agency’s expertise. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). An agency is required to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.* (internal quotation omitted). The reviewing court “is not to substitute its judgment for that of the agency,” *id.*,

1. In considering the parties’ competing Motions, the Court has reviewed the Administrative Record, Defendant’s Motion for Summary Judgment, Plaintiff’s Cross-Motion and Opposition to Defendant’s Summary Judgment, De-

fendant’s Reply and Opposition to Plaintiff’s Cross-Motion, and Plaintiff’s Reply. As the Court does not reach the issue of voluntariness, it has not considered the supplemental briefing on this issue.

and thus “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 285–86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974) (internal quotation omitted). Nevertheless, a decision that is not fully explained may be upheld “if the agency’s path may reasonably be discerned.” *Id.* at 286, 95 S.Ct. 438. The court should focus its review on the “administrative record already in existence, not some new record made initially in the reviewing court.” *See Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

III. Analysis

Plaintiff maintains that the ABCMR acted arbitrarily and capriciously when it affirmed the Army’s decision to seek recoupment of more than \$130,000 from him for failing to complete his obligations to the Army. He argues principally that the Board unlawfully ignored precedent, that it mistakenly concluded that his CPFT failures were voluntary, and that justice requires reversal of its decision. Because the Court agrees that the Board did not sufficiently distinguish its precedent, it need not at this time address the other issues.

A. Standard of Review

[1] Before turning to a discussion of precedent, it is necessary to resolve the parties’ dispute over the applicable standard of review. By statute, the Secretary of the Army “may correct any military record of [his] department when [he] considers it necessary to correct an error or remove an injustice.” 10 U.S.C. § 1552(a)(1). This review is done through the ABCMR. Federal courts review final decisions made by the ABCMR under the APA. *Baker v. Dep’t of Army*, 1998 WL

389097, at *1 (D.C.Cir.1998) (“The district court has jurisdiction to review the ABCMR’s refusal to correct military records, unless the claim is in essence one for monetary relief, which it was not in this instance.”); *see also Kidwell v. Dep’t of the Army, Bd. for Correction of Military Records*, 56 F.3d 279, 283–84 (D.C.Cir.1995).

Considering the wide latitude granted to the Secretary by Congress, this Circuit has found that decisions by the ABCMR receive the benefit of an “unusually deferential application of the ‘arbitrary or capricious’ standard”:

[T]he question whether a particular action is arbitrary or capricious must turn on the extent to which the relevant statute . . . constrains agency action. While the broad grant of discretion implicated here does not entirely foreclose review of the Secretary’s action, the way in which the statute frames the issue for review does substantially restrict the authority of the reviewing court to upset the Secretary’s determination. It is simply more difficult to say that the Secretary has acted arbitrarily if he is authorized to act “when he considers it necessary to correct an error or remove an injustice,” 10 U.S.C. § 1552(a), than it is if he is required to act whenever a court determines that certain objective conditions are met, i.e., that there has been an error or injustice.

Kreis v. Sec’y of Air Force, 866 F.2d 1508, 1514 (D.C.Cir.1989) (emphasis in original) (*Kreis I*). This does not mean that the ABCMR’s decision cannot be reviewed by federal courts, but rather that “only the most egregious decisions may be prevented under such a deferential standard of review.” *Id.* at 1515.

Plaintiff argues that this “unusually deferential” standard of review is inappropriate in this case because he has raised “non-frivolous claims of plain legal error

involving the Army's failure to comply with statutes, regulations, and mandatory procedures." Pl. Cross-Mot. at 12. Defendant, seemingly misconstruing Plaintiff's argument, responds that the Court should apply the arbitrary and capricious standard in this case. Def. Reply at 3-5. This is indeed what Plaintiff himself has requested—that the traditional APA standard be used instead of the "unusually deferential" standard established in *Kreis I*. Both sides thus agree that the traditional APA standard should be used.

This accords with the law in this Circuit, which differentiates between "military judgment requiring military expertise," which should be reviewed under the "unusually deferential" standard, and "review of the Board's application of a procedural regulation governing its case adjudication process," which is reviewed under the traditional arbitrary and capricious APA standard. *Kreis v. Sec'y of Air Force*, 406 F.3d 684, 686 (D.C.Cir.2005) (*Kreis III*). As the claims here raise issues of procedural fairness, the traditional APA standard applies.

B. Precedent

[2-4] Plaintiff argues that the ABCMR's decision in his case was arbitrary and capricious because the Board did not properly distinguish relevant precedent. Compl., ¶¶ 47-62. Defendant first responds that the ABCMR is not bound by precedent because it is a board of equity. Def. Mot. at 16-17. Defendant has not cited a single case in support of this novel legal argument. On the contrary, in this Circuit, "[i]t is axiomatic that '[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.'" *Kreis III*, 406 F.3d at 687 (quoting *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C.Cir.1996)). Indeed, a "fundamental

norm of administrative procedure requires an agency to treat like cases alike," *Westar Energy, Inc. v. Federal Energy Regulatory Com'n*, 473 F.3d 1239, 1241 (D.C.Cir. 2007), and an agency "must provide an adequate explanation to justify treating similarly situated parties differently." *Burlington Northern and Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C.Cir.2005). This is not to say that the broad discretion afforded to the ABCMR, as discussed above, does not also grant it significant flexibility in judging the respective merits of each application for review. Nonetheless, "[l]ike a court, '[n]ormally, an agency must adhere to its precedents in adjudicating cases before it.'" *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1120 (D.C.Cir.2010) (quoting *Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d 316, 323 (D.C.Cir.2003)).

[5] Even if the ABCMR is not required to distinguish every similar prior decision, the need to consider relevant precedent becomes especially acute when a plaintiff has pointed to a specific prior decision as very similar to his own situation. In such cases, the Board may not simply ignore such precedent for the sake of expediency. To do so would leave open the possibility that two identical cases would be decided differently. Nothing could be more arbitrary or capricious. See *Etelson v. Office of Personnel Management*, 684 F.2d 918, 926 (D.C.Cir.1982) ("Government is at its most arbitrary when it treats similarly situated people differently."); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dept. of Health and Human Serv.*, 300 F.Supp.2d 32, 42 (D.D.C.2004) ("[I]f an agency treats similarly situated parties differently, its action is arbitrary and capricious in violation of the APA.") (internal citation omitted).

Here, Plaintiff points to the ABCMR's 2004 review of case AR200309457. In that case, the applicant had also struggled with the CPFT throughout his time at the Academy, and though he narrowly passed a few of the tests with the help of remedial training, he eventually failed enough of them to face separation. Administrative Record at 232–47 (ABCMR Record Case AR 2003094057). He was ultimately disenrolled a few months before graduation, and the Army moved to recoup more than \$120,000 in tuition fees from him. *Id.* The Board there recommended correction of the applicant's record to disallow recoupment because it found that his repeated failure of the CPFT was “not due to a volitional act or misconduct.” *Id.* at 247.

While acknowledging this prior case's existence, the Board here entirely failed to distinguish it or to justify why the outcome in this case was different. Indeed, its only response to Plaintiff's reliance on the previous case was that: 1) “The ABCMR reviews each case individually and is presented before the Board based on its own merit and evidence,” 2) “There are no cases that set the standards on how the Board should always vote,” and 3) “The decision in ABCMR Docket Number AR200309457 . . . was not a unanimous decision to grant relief.” ABCMR Record at 21–22. None of these bases, singly or in concert, is sufficient.

The first two grounds are simple conclusory statements and have no particular application to this case or the earlier one. As for the third, this is no basis to undercut the validity of the prior decision. A split decision of any appellate court is no less valid than a unanimous one. *See, e.g., Paper Converting Machine Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 26 (Fed.Cir. 1984) (“Regardless of the reasonableness of the alternative interpretation . . . , we are bound by the Supreme Court's deci-

sion. No greater prerogative to modify it accrues to us from a 5–4 vote than from a unanimous decision.”). In such an instance, the Court cannot uphold the Board's determination. *See Kreis III*, 406 F.3d at 686–87 (finding that “the court must uphold the Board's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and that it is was “arbitrary and capricious because it is . . . an unexplained departure from its precedent”) (internal quotation omitted).

The Board may find on reconsideration after remand that the decision in AR200309457 is distinguishable from Plaintiff's case. Indeed, several of the arguments put forth by Defendant in his Reply may ultimately prove persuasive. Yet that is not for this Court to decide. As Plaintiff correctly points out, Defendant cannot retroactively justify the Board's decision. Pl. Reply at 8–9. Neither may this Court, even if it were convinced by Defendant's arguments, “substitute its judgment for that of the agency,” *Motor Vehicle*, 463 U.S. at 43, 103 S.Ct. 2856.

Given the Board's failure to distinguish precedent, the Court must decide whether “the agency's path may reasonably be discerned,” *Bowman*, 419 U.S. at 286, 95 S.Ct. 438, based on the administrative record it created. *Camp*, 411 U.S. at 142, 93 S.Ct. 1241. Though an agency's decision need not be “a model of analytic precision to survive a challenge,” its “explanation must minimally contain a rational connection between the facts found and the choice made.” *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404 (D.C.Cir.1995). This is certainly not a case in which “an agency merely parrots the language of a statute without providing an account of how it reached its results.” *Id.* at 1405. Indeed, the Board's 23–page decision carefully considers many of the factual and

legal issues at play in this case. Nevertheless, it is “impossible to discern the Board’s ‘path’” on this point, *id.*, where it has not indicated why it chose to deny Plaintiff’s request, but grant the one in AR200309457. As the *Dickson* Court so aptly put it, “To conduct even a limited review, we must be made privy to the Board’s reasoning.” *Id.* at 1406 n. 17. This case is, accordingly, remanded to the Board so that it may consider the applicability of case AR200309457 in reaching its decision here. *See, e.g., Kendall v. Army Bd. for Correction of Military Records*, 996 F.2d 362 (D.C.Cir.1993) (remanding case to District Court to remand to ABCMR to reconsider its interest of justice determination).

A separate Order consistent with this Opinion will be issued on this day.

SO ORDERED.



Cathryn Jeanne BONNETTE, Plaintiff,

v.

**DISTRICT OF COLUMBIA COURT
OF APPEALS, et al.,
Defendants.**

Civil Action No. 11-1053 (CKK).

United States District Court,
District of Columbia.

July 13, 2011.

Background: Legally blind law school graduate brought action under the Americans with Disabilities Act (ADA) against federal appellate court and vendor of bar exam testing materials, seeking an order allowing her to take her bar exam using a

computer equipped with an accessible screen-reading program commonly used by individuals with visual impairments. Graduate moved for a preliminary injunction, court moved for summary judgment, and vendor moved to dismiss or for summary judgment.

Holdings: The District Court, Colleen Kollar-Kotelly, J., held that:

- (1) court was a “person” subject to examination provision of the ADA;
- (2) vendor “offered” multistate bar exam within meaning of examination provision of the ADA;
- (3) implementing regulation for examination provision of the ADA was entitled to deference;
- (4) genuine issue of material fact existed as to whether defendants fulfilled their obligation to offer the exam in an accessible manner, precluding summary judgment;
- (5) graduate had substantial likelihood of success on merits of her claim;
- (6) graduate would likely suffer irreparable harm in absence of the injunction; and
- (7) balance of hardships and public interest favored issuance of the preliminary injunction.

Graduate’s motion granted and defendants’ motions denied.

1. Injunction ¶132, 138.18

A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

2. Injunction ¶138.1

A plaintiff seeking a preliminary injunction must establish: (1) that she is likely to succeed on the merits; (2) that she is likely to suffer irreparable harm in the