

Inside the Discharge Review Boards

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- Robert Powers, President, Naval Discharge Review Board

Veterans Law CLE

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SCHOOL OF LAW

UNIVERSITY OF MONTANA



U.S. AIR FORCE

Headquarters U.S. Air Force



Integrity - Service - Excellence

Air Force Discharge Review Board (AFDRB)



**Col Edward Segura
Board President**



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Objective



The objective of the Air Force Discharge Review Board (AFDRB) is to examine the equity and propriety of an applicant's administrative discharge.



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AFDRB 101



- **Board Composition—5 Members, Board Pres/Med/JAG/2 SNCOs**
- **MH provider per 10 USC 1553 if applicable**
- **Presume military discharged its duties correctly/lawfully/in good faith**
- **Applicant must submit substantial evidence to prove contention/rebut presumption of regularity**
- **AFDRB Reviews...**
 - Application to include attachments
 - Available military service and health records
 - Any other evidence obtained in accordance with governing instructions, including the testimony and statements of witnesses
- **AFDRB is not an investigative body**



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DRB Case Types

■ **Some Interesting Info...**

- Board receives over 600 applications per year; boards approximately 350 per year
- Bulk of our cases are requests for General to Honorable (approx 73%)
- Approximately 61% of our cases involve a MH component

■ **Discharge authorities we review...AFIs 36-3207, 36-3208, 36-3209**

■ **Medical Discharges--we do not review**

- Example—Johnny was id'd at BMT with Asthma and got an Entry Level Separation, Erroneous Enlistment
 - If he wants an Honorable and a change to the RE code, DRB has authority to review
 - If he wants a medical discharge, out of our purview

■ **Can be records-only or in person (approximately 90% records-only)**

- Regional Boards 3 times per year

■ **Clemency only for BCDs from special courts-martial--change to admin**



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DRB Relief



- **Relief will only be granted if found improper or inequitable**
 - Historical AFDRB relief rate of 8-9% increased to 19-20% due to “liberal consideration” policy

- **Propriety - discharges are deemed proper unless:**
 - An error of fact, law, procedure or discretion occurred **which** prejudiced the applicant’s rights
 - A change in policy occurred and was expressly made retroactive for the applicant’s type of discharge

- **Equity - discharges are deemed equitable unless:**
 - There is **substantial doubt** the applicant would have received the same discharge if current policies and procedures had been in effect at the time of discharge
 - The discharge was inconsistent with disciplinary standards at the time
 - Relief is warranted based on the applicant’s service record and **other evidence**, viewed in conjunction with the applicant’s quality of service and capability to serve



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Liberal Consideration & Discharge Reviews



- **OSD Guidance progression: 2014 (Hagel memo), 2016 (Carson memo), 2017 (Kurta Memo) & 2018 (Wilkie Memo—Not just LC)**

- **Kurta memo expanded Liberal Consideration application**
 - Liberal consideration does not guarantee upgrade...case still involves 4 guiding questions:
 - A. Did the Veteran have a condition or experience that may excuse or mitigate the discharge?
 - B. Did that condition exist/experience occur during military service (or aggravated—para 15)?
 - C. Does the condition or experience actually excuse or mitigate the discharge?
 - D. Does that condition or experience outweigh the discharge?



Deemed Proper Unless:

Option 1	Option 2
<p>A change in policy, made retroactive, requires a change in discharge.</p>	<ol style="list-style-type: none"><li data-bbox="981 568 1734 759">1. An error of fact, law, procedure or discretion; <u>and</u><li data-bbox="981 902 1684 1153">2. Prejudicial error (substantial doubt the discharge would have remained the same)



Deemed Equitable Unless:

Option 1	Option 2	Option 3
<ol style="list-style-type: none"> 1. Discharge policies or procedures used differ materially from current procedures; and 2. Current policies or procedures represent a substantial enhancement of rights; and 3. There is substantial doubt applicant would have received the same discharge under current policies/procedures. 	<p>At the time of issuance, the discharge was inconsistent with standards of discipline in the service.</p>	<p>Relief warranted based upon service record and other evidence viewed in conjunction with listed factors and regs, as follows:</p> <p style="text-align: center;">Quality of Service</p> <ul style="list-style-type: none"> - Service history & length of service - Awards or decorations/Promotions or demotions - Letters of reprimand or commendation - Combat service/Wounds in action - Level of responsibility at which applicant served - Other acts of merit not formally recognized - Prior military service and type of discharge - Outstanding post-service conduct - Convictions military & civilian - Record of NJP, discharge or unauthorized absence <p style="text-align: center;">Capability to Serve</p> <ul style="list-style-type: none"> - Total capabilities (age, education, aptitude scores) - Family & personal problems - Arbitrary or capricious action - Discrimination



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Questions?

<https://www.afpc.af.mil/Separation/Discharge-Review-Board>

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Naval Discharge Review Board (NDRB)



NDRB Presentation to

Univ. of Montana, Veterans Law CLE

by

Robert Powers

President, NDRB, Secretary of the Navy, Council of Review Boards



NDRB Case Receipt FY15-18

NAVAL DISCHARGE REVIEW BOARD - 20190108

PRESIDENT REPORT

A. PRODUCTION					FY-2019				
	FY-2015	FY-2016	FY-2017	FY-2018	Quarter 1	Quarter 2	Quarter 3	Quarter 4	
APPLICATIONS RECEIVED	3567	4643	4879	4712	1521				
APPLICATIONS DOCKETED	1645	1736	1625	1487	292				
MEDIAN PROCESSING (MONTHS)	5	9	DR: 7 PAH: 16	DR: 9 PAH: 20	DR: 11 PAH: 23				
DOCUMENTARY REVIEW (CLOSED)	1728	1163	1453	1147	356				
PERSONAL HEARINGS HELD	88	132	137	171	48				
JOINT SERVICE REVIEWS	5	3	3	1					
TOTAL DECISIONS	1821	1298	1456	1148	404	0	0	0	404

B. ACTIVE CASES PENDING

P050 AWAITING RECORDS	305		P190 DOCUMENTARY REVIEW AT BOARD	68
P061 HOLD FOR MEDICAL RECORDS	161		P400 SCHEDULED HEARINGS	8
P080 DOCUMENTARY REVIEW SHELF	458		P501 PENDING CLOSEOUT	82
P082 HEARING SHELF	385		TOTAL	1467



NDRB Case Production FY19

C. CASES CLOSED	USN FY-2019								TOTAL	FY % UPGRADE
	Quarter 1		Quarter 2		Quarter 3		Quarter 4			
	CHANGE	NO CHANGE	CHANGE	NO CHANGE	CHANGE	NO CHANGE	CHANGE	NO CHANGE		
NAVY										
HEARING	3	24							27	11%
DOCUMENT REVIEW	14	167							181	8%
DON'T ASK DON'T TELL	1								1	100%
POST TRAUMATIC STRESS DISORDER	5	21							26	19%
DRUG ABUSE	6	41							47	13%
TRAUMATIC BRAIN INJURY	1	2							3	33%
MILITARY SEXUAL TRAUMA	0	7							7	0%
MENTAL HEALTH	3	32							35	9%
CWFA	0	6							6	
NAVY TOTAL	17	197	0	0	0	0	0	0	214	8%
	214		0		0		0			
USMC	USMC FY-2019									
	Quarter 1		Quarter 2		Quarter 3		Quarter 4		TOTAL	FY % UPGRADE
	CHANGE	NO CHANGE	CHANGE	NO CHANGE	CHANGE	NO CHANGE	CHANGE	NO CHANGE		
HEARING	13	24							37	35%
DOCUMENT REVIEW	23	128							151	15%
DON'T ASK DON'T TELL	1								1	100%
POST TRAUMATIC STRESS DISORDER	7	19							26	27%
DRUG ABUSE	2	29							31	6%
TRAUMATIC BRAIN INJURY	3	6							9	33%
MILITARY SEXUAL TRAUMA	4	2							6	67%
MENTAL HEALTH	13	19							32	41%
CWFA		2								
USMC TOTAL	36	154	0	0	0	0	0	0	190	19%
	190		0		0		0			
COMBINED TOTAL	53	351	0	0	0	0	0	0	404	13%
	404		0		0		0			



Types of Reviews

	Documentary Record Review (DR)	Personal Appearance Hearing (PAH)
Board Members:	5	5
Average Length:	11 Months	22 Months
Decision Threshold:	Simple majority	Simple majority
Location:	Washington Navy Yard, Washington, DC	Washington Navy Yard, Washington, DC (no travelling panel) (Telephonic Available)
Frequency Held:	Once per week (all ready cases)	Three hearings per day, one week per month, scheduled in advance
Affords Applicant:	An opportunity to submit any documentation in support of discharge upgrade based on propriety and equity	An opportunity to appear in person before the Board to present argument for discharge upgrade based on propriety and equity*

***Note: Strongly recommend DR before PAH (verification requested if PAH marked on application with no prior DR). PAH is non-confrontational, but board members may ask direct questions.**



How to Prevail

- Develop and maintain a clear theory/version of your case!
- Strategy – Seek Equity/Clemency or Impropriety/Legal Error?
- Tactic lead with Equity/Clemency-type arguments:
 - ❑ What is the reasonable excuse for the Applicant's misconduct that caused an unfavorable discharge!
- Focus on the **nexus** between the Applicant's misconduct and any mitigating factors;
 - ❑ I.e., **What caused the Applicant to have limited reasoning ability to make/take the wrong choice/action?**
 - ❖ E.g., The Applicant (without prior misconduct/drug use) suffering from a mental health condition (such as PTSD) smoked Marijuana (one-time) when offered on the one-year anniversary of losing his combat buddy in Iraq. (Theory → A hero both now and then, but for this one-time error committed while in a “weakened” logical state of mind).



How to Prevail

- Start with an Equity Argument over a Legal/Propriety Argument:
 - ❑ A NDRB Board generally contains few (if any Lawyers); a Legal /Propriety Argument is rarely as persuasive as an Equity/Fairness Argument.
 - ❖ I.e., do not thread the needle; do not place a high emphasis on harmless administrative error.

- Proprietary Arguments are effective in cases where there is a clear violation:
 - ❑ However, would start with the unfairness/equity (and post-service facts) and then conclude with why the Applicant deserves an Honorable Discharge based on the Service Regulations/regulatory error.
 - ❖ E.g., Applicant with: 1) no misconduct in the record; 2) a medical condition not a disability, but received a General Discharge rather than a “Honorable.” (Theory → Now a Great American who was denied the proper Discharge of “Honorable”).

- Footnote the NDRB is a “Review Board” not a “Clemency Board.”
 - ❑ This is an important distinction despite the strategy & tactics stated above.



Hypothetical – PTSD

- ❖ **PTSD/Mental Health → Marine Sergeant returns from Iraq and 30 days later meets with friends and smokes Marijuana (one-time); pops positive on Urinalysis; receives an Under Other Than Honorable (UOTH) Discharge .**
 - ✓ An upgrade depends on rebutting the NDRB’s “presumption of regularity in government affairs” that the above discharge was proper and equitable.
 - I.e., the NDRB will not assume the Marine’s Command unfairly discharged the Marine with an UOTH.
 - I.e., By statute, the NDRB is a “Review Board” not a Clemency Board.
- **More likely chance for an upgrade if:**
 - Marine suffers from PTSD and drug use was an attempt to cope with symptoms;
 - PTSD; and/or alcohol use; and/or influence of friends, reduced Marine’s ability to avoid drug use;
 - In-service history of exemplary performance; and/or significant combat experience/Military Sexual Trauma (MST); and/or Veteran has noteworthy post-service conduct/performance.
- **Less likely chance for an upgrade if:**
 - Marine has PTSD diagnosis based on limited evaluation/symptoms;
 - In-service history of past misconduct; and/or poor performance; and/or substance abuse; especially, prior to trauma leading to PTSD diagnosis;
 - Post-service misconduct showing moral turpitude.



Applicant Trends

- Failure to address the relevant issues of Propriety and Equity.
- Failure to address any **nexus** between the Applicant's misconduct and any mitigating factors.
- In majority of cases, post-service documentation is insufficient or merely alleged.
- Applicants file with the NDRB instead of the BCNR: (e.g., request medical retirement; restoration of pay & benefits).
- Applicants do not clarify conflicting facts; Discovered dishonesty creates doubt concerning an Applicant's submitted evidence.



NAVAL DISCHARGE REVIEW BOARD

QUICKSERIES GUIDE IN AN APP



Reference:

- Eligibility
- Types of discharge reviews
- Preparing and submitting the application
- Appeal options

- Policy changes and implantation
- Don't Ask Don't Tell
- PTSD, TBI, Mental Health, MST
- Administrative Corrections
- Veteran Affairs Discharge Upgrade Tool
- Outreach Programs
- Videos



Available on the Apple and Google App Stores



Questions?

Naval Discharge Review Board

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