



**The Veterans
Consortium**

DISCHARGE UPGRADE PROGRAMSM

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FULFILLING OUR PROMISES
TO THE MEN AND WOMEN WHO SERVED

Charitable Service Trust

Discharge Upgrades Based on Don't Ask, Don't Tell & Prior Policies

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Thank you to the Major General Ernest A. and Marilyn Bedke Veterans Law Center at Bay Area Legal Services for sharing the information in this presentation.



**The Veterans
Consortium**

PRO BONO PROGRAM®

We believe
That our veterans
~our nation's defenders~
Deserve the care,
Benefits, and compensation
They were promised
And the best legal services,
Free of charge,
To meet their challenges.

#theyfoughtforus

What We Do

- **Provide pro bono representation worldwide to all qualifying veterans in need and their families, caregivers, and survivors in federal venues**
 - U.S. Court of Appeals for Veterans Claims
 - U.S. Court of Appeals for the Federal Circuit
 - U.S. Supreme Court
- **Provide pro bono legal services to service men and women who received “Other Than Honorable” Discharges**
 - Discharge Review Board cases
 - Board for Correction of Military Records cases
- **Operate the National Veterans & Appellate Law Clinic**
 - Weekly legal information and referral clinic at the VAMC in Washington, DC
 - Monthly legal information and referral clinic at the Washington, DC VAMC Women’s Health Clinic
 - Veterans local legal clinics (TVC Clinic-in-a-Footlocker)
- **Provide pro bono assistance to Veterans seeking U.S. naturalization through military service**



What is a Discharge Upgrade?

Discharges from military service may be:

Administrative

- Honorable
- General
- Uncharacterized
- Other than Honorable (OTH)

Punitive

- Bad Conduct
- Dishonorable
- Dismissal

Each branch (except the Navy and the Marines which have joint boards) has two boards that review veterans' requests to have a less than honorable discharge upgraded. This changes the "character of service" on the DD-214-Certificate of Release or Discharge from Active Duty.



Importance of an Upgrade

- Eligibility for VA Benefits
 - Medical care
 - Mental health care
 - Disability compensation
 - Housing assistance
 - Employment assistance
 - Survivor and dependent benefits
- Reduces the risk of homelessness & suicide
- Removes negative stigma
- Ability to re-enlist
- Recognition as a veteran
- Veteran employment preferences
- Restore honor



Discharge Review Boards (DRBs)



Discharge Review Board

- [DD-293 form](#)
- FIRM 15-year deadline
- Apply by filing DD-293 (and a lot more!)
- Cannot grant medical discharge or military retirement
- Cannot review a discharge from a General Court Martial
- 2 bites at the apple
 - Record review
 - Personal appearance hearing

Boards for Correction of Military/Naval Records (BCMRs and BCNR)

- [DD-149](#) --- difficult to find the current DD-149 form online
- BCM/NRs require that the veteran exhausts their remedies with the DRB before applying to BCM/NR
- 3-year deadline from the date the error or injustice is discovered
 - This is a waivable deadline
 - Board can waive the deadline “in the interest of justice”
 - Board will also waive the deadline if mental health concerns are involved (more about this later)
- Can change reason to or from to medical retirement/disability
- Apply by filing DD-149 (and a lot more!)
- Can grant upgrade from General Court Martial
- No personal appearance hearings



Sample DD-214 Form

SAMPLE DD 214 FORM

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY							
1 Name		2 Department, component, and branch		3 Social security number			
4a Grade, rate, or rank		B Pay grade		5 Date of birth		6 Reserve obligation termination date	
7a Place of entry into active duty				b Home at time of record			
				NOTE FROM THE MDHE: This section will help determine if the veteran was a <u>Missouri resident</u> at the time he or she entered the service.			
8a Last duty assignment and major command				b Station where separated			
9 Command to which transferred				10 SLGI Coverage None Amount			
11 NOTE FROM THE MDHE: This section will help determine if the veteran served <u>after September 11, 2001.</u>				12 Record of service			
				a Date entered ad this period			
				b Separation date this period			
				c Net active service this period			
				d Total prior active service			
				e Total prior inactive service			
				f Foreign service			
				g Sea service			
				h Effective date of pay grade			
13 Decorations, medals, badges, citations, and campaign ribbons awarded or authorized				14 Military education			
NOTE FROM THE MDHE: This section will help determine whether the veteran served in <u>armed combat</u>							
15 a Member contributed to post-Vietnam era educational assistance program							
b High school graduate or equivalent							
16 Days accrued leave				17 Member was provided complete dental examination and all appropriate dental services and treatment within 90 days prior to separation			
18 Remarks							
NOTE FROM THE MDHE: This section will help determine whether the veteran served in <u>armed combat</u>							
This section may contain references to the <u>geographic region where the veteran served</u> or references to service in support of <u>Operating Enduring Freedom</u> ("OEF") or <u>Operation Iraqi Freedom</u> ("OIF").							
19 a Mailing address after separation				b Nearest relative			
20 Member requests copy 6 be sent to							
21 Signature of member				22 Official authorized to sign			
				Special Additional Information			
23 Type of separation				24 Character of service			
				NOTE FROM THE MDHE: This section will help determine if the veteran was discharged <u>under honorable conditions</u>			
25 Separation authority				26 Separation code			
27 Reentry code							
28 Narrative of reason for separation							
NOTE FROM THE MDHE: This section may contain information relevant to the determination of whether the veteran was discharged <u>under honorable conditions</u>							
29 Dates of time lost during this period				30 Member requests copy 4			

DD FORM 214



Make Sure to Request:

Change in character of service (e.g. from OTH to Honorable) -- 24
re-enlistment code – 27

If you only request a change in the character of the service and are successful in getting the discharge upgraded, it will not change the other items.

Thus, a veteran could get an upgrade from OTH to General or Honorable, but still have a pejorative narrative reason (e.g. “pattern of misconduct” or “substance abuse”) on the new DD-214.

Evidence Gathering



- Request veteran's entire military service and medical records
- (OMPF – Official Military Personnel File)
 - SF 180 – request at <https://www.archives.gov/veterans>
 - Review the records carefully with the Veteran - note any awards or medals
- Veteran's VA and/or private sector medical and mental health records
- Battle buddy and Commanding Officer statements
- Family, friends, clergy statements
- Volunteer and work history
- Post service education/training

Interviewing the Veteran

- Military cultural competence
- LGBTQIA cultural competence
- Trauma informed interviewing
 - Establish rapport
 - Several interviews over time
 - Memory of traumatic events is not linear
 - Timeline and witness list are not static documents
 - As you continue to discuss the case, the veteran may begin to remember additional events or witnesses
- 4 Time periods
 - Pre-service
 - Service
 - Discharge
 - Post service





Evidence

- The Boards will presume that discharges are correct, lawful and done in good faith (presumption of government regularity)
- The veteran has the burden of proof to show that the discharge was incorrect and should be changed
- Rules of evidence do not apply
- Boards do not support witnesses – it is up to the veteran to bring any witnesses they want to testify or to submit affidavits for witnesses that cannot attend
- A positive character of discharge (COD) determination from the Department of Veteran's Affairs is persuasive (not controlling) --- more about COD's in a bit

Evidentiary Standards

- DRBs
- Equity
- Propriety
- Clemency (for discharges due to a SPECIAL court martial conviction)
- BCMRs
- Injustice
- Error
- Clemency (for discharges due to a special court or general court martial conviction)

Equity/Injustice Arguments

Three Regulatory Arguments:

- Later Policy Change: Argue when the veteran was discharged under a policy that has been changed such that the veteran would not have been discharged under the new policy. See 32 C. F.R. §70.9(c)(1)
- In-service Inconsistencies: Argue when the veteran's discharge was not consistent with the discipline standards in place at the time of discharge. See 32 C. F. R. §70.9(c)(2)
- Personnel Records: Argue when the discharge was not equitable or just based on evidence relating to the veteran's: 1) quality of service or 2) capability to serve. See 32 C. F. R. §70.9(c)(3)

Error/Injustice Arguments

Two regulatory arguments:

- An error of fact, law, procedure, or discretion such that the rights of the veteran were prejudiced. Prejudicial error occurs when there is “substantial doubt that the discharge would have remained the same if the error had not been made.” See 32 C. F. R. §70.9(b)(1)(i)

or



- The military service of which the veteran was a member made a change in policy “expressly retroactive to the type of discharge under consideration.” See 32 C. F. R. §70.9(b)(1)(ii)

Authorities for Citation


- CFR (32 C.F.R. §70.9)
- DOD Memos (Hagel, Carson, Kurta, and Wilkie)
- USECDEF for personnel and readiness 20 September 2011: correction of military records following repeal of section 654 of Title 10, U.S. Code (repeal of DADT)
- Boards' prior decisions
- Case law (such as there is)
- 10 USC§1177 (veterans who served in combat zone within 2 years and showed PTSD/TBI symptoms prior to adsep – Command must look at whether PTSD/TBI contributed to behavior that led to the discharge – now also includes provision for MST)

Hagel Memo

September 4, 2014

- 
- 
- Liberal consideration for in-service PTSD if service treatment records or service personnel records reveal PTSD symptoms
 - Special consideration given for VA determination of service-related PTSD
 - Liberal consideration of civilian provider diagnoses
 - Statute of limitations liberally waived for BCM/NRs (NOT For DRB's)

Hagel Memo – A Trauma-Informed Approach to Discharge Upgrades

- 
- By mandating that Boards give liberal consideration to applications that raise PTSD/TBI issues, the DOD is acknowledging the role of trauma on the service member's behavior.
 - This is aligned with a trauma informed approach to understanding PTSD, TBI, MST and other mental health issues.
 - A trauma informed approach does not ask “What’s wrong with you?” rather it asks, “What happened to you?”

Carson Memo

February 24, 2016

- Time limits for BCM/NRs waived for pre-Hagel PTSD cases
- Provides de novo review of PTSD-based cases pre-Hagel standard, or cases for which Hagel standards were not used
- Specifically lists TBI as a condition related to PTSD

Kurta Memo -- August 25, 2017

- Expands issues to include “mental health conditions, sexual assault, and sexual harassment”
 - This means that mental health diagnoses like depression or anxiety need to be considered in addition to PTSD and TBI
- Confirms that the policy applies to characterization of discharge, narrative reason for discharge, separation code and re-enlistment code
- Requires that Hagel and Carson requirements apply to DRBs, BCM/NRs and all discharges (but time limit still not waived for DRBs)

Kurta Memo (cont'd)

**Four questions for the Boards to consider regarding mental health concerns
(answer each in your brief)**

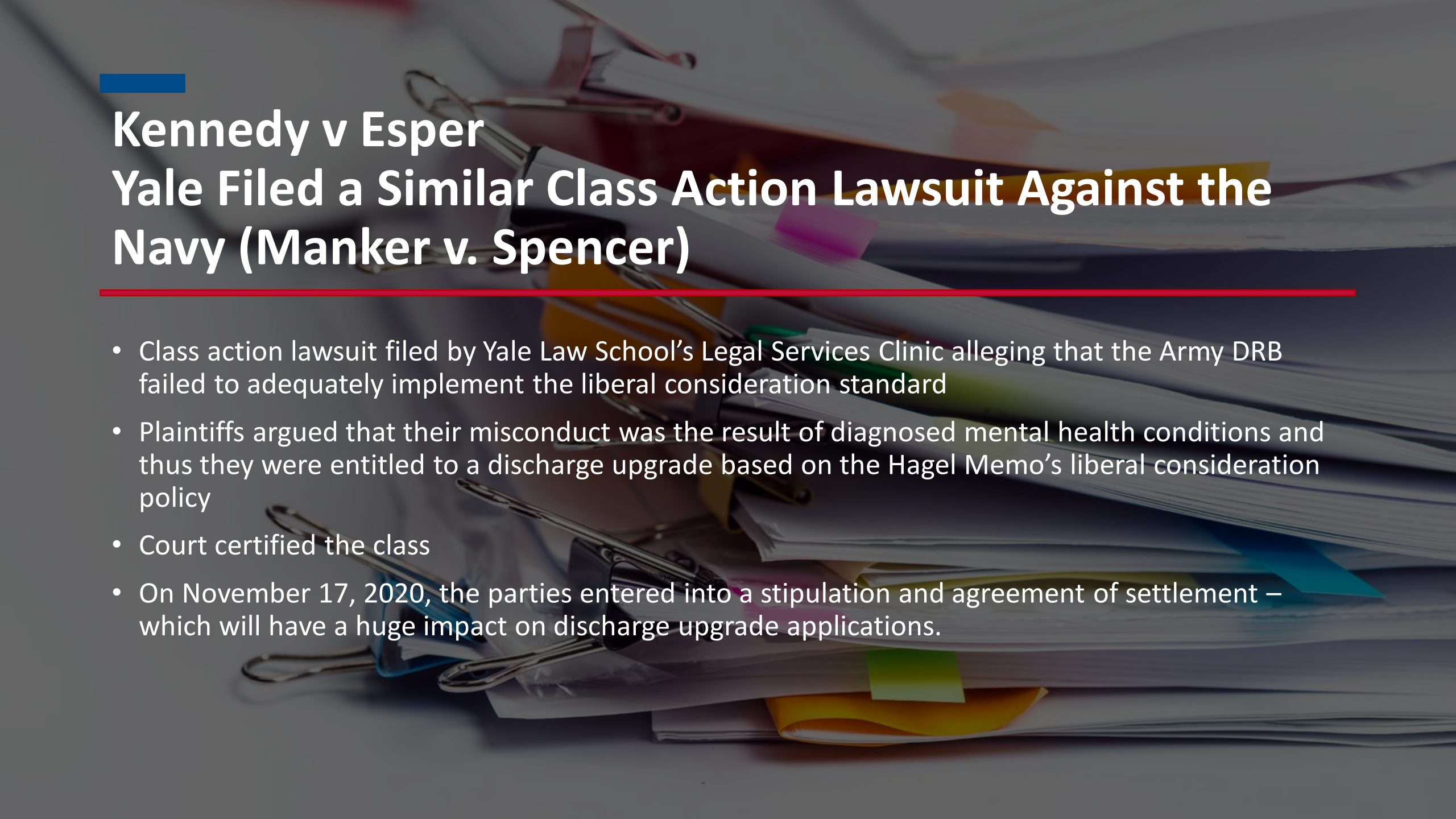
- Did the veteran have a condition or experience that may excuse or mitigate the discharge?
 - Did that condition exist, or experience occur during military service?
 - Does that condition or experience actually excuse or mitigate the discharge?
 - Does that condition or experience outweigh the discharge?
-

Wilkie Memo

July 21, 2018

- Provides standards focusing on fairness and second chances for DRBs and BCM/NRs for assessing equity and clemency.
- “An honorable discharge characterization does not require flawless military service.”
- “[R]elative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct...” (e.g. marijuana use).
- Acknowledges that similarly situated Service members may receive disparate punishments
- Directs BCM/NRs to consider post-service conduct





Kennedy v Esper Yale Filed a Similar Class Action Lawsuit Against the Navy (Manker v. Spencer)

- Class action lawsuit filed by Yale Law School's Legal Services Clinic alleging that the Army DRB failed to adequately implement the liberal consideration standard
- Plaintiffs argued that their misconduct was the result of diagnosed mental health conditions and thus they were entitled to a discharge upgrade based on the Hagel Memo's liberal consideration policy
- Court certified the class
- On November 17, 2020, the parties entered into a stipulation and agreement of settlement – which will have a huge impact on discharge upgrade applications.

Kennedy v Esper Stipulation Terms

2 Classes of applicants

- Class A – Army will reconsider all cases from 2011 to the effective date of the settlement
- Class B –All 2001-2011 applicants have the right to re-apply
- Army must send notices to all Class A and B applicants and provide online notices

For denials based on insufficient Kurta evidence, the decision letter must:

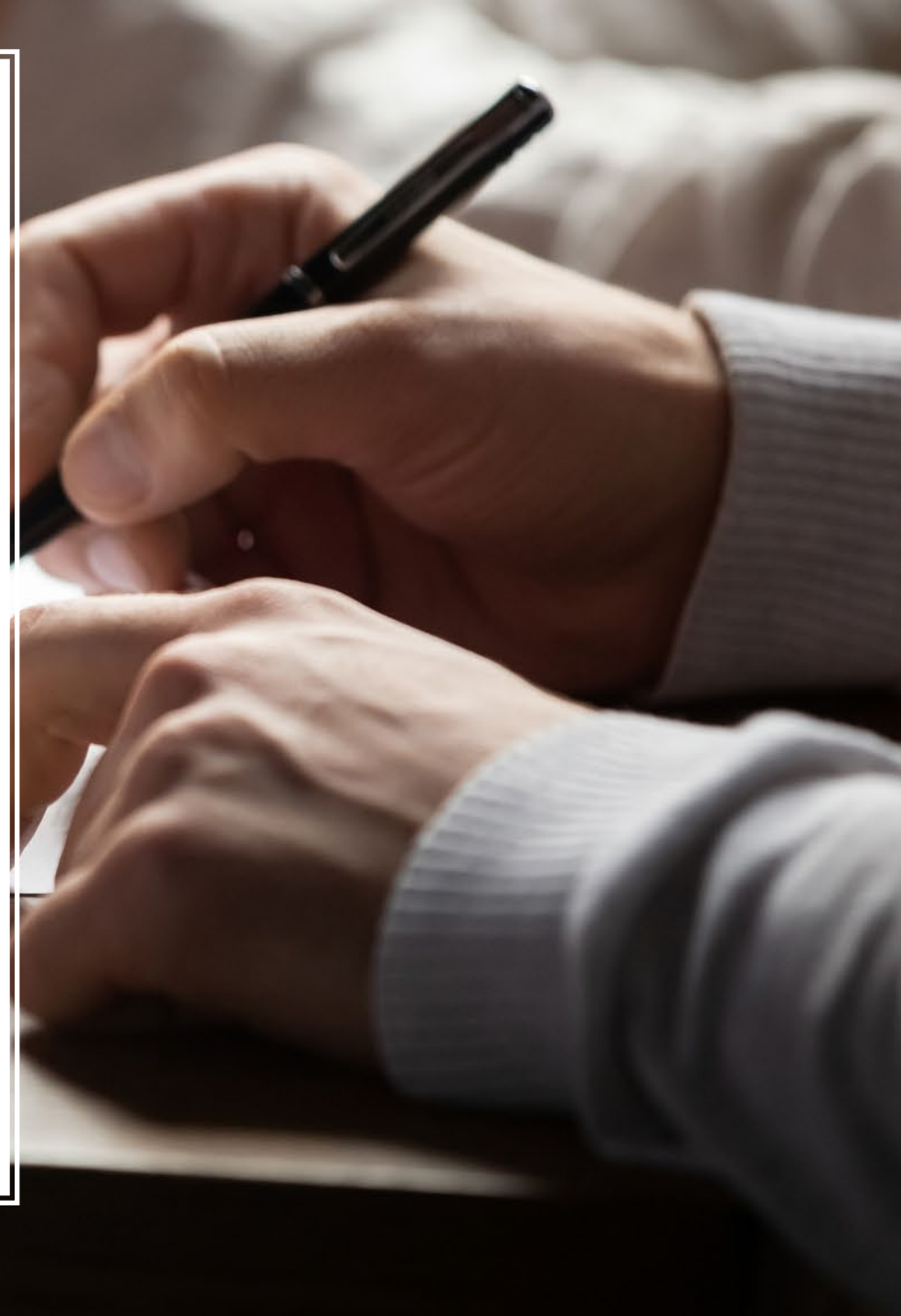
- Respond to every contention made by the applicant
- Describe evidence it relied upon
- Explain why it rules against the applicant
- Ensure it draws a rational connection between facts found and conclusions drawn
- Distinguish any prior Board decisions cited by the applicant

Universal Telephonic Hearings within 18 months of Final Approval Order

Annual training required

Notice to new applicants must:


- Inform them how to find VSO's and legal counsel
- Applicants may seek out and provide additional medical evidence within 45 days of receiving the notice
- Under 38 USC §17201, applicants have the right to obtain mental health evaluation and treatment at VA



Discharges Based on LGBTQ Status

Types of discharges
Relevant memorandum
Sample language



A photograph of a person's hands holding a large, rectangular cardboard sign. The sign is made of brown corrugated cardboard and has the words "Don't Ask; Don't Tell." written on it in a large, black, hand-drawn font. The sign is held up against a background that is partially visible, showing what appears to be an American flag with stars and stripes. The lighting is even, and the focus is sharp on the sign and the hands holding it.

Don't Ask;
Don't Tell.

5 Types of Discharge Reasons Related to DADT and Prior Policies

1. Discharge is solely based on LGBTQ+ status (DADT or prior policy)
2. Discharge is based on DADT (or prior policy) AND aggravating factors
3. Discharge is based on substance abuse related to emotional toll of DADT (or prior policy)
4. Pretextual discharge (especially an issue for transgender and gender nonconforming veterans)
5. Constructive discharge

USECDEF for Personnel and Readiness 20 September 2011: Correction of Military Records Following Repeal of Section 654 of Title 10, U.S. Code

Service Discharge Review Boards should normally grant requests to change the:

- Narrative reason for discharge to “Secretarial Authority” with a Separation Program Designator (SPD) code of JFF
- Characterization of service to honorable
- The RE code to immediately eligible to reenter category
- For the above upgrades to be warranted, both of the following must be met:
 - Original discharge based solely on DADT or similar policy in place prior to DADT
 - There were no aggravating factors in the record (e.g. misconduct)

Other Forms of Relief

Veterans may want to consider requesting additional forms of relief when warranted:

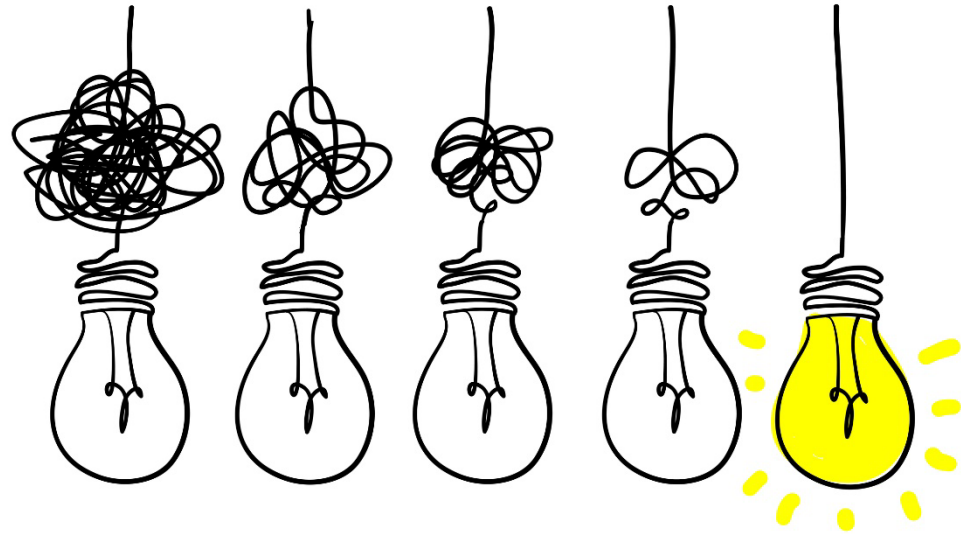
- “Removal, correction, or expungement of materials from the applicant’s military record that are inconsistent with a favorable decision”
- “Adjustment of separation date to provide active duty credit for remaining period of service contract terminated by discharge”
- “Back pay for remaining period of service contract terminated by discharge”

While the above are not commonly granted, consider requesting them as they can help build an administrative record to support a challenge in federal court.

From: Margaret Kuzma, Dana Montalto, Betsy Gwin & Daniel Nagin, *Military Discharge Upgrade Legal Practice Manual* (2021).



USECDEF 20 September 2016 Letter to Servicemembers, Veterans and Families



- Letter encourages Veterans who received bad paper under DADT (or prior policy) to seek a discharge upgrade

Sample Language DRB – DD-293

My discharge is inequitable because the sole reason for it was my admission that I had engaged in homosexual activity and there were no aggravating factors alleged in my discharge paperwork. Further, my record reflects high marks for my service. I have therefore met the requirement that the sole reason for my discharge was due to my homosexual act or admission. Please upgrade my discharge characterization to Honorable [include this ONLY if given a General discharge], change the narrative reason for separation to “Secretarial Authority,” the separation code to “JFF,” and the RE Code to “RE-1” [use “RE-1J” if you were USAF].

Under Secretary of Defense memo dated 01/28/2011 states that 'sexual orientation is a personal and private matter...' so please do not include any remarks on my new DD-214 that make it obvious that it was corrected,. Such remarks will naturally result in inquiries as to why.*

Credit: Swords to Plowshares June 10, 2020 CALTAP LGBTQ Informational Webinar

*This is important because language on the DD-214 essentially outs the veteran.

Sample Language BCMR/BCNR -- DD-149

Please make the following corrections to my record: 1. Upgrade my discharge characterization from General Under Honorable Conditions to Honorable [Include this ONLY if given a General Discharge]; 2. Change the narrative reason of separation to "Secretarial Authority;" 3. Change the separation code to "JFF;" and 3. Change the RE Code to "RE1" [use "RE-1J" if you were USAF]

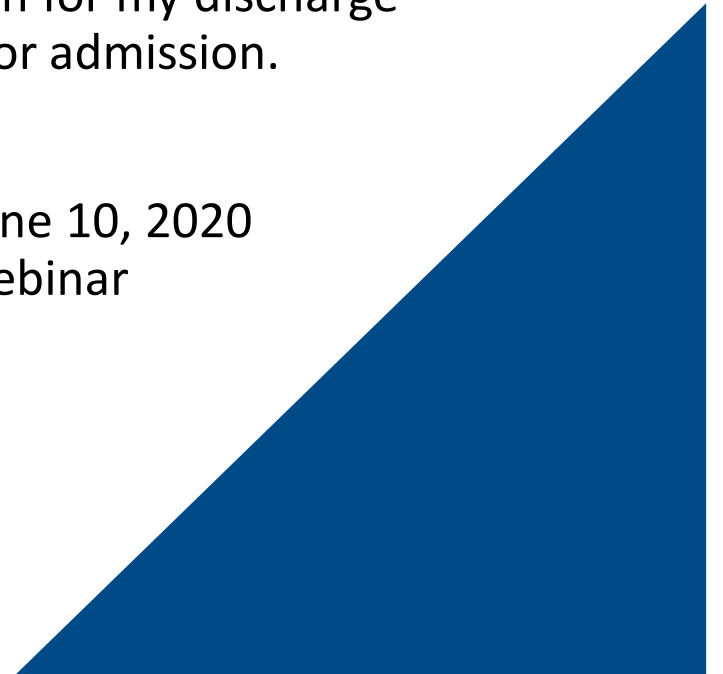
Under Secretary of Defense memo dated 01/28/2011 states that 'sexual orientation is a personal and private matter...' so please do not include any remarks on my new DD-214 that make it obvious that it was corrected,. Such remarks will naturally result in inquiries as to why.

Credit: Swords to Plowshares June 10, 2020 CALTAP LGBTQ Informational Webinar

DD 149 Continued

My discharge is unjust because the sole reason for it was admission that I had engaged in homosexual activity and there were no aggravating factors alleged in my discharge paperwork. Further, my record reflects high marks for my service. I have therefore met the requirement that the sole reason for my discharge was due to my homosexual act or admission.

Credit: Swords to Plowshares June 10, 2020
CALTAP LGBTQ Informational Webinar



DD 149 Continued

Even though I was discharged XX years ago, I only recently learned that I could apply for a records correction. Having “Homosexual Conduct” on my DD214 has hurt my employment opportunities and prevented me from accessing veteran services. Having my discharge upgraded and the narrative reason for discharge changed would lift these barriers in my life. In the interest of justice, I request that you consider my application.

Credit: Swords to Plowshares June 10, 2020
CALTAP LGBTQ Informational Webinar

Sample Language: Discharge with Aggravating Factors

- My discharge is [unjust/ inequitable] because I was discharged for admitting that I had engaged in homosexual activity. Although I have [minor] misconduct in my record, I am eligible to have the Board change the narrative reason for separation to “Secretarial Authority,” the separation code to “JFF. The characterization of my discharge is also [unjust/ inequitable] because...
- Under Secretary of Defense memo dated 01/28/2011 states that 'sexual orientation is a personal and private matter...' so please do not include any remarks on my new DD-214 that make it obvious that it was corrected,. Such remarks will naturally result in inquiries as to why.

Credit: Swords to Plowshares June 10, 2020 CALTAP LGBTQ Informational Webinar

Transgender Service Members Name Change Request Process Overview

- Only BCMR/BCNR has the authority to grant a name change
- Apply to BCMR/BCNR / Use DD-149
- Submit evidence of court-ordered legal name change
- For more information visit: Transgender American Veteran's Association:
<http://tavausa.org> or the National Center for Transgender Equality:
<https://transequality.org/know-your-rights/military-records>
- Florida veterans can visit:
floridanamechange.org for help with changing name & gender marker under Florida law.



2022 Streamlined Transgender Service Members Name Change Request Process:

ARMY

The new process is only for court-ordered name changes – other requests for corrections to the DD-214 must still undergo the full process of the service's board for corrections of military records.

All requests for an updated DD-214 must include a copy of a valid court order. Veterans should submit their request to their respective military service:

Army: usarmy.knox.hrc.mbx.tagd-ask-hrc@army.mil.

Postal Mail

Commander, U.S. Army Human Resource Command

Human Resources Service Center (AHRC-PDR-V)

1600 Spearhead Division Avenue, Department 420

Fort Knox, KY 40122-5402



2022 Streamlined Transgender Service Members Name Change Request Process:

NAVY

The Navy specifically requests the following information to be included with requests for an updated DD-214:

The full name, rank, and rate; Social Security Number; periods of service; and current mailing address.

If you were discharged since 1995

Navy Personnel Command

PERS 312

5720 Integrity Drive

Millington, TN 38055-3120

If you were discharged prior to 1995

National Personnel Records Center

1 Archives Drive

St Louis, MO 63138



2022 Streamlined Transgender Service Members Name Change Request Process:

MARINE CORPS

Email (the Marine Corps prefers email submissions)

SMB.MANPOWER.MMRP-10@USMC.MIL

Postal Mail

Headquarters, U.S. Marine Corps (MMRP-10)

2008 Elliot Road

Quantico, VA 22134

Point of Contact number: 1-800-268-3710



2022 Streamlined Transgender Service Members Name Change Request Process:

AIR FORCE & SPACE FORCE

- Continue to submit requests to the Air Force Board for Correction of Military Records.
- Name change requests supported by a court order are not subject to full board review.
- Website for Air Force Board of Correction of Military Records
- <https://afrba-portal.cce.af.mil/#application-submission-bcmr>.





Sample Language for Name Change -- DD-149

“Since separating from the Navy, I have legally changed my name and gender. I am requesting that the name in Block 1 on my DD214 be changed from Jane Smith to Jack Smith to conform to the enclosed judicial order. I request that a new DD214, not a DD215, be issued with my legal name in order to avoid invasive questions regarding the correction to my military record. In addition, I request that the name I served under is not stated in the Remarks section of my newly issued DD214 as that would defeat the result, I seek from obtaining a new DD214 and allow the injustice to continue namely, that I will have consistent identifying documentation and am not outed as transgender whenever I share a copy of my DD214 with employers and service-providers.”

Credit: Swords to Plowshares June 10, 2020 CALTAP LGBTQ Informational Webinar

VA Character of Discharge Review: An Alternative to a Discharge Upgrade

- This could be an entirely separate training!
- Veterans can request that the VA conduct a Character of Discharge (COD) review to determine if their discharge will be considered “other than dishonorable” for the purpose of accessing VA healthcare and benefits
- COD should be triggered any time a Veteran applies for any benefit
- Veteran can submit a Statement in Support of Claim requesting that a COD be done



Remember that even if veterans are not eligible for VA services, many community programs will help them even if they have an Other Than Honorable discharge.

[Vet Centers](#) for combat veterans/survivors of MST offer free counseling



Resources

Margaret Kuzma, Dana Montalto, Betsy Gwin & Daniel Nagin, Military Discharge Upgrade Legal Practice Manual (2021).

Board reading rooms:

<https://boards.law.af.mil/>

Veteran Discharge Upgrade Database:

<http://upgrade.vet/vetup/>

- This is a searchable database, but only includes cases published through late 2015 (pre-Carson, Kurta, and Wilkie memos).

Resources

Swords to Plowshares: Upgrading Your Discharge:

<https://www.swords-to-plowshares.org/guides/upgrading-your-discharge>

Connecticut Veterans Legal Center Discharge Upgrade

Manual: [https://ctveteranslegal.org/wp-](https://ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-2011.pdf)

[content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-2011.pdf](https://ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-2011.pdf)

Connecticut Veterans Legal Center Discharge Upgrade

Mental Health Supplement: [https://ctveteranslegal.org/wp-](https://ctveteranslegal.org/wp-content/uploads/2018/05/18.04.16-FINAL-Discharge-Upgrade-Mental-Health-Supplement.pdf)

[content/uploads/2018/05/18.04.16-FINAL-Discharge-Upgrade-Mental-Health-Supplement.pdf](https://ctveteranslegal.org/wp-content/uploads/2018/05/18.04.16-FINAL-Discharge-Upgrade-Mental-Health-Supplement.pdf)

Resources

Blewett School of Law at the University of Montana
Veterans Law CLE: Intro to Discharge Upgrades:
<https://www.youtube.com/watch?v=AJIQ02sPMrI&t=1581s>

Blewett School of Law at the University of Montana
Veterans Law CLE: Inside the Discharge Review Boards:
<https://www.youtube.com/watch?v=05IBtZyeRAw&t=3s>

Blewett School of Law at the University of Montana
Veterans Law CLE:

VA Character of Discharge Determinations:
<https://www.youtube.com/watch?v=p3eIRD-fCfg&t=3s>



CONTACT US

Discharge Upgrade Program- Apply Online:

<https://www.vetsprobono.org/legal-help/discharge-upgrade/>