



Other-Than-Honorable Military Discharge *Ramifications and Remedies*

By Thomas J. Hetchler Jr. and Aaron E. Cook

The mission statement of the U.S. Department of Veterans Affairs (VA) includes President Lincoln's promise "[t]o care for him who shall have borne the battle, and for his widow, and his orphan" by serving and honoring America's veterans.¹ Ensuring that all service members receive the care they need is not always as simple as making benefits available—service members must first be eligible for these benefits.

In many instances, when a service member receives an other-than-honorable discharge for persistent and willful misconduct, he or she is ineligible for VA benefits and services.²

Under 38 CFR 3.12, Congress has established behavior that leads to other-than-honorable discharges and restrictions on certain benefits this status creates.³ VA is required to consider the benefits eligibility of a service member with an other-than-honorable discharge on the basis of available evidence and make a plausible decision. Its decisions lead to different outcomes and benefits for each individual, and many veterans are denied benefits based on the characterization of discharge alone.

How military discharge is determined

To initially determine the character of a service member's discharge, the military considers the specific facts and circumstances of the individual's conduct during a particular period of service. Although the branches under the Department of Defense (DoD) fall within the same general mission of military preparedness, each branch is unique in its preparation and separate undertaking. Consequently, individual branch regulations for separation vary to reflect these differences. In addition, within each branch exists a distinct military culture.

As a result, the DoD grants each military branch the authority to separate service members and determine individual discharge characterization.⁴ Military separation occurs at either an administrative or a punitive level within each branch of service,⁵ and the decision to separate a service member from the military and the discharge character he or she receives is determined on a case-by-case basis.⁶ In general, regulations throughout the service branches

regarding other-than-honorable discharge decisions and separation mimic one another; however, subtle differences in the language of each branch's regulations might be worth noting when developing a case.⁷

Army Regulation 635-200⁸ outlines the effect of separation on service members: "Both honorable and general discharges entitle a Soldier to full Federal rights and benefits provided by law" and a "[d]ischarge under other than honorable conditions may or may not deprive the Soldier of veteran's benefits administered by the [VA]; a determination by that agency is required in each case."⁹

Air Force Instruction 3208 § 1.17 provides guidance on what to consider when characterizing service. In general, the Air Force considers the quality of the member's service based on current enlistment records and post-service conduct—not isolated behavior, but a pattern of conduct—in the civilian community.¹⁰

Navy and Marine Corps regulations such as MILPERSMAN 1910-300 provide guidelines on the authorized types of separation from the Navy.¹¹ Their policy "is to promote readiness by maintaining high standards of conduct and performance."¹²

Dealing with discharge character

Often years after service and in many instances after denial by VA, veterans realize the character of their discharge prevents or limits possible VA benefits including disability compensation, healthcare, education benefits, and vocational rehabilitation. In fact, between 2000 and 2005, a little more than 55,000 service members received other-than-honorable discharges.¹³ Those veterans, many of whom served in combat, are ineligible to receive VA benefits including healthcare and compensation for disability. Nevertheless, they are expected to operate in society without necessary treatment for service-connected problems.

Unfortunately, many veterans simply give up after being denied benefits. But veterans discharged from any branch of service under other-than-honorable conditions have three options for upgrading their discharge. The first two are administrative boards—the Discharge Review Board and the Board for the Correction of Military Records (collectively, "the board").¹⁴ The third option is judicial review. Even veterans with final court-martial or final administrative review board determinations maintain the option of judicial review; however, historically, judicial review has been extremely difficult for veterans to prevail. The remainder of this article concentrates mainly on the Discharge Review Board process.

To begin the process of upgrading a discharge characterization, a service member must file an application for review of discharge or dismissal from the United States Armed Forces within 15 years of the date of discharge.¹⁵ A waiver is not available if the veteran fails to file the application within this period before the tolling of the statute of limitations.¹⁶ The first step in establishing whether a discharge upgrade is feasible is obtaining the veteran's military service records to determine the type and circumstances of his or her discharge. The representative can request these records from the National Personnel Records Archives located in St. Louis, Missouri,¹⁷ or directly from the service member. Look for records likely to show the discharge characterization was unjust

or the conduct or behavior could be explained with the veteran's service medical records. Review the documents with the question in mind, "Did the veteran's branch of service take extenuating circumstances into consideration?"

In addition, it is important to strengthen the application with supplementary material to help the board make its decision. Submitting a memorandum with supporting evidence and documentation similar to what a client might provide in an attempt to expunge a criminal record is recommended. This entails providing the board with statements from members of the community who support ruling in the veteran's favor. A veteran should consider including statements from coworkers, fellow church members, and school authorities who know him or her best. The memorandum should be professional, yet informal, and written in plain English. Board members are nonlawyers—usually career officers assigned on a temporary basis to review applications—and not often swayed by legal jargon or case citations. Army Regulation 15-180 governs the actions and composition of the Army Discharge Review Board. Each branch of service has similar regulations.

The veteran should consider addressing why he or she received an other-than-honorable discharge, as such candor goes a long way before the board. The veteran must personally address the reasons why the board should grant a discharge upgrade and steps he or she took to resolve the underlying issue of the original discharge characterization. To initiate consideration of an upgraded discharge from the Discharge Review Board, the former service member must complete DD Form 293.¹⁸

For a personal hearing before the Army Discharge Review Board, the former service member has only one location option—Washington, D.C.¹⁹ However, there are three avenues to appear before the board: personal appearance, either with or without counsel; counsel appearing on the applicant's behalf; or the board evaluating the case based on military records and additional evidence provided by the former service member.²⁰

The results of an upgraded discharge and the impact on the veteran are mixed. In some cases, the veteran is provided retroactive consideration of benefits, ensuring a fair chance to obtain compensation and benefits deserved from the onset of discharge. However, on other occasions, an upgrade provides only a looking-forward effect from the date of upgrade.

FAST FACTS

In many instances, when a service member receives an other-than-honorable discharge for persistent and willful misconduct, he or she is ineligible for VA benefits and services. However, a veteran discharged from any branch of service under these conditions has options for upgrading his or her discharge.

How an other-than-honorable discharge affects the service member

An other-than-honorable discharge also results in a lack of protection under the federal Uniformed Services Employment and Reemployment Rights Act, which offers job security for those who deploy. Upon return from deployment, service members still have rights at their previous place of employment. Those discharged under other-than-honorable conditions or other punitive discharges do not enjoy protections under the act.²¹

Upon an upgraded discharge status to honorable or general-under-honorable conditions, a service member who otherwise meets eligibility criteria of the act may once again receive protection, which restores previous employment rights.²² It should be noted that even with retroactive employment rights, the employer is not subsequently liable for those dates the service member was deemed ineligible because of discharge characterization.²³



Conclusion

Many service members find it increasingly difficult to readjust to life back in the States after serving in combat. Cases involving posttraumatic stress disorder and traumatic brain injuries can manifest months or even years after leaving the service and often go undiagnosed. In many cases, the very conduct that led to the other-than-honorable discharge was directly related to stress disorder and brain injuries incurred during combat.

Veterans who apply for and are denied benefits based on characterization of discharge should not give up. Veterans never join the service with the intention of participating in dishonorable conduct. As in all walks of life, people make mistakes. In the military, those mistakes can be costly and follow you throughout life. Veterans should seek out an accredited attorney or knowledgeable representatives in a veteran's service organization for assistance in obtaining benefits through a discharge upgrade process. Help your veteran clients explore the possibility of applying for an upgraded discharge. If successful, you will change their lives forever. ■



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ENDNOTES

1. U.S. Department of Veterans Affairs, *About VA* <http://www.va.gov/about_va/mission.asp>. All websites cited in this article were accessed January 20, 2015.
2. *Beck v West*, 13 Vet App 535, 539 (2000), citing *Struck v Brown*, 9 Vet App 145 (1996).
3. 38 CFR 3.12 (2012).
4. 10 USC 1441.
5. 38 USC 5303(e)(1).
6. 38 USC 5303(e)(1).
7. See AR 635-200, ch 11, § 11-3; see also AFI 36-3208, § 1.18.3 through § 1.18.3.7.
8. AR 635-200, *Active Duty Enlisted Administrative Separations* (2005).
9. AR 635-200, ch 3, § 3-6(a) and (b).
10. Secretary of the U.S. Air Force, *Administrative Separation of Airmen*, AFI 36-3208 <http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3208/afi36-3208.pdf>.
11. Secretary of the U.S. Navy, *MILPERSMAN 1910-300* <<http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1910-300.pdf>>.
12. Secretary of the U.S. Navy, *MILPERSMAN 1910-010* <<http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1910-010.pdf>>.
13. Brooker et al, *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 Mil L R 1, 17 (2012), citing U.S. Ct of Appeals for the Armed Forces, *Annual Reports* <http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm>.
14. 10 USC 1553.
15. See U.S. Department of Defense, *DD Form 293 Application for the Review of Discharge from the Armed Forces of the United States* <<http://arba.army.pentagon.mil/documents/dd0293.pdf>>.
16. 10 USC 1553.
17. Send Standard Form 180 to National Personnel Records Center, 1 Archives Drive, Saint Louis, MO 63138-1002.
18. See U.S. Department of Defense, *DD Form 293 Application for the Review of Discharge from the Armed Forces of the United States* <<http://arba.army.pentagon.mil/documents/dd0293.pdf>>.
19. Army Review Boards Agency, *Mission Statement and Overview* <<http://arba.army.pentagon.mil/adrb-overview.cfm>>.
20. *Id.*
21. 38 USC 4304.
22. 20 CFR 1002.137 (2006).
23. 20 CFR 1002.138 (2006).