Restore Honor, Restore Dignity: Updating Certificates of Release or Discharge from Active Duty (DD Form 214) for LGBT Veterans

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Agenda

- DD Form 214 and Discharge Characterizations
- Changing/Correcting Military Records
- Board for Correction of Military Records
- Name Changes
- Discharge Review Board
- Discharge Upgrades
DD Form 214

• **What is it?**
  - The most important discharge document a veteran receives.
  - It is a one page record of the veteran’s military service.
  - There is no gender marker on a DD 214.

• **Why is it important?**
  - It is proof of the veteran’s military service.
  - Required to prove entitlement to various veterans’ benefits, including health, housing, and education benefits.
  - Also often crucial to a veteran for employment purposes.
DD Form 214

- Character of Separation
- Narrative (codes and narrative)
- Re-entry codes

For DADT cases, boxes 24-28
OLDER DD Form 214

• Generally do not include narrative reasons for separation or reentry codes on face of form
• SPN=SPD=Separation Code
• Separation Authority will lead to narrative reason
• May bear “Undesirable” discharge characterizations
• Certificates of Discharge
• Older Service Records
  • Usually much less extensive
  • Thousands destroyed in 1973 archive fire
Military Discharges

• A discharge terminates the contract to serve in the military.
  ▪ Only enlisted personnel are discharged.
  ▪ Officers resign their commission.

• Discharges are either Administrative or Punitive

• Characterizations of discharge
  ▪ Honorable
  ▪ General Under Honorable Conditions (a “General”)
  ▪ Other Than Honorable (an “OTH”)
  ▪ Bad Conduct (a “BCD”) – punitive only
  ▪ Dishonorable – punitive only

• “Type” of discharge generally refers to characterization
Importance of Discharge Characterization

• Veterans Benefits
  ▪ Affects both federal and state benefits
  ▪ OTH’s may or may not get medical benefits
  ▪ GI Bill education benefits (only Honorable)
  ▪ Home loans
  ▪ PD is not a compensable disability

• Employment
  ▪ Veterans preferences
  ▪ Stigma, employability
Changing/Correcting Military Records

• **Who Changes or Corrects Military Records?**
  - Each branch of the military corrects its own records.
  - There are two administrative boards in each branch with the authority to change military records including the DD 214
  - Discharge Review Boards (DRB) and Boards for Correction of Military Records (BCMR/BCNR)
  - DRB decisions can be appealed to the BCMR/BCNR.
Typical Bases for Correction

• Genuine Error
• Failure to Counsel
• Regulatory Violations
• Any Circumstance that Creates an Injustice
• Changing Standards / Law
• Clemency
Typical Corrections

- Awards
- Separations / Discharge
- Disability review
- Evaluation Reports
- Pay and Allowances
- Clemency Petitions
- Article 15 (UCMJ)
- Punishment
- Memoranda of Reprimand
**BCMR/DRB**

- **Authorities**
  - Title 10, U.S. Code
    - Sec. 1552 – Boards for Correction of Military Records (BCMR)
    - Sect 1553 – Discharge Review Boards (DRBs)
    - Sect 1556 – Ex parte communication prohibited
    - Sect 1557 – Timeliness Standards for disposition of applications before Correction Boards
      - **90 percent of cases must be processed within 10 months (300 days)**
      - **No case should exceed 18 months (540 days)**
    - Sect 1034 – Whistleblower/reprisal (BCMR may request IG inquiry, recommend discipline)
  - Department of Defense Guidance (Directives, Instructions, and Memorandums)
  - Service Regulations – Army, Navy, Air Force
BCMR

• Mission
  ▪ Correct errors or remove injustices from military records for Active Duty, Reserve, and former Service Members.
  ▪ “The Secretary... acting through boards of civilians... may correct any military record... when necessary to correct an error or injustice...” (10 U.S.C. §1552)

• Highest level of administrative appeal in the Department of the Army / Navy / Air Force
  ▪ Decisions are “final agency action”
  ▪ Federal Courts apply an “arbitrary and capricious” standard of review”
BCMR Authority

- Powers are very broad

- Board cannot change the law, but can change the facts in a military record to make them fit the law
  - To remove an injustice, the Board can change a record to reflect the way things should be, rather than how they actually are

- BCMR can review decisions of DRB
  - Petitioners must exhaust administrative remedies
  - Discharges < 15 yrs old should be reviewed by Discharge Review Board
BCMR Authority

• Limitations
  ▪ Statute of Limitations: 3 years; may be waived in the interest of justice
  ▪ Reconsideration: By regulation requires “new and material evidence” within one year of BCMR decision
  ▪ No authority, sua sponte, to review records. BCMRs can only act on a petition from an individual veteran or directive by Service Secretary on behalf of a group similarly harmed by the same error or injustice.
  ▪ Cannot overturn court-martial convictions, but can grant clemency
  ▪ Cannot change records of other agencies, or actions taken by the President
## BCMRs Compared

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<th>ORGANIZATION</th>
<th>ARMY</th>
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<th>AIR FORCE</th>
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<td>Reports to Secretary through Review Board Agency</td>
<td>Direct report to Asst. Secretary (ASN(M&amp;RA))</td>
<td>Reports to Secretary through Review Board Agency</td>
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| STAFF | 44 (28 examiners) | 34 (16 examiners) | 31 (21 examiners) |


| PANELS | At least 3 mbrs. Each sit once per quarter | 3 mbrs. Each mbr sits approx one panel per month | 3 mbrs. Each mbr sits approx one panel per quarter |

| PRESENTATION | Case file / synopsis | Oral, w/brief sheet | Written, in advance |

| APPLICATIONS | 17,000 / YR | 12-15K / YR | 6000 / YR |

| BOARDABLE CASES | 9144 / YR | 6K-7K / YR | 3000 / YR |
DRB

- DRB reviews the propriety of the discharge (was it “inequitable” or “improper”)
  - Similar to BCMR/BCNR authority to review for the “correction of an error or injustice”
  - Inequitable means the reason or characterization of the discharge is not consistent with the policies and traditions of the service.
    - An inequity might include a discharge based on one isolated incident in four years of unblemished service.
  - Improper means that the reason or characterization of the discharge is in error (i.e., is false, or violates a regulation or a law).
    - Improper might include a case where the applicant received an OTH for solely an admission of sexual orientation.
• Authority
  - Can change characterization of discharge and reasons for discharge (cannot change reason to physical disability)
  - Cannot review General Court-Martial discharges
    - Can review Special Court-Martial Bad Conduct Discharge

• Process
  - Board of first instance
  - 15 year statute of limitations (strictly enforced)
  - Two types of review
    - Record (documentary) review
    - Personal hearing
    - Must grant personal hearing if requested
DRB

• **Record Review**
  - Should be requested first unless SOL is an issue
  - Service record and documentation submitted reviewed by analyst
  - Analyst’s report used by DRB to render a decision

• **Personal Hearing**
  - Requires submission of new Form DD 293
  - In Washington DC at applicant’s expense
    - AF DRB travels to four regional locations
  - Board of five senior officers
  - No formal rules of evidence
  - Hearing is recorded

• **Application is made by use of a DD Form 293**
Advising Clients: BCMR or DRB?

• Discharge character, reason, or reenlistment code?
  ▪ DADT
  ▪ DRB or BCMR

• Other relief (advancement, evaluation, pay)?
  ▪ Name change
  ▪ BCMR only

• Limitations on applying to DRB:
  ▪ Discharge must be less than 15 years ago
  ▪ Cannot review discharge awarded by General Court-Martial
  ▪ Cannot change narrative reason to “Physical Disability”
  ▪ Cannot reinstate petitioner into the Service
  ▪ Cannot award back pay or separation pay
Advising Clients

• Leverage all review opportunities:
  ▪ DRB document review
  ▪ DRB personal appearance
  ▪ BCMR petition
  ▪ Federal Court

• Build the administrative record at every stage of representation.

• Obtain all admin service records, medical documents, or other information needed for a BCMR case.
Applying to the BCMR

• Application is made by use of a DD Form 149
  ▪ “Application for Correction of Military Records”

• Relief requested (DD Form 149, Item 5)
  ▪ In the case of a transgender veteran seeking to change his or her name on the
    DD 214, the relief is requested to correct and prevent an injustice, not to correct
    an error.
Applying to the BCMR

- Veteran’s statement of the issues is important (DD Form 149, Item 6)
  - The statement may also be made on plain paper and attached the Form 149.
  - Explain what happened and why it is an error or injustice in simple, direct terms.
  - There are several arguments can be considered in requesting a name change on a DD 214 for a transgender veteran.
    - There is a great potential for employment discrimination and hindrance in obtaining benefits
    - The DD 214 is an identity document
    - The relief is requested to prevent an injustice
    - Reference to the prior name will not prevent injustice
Applying to the BCMR

• Best Practices
  ▪ Provide evidence, or explain why it is not available.
  ▪ Explain why it is in the interest of justice to waive the statute of limitations, if applicable
  ▪ If a personal appearance is requested, articulate why granting it will be helpful to the Board
  ▪ Plain English and brevity. The brief should be limited to not more than 25 pages. Not all reviewers are lawyers.
  ▪ Keep copies of the application and all supporting documents
BCMR Review

• Application reviewed by 3-member panel
  ▪ DoD civilians

• Board may solicit advisory opinions
  ▪ Opinion will be forward to applicant for comment
  ▪ 30 days to respond
  ▪ Failure to comment does not imply agreement
  ▪ Board not required to follow advisory opinion

• BCMR/BCNR is the highest level of administrative appeal and provides the final Service decision
  ▪ Next step is to request reconsideration or file a suit in the federal court system
Staff analyzes the application

- Assembles facts from military records, advisory opinions, applicant’s supporting evidence, regulations and laws
- Some cases are administratively closed if there are no records, application is not appropriate for Board review, or issue can be corrected administratively

Staff analysis and application materials are submitted to a Board for consideration and vote

- Presumption of administrative regularity
- Boards are not investigative bodies

Board decision is transmitted to the applicant and, if applicable, to appropriate staff office for implementation
BCMR Analysis

• Test 1 for Board action: Is There an Error?
  ▪ Yes: the Board can correct the record
  ▪ No: the Board cannot correct the record (unless there is injustice)

• Test 2 for Board action: Is There an Injustice?
  ▪ What is the injustice?
  ▪ Is there a fact or facts that, if changed, would provide relief?
  ▪ Yes: the Board can correct the record
  ▪ No: the Board cannot correct the record
**BCMR Evidence**

- **BCMR is not an investigatory body**
  - Burden on applicant to provide sufficient evidence to show it is “more likely than not” there was a material error or injustice
  - Presumption of Regularity: Absent contrary evidence, Board presumes officials acted in accordance with governing law/policy and in good faith

- **Presumption of Regularity**
  - absent contrary evidence, it is presumed that government officials acted in accordance with governing law/policy and in good faith based on available information

- **Applicant must provide sufficient evidence to show it is more likely than not there was material error or injustice**
**BCMR Policies**

- **Name Changes:**
  - Applicant must demonstrate error or that having their former name on their DD-214 causes an injustice (e.g., gender identity)
  - Evidence should include court order showing applicant’s name was legally changed. However, even absent court order, Board considers each application on its own merits.

- “Don’t Ask, Don’t Tell:” BCMRs will normally grant change of discharge (characterization, narrative reason, RE codes)
  - If discharge was based solely on homosexuality (orientation, statement, act)
  - If there were no aggravating factors, such as misconduct.
Repeal of DADT

- 20 Sept. 2011 Memorandum re: Correction of Military Records following Repeal of Section 654 of Title 10, United States Code

- For DRBs:
  - Expands authority to include changes to reentry codes and separation codes
  - Designates replacements for sexual-orientation related information
  - Sets out 2 part test to qualify for upgrade

- For BCMRs/BCNR:
  - DADT repeal may be taken into account to make changes similar to those of DRB
  - Warns against other broad retroactive changes (ie: changing the fact of discharge, credit for time lost, increasing separation pay, etc, restoration of pay grades)
DRB

• Application is made by use of a DD Form 293
  ▪ “Application for the Review of Discharge or Dismissal from the Armed Forces of the United States”

• Veteran’s statement of the issues is important (DD Form 293, Item 6)
  ▪ It should be made in clear terms in Item 6.
  ▪ If an issue is not raised in Item 6, the DRB may not address the issue even if it is discussed in other written submissions or at a hearing.
  ▪ Changes or additions may be made to a DD Form 293 anytime before the DRB closes the review for deliberation.
• The veteran should provide documentation to support his claim (DD Form 293, Item 8)
  ▪ Signed statements from the veteran and witnesses; copies of records that substantiate or relate
directly to the issues.
  ▪ Normally, the best evidence is statements from persons who have direct knowledge or
involvement.
  ▪ Other helpful documents include character references and medical reports. Generally, the DRB
is less interested in the veteran’s behavior or conduct after leaving the military.
  ▪ The DRB will consider all submissions, but will respond only to the issues set forth in Item 6.

• Evidence not in official military records should be submitted to the DRB before the review date.
• **Obtain documentary evidence as soon as possible while drafting the DRB request.**

• **Documentation that should be obtained includes:**
  - A complete copy of military personnel records, outpatient medical records, and any in-patient hospital records.
    - Request a copy of personnel and clinical records from the National Personnel Records Center (NPRC)
      - Request a copy of health records from VA
  - A complete copy of the “discharge packet” sent to the separation authority.
  - A complete copy of all files kept by the veteran’s civilian and/or military attorneys.
  - Complete copies of NCIS, OSI, CID, or DIS records if an investigation was made.
Resources

• BCMR Websites:
  - Army – http://arba.army.pentagon.mil
  - Air Force –
    www.afpc.af.mil/afveteraninformation/airforceboardforcorrectionofmilitaryrecords
  - Websites include information on
    o Boards and application procedures
    o Frequently Asked Questions and Answers
    o Printable DD Form 149 (BCMR) and DD Form 293 (DRB)
    o Online application (Army)
  - BCMR / DRB Electronic Reading Room: http://boards.law.af.mil/
DEPARTMENT OF DEFENSE:
DoD Directive 1332.41 – Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs)

ARMY: http://arba.army.pentagon.mil/abcmr-overview.cfm
Army Regulation 15-185 - Army Board for Correction of Military Records
Code of Federal Regulations, Title 32, Part 581, Section 581.3

SECNAVINST 5420.193 – Board for Correction of Naval Records
Code of Federal Regulations, Title 32, Part 723

AIR FORCE: http://www.afpc.af.mil/afveteraninformation/airforceboardforcorrectionofmilitaryrecords/
AF Pamphlet 36-2607 – Applicant's Guide to the Air Force Board for Correction of Military Records (AFBCMR)
AFI 36-2603 – Air Force Board for Correction of Military Records (AFBCMR)
Code of Federal Regulations, Title 32, Part 865, Subpart A
QUESTIONS ?