

Chapter Fifteen

Upgrading Less-Than-Fully-Honorable Discharges

By Kathleen Gilbert

Introduction

For many vets, no veterans issue is as important as the upgrading of discharges. Changing a bad discharge can make a veteran eligible for VA benefits and other state and federal veterans benefits, even many years after discharge. A discharge upgrade can make a major difference in employment and career options. And for many vets, there are matters of personal honor and dignity that are equally important. This chapter describes the most common way to upgrade less than honorable discharges and to change reasons for discharge, through the Discharge Review Board and the Board for Correction of Military Records (BCMR) for each service.

GI's are given discharge documents on the day they are discharged. The most important of these is a DD 214, which includes a great deal of information about their time in the service. The DD 214 comes with a "long form," showing the reason for discharge, character of discharge, reenlistment code and a three-letter or -number code matching the reason for discharge. There is also a "short form" version, which doesn't include that information. Of course the VA and many employers want to see the long form.

Myths about discharges and upgrading

There are a number of military myths and urban legends about discharges and discharge upgrades, and some have been around for decades. You may have heard some of them: bad discharges automatically upgrade to general (or honorable) after six months; all you have to do is wait six months and send in a form to get an upgrade; anyone can get an upgrade by showing that they've done well after getting out; nobody looks at DD 214 discharge documents anymore, so there's no reason to worry about the kind of discharge you get.....and so on.

A few rumors say just the opposite: general discharges can be under other than honorable conditions, and those don't entitle you to benefits; you don't get any benefits with any general discharge; with an other than honorable, you lose all federal benefits, not just veterans benefits.

None of these things are true. But many people honestly believe them, and commands often use the first set of rumors to convince soldiers or sailors to waive all their rights in discharge proceedings and take whatever the command wants to give them. The truth is that there are no automatic discharge upgrades, no minimum time before you can apply for an upgrade, and almost no easy upgrade cases. On the other hand, there is no such thing as general under other than honorable conditions; general discharges only affect GI bill benefits, not most other VA benefits, and vets with other than honorable discharges may be able to apply for VA benefits in some circumstances. Most federal benefits, like social security, aren't affected at all.

Statistics obtained by the National Veterans Legal Services Program show the real picture. In the last several years, overall success rates in discharge upgrade cases at the Navy Discharge Review Board have run around 4%. The Army DRB success rate in upgrades is 41%. The Air Force rate is 19%;(that breaks down to 15% for upgrade applicants who don't have a personal appearance and 45% for those who have an appearance). The Coast Guard DRB has a success rate of only 1%. The Board for Correction of Naval Records upgrades approximately 15-20% of cases, while the Army Board for Correction of Military Records (BCMR) upgrades 10-15% and the Air Force BCMR upgrades 20%. Coast Guard BCMR rates are 15-20%. (The BCMRs, discussed in Chapter 16, can consider "appeals" of bad DRB decisions, and can make many other changes in discharges and service records as well.)

But it is important to remember that every case is different, with its own set of facts and legal issues. These make a huge difference in individual

chances of success. However, the low overall success rates mean that it's important not to rely on the rumors that upgrades are automatic or easy, and to treat your case like a serious military engagement. Good representation by an advocate or attorney, careful preparation and thorough documentation are extremely important. Requesting a personal appearance before the DRB usually makes a big difference as well. In this writer's experience, these things frequently mean the difference between a victory and defeat. Just filling out an application form and submitting evidence of good character seldom results in anything but a denial.

A quick look at discharges

It's useful to take a look at the military's discharge system when thinking about upgrades. (This is also discussed in the first part of chapter 18, which covers early separations.) This chapter uses the term "discharge," because it's the common word. Technically, a "discharge" means the complete end of a military obligation, while a "separation" can mean release from one kind of service to another. At the end of their active duty service, most GI's are separated and placed in the inactive reserve to finish the eight-year military obligation all enlisted personnel incur, and are discharged when they reach eight years.

Character of service is often the most important issue in a discharge review case. It may be an honorable discharge (HD), general under honorable conditions (GD), other than honorable (OTH), (For older vets, OTH discharges were characterized as "undesirable" or, before that, "blue" discharges.) Courts-martial discharges, called punitive discharges, may be bad conduct discharges (BCD) or dishonorable discharges (DD); officers would be awarded "dismissal" instead. Discharges initiated within the first 180 days of continuous active service may be Entry Level Separations (ELS), which are technically uncharacterized. Occasionally, when an enlistment is shown to be completely illegal to begin with, enlistments are "voided" with no discharge or character of discharge.

Discharges at the end of active service (ETS or EAOS) are characterized as honorable or general, as are discharges on completion of active or inactive reserve status.

Discharges prior to the end of enlistment are frequently administrative (which just means the military uses administrative procedures and the chain of command to give them). These can be honorable, general or other than honor-

able, depending on the reason for discharge. Administrative discharges include, among others, hardship, erroneous enlistment, conscientious objection, homosexual conduct, parenthood, pregnancy and misconduct.

Early medical discharges or retirement, awarded through the military's disability system rather than the command structure, are normally honorable, but in some services may be characterized as general if the overall service record is poor. They cannot be under other than honorable conditions.

BCDs and DDs may only be awarded by courts-martial—BCDs may be given by either special or the more serious general courts-martial, and DDs come only as the result of general courts-martial. Officers can receive only “dismissals” at courts-martial, and these come only from general courts-martial.

In addition to the character of discharge, vets may want to change the reason for discharge (called the narrative reason for discharge on DD 214 forms); the army refers to most of them as “chapters.” They describe the basis for discharge, such as disability, erroneous enlistment, hardship, personality disorder, misconduct, etc. In many cases, vets feel they have been discharged for the wrong reason, or should not have been discharged at all, and may want to change the reason as well as character.

Discharges are also coded with reenlistment (RE) codes and letter or numerical codes (formerly called SPN codes). RE codes show eligibility for reenlistment. They may be RE-1, which allows immediate reenlistment, RE-2 or -3, which require various levels of waiver for reenlistment, or RE-4, which bars reenlistment unless it the code is changed, not just waived. SPN codes correspond to the reason for the discharge, sometimes giving slightly more detail. Since these codes aren't well known, and have changed over the years, employers may know that they mean something, but not know what.

Discharge upgrades in a nutshell

Each branch of the service has a Discharge Review Board (DRB) and a Board for Correction of Military (or Naval) Records (BCMR or BCNR); most upgrade cases begin at the DRB. DRBs have the power to upgrade any discharges except those awarded by a general court-martial, and can change the reason for discharge to or from any reason except medical disability. The DRBs cannot change RE codes, change a discharge to medical retirement or medical discharge, reinstate people in the service, or make other changes in their records.

The BCMRs can make all of these changes, too, so they are usually used to appeal unfavorable DRB decisions. (If applications ask for an upgrade or change in reason, which the DRBs can grant, and nothing else, the BCMRs will tell applicants to apply to the DRB first, unless the 15-year period to apply to the DRB has passed.) In addition, the BCMRs can change other discharges to medical retirement or discharge, upgrade BCDs and DDs from general courts-martial and make a wide range of other changes in a person's service and medical records. (The BCMRs are discussed in more detail in Chapter 16).

DRBs are composed of officers from the branch of service involved; the Navy board reviews Marine Corps cases, and have a mix of Navy and Marine Corps officers. Applications to the DRBs must be made within 15 years of the date of discharge, and the DRBs don't accept late applications. DRB applicants can ask for a records review (also called a documentary review) or a personal appearance review. In a records review, the case is considered on the basis of the veteran's official military personnel and medical records and any evidence or statements submitted by the veteran., but the boards rarely obtain any other records, either on their own or at the veteran's request. Essentially, the boards believe it is the applicant's job to produce any other records that are important to the case.

A personal appearance review involves an informal hearing before the board, where the vet and/or representative can present arguments, testimony, witnesses and evidence for the Board's consideration. All of the boards hold hearings in Washington, DC, and some of them have travel panels, which hold hearings in a few major cities around the country. If a records review is held first, applicants can ask for a personal appearance review later, so long as it is still within 15 years of discharge. Vets can only ask for another review after a personal appearance if there was absolutely no representation provided the veteran in the prior review, or if the service can be persuaded that the DRB acted improperly. (The DRB regulations say that finding new material evidence might allow another review, but this writer doesn't know of any such cases.) Success rates are normally much higher with a personal appearance, except in cases involving purely legal arguments or really obvious factual mistakes.

Choosing the best approach

Most discharge upgrade cases start at the Discharge Review Board level, but there are lots of variables, and it important to talk with an attorney or advocate

as you think about how to approach the case. For example, if you believe you should have been medically retired, but were administrative discharged, you may decide to skip the DRB and apply directly to the BCMR, since the DRB cannot make that change. The same thing is true if you have an otherwise good discharge but want to change your RE code.

If you have an OTH discharge, and your main interest is in receiving VA benefits, you can sometimes ask the VA to make a character of discharge determination and award benefits anyway. This is not a discharge upgrade, however, and doesn't change your DD 214. The VA also has some "bars" to benefits, where a character of discharge determination is more difficult and an upgrade by a DRB is not binding. One important bar is an OTH for an unauthorized absence (AWOL or UA) of 180 continuous days or more. In those cases, an upgrade from a BCMR is necessary. Some veterans challenge their discharges through the VA and DRB or BCMR at the same time, though they may run into problems if more than one agency tries to obtain the vets' military records at the same time.

Some veterans decide to wait a while after discharge before applying to the DRB, in order to build a strong record of post-discharge accomplishments. With a BCD or DD discharge, which can only be upgraded on the basis of clemency, this is extremely important, since rehabilitation and good conduct after discharge are central issues. Vets who choose to wait need to keep the DRB and BCMR deadlines carefully in mind. On the other hand, in administrative discharges with serious legal errors in the discharge process, and discharges involving important and obvious factual mistakes, waiting and developing a good record (and requesting a personal appearance) may be less important.

The moral of all this is that an advocate or attorney can help you to make decisions about where and when to apply for review at the beginning of your case, to give you the greatest likelihood of success.

Legal standards and presumptions.

Most vets who apply to the boards believe that they will get a fair and objective review of their case—that vets start out on an even playing field, and that the boards look carefully at the official record to make sure each discharge was fair and proper. But the DRBs and the BCMRs use legal standards and presumptions that make almost every case an uphill battle. By law, the DRBs consider

cases with a “presumption of regularity in the conduct of governmental affairs”, which is a nice way of saying that the boards start from the position that discharges are fair and legal, that commands and discharge authorities acted properly and military records give an accurate statement of what really happened.

When you apply to the DRB (or BCMR) the legal burden is on you to overcome that presumption by providing “substantial credible evidence” that the discharge was not fair or proper. In plain language, good documentation and well-constructed arguments can make a tremendous difference. While your own statement about what happened is evidence, it is rarely enough evidence, by itself, to overcome this “presumption of regularity.”

DRBs and BCMRs consider administrative and ETS cases on the basis of the fairness and the legality of the discharge at the time it was given. The DRBs call these issues equity (fairness) and propriety (legal and technical sufficiency), while the BCMRs use the terms injustice (unfairness) and error (legal error). Court-martial discharges are handled differently, though—here the Boards consider only clemency, not fairness at the time of the discharge or legal error in the court-martial. Clemency may mean mitigating circumstances at the time of the offense(s) leading to the court-martial. Rehabilitation and good conduct after discharge are usually the principal consideration in an upgrade.

One of the nice legal things about these boards is that the rules of evidence do not apply. You can submit evidence which would not be admissible in court, including second-hand information, testimony and statements that are not given under oath, and very informal evidence. This gives you a lot of freedom to introduce not only character letters, but informal statements from people who were generally aware of the circumstances surrounding the discharge, or who have an opinion about the fairness of the discharge. (This does not mean that formal, notarized statements are unimportant.)

Getting Started

You probably don't want to start with just an application to the Discharge Review Board. Applications are submitted on an “Application for the Review of Discharge or Dismissal from the Armed Forces of the United States,” Form DD-293. The form looks straightforward and simple, with a little box where you can state your arguments and issues, and another little box to list any evi-

dence you submit. In reality, just filling out the form and sending it in is not the best way to present your case, and isn't a very good way to start.

Before you submit the form, get educated. In addition to this chapter, you may want to look at the DRB website for your branch of service, and look at information available on civilian websites such as www.nlgmltf.org and usmilitary.about.com/cs/generalinfo/a/dischargeupgrade. If you are interested in more serious research for your case, you might want to look at the Discharge Upgrading Manual and the Veterans Benefits Manual published by the National Veterans Legal Services Program; you'll find their contact information at www.nvlsp.org. The manual on upgrades, even though it has a supplement, is very much out of date, but it is the most detailed discussion of discharge upgrades around. If you read it along with the discharge upgrade chapter of the benefits manual, you can put together a thorough picture of how the boards work. This is not a substitute for good representation, but it can be valuable in putting together your case.

Then look for representation. (If this sounds very repetitious, it's because of its real importance.) The organizations listed in the Appendix can help you find an attorney or advocate in your area. Some cities have legal panels or legal clinics that will assist vets in discharge upgrades pro bono (on a volunteer basis) or at reduced fees. Several programs have been set up to work specifically with of the wars in Iraq and Afghanistan.

You and your representative should obtain the records, which the DRB will see, your personnel and medical records, before submitting your application. Once you apply to the DRB, its staff will order your records, and you will not be able to order separate copies of your own—your only way to see the records then is to review them at the DRB office or the hearing site.

Military records can be ordered with a Request Pertaining to Military Records form (Form SF 180), available at VA regional offices and on line at www.archives.gov/research/order/standard-form-180.pdf. The form includes instructions and a chart explaining where to send it for personnel and medical records. (See Chapter 17 of this book.) If you have been seen at a VA medical facility, that office may also have a copy of your military medical record, and can also provide you with a copy of all your VA medical records for additional information. Even if you came away from the service with a copy of your records, it is wise to order a copy officially, and then compare it with your own copy, as records are sometimes lost or miraculously “appear” in your official record after discharge.

The personnel records centers (except for the Air Force) are notorious for providing incomplete sets of records, so you may need to make a follow-up request for records you think should be there, such as performance evaluations, administrative discharge packets, and disciplinary records. In addition to this, it is valuable to look at the DRBs copy of the record at the DRB office or hearing site, before the case is decided, to check for differences between your copy and the board's. (This author has had a number of cases in which the boards received critical records which the records centers did not provide to the veteran, including two in which "confessions" in personnel files were missing in the veteran's copy of the records, but not the board's.)

It is also important to obtain copies of other records which the review boards will not normally see, but which you may want to submit. Sometimes these records provide valuable evidence that would not otherwise be available to the board. For example it is worth ordering copies of the record of trial of your court-martial if you received a punitive discharge. If you were the subject of or a witness in an investigation by Naval Criminal Investigative Service, the Army Criminal Investigative Division, the Air Force's Office of Special Investigations or the Defense Investigative Service, you can request any investigative records they made or obtained. These records may include important facts left out of the official records, and the board won't be aware of them without your help.

If you were a hospital in-patient in the service, those medical records don't become part of your regular medical record, but can be ordered from the military hospital (or, if the hospital has 'retired' them to storage, you can ask the hospital for the name of the agency storing them). If any civilian or VA medical records have a bearing on your case, it is important to order them, as well. Local commands and military archives keep some other records, such as unit logbooks, which sometimes contain useful evidence. Perhaps the best discussion of military-related records can be found in the NVLSP's Veterans Benefits Manual. The Manual is pricey, but can often be found in local law libraries or through your attorney or advocate.

You and your representative should review these records carefully, and think about how to show the real story of your discharge. Service records provide the official version of the case, the version that the DRBs will accept as correct unless you prove otherwise. In many cases, commands will make a very careful paper trail of their version of events, often painting an incorrect picture of your service and conduct. Personnel and medical records are the starting point in case preparation—looking at them, you and your counsel can

decide what equity and propriety arguments will make the most sense, and what other evidence should be gathered to overcome the picture in the official record.

It is important to consider the regulations which governed your discharge—those in effect at the time of the discharge, and the current version. Commands and separation authorities often overlook important parts of the regs, and these failures may provide important arguments. In addition, if you were discharged some time ago, the current regulations may be more to your advantage, allowing an equity argument that you would have been given a better discharge under current standards, an contention that the DRBs are supposed to accept as equitable grounds for an upgrade. Finally, you can look at other decisions of the DRBs in cases similar to yours, available through the boards' electronic reading rooms. (You can find these by starting at the review board's website.) Unless these cases decided very basic legal issues, they are not binding on the boards, but can be "persuasive" in consideration of your case.

Early preparation....if you are about to be discharged

If you are reading this because you are about to receive a discharge you don't like, this may be the best time to start fighting the discharge or to start making a paper trail for a later discharge upgrade application.

If you're not already out the gate, stop for a minute and think about whether there are things you can do to challenge the discharge before it happens. Many GIs are so fed up at this point that they just want out, and are willing to take whatever they get. But down the road that discharge may be important in getting medical benefits or the job you really want. Even if the separation authority has already ordered your discharge, take a minute to talk with a military attorney (a Judge Advocate or JAG) and a civilian attorney or counselor experienced in military discharges. A good starting point is the national GI Rights Network's hotline, 877-447-4487 or the Military Law Task Force, 619-463-2369. If it is too late to stop the discharge, or you truly can't stand another day in the service, they can also talk to you about some initial steps to take to begin to document a discharge upgrade case.

For example, if the military has ignored medical or psychological problems that led to your discharge, such as Post Traumatic Stress Disorder or an injury or illness that you think might be related to 'misconduct' or poor performance during your service, you can help your case tremendously by getting an inde-

pendent civilian medical evaluation right away. Documentation of medical problems right at the time of discharge is much more useful than documentation months or a year later. If there are others in the command who know about the events or mitigating circumstances of the discharge or can speak to your good performance and character, ask them for written statements. If potential witnesses are hesitant to say anything, you can still get their permanent address. Once you are in the discharge upgrade process, their statements don't come back to haunt them; if they have been discharged by then, they may feel free to speak.

As you are being discharged, you can request complete copies of many military records that may be lost or discarded later—not only your complete personnel and medical records, but also the separate records kept by at base clinics or medical treatment facilities, your JAG's file, your Equal Opportunity (EO) officer's file on a complaint you made, or copies of ship's logs that may document facts important to your case. If you ask your command's personnel office for a copy of your record, beware the tendency to give you only your old transfer and assignment orders. There are many more important things in your record, such as performance evaluations, administrative data, and the documents made when your discharge was being considered, and these are among the things that tend to get lost in some cases..

In many cases, it is also helpful to make a written statement on the record about the discharge or any waiver of rights, even if you and the command have already completed the paperwork. With the help of a JAG, civilian attorney or counselor, you can write a letter explaining any medical, personal or family problems that affected your service, documenting in your own words any harassment or discrimination that led to the discharge, or explaining why you may have waived rights in the discharge proceedings. (Since the DRB starts out with a presumption that the command acted properly, it will presume that you would have demanded all of your rights and fought the discharge if you had any grounds to do so. You may want to explain any mitigating circumstances or command action that caused you to waive your rights and accept the discharge.) You can give this to your command, your JAG, your medical officer or the command legal officer, asking that they sign a receipt for it and place it in your record. If they later 'lose' the statement, you'll have your own copy, hopefully with evidence that you gave it to the command.

More evidence

Whether you're a recent vet or were discharged 20 years ago, you can still gather other documentation about the circumstances leading to your discharge and about your good character, performance and conduct in the military and after you got out. You may be able to track down people from your command that can provide letters or statements about the circumstances or problems leading to your discharge, how they affected you, and, if it's important, how the command responded to the problems. People who have known you since discharge can describe the on-going effects of any medical, family or other problems you had in the military. In most cases, it's important to show that your overall service was good, and statements from co-workers and especially supervisors can be extremely helpful.

In almost every case, it's important to let the board know about your post-service good conduct. Character letters, certificates and awards, educational and good employment records, police department statements showing that you have no criminal activity since discharge, are all helpful. But get creative here! If you're mentioned in a church bulletin as part of a group helping the homeless, get a copy! If you got a write-up in a school newsletter or local paper for some achievement, or charitable or community activity, use it. Get letters from people who know that you are a good person. In many cases, this type of evidence shows the board the sort of soldier or sailor you would have been if not for the problems that led to your discharge. Letters about your honesty and integrity can be important if the board will need to judge whether your statements in the military or to the board are trustworthy—this is especially important if your statement is the only evidence about a fact or situation that's important to your case. And whether or not it is related to an issue in your case, the boards are influenced by evidence of good character and conduct since your discharge.

Arguments

The board is required to consider every issue or argument that you raise. It's important to set out these issues clearly on the DD 293 form and as separate arguments in a written brief which you can present to the board with the application or at any time up before the decision on your case. Issues should be identified as "equity" or "propriety" issues, or as both.

There are many different ways to present arguments and issues, and you may want to defer to the style your advocate likes. If you are making the decision, you can look at examples in the Discharge Upgrading Manual and other resource materials. Some advocates like a “building-block” format in which each part of a propriety or equity argument is set out as a separate point or sub-point, while others prefer a more condensed approach. It is important to state the argument clearly and succinctly before discussing it, so that the board will not ignore the issue or get lost in the discussion. The board is required to address each separate issue that you raise, so clarity is important.

Just by way of example, some vets could make these arguments:

MY DISCHARGE IS INEQUITABLE, AND SHOULD BE UPGRADED TO HONORABLE AND CHANGED TO DISCHARGE BY REASON OF HARDSHIP/DEPENDENCY IN THAT SERIOUS FAMILY PROBLEMS LED TO MY A.W.O.L. AND OTHER THAN HONORABLE DISCHARGE.

and

MY DISCHARGE IS IMPROPER IN THAT I WAS DENIED THE RIGHTS AVAILABLE TO ME IN THE ADMINISTRATIVE DISCHARGE PROCEEDINGS.

MY COMMAND DENIED ME THE OPPORTUNITY TO SUBMIT A STATEMENT ON MY OWN BEHALF IN THE DISCHARGE PROCEEDINGS,

BY FORWARDING THE DISCHARGE RECOMMENDATION PRIOR TO THE TIME ALLOWED TO SUBMIT MY STATEMENT.

I WAS DENIED PROPER REVIEW OF MY DISCHARGE IN THAT THE SEPARATION AUTHORITY WAS NOT PROVIDED A COPY OF MY STATEMENT AND MY EVIDENCE OF A SEVERE FAMILY HARDSHIP,

AND WAS UNAWARE OF THE FACTS WARRANTING A MORE FAVORABLE DISCHARGE.

The first argument gives a general equity issue, under which you and your advocate can discuss the relevant evidence of the hardship and your efforts to solve it through proper military channels before going AWOL. The second argument divides a legal issue into specific sub-points about the denial of a basic right to submit a statement, and the result that the discharge authority wasn't allowed to see the whole picture....two violations of the admin discharge regulations stemming from the same command mistake. In a brief, this could be followed by references to the specific regulations and an explanation

of how the outcome might have differed if you had been able to use these rights.

Some common issues in discharge upgrade cases include:

Alcohol-related misconduct. If a drinking problem led to an AWOL or other misconduct, it helps to show the severity of the problem and the relation between the alcoholism and the misconduct. This is more likely to be successful if you can show that the command failed to recognize the problem and offer you rehabilitation.

AWOLs or other misconduct stemming from family problems. If you had to go home to take care of family problems, or the problems caused you stress that led to misconduct, it is important to document the problem and discuss the relationship between your concern about the problems and the misconduct. If you tried to go through the chain of command and didn't get help (for instance, if the sergeant told you not to apply for a hardship discharge because it would be turned down) it is very helpful to document both the fact that you tried, and the way in which the command responded. Medical records or statements documenting the problems are very important. And, of course, if you can show that you went home and helped the family while AWOL or after discharge, this is important.

AWOLs or other misconduct related to a medical condition. Misconduct can sometimes be mitigated by the fact that you were ill or injured prior to discharge, and suffering from the effects of that condition. Command failure to let you get medical help, or military medical staff's failure to properly diagnose and treat the problem, will strengthen this argument a great deal. It helps if you can document the severity of the problem at the time of discharge—medical records or evaluations made then are the most persuasive—although later medical evaluations are also useful if they shed light on your condition while in the service. If you developed a medical problem like depression, and military doctors under-diagnosed it as a personality disorder, or if doctors mistook your painful spinal injury for a muscle sprain, the board may be somewhat sympathetic to poor performance or conduct while the condition went untreated. It's important to show that the problems leading to discharge stemmed from the medical problems, not just that they happened at the same time.

Discharge in lieu of court-martial. This discharge, which can be requested by GIs facing serious court-martial charges (lengthy AWOLs are most common), may be difficult to upgrade. The DRB will know you asked for the discharge, and may think that you did so because you had no real defense or mitigation, and just wanted the easy way out. But evidence of personal, medi-

cal or family problems can be helpful here. If you needed to take this relatively quick admin discharge because the problem was still troubling you, you were needed at home to care for a sick family member, or the command threatened heavy punishment no matter what the circumstances, evidence of this is important. This is one of the places in which it is very helpful to document your reason for taking the discharge at the time.

Misconduct/drug abuse. DRBs share the military's "zero tolerance" attitude, and this is a difficult discharge to upgrade. In some cases, you may be able to gather evidence that you were not abusing drugs (through evidence of faulty urinalysis testing, for example). If the drug use was proven, or admitted, it helps if you can show that drug use involved a real dependence or addiction, or stemmed from painful and untreated medical problems—or even that the problem began with drugs the military prescribed for an injury. While the command's failure to provide you with rehabilitation is seldom an issue by itself, the boards may be sympathetic if the condition was beyond your control and/or you really wanted help with it. It is useful to check both the discharge reg and your service's drug reg carefully to see if your case was handled properly by the command. In some limited situations, including self-referrals for drug treatment, some drug-related information cannot be used for characterization of your discharge, but not all commands can keep this straight.

Fraudulent enlistment. Back in 1982, the regulations changed so that only a few limited kinds of fraud are grounds for OTH discharge, and most must be honorable, general or ELS. Many commands get this wrong, and try to give OTH discharges anyway. It's important to check the regulation to see if the discharge characterization was proper. Even with a general or ELS, you may have arguments for an upgrade if the fraud was quite minor or understandable. If, as often happens, the recruiter told you to withhold information, the board usually requires evidence of the recruiter's misconduct, or a pattern of such behavior in other cases involving the same recruiter. If the "fraud" was a simple misunderstanding of the questions asked at enlistment, if you didn't know the name of a medical condition you had as a child, or were too young to know the doc you had seen was a psychiatrist, for instance, this lack of knowledge and intent to defraud can be shown through statements from your family or friends. In pre-1982 discharges, vets can argue that they would have received a better character of discharge under current policy, so that the discharge should be upgraded as a matter of equity.

Homosexual conduct. Only certain "aggravating circumstances" listed in the regulations warrant an OTH; otherwise the discharge should be honorable

or general (or ELS) depending on your overall service. Some commands can't accept this, and give an inappropriate discharge simply because of their bias. Some violate the "don't ask, don't tell" rules and base discharges on mere rumors, and arguments based on the regulations can show the discharge was improper. Many commands will "ask" questions and get information that they have no right or need to know under the regs. However, these violations of the regulation will not invalidate the gay discharge itself, though they may gain sympathy from a decent board. Again, in older discharges, especially those given before 1981 and 1982, you may be able to use a current standards argument for an upgrade. It's important to check the regulations in effect at the time of your discharge and the current regulations, and to look for technical errors as well as improper characterization. The DRBs are supposed to provide you with copies of these regulations if you request them.

Racial, gender or other discrimination. Statistics show that race, in particular, tends to affect the character of discharges; people of color receive worse discharges for treatment some supervisors and commands overlook in white GIs. The DRBs must admit that racism and sexual discrimination exist, but are allowed to presume that no discrimination occurred in your case unless they are presented with specific evidence. In most cases, this means evidence of bias shown towards you, though a pattern of command bias against other people of color, women, etc., can sometimes succeed. If the discrimination led to unequal treatment, or caused the command to assume you committed misconduct when you did not, the board will be attentive if they have no way to ignore the discrimination.

Sexual harassment or sexual assault. Current statistics show that women who complain about (or even threaten to complain about) sexual harassment or assault often end up with involuntary discharges, and these are often less than honorable. Again, it is important to overcome the board's presumption that the regulations were followed and the command acted properly in your individual case. But where command wrongdoing can be shown, the boards can be forced to admit that discharges are inequitable and improper. It is important to look at the limited protections offered by the Military Whistleblower Protection act and implementing regulations. (These are discussed in chapter 26.) If retaliation was not an issue, the boards may also be open to arguments that the psychological stress caused by harassment or assault mitigates poor performance or misconduct.

Misconduct outweighed by a pattern of good service. It's not uncommon to see a well-respected soldier or sailor suddenly labeled a "dirt bag" after one

or two incidents of misconduct, no matter how good his or her behavior was beforehand, and no matter what the circumstances. The DRBs will consider prior good performance and conduct, and particularly receipt of awards and decorations, when considering whether the misconduct outweighed the overall record of good service. In theory, only the performance and conduct in the last period of enlistment should be considered in characterizing discharges, but the boards will sometimes look sympathetically at prior periods of honorable service. The discharge regulations and DRB regulations encourage this, but you should still expect the board to treat even minor acts of misconduct as if they were major felonies, particularly for GIs with some years of service, or those who are E-4 and above. This argument usually works best if combined with another showing some mitigating circumstances leading to the misconduct.

Hearings

Personal appearances before the DRBs are considered very helpful in discharge upgrade cases, and the overall statistics bear this out. A hearing offers you an opportunity to tell the board what happened, to let the board members judge your character by your words and demeanor, to present witnesses who know the circumstances of the discharge or your character, and to hear oral arguments from you or your representative.

Hearings before the DRBs are informal and non-adversarial. The lowest-ranking officer on the board serves as a ‘recorder.’ He or she explains the board procedures to you before the hearing, and they are explained again at the beginning, to ensure that you know your rights in the proceedings and, in theory, to make you feel comfortable speaking to the board. Sessions are recorded by the board, and you are entitled to a copy of the recording if you request it. In theory, the board members want to hear from you, and no one is to act as a prosecutor to argue against you. In reality, board members may ask very difficult questions and respond to your arguments with their own views.

Veterans can give sworn or unsworn statements to the DRBs, as can witnesses. If you make a sworn statement under oath (or affirmation, if you believe it’s wrong to take an oath), the board members are allowed to question you. They cannot do so with an unsworn statement. Presenting your case to the board can be a stressful experience. Some vets practice hearings with their advocate beforehand, or with a third person so that they can see how their advocate handles things. While some vets just make a statement from memory, or

from notes, others read a statement prepared beforehand. Some give their statements in question-and-answer form with their representative; the questions highlight each of the points they want to make. Some vets choose to present a written statement or a statement made through their advocate. Boards do like to hear from veterans, however, and an oral statement can help not only to establish the facts of the case, but also to give the members a sense of the vet's character.

Some advocates start and end the hearing by making an opening statement and closing argument. If board members question you or your witnesses, your advocate can respond with other questions to clarify, and he or she can object if questions are improper or rude, if the members ask questions too quickly to give answers, or otherwise make it difficult for you to present your case. The advocate can also discuss the propriety or relevance of the members' questions, reminding the members if they are looking at issues they should not consider. On those rare occasions when board members get carried away and become hostile, advocates can intervene. If you have troubles speaking to the board or answering questions, your advocate can help you to explain what you meant, give you a chance to catch your breath and collect yourself, or make arguments to emphasize the important parts of your statement.

Sometimes new issues come up during the hearing, or it becomes clear that the board members are focused on an unexpected issue. It is possible to present new issues before the hearing ends, and the recorder should ask that these be written on a DD 293 form to document them. On rare occasions, it may be useful to ask the board to defer its decision until new evidence or arguments can be submitted to address an issue that came up for the first time in front of the board.

At most hearings, the members end by thanking the veterans for presenting their case, and wish them well—but they don't make a decision then. Instead, the members discuss the case afterwards, and send the veteran a written decision, usually four to six weeks later. If they deny a case in whole or in part, they should explain why they disagree with each issue the vet raised, or why they feel it doesn't require an upgrade.

Further review

If the DRB denies part or your entire request, like upgrading your discharge to general rather than honorable, or changing the character but not the reason,

you have several options. If you have had only a records review, or had a hearing without any representation, you can reapply by requesting a hearing at any time up to the 15-year deadline. If that doesn't apply, or doesn't seem useful, you can petition the Board for Corrections of Military/Naval Records. They can consider the case as you presented it to the board, along with any new evidence and arguments. You may want to add requests to your application that the DRB could not consider, such as a change in reenlistment code.

Some veterans take their cases to federal court. The courts can address major issues of law, but rarely decide the that review boards abused their rather broad discretion in deciding cases. Here the advice of an attorney is extremely important, to determine whether litigation would be useful.

In some cases, veterans feel that the boards did not act properly in applying their own legal standards or requirements. If this is the case, you may want to speak with your advocate about a complaint to the Joint Service Review Activity. The JSRA gives the military department an opportunity to review the case and, if the service does not take action, the JSRA makes its own review and provides recommendations to the Deputy Under Secretary of Defense (Program Integration) for a decision. Remember here that the complaint doesn't directly address the validity of an upgrade application, but rather whether the DRB acted properly in considering the case.

By way of conclusion

Discharge upgrade cases are obviously complex, and they involve a fair amount of work. But good representation can take much of that load off of your shoulders, and allow you to raise significant legal issues without spending a year in a law library. Although success rates are not high, a well-prepared and well-documented case can have a strong chance of success. The rewards can be important, in personal honor and in a "clean" DD 214 which opens the way to important benefits.

Kathleen Gilberd is a paralegal military counselor, who assists servicemembers and veterans in voluntary and involuntary discharge cases, discharge upgrades and Board for Correction of Military/Naval Records cases, sexual harassment and racial discrimination complaints, and medical (disability evaluation system) proceedings. Ms. Gilberd is a graduate of the University of

California, Berkeley; she first became interested in military law there when soldiers at nearby Fort Ord asked for help with a demonstration against the Vietnam war at their base. This taught her a great deal about servicemembers' rights, and the lack thereof, and led to professional and pro bono work as a military counselor beginning in 1973. Her work has ranged from Navy sailors' protests of dangerous shipboard conditions to participation on the legal team for Col. Margarethe Cammermeyer in a successful lawsuit against the pre-"Don't Ask, Don't Tell" policy, and now to challenges to the Army's and Marine Corps' efforts to discharge combat veterans with PTSD for misconduct or "personality disorder."

For more years than she cares to remember, Ms. Gilberd has served as the chair or co-chair of the National Lawyers Guild's Military Law Task Force, and she contributes regularly to its legal journal, *On Watch*. She has written extensively and, she says, boringly, on military administrative law, including contributions to the military counseling manual, *Helping Out*, Clark Boardman Callahan's *Sexual Orientation and the Law*, and other legal manuals. She also serves on the advisory committee of the national GI Rights Network.