



Discharge Review in the military review system

**A consideration the issues of discharges
from the US Military**



Types of Discharges:

- Administrative - as a result of processing – also sometimes referred to as an involuntary discharge
- Punitive – part of the sentence of a court-martial
 - Bad Conduct
 - Dishonorable
 - Dismissals



Reasons For Discharge

- Convenience of the government
- Unsuitability
- Misconduct
- Unfitness – No longer a basis but may be the basis for discharge in older veterans (pre 1980)
- Punishment BCD, DD, Dismissal

Character of Discharge

- Honorable – The highest character – each service has its own definition
- General – AKA “under honorable conditions”
- Other than honorable conditions
 - Formerly “undesirable discharge” for enlisted personnel
 - BCD will be characterized as under “conditions other than honorable” on the DD 214
- Dishonorable – Sentence of a GCM only
- Dismissal – equivalent to a dishonorable discharge

Appendix A
Sample Separation from Service Form

THIS IS AN INFORMATION REPORT
FOR RECORD USE

1. COPY NAME/UNIT AND GRADE OR RATE
USMC

2. SERVICE NUMBER
032

3. SOCIAL SECURITY NUMBER
682

4. GRADE OR RATE OR RANK AND DATE OF PROMOTION
Private E-4

5. DATE OF ENTRY INTO SERVICE
1 Jun 68

6. DATE OF SEPARATION
31 May 75

7. NAME OF MEMBER
Portaferry, North Ireland

8. DATE OF BIRTH
30 Jul 45

9. GRADE OR RATE AND DATE OF PROMOTION
**Local Board #21
Woughkeensie, New York**

10. DATE OF ENTRY INTO SERVICE
30 Jul 45

11. NAME OF MEMBER
**Marine Barracks,
New York 11251**

12. GRADE OR RATE AND DATE OF PROMOTION
**Transferred to Marine Corps Reserve
Naval Base, New York, NY 11251**

13. DATE OF ENTRY INTO SERVICE
**When USMC activated 210 - Convenience of Government, paragraph
1926.14 Marine Corps Personnel Manual and MCC 1910.23.**

14. GRADE OR RATE AND DATE OF PROMOTION
**27 Nov 68, Letter-Dir, POC SFRAN
HONORABLE**

15. DATE OF ENTRY INTO SERVICE
Marine Corps Automated

16. NAME OF MEMBER
**Delta Service Center
300 E. Franklin Road, Kansas City, Missouri**

17. GRADE OR RATE AND DATE OF PROMOTION
2 Oct 72

18. DATE OF ENTRY INTO SERVICE
3 Oct 68

19. NAME OF MEMBER
**Private (E-4)
Albany, New York**

20. GRADE OR RATE AND DATE OF PROMOTION
**Private (E-4)
Albany, New York**

21. DATE OF ENTRY INTO SERVICE
01 11 68

22. NAME OF MEMBER
**Robert Engineer
Monkey (robot)**

23. GRADE OR RATE AND DATE OF PROMOTION
1 72

24. DATE OF ENTRY INTO SERVICE
00 02 75

25. NAME OF MEMBER
**College 2 - Physics
MCS, MCS, COLLEJ - 4 weeks - 1967 - Robot Engineer Course
MCI, Wash, D. C. - 1968 - Marine Corp Stock Dist**

26. NAME OF MEMBER
None

27. GRADE OR RATE AND DATE OF PROMOTION
N/A

28. DATE OF ENTRY INTO SERVICE
N/A

29. NAME OF MEMBER
**Grand Marshal Medal
Awarded**

30. GRADE OR RATE AND DATE OF PROMOTION
Sec Item #1

31. DATE OF ENTRY INTO SERVICE
None

32. SIGNATURE OF OFFICER AUTHORIZED TO SIGN
L. CORTON, Delta, USMC, Adjutant

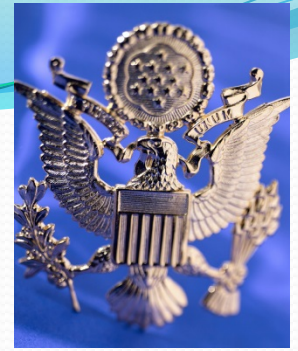
33. SIGNATURE OF MEMBER BEING TRANSFERRED OR DISCHARGED
Robert Engineer Monkey (robot)

34. SIGNATURE OF MEMBER BEING TRANSFERRED OR DISCHARGED
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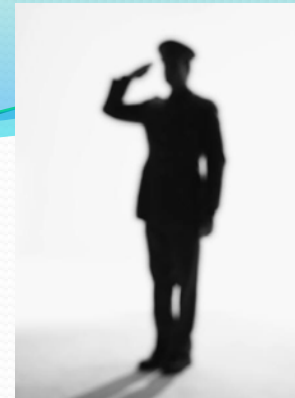
35. SIGNATURE OF MEMBER BEING TRANSFERRED OR DISCHARGED
Robert Engineer Monkey (robot)

Administrative Discharges

10 USC 1161 & 1178



- Any termination of service prior to the completion of enlistment.
- May not require a due process hearing
- Separate Regulations in each service
- Discharge authority may vary, but generally must be approved by an officer exercising general court-martial jurisdiction.



The Discharge Process

- Initiated by a commander (typically a company grade – officer i.e., captain USA/USAF/USMC or Lieutenant USN/USCG)
- Service member must be notified of intent to discharge.
- If the proposed discharge is “non-stigmatizing” respondent is generally given right to discuss with a lawyer and respond in writing to the recommendation for discharge.



The discharge process

- If stigmatizing – respondent must consult with a lawyer
- Hearing generally authorized
- May present evidence and call witnesses
- After hearing the recommendation is reviewed by command counsel (i.e., the staff judge advocate)
- Decision generally made by an “officer exercising general court-martial jurisdiction” (i.e., a flag officer in command)



Obtaining Records



- SF 180
- Used to obtain military personnel and medical records – generally no charge; note requestor must have some status – e.g. counsel for vet.
- Court-Martial – must write to the JAG of each service – may be a charge per page. Request only the parts you need.
- A request for the record of any prior discharge review must go to the agency which conducted the review (i.e. service DRB or Correction Board)

Nonjudicial punishment

- Art 15 UCMJ (10 USC 815)
- Imposed by commanding officer
- Limitations on punishment are set by the grade of officer imposing punishment
- Generally limited to loss of pay and restraints on liberty and reductions in grade (enlisted only)
- Appeals to next senior in command
- Navy/USCG Captain's Mast USMC – Office Hours
- Army and Air Force “Article 15”



The legislative reorganization act of 1948

- Purpose was to eliminate “private bills”
- Empowered Correction boards and other similar entities to do all the things previously handled by Congress by private relief act.
- Some limitations e.g., no review of conviction by courts-martial

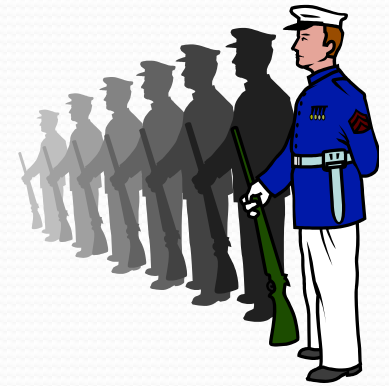
Exclusive Remedy

- Chappell v. Wallace, 426 US 206 (1983) Availability of correction boards and other remedies means FTCA Does not apply to actions of superiors in military (Bivens action)
- United States v. Stanley, 483 US 669 (1987) Reiterates Feres Doctrine w/regard to these issues



Discharge Review Board

- 10 USC 1553
- DD 293 – Application form
- Commissioned officers of the military
- Hearings but generally held in Washington DC area
- 15 year statute of limitations for application
- May review any administrative separation and BCDs from SPCM



Panels of 5 Senior Commissioned officers

Either a document review or a personal appearance – if the veteran denied relief on a document review he/she may request a personal appearance



Allege an “inequity” or an “impropriety”
“inequity” equates to a departure from service traditions and standards

“impropriety” generally refers to legal or factual errors in the process

Special considerations where PTSD is an issue

- At least one board member must be a medical officer or a mental health professional
- Accelerated consideration – Decision must be made within one year of receipt of all materials for the board
- 10 U.S.C. § 1553(d)(1) and (2).





Service Correction Boards

10 USC 1552 – Secretary may correct any record of his department when he considers it necessary to correct an error or remove an injustice

Acts through “boards of civilians” – senior civilian officials of the department

Must apply within three years of discovery of the error or injustice (See caveat)



Application form – DD149

Senior Civilian employees of each service department.

Mostly a review on the record. In rare cases the board may authorize a hearing.

May review any discharge or dismissal

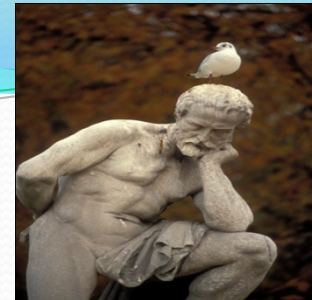
Considers appeals of DRB decisions

May remove bar to VA benefits.

The Statutory Bar to Benefits

- 38 U.S.C 5303
- Conviction by GCM
- Desertion/UA for 180 or more continuous days
- Conscientious Objector (self requested)
- Discharge by reason of alien status in time of war (self requested)
- May only be removed by a “case by case basis”

Strategies



- Failure to follow discharge regulations
- Failure to properly counsel former member as to conduct or performance of duty
- Improper basis for discharge (e.g. vet was discharged for misconduct but should have been separated for unsuitability)
- Unduly harsh given the quality of the veteran's service- e.g. failure to give weight to combat service or personal decoration



The advisory opinion

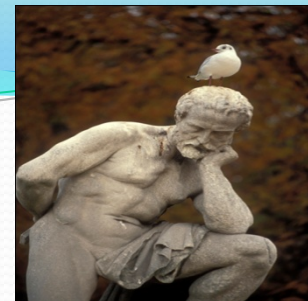
- Prepared by the military – typically the legal advisor to the staff section concerned.
- Board need not request such an opinion; typically the Naval Service does not in discharge cases
- Always respond to the opinion even if favorable – the board is not bound by it.
- Watch for “harmless error” analysis – injustice is an equitable doctrine.



Special issues

- Discharge/resignation in lieu of trial or administrative proceedings (RILO, GOS, Chapter 10) Very difficult to change. Wilson. V. McHugh, 842 FSupp. 2d. 310 (D.D.C. 2012) (service member will not be allowed to relitigate underlying misconduct)
- Discharge requested by accused during sentencing at a court-martial.
- I lied to get out of the military. Weir v. United States, 474 F2d. 617 (Ct.Cl. 1973) (petitioner estopped from asserting untruth of original assertions)
- Misconduct unrelated to military service (How does it impact on the character of the veteran's service?)
- Reserve discharges – Is the basis for discharge something unrelated to the former member's service? (see above)
- Prior Proceedings – e.g., Discharge proceedings based on misconduct previously the subject of a court martial or other administrative proceeding
- Homosexual conduct/tendencies

Strategies



- Failure to follow discharge regulations
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Limitations on Lawrence v. Texas

- United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2006)
- “. . . the question this Court must ask is whether Article 125 is constitutional as applied to the charged conduct; this as-applied analysis requires consideration of three questions: First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence? 539 U.S. at 578. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?”
- Separate society theory

Myths

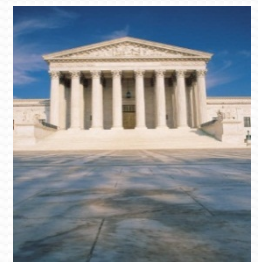
- Six months after discharge a general discharge will become an honorable, an OTH will become a general, etc.
- Good conduct after discharge warrants an automatic upgrade.
- Bad paper is ignored by employers (etc) because everyone knows the system is unfair.
- My records were lost in the [St. Louis Records Center] fire



Judicial Review



- May be either to the Court of Federal Claims or the local District Court.
- “Little Tucker Act” 28 USC 1346(a)(2)
- General six year statute of limitations runs from the date of discharge, not from the date of DRB or BCMR decision See Martinez v. United States, 333 F.3rd. 1295 (Fed.Cir. 2003)
- Theoretically may be reviewed under the APA; most circuits (including the DC and Fed Circuits) apply an “arbitrary and capricious” standard
- Extremely deferential standard of review See Kreis v. Secretary of the Air Force, 866 F2d 1508 (D.C. Cir 1989)



Implications on homosexual discharges for Veteran's Law

- What happens if the discharge is upgraded?
 - Change the RE (reenlistment) Code
 - Constructive service? Usually this remedy limited to constructive service forward to the point where the plaintiff's existing contract would have expired.
 - Reinstatement?
 - Unlikely – contrast with Cammermeyer v. Aspin 850 F.Supp 910 (W.D. Wash 1994) Military directed reinstate plaintiff and remove all references to homosexuality from her record. Appeal denied as moot, 97 F.3d 1996 (9th Cir 1996).



Potential impacts of the Defense of Marriage Act

- Visitation rights at hospitals etc.
- Additional compensation for spouse and children.
- Dependent's indemnity compensation
- Aid and Attendance

Review by the DVA



- Very limited – determination of the “Character of Service”
- Offenses of “moral turpitude” – generally felonies
- “Willful and persistent misconduct” – a pattern of offenses. Not a single minor offense. Look to see what the offenses were and the possible underlying causes.
- Periods of good service followed by an enlistment terminated by a bad discharge 38 U.S.C. 101(18)

Admin discharge where a medical board is indicated

- Practice of admin processing for service members who have demonstrated characteristics of PTSD/TBI
- Look for a record of minor disciplinary infractions
- Was a medical evaluation board held?
- Did the service member waive processing?
- Has there been DVA evaluation?
- Recent Litigation
- Statute of limitations issues

PTSD vs. Personality disorder

- Must differentiate between the two
- Many vets discharged with a personality disorder are really suffering from PTSD
- Check med records to see if the vet was seen by a military mental health professional before separation and or processing
- Class action for vets discharged between 2002 and 2008.
- Particularly important for vets discharged prior to 1980

Sabo v. United States, No. 08-899 C FedCl. July 28, 2011

<http://www.washingtonpost.com/wp-srv/nation/Sabo-7-28-2011-motion.pdf>

Swords to Plowshares web site for Examples of plain language briefs
for discharge upgrades

<http://www.swords-to-plowshares.org/tag/discharge-upgrade>

Review boards reading room: <http://boards.law.af.mil/index.htm>