



# DOD DEVELOPMENTS IMPACTING DISCHARGE UPGRADES

Veterans Advocacy Project

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# Discharges at a glance

- There are six types of discharges
  - Honorable discharge [HD]
  - General Discharge [GD]
  - Other Than Honorable [OTH]
  - Bad Conduct Discharge [BCD]
  - Dishonorable Discharge [DD]
  - Dismissal [officers only, equivalent of DD]

# Forums for Discharge Upgrades

- Discharge Review Boards (DRBs) or Boards for Correction of Military/Naval Records (BCMRs/BCNRs) can change the character of a discharge
  - DRBs only change the character reason for discharge, and have a 15-year, non-waivable statute of limitations.
  - BCMRs/BCNRs have the power to change almost anything in a veteran's military record, and they have a 3-year waivable statute of limitations, if in the interest of justice.
- A veteran can also receive a VA character of discharge determination. Not the same as a discharge upgrade, but is an appeal directly to the VA to allow a grant of benefits, despite an OTH discharge.

# The Discharge Appeal Review Board (DARB)

- The DARB was created by the National Defense Authorization Act of 2020.
- Signed into law on December 20, 2019, and is considered the final level of administrative review before the Department of Defense (DOD).
- The Air Force has been designated the branch that will oversee the new entity.

# Hagel Memo

- In 2014, Secretary Hagel issued new guidance relating to discharge upgrades and PTSD.
- PTSD required to be considered as a mitigating factor by BCMR/BCNRs .
- Time limits would be liberally waived for applications.

# Kurta Memo

- Expanded and clarified Hagel Memo
- DRBs and BCMRs must give liberal consideration to upgrade petitions when based on mental health conditions (PTSD, TBI, MST and sexual harassment)
- Four questions should be answered and used as the headings in the brief:
  - Did the veteran have a condition or experience that may excuse or mitigate the discharge?
  - Did that condition exist/experience occur during military service?
  - Does the condition or experience actually excuse or mitigate the discharge?
  - Does that condition or experience outweighs the discharge?
- Liberal consideration to evidence presented and medical opinions

# Wilkie Memo (2018)

- Robert L. Wilkie is the current Secretary of Veteran's Affairs.
- Intended to provide guidance for DRBs and BCMRs in determining whether the circumstances surrounding a criminal conviction warrant second chances and restoration of civil rights.
- Guidance is couched in the same fairness standards seen in other memoranda.
- BCMRs are empowered to consider an extensive list of factors, and instructed to favor second chances in situations in which individuals have paid for their misdeeds.
- BCMRs are still permitted to overturn a court-martial's decision if fairness demands it; DRBs still cannot overturn a court-martial.

# Stanley Memo - September 2011

- Service DRBs should normally grant requests to change the narrative reason for a discharge (the change should be to "Secretarial Authority")
- Requests to re-characterize the discharge to Honorable, and/or requests to change the reentry code to an immediately-eligible-to-reenter category should be granted when both of the following conditions are met:
  - (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and
  - (2) there were no aggravating factors in the record, such as misconduct.Although each request must be evaluated on a case-by-case basis, the award of an Honorable or General Discharge should normally be considered to indicate the absence of aggravating factors.




## 10 U.S. Code § 1177. Members diagnosed with or reasonably asserting post-traumatic stress disorder or traumatic brain injury: medical examination required before administrative separation

- (a) Medical Examination Required.—
- (1) The Secretary of a military department shall ensure that a member of the armed forces under the jurisdiction of the Secretary who has been deployed overseas in support of a contingency operation, or sexually assaulted, during the previous 24 months, and who is diagnosed by a physician, clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse as experiencing post-traumatic stress disorder or traumatic brain injury or who otherwise reasonably alleges, based on the service of the member while deployed, or based on such sexual assault, the influence of such a condition, receives a medical examination to evaluate a diagnosis of post-traumatic stress disorder or traumatic brain injury.
- (2) A member covered by paragraph (1) shall not be administratively separated under conditions other than honorable, including an administrative separation in lieu of court-martial, until the results of the medical examination have been reviewed by appropriate authorities responsible for evaluating, reviewing, and approving the separation case, as determined by the Secretary concerned.
- (3) In a case involving post-traumatic stress disorder, the medical examination shall be performed by a clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse. In cases involving traumatic brain injury, the medical examination may be performed by a physician, clinical psychologist, psychiatrist, or other health care professional, as appropriate.

# 10 U.S. Code § 1177

- (b)Purpose of Medical Examination.—
- The medical examination required by subsection (a) shall assess whether the effects of post-traumatic stress disorder or traumatic brain injury constitute matters in extenuation that relate to the basis for administrative separation under conditions other than honorable or the overall characterization of service of the member as other than honorable.



## UPDATES ON ADVOCATING FOR VETERANS WITH LESS- THAN-HONORABLE DISCHARGES

LEGAL SERVICES CENTER OF HARVARD  
LAW SCHOOL  
DVVC APRIL 2022

1

Discharge  
Review Board  
Settlements.

2

BCM/NR Name  
Change  
Petitions.

3

VA Eligibility  
Overview.

4

Recent Changes  
in VA Eligibility  
Rules.

5

Pending  
Changes to VA  
Eligibility  
Regulations.

## AGENDA



## DISCHARGE REVIEW BOARD CLASS ACTIONS



Army DRB  
*Kennedy*

Naval DRB  
*Manker*

Air Force DRB  
*Johnson*



Photo credit: Steve Kennedy

# DISCHARGE REVIEW BOARD CLASS ACTIONS

## Which former servicemembers are covered?

1. Former servicemembers who were discharged from October 7, 2001 to April 26, 2021 (Army); February 15, 2022 (Navy/Marine Corps); and the present (Air Force)
2. Who have a General or Other Than Honorable discharge status (but not Bad Conduct or Dishonorable)
3. Who have not received upgrades to Honorable
4. Who have diagnoses or records documenting symptoms of PTSD, TBI, or other behavioral health conditions or who experiences MST

## What is the current status?

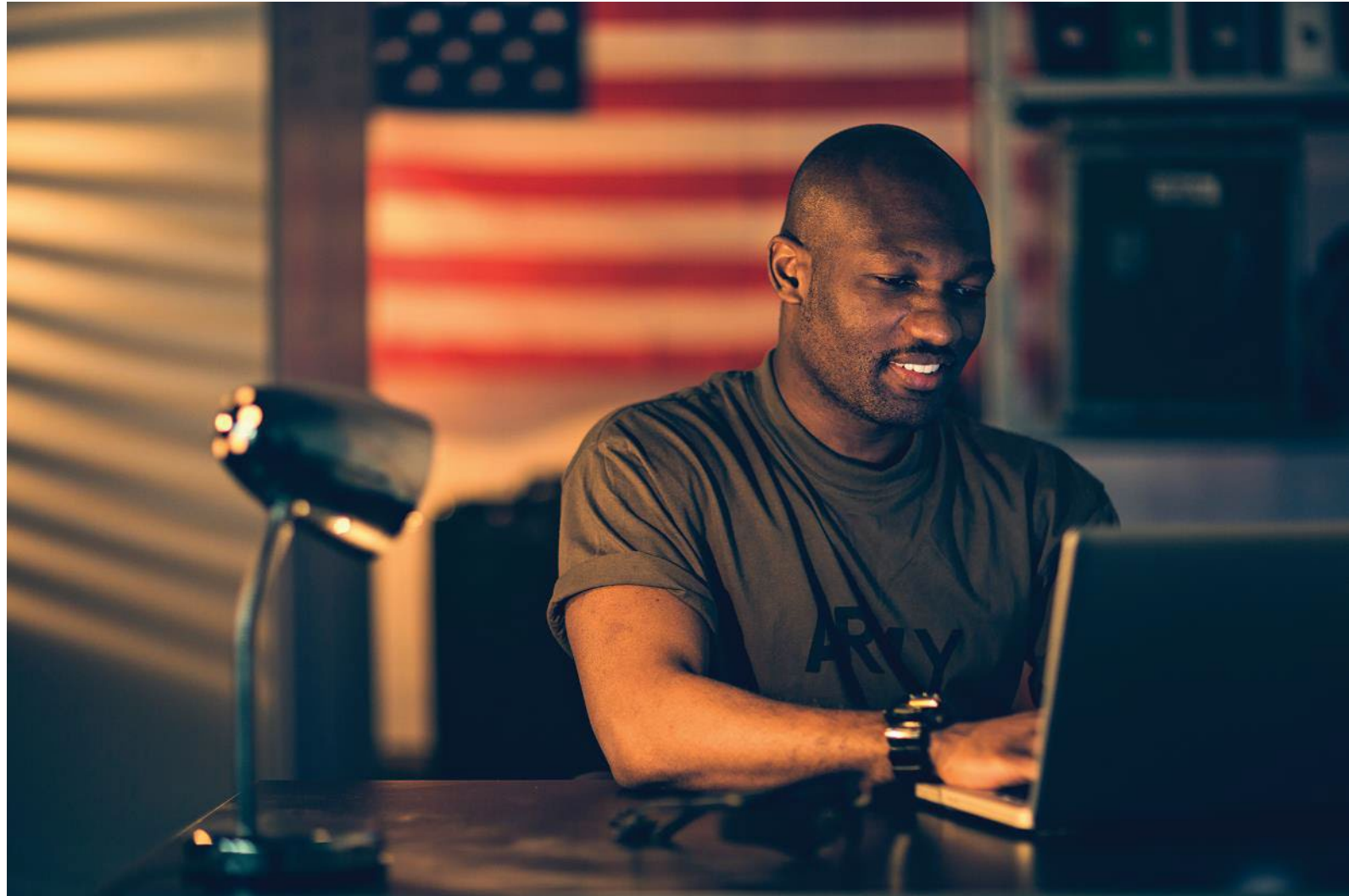
- Army class action (*Kennedy*) settlement approved April 2021: [kennedysettlement.com](http://kennedysettlement.com)
- Navy/Marine Corps class action (*Manker*) settlement approved February 2022: [mankersettlement.com](http://mankersettlement.com)
- Air Force class action still pending

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## RECORDS CORRECTION BOARD NAME CHANGE PETITIONS

Recent DOD policy guidance to make it easier for former servicemembers to change their name listed on their DD 214.

- Penrod Memo: encouraging Boards not to require court order
- Board guidance: not requiring full Board process for approval.



# VA ELIGIBILITY OVERVIEW FOR VETERANS WITH LESS-THAN-HONORABLE DISCHARGES

Prior Honorable Enlistment.

Favorable VA COD Determination.

Healthcare for SC Disabilities if OTH barred by regulation only.

Mental Health Care if OTH + combat/MST.

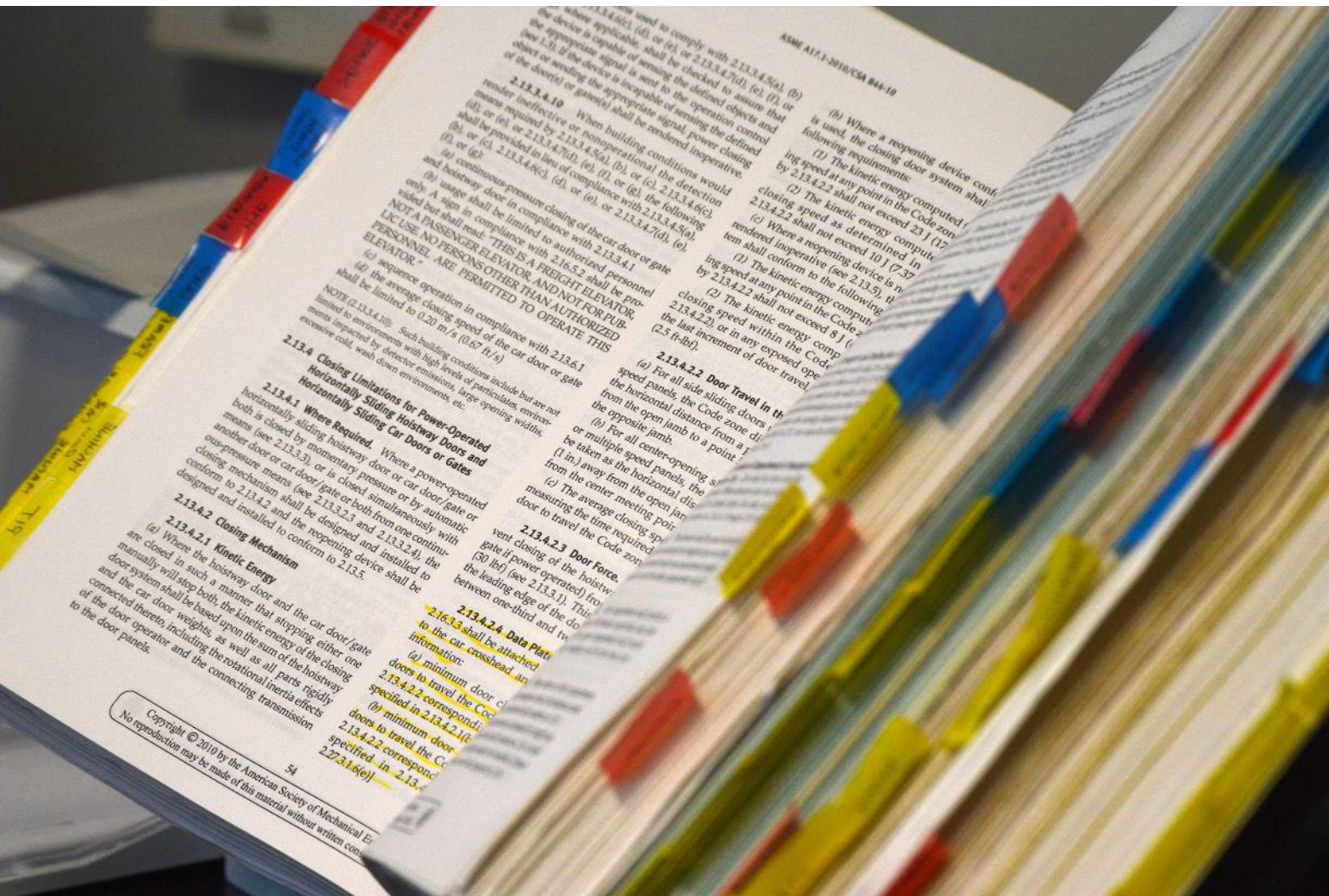
Emergency Mental Health Care for 90 days.

Vet Center Counseling.

Homelessness Prevention Programs.







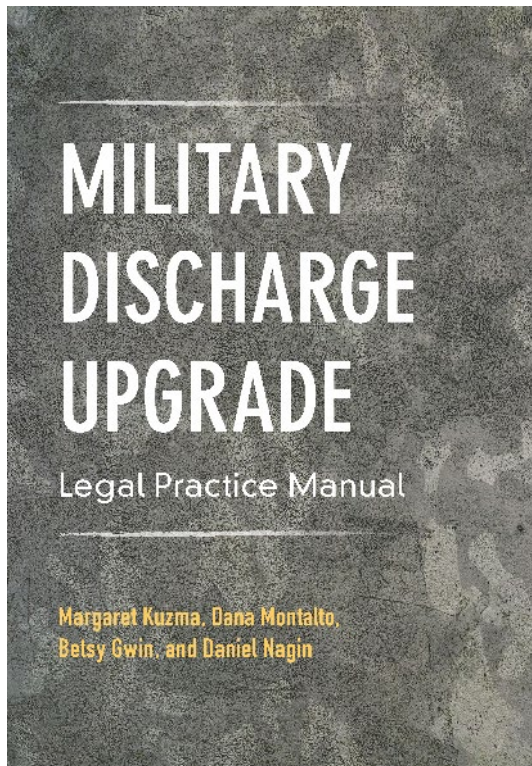
## RECENT CHANGES IN VA ELIGIBILITY RULES

- **1720I Honor Our Commitment Act:** mental health care treatment for veterans with OTH discharges who experienced combat or MST.
- **Homelessness prevention programs:** veterans with OTH discharges now eligible for HUD-VASH, as well as other programs (SSVF, GPD).

# PENDING CHANGES TO VA ELIGIBILITY REGULATIONS

- VA proposed updates to its Character of Discharge regulations, which govern whether veterans with less-than-honorable discharges can access basic VA benefits (health care, disability compensation, pension, VR&E, etc.)
- Advocates across the country have asked VA to update, clarify, and streamline these regulations which unfairly exclude veterans from accessing needed support and which also are burdensome on VA
- From advocates' perspective, current regulations:
  - Bar veterans for minor misconduct that never would have led to a Dishonorable discharge
  - Fail to account for mitigating circumstances or positive service
  - Are confusing, vague, and overbroad
  - Lead to arbitrary and inconsistent outcomes
- VA proposed to:
  - Add some consideration of mitigating circumstances
  - Remove unconstitutional targeting of "homosexual" behavior
  - Further detail the meaning of "willful and persistent misconduct" and "moral turpitude"
- VA sought input through two rounds of public comment and a public listening session

## FURTHER RESOURCES



- Military Discharge Upgrade Legal Practice Manual (available online)
- Swords to Plowshares Self-Help Guides: <https://www.swords-to-plowshares.org/resources/self-help-guides>
- Accessing VA Health Care with an LTH Discharge Self-Help Guide: <https://www.legalservicescenter.org/a-self-help-guide-for-accessing-va-health-care/>
- Stateside Legal: <https://www.statesidelegal.org/>





## THE MOST IMPORTANT TAKE-AWAY

Veterans who do not have fully Honorable discharges may be eligible for limited or full VA benefits.

The only way to know for certain is for the veteran to apply for benefits and receive an individualized determination.





# THANK YOU!

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# ADDITIONAL RESOURCES (CHECK THE CHAT!)

## LOCAL

**Legal Aid of Southeastern PA** - Veterans Advocacy Project

<https://www.lasp.org/veterans>

610-283-0884

(Bucks, Chester, Montgomery and Delaware Counties only)

**Legal Services of New Jersey** - Veterans Legal Assistance Project (VLAP):

(No DUs)

<https://www.lsnj.org/pdfs/vlap.pdf>

1-888-576-5529

**Delaware Law School** - Veterans Law Clinic

302-477-2090

**Homeless Advocacy Project** - Philadelphia

<https://www.haplegal.org/>

**VSOs- County Offices of Veteran Affairs** (OVAs) (VA Benefits and Local State Benefits)

<https://www.dmv.pa.gov/veteransaffairs/Documents/Outreach-and-Reintegration/countyprint.pdf>

## NATIONAL

The Veterans Consortium: Pro Bono Program:

<https://www.vetsprobono.org/dischargeupgrade/>

(Discharge Upgrades)

National Veterans Legal Services Program (NVLSP):

[www.NVLSP.org](http://www.NVLSP.org)

# BAD PAPER UPGRADES DVVC CASE STUDY

- Mike Myers, Navy Veteran
  - First enlistment included Beirut bombing
  - Second enlistment included self-medication; discharged under other than honorable
  - Suffered a severe motorcycle accident
  - Client of the Fighting Back Veterans Program
- Bill Orr, Army Veteran
  - Board Member, Fighting Back
  - Member, DVVC Marketing & Social Media Cmte
- Mo Gillen, Army Veteran
  - Chair, DVVC Marketing & Social Media Cmte
- Kate Watson, Marine Mom
  - Founder, YourNexStage
- Luke Fry, Marine Veteran
  - VSO, Chester County Dept of Veterans Affairs

# **BAD PAPER UPGRADES DVVC CASE STUDY**

In August 2019, Kate is attending America's Warrior Partnership Symposium in Atlanta. The YNS board member who is supposed to attend with her has a conflict.

Kate invites Mo. Mo alerts the DVVC M&SM team that they need to postpone their next meeting and tells them why.

Bill asks Mo to attend a breakout session "Supporting Those with Less Than Honorable Discharges". Bill has been trying to help Mike but having no luck going directly to the VA.



## **BAD PAPER UPGRADES DVVC CASE STUDY (CONT)**

Mo learns all kinds of things in this session, brings notes back to Bill. Together, they review Mike's file and create an application for a discharge upgrade to the Navy Correction of Record Board.

Luke provides support for the filing, including preliminary access to VA medical benefits.

In July 2021, Mike's discharge is approved for upgrade to General. Mike gets VA medical benefits.

Mike works with Bill and Luke to request VA disability compensation. Waiting for VA to get the records...