

# Assisting “Bad Paper” Veterans

## Discharge Upgrades & Character of Discharge Determinations

Mo Siedor  
Legal Director

Swords to Plowshares  
1060 Howard Street  
San Francisco, CA 94103

<https://www.swords - to - plowshares.org/>

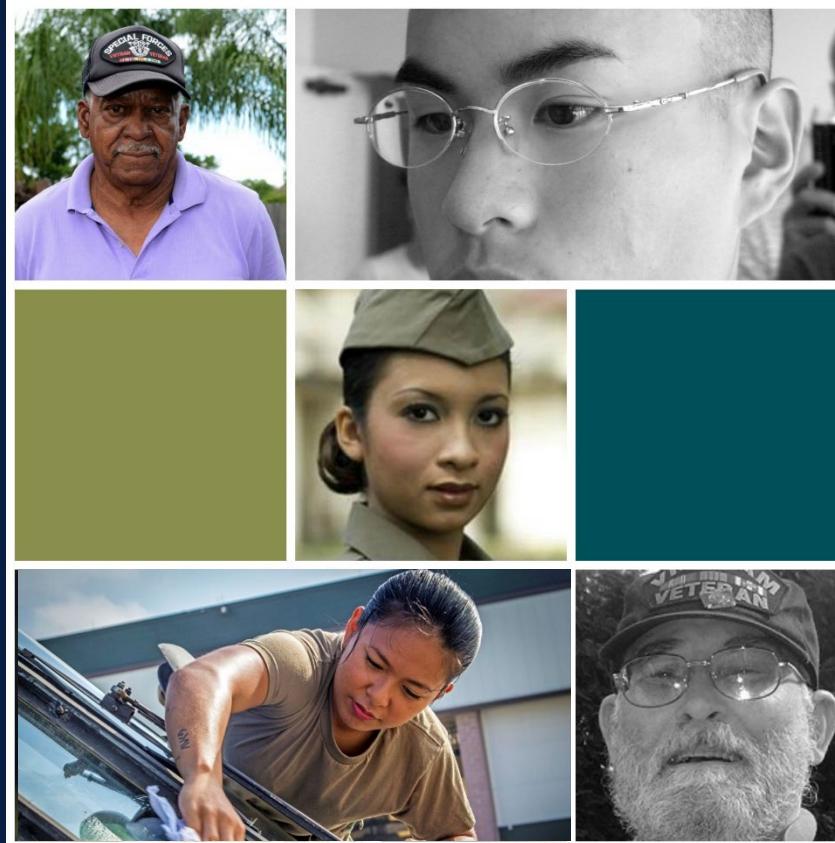


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# Overview

1. Who are “bad paper” veterans?
2. Character of Discharge Determination
  - How to help a veteran through the COD process
3. Discharge Upgrades
  - How to help a veteran through the DU process
4. How to pick?: COD or DU or Both

# Who are "Bad Paper" veterans?



# “Bad Paper” Risk

Between 2000 and 2013 more than 600,000 service members received a less than honorable discharge – roughly one out of every four veterans.

## ...and the Consequences

### Causes of Bad Paper...

#### **Mental Health**

PTSD diagnosis - 11x more likely

#### **Retaliation**

MST report - 35% more likely

#### **Differences between branches**

Marines 10 x more likely than Airmen

#### **Changing pattern between eras**

Post- 9/11 - 3x more likely than during  
Vietnam Era

#### **Suicide**

2x suicide rate

#### **Suicidal Ideation**

3x higher

#### **Homelessness**

7x homelessness rate

#### **Incarceration**

50 % higher rate

# Racial Disparities In Military Justice

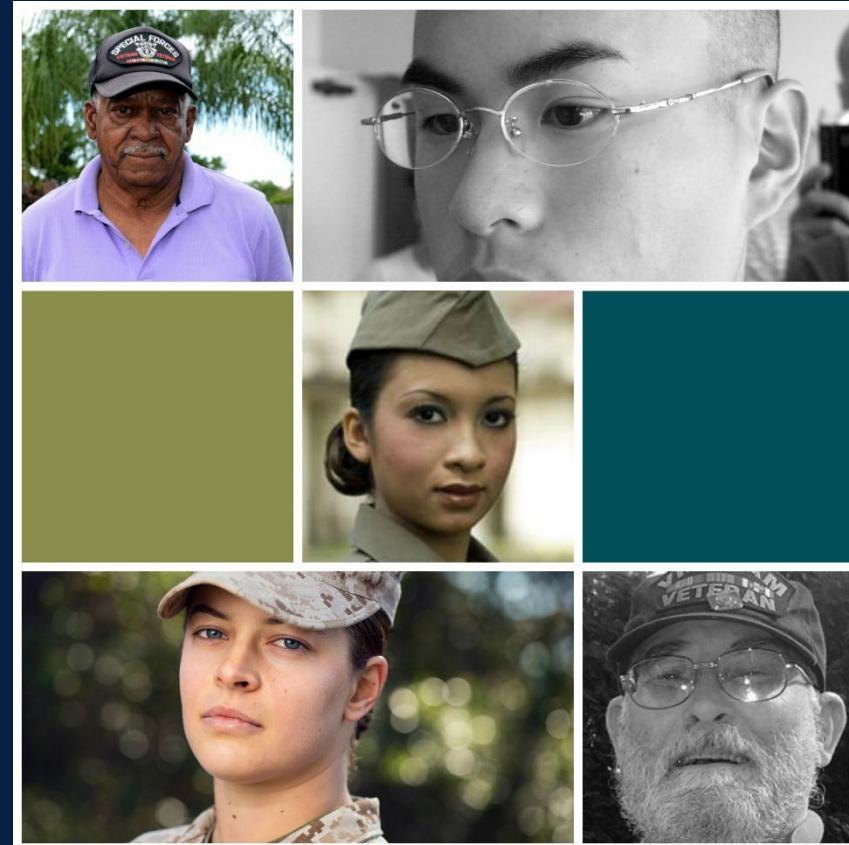
## Protect Our Defenders Report from 2017:

- **USAF:** Black airmen 71% more likely to face court martial or NJP than white airmen.
- **USMC:** Black marines 32% more likely than white marines to receive a guilty finding at court martial
- **USN:** Black sailors 40 % more likely than white sailors to be referred to court martial
- **US Army:** Black soldiers 6 1% more likely to face a court martial than white peers.

**GAO Report 2019:** Confirmed POD findings; called for better data collection.

**NDAA FY2020:** Directed DoD to improve data collection, set guidelines for identifying, investigating, and addressing bias in military justice.

# Character of Discharge Determinations



# The Basics of Character of Discharge

## Who has “veteran status” at the VA?

A person who served in the active military, naval, or air service, and **who was discharged or released there from under conditions other than dishonorable.**

38 U.S.C. 101(2)

### Other than **Dishonorable** Discharge

1. Statutory Bars
2. Regulatory Bars



# Discharge Characterizations

<b>Honorable</b>		
<b>General</b>		
<b>Uncharacterized</b>	Due to Entry Level Separation	Eligible
<b>Uncharacterized</b>	Due to Void Enlistment/Dropped from the Rolls	
<b>Other than Honorable</b>	Service record shows some misconduct, but not with a court-martial conviction.	VA Character of Discharge Determination needed
<b>Bad Conduct</b>	From conviction of a Special Court Martial (misdemeanor- level)	
<b>Bad Conduct</b>	From conviction of a General Court Martial (felony- level court)	VA COD needed, but likely barred from VA benefits*
<b>Dishonorable</b>		

\*unless insane at the time of the misconduct

# Character of Discharge Determination

## STATUTORY BARS:

Benefits are not payable where the former service member was **discharged or released** under one of the following conditions:

- Conscientious objector or deserter
- **General court - martial conviction**
- Resignation by an officer for the good of the service
- **Absence without official leave (AWOL) for a continuous period of at least 180 days.** This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence

# Character of Discharge Determination

## REGULATORY BARS:

A **discharge or release** because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

- In lieu of General Court Martial
- Mutiny or spying
- **“Willful and persistent misconduct”** unless misconduct was minor and service was otherwise “honest, faithful and meritorious”
- Moral turpitude, usually involving felony conviction
- Homosexual acts involving aggravating circumstances

These regulations are expected to change.

Proposed new rules were published in July 2020.

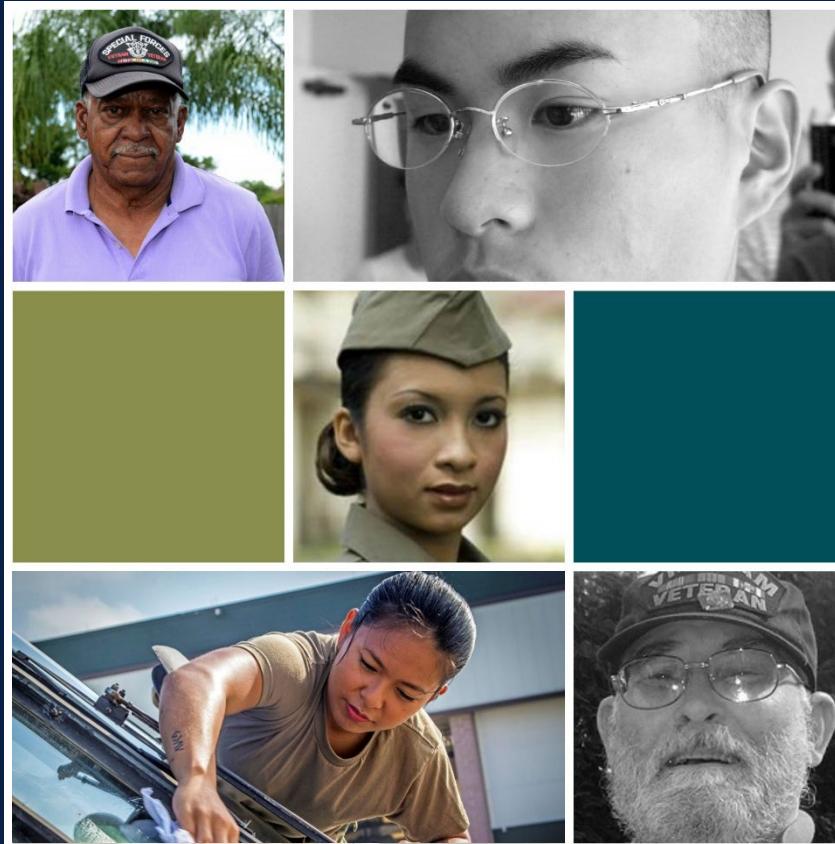
# Assessing Merit of COD

- Mitigation or explanation?
  - Trauma (i.e. combat or MST)
  - Family hardship
  - "Compelling circumstances" for AWOLs over 180 days
- Nature of the misconduct
  - Drugs? Alcohol?
  - AWOL?
  - PTSD-related offense?
- Frequency of misconduct
- Length of service
- Quality of military service outside of the misconduct
- Officer vs enlisted
- During deployment vs stateside
- Post-service life is **not** considered – which can be a good or bad thing

# Character of Discharge Determination

- Usually use service-connection or pension to trigger a COD; VHA also triggers CODs
- (Almost) always request a hearing – helps personalize the claimant
- Personal statements are essential – help them tell their story
- Corroborating evidence from buddies they served with and people who knew them at the time – anyone who can help explain the misconduct and/or establish mitigation
- Help them argue that a bar to benefits doesn't apply to their case
- Previous denials: Same appeal options as other claims
- VA Accreditation required for anyone representing a claimant before VA

# Discharge Upgrades



# Military Discharge Review

## OVERVIEW

Discharge review is an administrative law procedure whereby a military board may change the reason for discharge, character of service, or other aspects of military records.

Applications are brought before the military branch's **Discharge Review Board (DRB)** or **Board for Corrections of Military or Naval Records (BCMR/BCNR)**.

If successful, a discharge upgrade or military records correction will result in a new military separation document

# Deadlines

## DRB Statute of Limitations:

15 years from the date of discharge. No exceptions.

## BCMR/BCNR Statute of Limitations:

Three years from the date on which the veteran “discovers the error or injustice.”

The three years may be:

- From date of discharge.
- From most recent DRB denial.
- From actual discovery of error/injustice.

**Exception:** a waiver in the “interest of justice”



# Discharge Review Boards

## Discharge Review Boards CAN

Upgrade the character of discharge (e.g., from OTH to Honorable).

- **Exception:** not if the veteran's discharge was based on a General Court Martial conviction.

Change a veteran's narrative reason for separation (e.g., from Misconduct to Secretarial Authority).

- **Exception:** DRBs cannot change a veteran's Narrative Reason to or from "Medical Retirement."

Change a veteran's Re - enlistment code

- **ONLY** if accompanying a change in discharge characterization or narrative reason

# Boards for Correction of Military/Naval Records

**BCMRs/BCNRs have the same powers as the DRB, plus they can:**

- Upgrade a veteran's Character of Service that resulted from a General Court Martial conviction.
- Change a veteran's Narrative Reason for Separation to or from "medical retirement".
- Reinstate a veteran into the military.
- Review applications for veterans discharged more than 15 years ago.
- Review applications for veterans that have been denied at the DRB.
- Make a wide range of changes to a veteran's service and medical records

# Standards of Review

Veterans need to show "substantial credible evidence" proving:

- **Equity** (DRB) / **Injustice** (BCMR/BCNR)
  - Inconsistent with disciplinary standards at time of discharge
  - Policy change since discharge, if serving today, would receive different discharge
  - Quality of service
  - Capability to serve (mitigating factors)
- **Propriety** (DRB) / **Error** (BCMR/BCNR)
  - Error of fact, law, procedure, or discretion occurred
  - A change in policy that is EXPRESSLY retroactive
- **Clemency** (Both) – for Court Martial Convictions
  - Leniency

# The DU Application

## What do applications have to include?

- DD293 (DRB) or DD149 (BCMR) and DD214

## What else do we suggest?

- Personal statement
- Copies of all relevant military records
- Copies of all relevant medical records
- Proof of mental health diagnosis, if applicable
- A timeline of major events
- Evidence of positive character

# Guidance on Mental Health - Related DUs

## If there's a causal link between misconduct and mental health:

- The applicant should be afforded “liberal consideration”.
- Applies to PTSD, TBI, other mental health conditions, and MST (including sexual harassment)
- In-service diagnosis isn’t required (but evidence of symptoms is required)
- Special consideration for VA determination of service-connected mental health conditions
- Some misconduct (like marijuana use) is considered more minor today than in the past
- Boards shall seek advice, counsel, and advisory opinions from mental health professionals in some circumstances
- Statute of limitations liberally waived at the BCMRs (not DRBs)

# CODs vs. DU vs. Both?

## Veteran's goal?

- Only VA benefits = COD
- New DD214, employment prospects, dignity concerns, and VA = DU
- GI Bill Eligibility = DU

## Which to do first?

- Can do both at once
- CODs take a few months and have a higher likelihood of success
- DUs can take 1-3 years and very few prevail, especially without mental health link
- Consider the client's vulnerability

## Key Differences:

- VA / DOD
- COD bars (willful & persistent, moral turpitude, etc.) versus DOD standards (equity, propriety, etc.)
- Post-service contributions (or lack thereof) only matters with DUs
- **Note:** Evidence for both tend to be the same (OMPF, STRs, personal statement, lay evidence)

# Swords' Self - Help Guides

## Self- Help Guides

- Discharge Upgrades
- Character of Discharge Determinations
- Requesting Court Martial Records
- Requesting Military Records
- Writing PTSD Stressor Statements
- PTSD Statements for Friends & Family



### Website:

<https://www.swords-to-plowshares.org/resources/self-help-guides>



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### UPGRADING YOUR MILITARY DISCHARGE AND CHANGING THE REASON FOR YOUR DISCHARGE

This guide provides step-by-step advice on how to pursue a discharge upgrade or change in your reason for discharge.

A **discharge upgrade** changes the **“character of service”** shown on your DD-214 discharge certificate. Today, most certificates show the “character of service” as either Honorable, General (Under Honorable Conditions), Other Than Honorable, Bad Conduct or Dishonorable.

A **change in the reason** for your discharge is a change in the **“narrative reason for separation”** shown on your DD-214. Among the many possible “narrative reasons for separation” are “misconduct,” “disability,” “personality disorder,” and “homosexual conduct.”

Along with the basics about how to apply for corrections, this guide covers important developments—“Hagel & Kurta Memos”—that might increase your chance of success:

- 1) If the circumstances of your discharge were the result of **Post-Traumatic Disorder (PTSD)**, your request may be eligible for “liberal” consideration under the **“Hagel Memo”** and related laws.
- 2) If the circumstances of your discharge were the result of a **mental health condition (including PTSD)**, **Traumatic Brain Injury (TBI)**, or **sexual assault/harassment**, you may be able to strengthen your application by submitting special types of evidence, in addition to service records, that will also be given “liberal” consideration under the **“Kurta Memo”**.

#### Before we get started, an important note:

You may be able to get most VA benefits even if your discharge isn't upgraded, through a process known as a **Character of Discharge Determination (COD)**. In addition, if you stayed in the military beyond your original ETS date, there are special rules that help you to get most VA benefits. For more information, review the memos on COD's and Back-to-Back and Conditional Discharges at <https://www.swords-to-plowshares.org/guides/va-character-of-service-determination-an-alternative-to-discharge-review/> and <https://www.swords-to-plowshares.org/guides/back-to-back-and-conditional-discharges/>.

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1060 Howard Street, San Francisco, CA 94103 | tel: 415.252.4788 | [swords-to-plowshares.org](http://swords-to-plowshares.org)

