



## Understanding Discharge Upgrades

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

1

---

---

---

---

---

---

---



### Recorded Webinar Intro Notes

- We have embedded three verification codes in this webinar. When you see a slide with a code, write it down.
- If you would like a certificate of attendance for viewing the recording of this webinar, after you finish viewing the recording, submit these three verification codes to NVLSP on the same page that you viewed this webinar or email them to [webinars@nvlp.org](mailto:webinars@nvlp.org)
- If you have any questions, please contact us at [webinars@nvlp.org](mailto:webinars@nvlp.org) or 202-621-5673

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

2

---

---

---

---

---

---

---



### Presenter Abigail Reynolds



- NVLSP Staff Attorney with Lawyers Serving Warriors
- Mentors and advises attorneys representing veterans before the DRBs and BCMRs and the BVA
- Veterans Benefits Manual Author

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

3

---

---

---

---

---

---

---

# Presenter

## Amy Fulmer

# Training Overview

- Military Discharges
- Discharge Upgrades
  - DRBs
  - BCMRs / BCNR
- Preparing a Successful Discharge Upgrade Application
- Options After a Denial
- VA Character of Discharge Determinations

---

---

---

---

---

---

---

---

---

---


**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM

# Military Discharges



© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

6

## Characterizations of Service



- **Administrative**
  - Honorable
  - **General (Under Honorable Conditions)**
  - **Under Other Than Honorable Conditions (OTH)**
  - **Uncharacterized**
- **Punitive (only through a court-martial)**
  - **Bad Conduct**
  - **Dishonorable/Dismissal**

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

7

## Characterizations of Service



Characterization	Description (DOD Instruction 1332.14, Enlisted Administrative Separations, Encl. 4)
Honorable	<ul style="list-style-type: none"> <li>• Quality of service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate</li> </ul>
General (Under Honorable Conditions)	<ul style="list-style-type: none"> <li>• When service has been honest and faithful</li> <li>• Significant negative aspects of conduct or performance of duty outweigh positive aspects</li> </ul>
Under Other Than Honorable Conditions (OTH)	<ul style="list-style-type: none"> <li>• Separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of service members</li> <li>• Separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected of service members</li> </ul>

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

8

## Narrative Reason for Separation



- A brief statement about the reason for the service member's discharge from active duty
- Examples include:
  - **Completion of Required Active Service**
  - **Misconduct**
    - Pattern of Misconduct; Drug Abuse; Commission of a Serious Offense; Civilian Conviction
  - **In Lieu of Trial By Court Martial**
  - **Condition, Not a Disability**
  - **Personality Disorder**
  - **Homosexuality**

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

9

# Important DD-214 Information

# Impacts of Characterization of Service

- A less than fully honorable discharge can:
  - Prevent Veteran from accessing benefits
  - Hurt employment opportunities
  - Damage reputation and self-esteem

# Impacts of Characterization of Service



**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM

## Vets with OTH May Still Receive Healthcare from VA



- A Vet who has an OTH discharge due to a regulatory bar under 38 C.F.R. § 3.12(d) retains eligibility for VA healthcare benefits for service-incurred or service-aggravated disabilities
- Treatment for mental health conditions may be provided under VA's tentative eligibility authority (38 C.F.R. § 17.34) to an individual with an OTH discharge who presents to VA seeking mental health care in emergency circumstances for a condition the former servicemember asserts is related to military service

© 2025 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

13

## Discharge Upgrades



© 2025 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

14

## What is a Discharge Upgrade?



- Change the characterization of service
  - For example, upgrade from "Other Than Honorable" to "Honorable"
- Change the narrative reason for separation to something less stigmatizing
  - For example, change from "Misconduct" to "Secretarial Authority"

© 2025 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org

15


**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM

# Where to Apply

- Applications for a discharge upgrade are submitted to a board w/in Vet's service branch
  - Marine Corps Vets apply to Navy boards
- Each service branch has two boards:
  - Discharge Review Board (DRB)
  - Board for Correction of Military (or Naval) Records (BCMR/BCNR)
- Coast Guard boards are located within the Dep't of Homeland Security

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

16


**NVLSP**  
 National Veterans Legal Services Program

# Time Limits for Filing

- **Discharge Review Boards (DRB):**
  - **Statute of Limitations:** 15 years from date of discharge
  - **Vet who is w/in 15 years of date of discharge** must apply to DRB for a discharge upgrade if eligible. Otherwise, **Vet can apply to the BCMR/BCNR.**
  - **Vet only needs to submit an application before the 15-year deadline. They do not need to receive a decision before the end of the 15-year period.**

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

17


**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM

# Time Limits for Filing

- **Boards for Correction of Military (or Naval) Records (BCMR/BCNR):**
  - **Statute of limitations:** 3 years from discovery of the “error or injustice”
  - BCMRs may excuse a failure to file w/in 3 years of discovery if it finds it to be “in the interest of justice” to review the application.
  - BCMRs frequently waive the statute of limitations. Additionally, advocates can make creative arguments about when the error or injustice was discovered, and argue that the application is filed within 3 years of that discovery.

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

18

# Composition of the Boards

# Composition of the Boards

# Composition of the Boards

 NVLSP  
National Veterans Legal Services Program

# Powers of the Boards

- DRB can:
  - Upgrade Vet's characterization of discharge
    - But, CANNOT upgrade if the discharge was the result of a *General Court-Martial* conviction
  - Change Vet's narrative reason for separation
- DRB cannot:
  - Change re-enlistment codes
  - Reinstate a person into the service
  - Issue an applicant a less favorable discharge than that issued at the time of separation

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

22


**NVLSP**  
 National Veterans Legal Services Program

# Powers of the Boards

- **BCMR/BCNR can:**
  - Upgrade Vet's characterization of discharge, even if given at a General Court-Martial
  - Change the narrative reason for separation
  - Medically retire a Vet
  - Change re-enlistment codes
  - Reinstate someone into the service
  
- **BCMR/BCNR cannot:**
  - Issue an applicant a less favorable discharge than issued at the time of separation

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

23

# Types of Review at DRB



**NVLSP**  
National Veterans Legal Services Program

- **Records Review**
  - Involves a review of applicant's application form; military records; and documentation submitted by the applicant, including statements, relevant evidence, and possibly brief or letter with argument in support of the application
  - DRB will have Vet's Official Military Record and some Service Medical Records
  - Burden of proof is on the applicant

---

---

---

---

---

---

---

---

---

---

## Types of Review at DRB



- Personal Appearance Hearing
  - Formal rules of evidence don't apply
  - Applicants may make sworn or unsworn statements, and introduce witnesses, documents, or other info
  - Non-adversarial proceeding – no trial counsel or prosecutor presenting evidence against applicant



© 2005 National Mathematics Council Standards Program. All Rights Reserved. [www.nctm.org](http://www.nctm.org)

## Types of Review at DRB



- Applicant may either
  - Initially request a records review and later request a personal hearing (if still w/in 15 years)
  - Initially request a personal hearing
  - Initially requesting personal appearance hearing precludes a later records review
  - Generally should start with records review unless close to 15-year deadline

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

88

## Types of Review at BCMR



- Records Review

- Involves review of Vet's application form; military records; and documentation submitted by applicant, including statements, evidence, and legal brief
- BCMR will have access to Vet's OMPF and some SMRs
- Burden of proof on applicant

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)


**NVLSP**  
 National Veterans Legal Services Program

# Types of Review at BCMR

- Personal Appearance Hearing
  - Unlike at DRB, applicants don't have a right to a hearing
  - In practice, BCMRs almost never grant hearings
  - Formal rules of evidence don't apply
  - Applicants may make sworn or unsworn statements, and introduce witnesses, documents, & other info

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

28



**NVLSP**

# Types of Review at BCMR

- Reconsideration
  - “Any request for reconsideration . . . shall be reconsidered . . . if supported by materials not previously presented to or considered by the board.”
    - 10 U.S.C. § 1552(a)(3)(D)
  - There is no time limit for filing a request for reconsideration


**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM

# Choosing a Forum

- To determine which board is appropriate, advocates must consider:
  - When Vet was discharged
    - DRB applications must be filed w/in 15 years of discharge; otherwise apply to BCMR
  - What Vet would like the board to do
    - BCMRs are the only boards that can review discharges from General Courts-Martial or grant medical retirements

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

30

## Survey #1



- GI Joe served in the Army during the Vietnam War and was discharged with a Bad Conduct Discharge in 1974. He was convicted at a Special Court-Martial of violating the UCMJ Art 112a for use of marijuana. He has never applied for an upgrade before. He believes he has PTSD due to his service in Vietnam.
- Which Board should he apply to?
  - A. Army DRB
  - B. Army BCMR
  - C. Either

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

**Answer: B**



- GI Joe must apply to the Army BCMR
- He was discharged 50 years ago, so he is unable to apply to the Army DRB because the time limit has expired
- He will have to apply to the ABCMR and ask the ABCMR to waive the 3-year statute of limitations in the interests of justice

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

22

## Survey #2



- Sailor Sam served in the Navy until he was discharged in 2013 with an Other Than Honorable characterization of service through an administrative separation. He has not applied for a discharge upgrade before.
- Which Board should he apply to?
  - A. Naval DRB
  - B. BCNR
  - C. Either

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

### Answer: A



- Sam must apply to the Naval DRB
- He was discharged less than 15 years ago and hasn't applied to the DRB before, so he must exhaust his administrative remedies through a DRB application before he is eligible to apply to the BCNR

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

## Survey #3



- Jane is an Air Force Vet who was discharged in 2011 and received a Bad Conduct Discharge through a General Court-Martial.
- Which Board should she apply to?
  - A. Air Force DRB
  - B. Air Force BCMR
  - C. Either

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

25

**Answer: B**



- Jane must apply to the Air Force BCMR
- At first glance, you might think she should apply to the Air Force DRB
  - She was discharged less than 15 years ago
  - DRBs can upgrade a Bad Conduct Discharge to Honorable
- However, a DRB cannot upgrade a discharge that resulted from a *General Court-Martial*. She must apply to the AFBCMR instead.

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

## Legal Standards



- Boards are authorized to grant discharge upgrades on the basis of either procedural errors or inequities
- **Clemency** is required to upgrade a discharge resulting from the sentence of a Special or General Court-Martial

	DRB	BCNR
Inequity	"Equity"	"Injustice"
Procedural errors	"Propriety"	"Error"
Relief from Sentence of a Special or General Court-Martial	Clemency	Clemency
Statutes / Regulations	10 U.S.C. § 1553 32 C.F.R. § 70.9	10 U.S.C. § 1552

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

37

## Error & Propriety



- **Propriety**
  - The service branch did not follow its own rules and regulations for the discharge;
  - A prejudicial error of fact, procedure, or discretion occurred during the discharge; **or**
  - A retroactive change in policy is enacted
    - DODI 1332.28, E4.2; 32 C.F.R. § 70.9(b)
- **Remember the presumption of administrative regularity**

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

38

## Injustice & Equity



- **Equity**
  - Current discharge policies are materially different than those that led to discharge
    - Substantial doubt that applicant would have received same discharge under current policies
  - **Discharge was inconsistent with disciplinary standards at the time**
  - **Quality of service and capability to serve**
    - For example, service history, awards, commendations, deployments, family and personal problems
    - DODI 1332.28, E4.3; 32 C.F.R. § 70.9(c)

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

39


**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM

# Clemency

- Clemency:
- Standard if discharge was result of Special or General Court-Martial sentence
- No strict definition, but tends to focus on post-discharge conduct
- Primary consideration: does Vet deserve a second chance?
  - 10 U.S.C. §§ 1552(f)(2), 1553(a)

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

40

# DOD Supplemental Guidance

---

---

---

---

---

---

---

---

---

---


**NVLSP**  
 NATIONAL VETERANS LEGAL SERVICES PROGRAM

# Liberal Consideration

- Hagel, Carson, and Kurta memos focus on mental health conditions linked to service and have led to increased rates of discharge upgrades
- Boards must give “liberal consideration” to applications involving:
  - Post-Traumatic Stress Disorder (PTSD)
  - Traumatic Brain Injuries (TBI)
  - Other Mental Health Conditions
  - Military Sexual Trauma (MST)

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

42

## Liberal Consideration



- The guidance recognizes that an honorable discharge does not require flawless service
- Mental health conditions inherently affect behavior and choices
- Misconduct itself may be evidence of a mental health condition or behavior consistent with sexual assault or harassment
- Veteran's testimony alone may establish that the experience occurred

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.milap.org](http://www.milap.org)

## Liberal Consideration



- Kurta Memo gives 4 questions for boards to consider:
  1. Did the Vet have a condition or experience that may excuse or mitigate the discharge?
  2. Did that condition exist/experience occur during military service?
  3. Does that condition or experience actually excuse or mitigate the discharge?
  4. Does that condition or experience outweigh the discharge?

## Liberal Consideration



- Liberal consideration has been codified into statute for both DRBs and BCMRs
  - DRB: 10 U.S.C. § 1553(d)(3)
  - BCMR/BCNR: 10 U.S.C. § 1552(h)
- Statutory liberal consideration only applies to PTSD and/or TBI as a result of combat or MST

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

## Successful DU Case Example



- A Marine infantryman had two combat deployments to Afghanistan. He experienced daily gunfights and attacks by the enemy as well as the loss of two close friends. He received numerous awards, including a Combat Action Badge.
- He began to show extensive signs of PTSD. He failed to report another Marine's misconduct and was separated with an OTH discharge.
- Post-discharge, VA diagnosed him with PTSD, but he was not entitled to benefits because of his discharge
- Naval DRB found that his combat service and post-discharge PTSD diagnosis mitigated the misconduct, and his discharge was upgraded to General (Under Honorable Conditions)

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

## Post-Discharge Conduct



- Wilkie Memo clarifies equity, injustice, and clemency standards
- Purpose of review under these standards is to ensure “fundamental fairness”
- Adds additional factors for boards to consider, including:
  - Post-discharge conduct/good character
  - Youthful indiscretion
  - Relative severity of misconduct

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

15

## Post-Service Conduct

## Success Story



- A Marine excelled as a Military Working Dog Handler for over 8 years. While deployed in Iraq, he felt afraid for his life and began experiencing PTSD symptoms. His judgment was impaired, which led him to use marijuana once.
- After a positive urinalysis test, he was administratively separated with an OTH discharge
- Post-discharge, he founded a non-profit organization which rescues dogs from shelters and trains them to be service dogs for vets who are suffering from mental health conditions
- He has a PTSD diagnosis and continues to receive treatment
- Naval DRB first upgraded to General, focusing on Vet's exemplary service, mental health condition, and post-discharge accomplishments. After a personal appearance hearing, his discharge was upgraded to fully Honorable.

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

48


**NVLSP**  
 National Veterans Legal Services Program

# Don't Ask, Don't Tell

- 1993: DADT policy is introduced. Barred openly gay, lesbian, or bisexual persons from military service.
- 2011: Officially repealed, allowing LGBTQ service members to openly serve
- 2011: DOD directs boards to grant requests to change narrative reasons for separation, characterization of discharge, and re-entry codes where
  1. Original discharge was based solely on DADT or a similar policy in place prior to DADT; AND
  2. No aggravating factors (i.e. misconduct)

# Success Story

## Don't Ask, Don't Tell

- LSW assisted an Aircraft Mechanic who served in the Marine Corps. When another Marine threatened to reveal his sexual orientation, making threats of violence and bodily harm, the Marine wrote a letter to his commanding officer disclosing his sexual orientation and requesting a discharge.
- He was discharged based on his disclosure, and his discharge certificate listed "homosexual admission" as the narrative reason for separation
- Pro bono volunteers wrote a brief to the BCNR requesting that the narrative reason for separation be changed. The Board agreed and changed the reason for separation to Secretarial Authority.

# Preparing a Successful DU Application

# Successful Application


**NVLSP**  
 NATIONAL VETERANS LEGAL SERVICES PROGRAM

# Requesting Records

- Should always request Vet's:
- **Official Military Personnel File (OMPF)**
  - Request using SF-180: 3-6 months or longer to receive
  - Request through DPRIS: usually downloaded in 24 hrs
    - Only if OMPF is stored at locations 1, 3, 4, 7, or 10 (p. 3 of SF-180)
- **STRs**
  - Request using SF-180
  - 2-5 months or longer to receive
- **VA Claims File (if applicable)**
  - If VSO w/ org that holds POA, you should have access
  - Otherwise, request under Privacy Act using Privacy Act Waiver, but will take 8-12 months or longer to receive

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

53

- View prior board decisions
- Boards of Review Reading Rooms:  
<https://boards.law.af.mil/>
- “Stare Decisis”
  - Agency must adhere to its precedents in adjudicating cases before it
  - 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
    - *Wilhelmus v. Geren*, 796 F.Supp.2d 157 (D.D.C. 2011)

# Researching



- Get copies of administrative separation regulations that were in place at the time of discharge and current versions
  - Make sure the military followed the regulations then
  - Compare and see if service members have better protections now

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

55

## Application Package



- In general, a DU application will include:
  - 1) Application form
    - DRBs use DD Form 293
    - BCMRs use DD Form 149
  - 2) Cover letter
  - 3) Written brief/letter
  - 4) Supporting evidence

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

56

## Supporting Evidence



- Relevant military records
- Personal statement:
  - Positive aspects of military service
  - Struggles in-service
  - Statement of remorse and taking responsibility
  - Good character post-service
- Character references:
  - Fellow service members or Vets
  - Family members
  - Employers/teachers/members of community (anyone who can attest to applicant's work ethic, leadership potential, honesty, good character, standing in community)

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

57

## Supporting Evidence



- Evidence of mitigating factors:
  - Medical records, if applicant's medical condition contributed to misconduct
  - Police reports, if nothing negative
- Post-service good conduct:
  - Family events
    - Marriage certificate
    - Birth certificates of children
  - Education
    - Transcripts
    - Diplomas
  - Proof of rehabilitation



© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.milap.org](http://www.milap.org)

58

# Options After a Denial



© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

## Appeals to Federal Court



- If denied at BCMR or DRB, Vet can sometimes file a complaint in federal district court:
  - **Bring suit under the Administrative Procedure Act**
  - Court must “hold unlawful and set aside agency action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
  - 5 U.S.C. § 706(2)(A)
- **6-year statute of limitations, running from date of denial from reviewing board**

60

# Discharge Appeal Review Board



- Created by DOD in April 2021 after Congressional directive
  - Panel of at least 3 members appointed by the Director of the Air Force Review Board Agency
  - Will conduct de novo review of BCMR case file
    - No new evidence
    - No personal appearance hearings
  - Will make recommendation on upgrade, but Secretary of applicable military dep't has final authority to approve or reject recommendation

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

# Discharge Appeal Review Board

 **NVLSP**  
NATIONAL CONFERENCE OF CATHOLIC BISHOPS



- Applications filed at <https://afrba-portal.cce.af.mil>
- Only available to applicants who
  - Were separated after 12/19/2019
  - Have a less than honorable discharge or dismissal
  - Have exhausted all available administrative remedies, including DRB and BCMR/BCNR applications
- Timely file
  - Must apply w/in 365 days of receipt of BCMR decision

62

# VA Character-of-Discharge Determinations



© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)


**NVLSP**  
 National Veterans Legal Services Program

# Who is a Veteran?

- First step in determining whether a person can receive VA benefits is analyzing whether they meet's VA's definition of "veteran"
- VA defines a veteran as "a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable"
- **38 U.S.C. § 101(2); 38 C.F.R. § 3.1(d)**
- VA will consider a person to have been discharged or released "under conditions other than dishonorable" if no statute or regulation bars VA benefits

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

64


**NVLSP**  
 National Veterans Legal Services Program

# VA COD Determinations

- If person applies for VA benefits and separation was OTH/UD, BCD, dishonorable, dismissal, void enlistment / induction, dropped from rolls, or resignation for good of the service, VA will make a COD determination
  - No separate form or application necessary
- Former service members can also request a COD determination w/out filing a claim
- If Vet requests health care, VHA will complete VA Form 20-0986 to trigger COD determination
- VA will determine if there are any statutory or regulatory bars to VA benefits
  - See Manual M21-1, X.iv.1.A for more info

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

65

---

---

---

---

---

---

---

---

---

---

# VA COD Determinations

## VA COD Determination vs. Discharge Upgrade



- VA COD Determination and Discharge Upgrade are different, but can be pursued in tandem
  - DU will change DD Form 214
  - COD determination does NOT change DD Form 214
  - DU is binding on VA, so it may moot COD determination
  - COD determination is persuasive evidence to a DOD Board, but not binding
  - DU impacts both VA and non-VA benefits (employment, housing)
  - COD determination impacts only VA benefits

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.milap.org](http://www.milap.org)

## Statutory Bars



- Listed in 38 U.S.C. § 5303
- These circumstances may be considered a bar to VA benefits, unless the person was insane at the time of committing the offense
  - **Can be overcome by favorable BCMR/BCNR DU decision**
    - 38 C.F.R. § 3.12(f)
- **Statutory bars may apply even if Vet was issued an Honorable discharge**

## Statutory Bars



1. Discharge or dismissal issued by a general court-martial
2. Discharge was because SM was a conscientious objector who refused to perform military duty, wear the uniform, or comply with military authorities
3. Resignation by an officer for the good of the service
4. Discharged as a deserter
5. Discharged as an alien during a period of hostilities
6. Discharged as a result of being AWOL for a continuous period of 180 days

## Regulatory Bars



- Listed in 38 C.F.R. § 3.12(d)
- A discharge under the circumstances below is considered “dishonorable” for VA purposes; however, this can be overcome by a favorable VA COD determination, a favorable decision from the DRB or BCMR, or by demonstrating that the Vet was “insane” at the time of the offense:
  1. Acceptance of an undesirable discharge to avoid trial by general court-martial
  2. Mutiny or spying

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

## Regulatory Bars



3. An offense involving moral turpitude, generally meaning a felony conviction
4. Willful and persistent misconduct
  - Instances of minor misconduct occurring w/in 2 years of each other are persistent; an instance of minor misconduct occurring w/in 2 years of more serious misconduct is persistent; and instances of more serious misconduct occurring w/in 5 years of each other are persistent
  - “Minor misconduct” is misconduct for which the maximum sentence imposable under the Manual for Courts-Martial would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

71

## Compelling Circumstances

## Exception

- AWOL, W&P misconduct, and moral turpitude bars will not apply if VA determines there are “compelling circumstances” to warrant the person’s actions
- VA must consider:
  - Length and character of service exclusive of the period of misconduct and if it was honest, faithful and meritorious, and of benefit to the nation
  - Reasons for misconduct, such as mental/cognitive impairment; physical health; combat- or overseas-related hardship; sexual abuse/assault; duress, coercion, or desperation; family obligations or duties owed to others; age, cultural background, education, & judgmental maturity
  - If there is a valid legal defense that would have prevented conviction under the UCMJ

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.nvlp.org](http://www.nvlp.org)

72

## Old Rules



- Prior to 6/25/2024:
  1. Regulatory bars included “Homosexual acts involving aggravating circumstances or other factors affecting performance of military duties”
  2. Willful and persistent misconduct defined as
    - “an act involving conscious wrongdoing or known prohibited action” that “involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences”
  3. Compelling circumstances exception more limited only applied to statutory bar for AWOL

© 2025 National Veterans Legal Services Program. All Rights Reserved. [www.milap.org](http://www.milap.org)

## The Insanity Exception



- A person may overcome any statutory or regulatory bar to VA benefits if it is determined that at the time of the offense leading to the discharge, the individual was “insane”
- The insanity must have existed at the time of the offense, and does not have to be causally connected to the misconduct
  - In other words, person does not have to establish that their insanity caused them to commit the misconduct

## The Insanity Exception



- VA defines an insane person as:
  - one who, while not mentally defective or constitutionally psychopathic ... exhibits, due to disease, a more or less prolonged deviation from their normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides
- 38 C.F.R. § 3.354(a)

# Multiple Periods of Service



• In some cases, a Vet may have multiple periods of service or enlistments that ended with a separation and characterization of discharge

• This may make the Vet eligible for VA benefits if a prior period of service culminated with a discharge that was either Honorable or General under Honorable Conditions

- VA benefits must stem from the earlier period(s) of service

# Tips for COD Determinations

---

---

---

---

---

---

---

---

---

---