Curing "Bad Paper": A Primer on Review of Discharges from the Military

By James S. Richardson Sr.

So your firm has decided to embark on a pro bono project to assist veterans in your area. You agree to be part of the project and have had some—albeit limited—training in the subject matter. You receive your first case and discover that your potential client has previously applied for veterans' benefits and other services but has been denied them because his service has been determined to have been "under conditions of dishonor." What does this mean and how can you assist your client?

A colleague, who was a lawyer while on active military service and is still a member of a local reserve unit, suggests that the decision made by the Department of Veterans Affairs indicates that your potential client was a "bad soldier" (sailor/airman/Marine/Coast Guardsman). Your colleague also tells you that getting the discharge "upgraded" is the only possible solution to the former service member's problem. Without an upgrade, the veteran will continue to be ineligible for benefits administered by the Department of Veterans Affairs.

Your firm has taken steps to have the general counsel of the Department of Veterans Affairs certify you as a "claims agent."[1] You receive a file related to the veteran's prior application and find numerous documents including a DD 214 form—a report of separation from the armed forces. In addition to various biographical data contained in the document, the report indicates that the client was separated "under other than honorable conditions." The form also includes various references to the service regulations that seem to indicate the type and basis for the veteran's separation from the service.

With this limited information, you again consult your colleague, who tells you that the document does indicate

that the potential client was discharged from the service for cause with a negative characterization of his service. However, because the document was not issued by the service in which he was a member, he has little information concerning the regulations cited. Given these facts, what do you do for your client?

This article is designed as a primer on post-service review of discharges from the military in situations like the one described above. The discussion is not intended to be a definitive work; the aim is to provide general guidance to the practitioner who may from time to time undertake representation of a veteran who needs assistance.[2]

Types of Discharges

There are basically two types of discharges from military service: administrative and punitive. Punitive discharges are issued as a result of a sentence of a court-martial and have three subcategories: bad conduct discharge, dishonorable discharge, and dismissal.[3] Dismissals are reserved for commissioned officers and warrant officers in Grades W-2 through W-5 as well as for cadets and midshipmen of the service academies and certain other commissioning programs and may be adjudged only by a general court-martial. Discharges for bad conduct and dishonorable discharges may also be adjudged by a general court-martial and may be imposed on enlisted personnel as well as warrant officers (Grade W-1). A special court-martial may impose a bad conduct discharge on an enlisted member of the armed forces. None of these separations may be executed until the review is final.

Administrative discharges are those that terminate a service member's term of service before his or her period of enlistment is complete. Title 10 of U.S. Code §§ 1161 and 1178 permits the secretaries of the Army, Navy,[4] and Air Force to terminate the service of a member. Title 18 of the U.S. Code grants the same authority to the secretary of homeland security for members of the Coast Guard. There are three grades of administrative discharge: honorable, under honorable conditions, and under conditions other than honorable.[5] Administrative discharges are based on many specific reasons, ranging from expiration of enlistment (that is, completion of the service member's obligated service) to misconduct, which may include drug abuse, conviction of a civilian offense with a long term of confinement, or repeated military misconduct not warranting a punitive discharge.[6]

In most cases involving a discharge under conditions other than honorable, the service member is entitled to a hearing and representation prior to separation. However, if the discharge is based on the member's request for discharge in lieu of a court-martial or other proceeding, no hearing is required. Each service has its own regulations regarding military discharges. A complete list of those regulations, along with the web address for the regulation, is found in the appendix to this article.

When asked to represent a veteran who needs assistance with regard to a military discharge, the first step counsel needs to take after interviewing the client is to request a copy of the veteran's service and medical records. You should have the veteran complete and sign a Standard Form 180: Request Pertaining to Military Records, which is available on the Internet at contacts.gsa.gov/webforms.nsf/0/6A748D94A429DE1085256CB10043FB7B/$file/sf180_e.pdf, and may be completed online. It should be noted that the form cannot be saved electronically and should be downloaded and placed in the client's case file. If a court-martial is involved and the veteran does not have a copy of the record of trial, you should contact the judge advocate general of the service concerned and request a copy of that record as well as the veteran's medical records and service records.

Once you have received the records you should familiarize yourself with them. This task requires some education on your part. Each service has its own personnel regulations and its own system for measuring performance and conduct. (Titles of regulations and corresponding Internet links are found in the appendix.) Even though the systems adopted by the services are often somewhat subjective, there are certain objective criteria that may require specific entries and/or evaluation of a service member's conduct. If you are located near a military installation, particularly one of the same branch as the one in which your client served, it is advisable to contact the local JAG office and request help from one of the defense attorneys.

Having thus prepared yourself, where do you go? The Department of Defense has a substantial system for review of previously executed discharges, both as to character of service and the basis for the discharge. The two principal reviewing authorities are the Discharge Review Board in each individual service and the Board for Correction of Military and Naval Records.

Discharge Review Boards

Many discharges are reviewable by each service's Discharge Review Boards. These boards and their predecessors (along with the Correction Boards) were established following World War II to review previously issued discharges and to allow former members to challenge the basis for their separation from the military. These boards were, along with the establishment of the Uniform Code of Military Justice, a congressional reaction to the harshness of military justice in war time. According to the enabling statute, 10 U.S.C. § 1553, Discharge Review Boards may review any discharge that is not the product of a sentence of a general court-martial. The boards, which consist of military officers, hold hearings at which a former member may appear and may be represented by counsel—all at the veteran's own expense.

The discharged service member must apply for a hearing using DD Form 293, Application for Review by a Service Discharge Review Board (available online, URL included in the appendix). The application may be completed online but must be downloaded and printed. Hearings are available but generally are held only in the Washington, D.C., area. Travel and other expenses must be borne by the applicant. It should be noted that the enabling statute creates a 15-year statute of limitations for applications. Historically, this time limit has been strictly enforced.

After reviewing the files and any information submitted by an applicant, a Discharge Review Board may recommend that the secretary of the service "recharacterize" (that is, upgrade using the more common term) a discharge. In other words, the board may recommend that the discharge that was previously issued be changed from one of stigmatizing character (for example, under conditions other than honorable) to a nonstigmatizing discharge (either general or honorable). The board may also recommend that the basis for the discharge be changed.

There is one caveat to relying on a review by these boards. When amnesty was being considered for deserters during the Vietnam era, many returning service members were discharged at their request in lieu of a court-martial. President Carter's administration directed that many discharges be reviewed (even if they had been reviewed and denied previously) under what was perceived as more relaxed criteria. To preclude individuals who received a recharacterization under these programs, which would entitle these applicants to benefits and services administered by the (then) Veterans Administration, Congress enacted, and the VA promulgated, a regulation that specifically barred granting benefits and services to a former member who had received a discharge in lieu of a court-martial for certain offenses.[7] The relevant offenses for the purpose of this article are desertion or unauthorized absence in excess of 180 days.[8] Under these circumstances, even if a Discharge Review Board recharacterizes a discharge, the board may not remove the bar to veterans' benefits; that power is restricted to the a Board for Correction of Naval and Military Records, which is discussed below.

To protest a previously issued discharge, one should be aware that the veteran's service records are presumed to be correct. Historically, attacking the discharge by showing that the service failed to follow its own regulations in separating the veteran has proved successful. However, as with all such attacks, the failure that has been demonstrated must be substantial and have had a prejudicial effect on the veteran's separation from service. Minor breaches of regulations or the failure to show substantial harm or prejudice is not sufficient. A second fruitful line of attack, where available, is a demonstration that the former service member was made aware of his or her deficiencies prior to the commencement of separation proceedings. This is particularly true in cases in which the basis for the discharge is a pattern of misconduct, such as repeated minor violations of the Uniform Code of Military Justice, or for failure to carry out one's duties. The boards are composed of military officers and are acutely aware of the need to inform the troops of their shortcomings. The failure to do so may weigh heavily in favor of having the discharge changed.

Decisions rendered by the Discharge Review Board may be reviewed by the service's Board for Correction of Military and Naval Records. Even though it might seem fruitless to have a second board appointed by the service secretary be the appeal authority, it is important to recall that different standards apply to the two boards, as discussed below.

Boards for Correction of Naval and Military Records

Boards for Correction of Military and Naval Records were created following World War II by the Legislative Reorganization Act of 1947, as were the Discharge Review Boards. The purpose of the act was to replace Congress as the source of relief in many cases that had previously been covered by private relief bills. Today the statute is codified at 10 U.S.C. § 1552.

In general, the Correction Boards may do anything that Congress did previously by such legislation. There is one limitation, however. Prior to the enactment of the Legislative Reorganization Act, Congress was able to set aside the findings and sentence of a court-martial. For many years, a debate raged as to whether the act transferred that power as well. Congress finally settled the matter by limiting the powers of these boards to the review of sentences alone—not to the findings. 10 U.S.C. § 1552(d).

The Correction Boards differ from the Discharge Review Boards in that they are composed of senior civilians (generally in Grades GS-14 and higher or the equivalent) in the office of the secretary of the relevant service. Service on the correction boards is an additional duty. The members may or may not have a background in specific active duty military service.

Under 10 U.S.C. § 1552, veterans may apply for a hearing by the Correction Board using DD Form 149, Application for Correction of a Military Record, referred to as a petition, (available online, URL included in the appendix). For review of a discharge, the application must be completed either by the veteran or someone having legal standing to act for the veteran, such as a next of kin or an attorney.

The Correction Board's grant of relief is premised on the finding of a probable error or "injustice," which is a wide-ranging grant of authority that lends itself to a more equitable attack on the discharge. In the case of a punitive discharge from a court-martial, a showing that the character of the discharge is "too harsh" for the offense is a good example. Other areas include a showing (1) that standards have changed, particularly when the member received a undesirable or discharge under conditions other than honorable, or was discharged for homosexual conduct that is not related to his or her service and whose service record is unblemished; (2) that the character of the discharge is not consistent with that of other service members who were discharged for the same reason during the relevant time frame; and (3) that the underlying basis for the discharge is not correct. For instance, one might argue that the veteran who was discharged for "misconduct" for repeated minor disciplinary actions really should have been found "unsuitable" for service because of some innate shortcoming. Careful reading of each service's regulations and the veteran's personnel records is essential to success in this area.

Section 1552 includes a three-year statute of limitations from the date of the discovery of the error or injustice that the discharged service member seeks to have corrected. However, the statute permits the Correction Board to entertain the application and grant relief in "the interests of justice"—a provision that has been interpreted in various

ways. In some cases, it has been strictly applied; in other cases, it has been applied to run from the date of a decision handed down by a Discharge Review Board; and in still others, it has extend the statute of limitation to 18 years (15 years for review of the discharge by the Discharge Review Board and an additional three years beyond that). Even though a discharge is arguably a continuing disability and its effects may not have been discovered by the veteran or his or her heirs until long after the date of separation, it is always best to address this question in the application.

As with the Discharge Review Boards, the Correction Boards meet in the Washington, D.C., area. Most cases are decided on the basis of existing records and written evidence submitted by the applicant or his or her counsel. Although hearings are permitted, they are held at the discretion of the board and are rarely granted. If a hearing is granted, any travel or other expense—including the travel of any witnesses permitted by the board—is at the applicant's expense.

Judicial Review

Judicial review of the decisions rendered by both of these boards is limited. Under the Little Tucker Act, 28 U.S.C. § 1346(a)(2),[9] the veteran may seek review either by the Court of Federal Claims or by the local federal district court. A plaintiff must demonstrate that the board's decision was arbitrary and capricious or an abuse of board's discretion. These arguments are difficult to prove and have met with limited success. As long as either board's written decision has some rational basis, the veteran is unlikely to prevail. In many cases, even when a review by the court is successful, the outcome is only a remand to the board for further proceedings.

An additional caveat is worth noting. The Little Tucker Act provides a general six-year statute of limitations for pursuing a claim against the United States. However, many circuit courts of appeals have held that review by the Discharge Review Boards and the Correction Boards is an administrative remedy to be undertaken prior to filing suit under the act. At the same time, several courts have held that time spent seeking such a review does not interrupt the running the statute. Therefore, a veteran may be caught in a somewhat circular process whereby he or she must exhaust his or her remedies but may find the claim barred by the statute of limitations while doing so. It is not clear whether simultaneous filing is a solution.

Helping veterans is a rewarding experience for attorneys. Many discharged service members who have served well came to grief because of issues beyond their control—substance abuse, for example. To assist veterans who seek a review of their discharge that may prevent them from receiving the benefits and services to which they may be entitled is to carry out the charge from our greatest lawyer, President Abraham Lincoln: "to care for him who shall have borne the battle and for his widow and his orphan." **TFL**

James S. Richardson Sr., a past national president of the FBA and retired federal attorney, is a mediator and pro bono litigator and advisor on veterans issues in Maryland. He received his undergraduate degree from Frostburg State University and his law degree from the University of Maryland.

Appendix

Statutes, Regulations, and Other Information Useful in the Discharge Review Process

Statutes

- 10 U.S.C. §§ 801–946 (Uniform Code of Military Justice)
- 10 U.S.C. §§ 951–956 (Military Correctional Facilities)
- 10 U.S.C. §§ 1161–1178 (Separation and Discharge of Service Members)
- 10 U.S.C. §1552 (Board for Correction of Naval and Military Records)
- 10 U.S.C. § 1553 (Service Discharge Review Board)
- 10 U.S.C. §§ 1554 and 1554a (Physical Disability Review Board)
- 10 U.S.C. § 1557 (Timeliness of Action of Correction Board)

Regulations

Separation and Discharge Regulations

- Navy: MILPERSMAN (NAVPERS 15560D), Chapter 1900 Enlisted Separations, advancement.corpsman.com/files/MILPERSMAN_1910_-_ENLISTED_ADMINISTRATIVE_SEPARAT.pdf
- Army: AR 635-200, Active Duty Enlisted Separations, www.sdmcp.org/Regs/armyenlistedseps.pdf
- Air Force: AFI 36-3208, Administrative Separation of Airmen, www.af.mil/shared/media/epubs/AFI36-3208.pdf
- Marine Corps: Separation and Retirement Manual (MCO P1900.16F), www.usmc.mil/news/publications/Documents/MCO%20P1900.16F%20W%20CH%201-2.pdf
- Coast Guard: CMDT Instruction 1000. 6A Coast Guard Personnel Manual, Chapter 12, isddc.dot.gov/OLPFiles/USCG/010564.pdf

Military Records Regulations

- Navy: MILPERSMAN, Chapter 1070, www.npc.navy.mil/NR/rdonlyres/FE028C4B-47C5-4C24-A766-569FF51F8D44/0/MILPERSMAN1070PERSONNELRECORDS.pdf
- Army: AR 600-108-104, Military Personnel Information Management/Records, www.army.mil/usapa/epubs/pdf/r600_8_104.pdf
- Air Force: 36-2608, Military Personnel Records System, www.af.mil/shared/media/epubs/AFI36-2608.pdf
- Marine Corps: MCO P1070.12K, Individual Records Administration Manual (IRAM), www.usmc.mil/news/publications/Documents/MCO%20P1070.12K%20W%20CH%201.pdf
- Coast Guard: CMDT Instruction 1000, 6A Coast Guard Personnel Manual, Chapters 1, 6, and 10, isddc.dot.gov/OLPFiles/USCG/010564.pdf

Forms

- DD Form 293, Application for Review by a Service Discharge Review Board, www.google.com/#hl=en&q=dd+form+293+download&aq=1sx&aqi=g-s1g-sx4g-msx3&aql=&oq=DD+Form+293&gs_rfai=&fp=3b8c5ebfdaf3b352
- DD Form 149, Application for Correction of a Military Record, www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0149.pdf

Endnotes

[1]In what many believe is an anomaly, a statute still limits attorneys who are not certified by the Department of Veterans Affairs from providing advice or accepting fees for assisting veterans. *See* 38 U.S.C. § 50. Certification must be obtained from the department's general counsel using VA Form 21a (available at www4.va.gov/OGC/docs/Accred/VA21a.pdf.

[2]A good general guide to military law and procedures, including administrative discharges, is Jonathan P. Tomes et al., Service Member's Legal Guide (Mechanicsville P.: Stackpole Books, 2005).

[3]In certain circumstances, the President, as commander in chief, may order that a commissioned officer be "dismissed" for misconduct. These circumstances usually involve extended unauthorized absence or a conviction by civilian court that results in a sentence of greater than one year. In time of peace, the officer has the right to demand trial by court-martial for the underlying misconduct. However, these instances are extremely rare.

[4]For many legal purposes, the Marine Corps is a part of the Department of the Navy and subject to regulations issued by the secretary of the Navy.

[5]Until the late 1970s, the last grade was called an undesirable discharge.

[6]If you are dealing with an older veteran—one from the Vietnam era or before—he or she may have been discharged for "unfitness." That general basis has been eliminated and several of the reasons for discharge for "unfitness" have been was subsumed by the category of misconduct.

[7]*See* 38 C.F.R. § 312 (c)(6).

[8]Uniform Code of Military Justice, Articles 85 and 86, 10 U.S.C. §§ 885 and 886.

[9]Essentially this is a claim for back pay and allowances. It should be noted that the Court of Veterans Claims does not review these actions.

NOTICE THIS *continued from page 46*

responsive to the entire spectrum of its claimants and to provide adequate, clear, and consistent notice to them regarding their claims for benefits. The secretary of veterans affairs is legally required to act quickly and without further prompting for the benefit of his constituency. **TFL**

Douglas J. Rosinski practices energy law and veterans litigation as Of Counsel in the Columbia, South Carolina, office of Ogletree, Deakins, Nash, Smoak & Stewart P.C. Prior to practicing law, Rosinski was a U.S. Navy submarine officer and obtained over two decades of experience in licensing, startup, operation, and safety oversight of civilian and government nuclear facilities and other technical operations. He can be reached at doug.rosinski@ogletreedeakins.com.

Endnotes

[1]Perhaps we should be content that the 30-day limit is even noted because, even though the VA procedure for preparing such letters repeatedly refers to the "60-day period," nowhere is the 30-day period mentioned, much less designated a required element. M21-1MR, part I, chap. 2, sec. B.5.

[2]As noted by the CAVC with increasing alarm, a Notice of Appeal misfiled with the VA has a remarkable chance of being forwarded to the court *a week or two after* the jurisdictional time limit for filings has run. *See, e.g.*, *Posey v. Shinseki*, 2010 WL 1634067 (Vet. App. Apr. 23, 2010) at *5 (listing 11 examples of suspiciously delayed forwarding of notices of appeal resulting in dismissal of the appeal).

[3]That would be the case, unless the VA adopts the practice of its New York regional office and simply enters false dates into the system. *See* Statement of Belinda J. Finn Assistant Inspector General For Auditing Office of Inspector General Department of Veterans Affairs Before the Subcommittee on Disability Assistance and Memorial Affairs and the Subcommittee on Oversight and Investigations Committee on Veterans' Affairs, U.S. House of Representatives Hearing on Document Tampering And Mishandling at the U.S. Department of Veterans Affairs at 9 (Mar. 3, 2009). The inspector general's investigation concluded that the management of the New York regional office of the VA had instructed staff to intentionally establish erroneous receipt dates of claims, and staff did so for 220 (56 percent) of 390 claims reviewed and had been establishing erroneous dates for a number of years.

[4]Available at www.socialsecurity.gov/notices/ACBNotice.htm.