

# CHARACTER OF DISCHARGE & ACCESS TO BENEFITS



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# AGENDA



## 1. Context

## 2. Paths to access benefits

- Apply to DOD for discharge upgrade to change discharge status
- Seek VA character of discharge determination
- Enroll in/Access VA health care
- Appeal EOVS/VERB character of discharge decision

# DISCHARGE STATUS



## CHARACTER OF DISCHARGE

Honorable

General (Under Honorable Conditions)

Other Than Honorable (formerly Undesirable)

Bad Conduct

Dishonorable or Dismissal

\*\*

Uncharacterized/Entry Level Separation

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES THIS IS AN IMPORTANT RECORD, SAFEGUARD IT ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

**CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY**  
This Report Contains Information Subject to the Privacy Act of 1974, As Amended

1. NAME (Last, First, Middle)		2. DEPARTMENT, COMPONENT AND BRANCH		3. SOCIAL SECURITY NUMBER	
4a. GRADE, RATE OR RANK		b. PAY GRADE		5. DATE OF BIRTH (YYYYMMDD)	
6. RESERVE OBLIGATION TERMINATION DATE (YYYYMMDD)		7a. PLACE OF ENTRY INTO ACTIVE DUTY		b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)	
8a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND		b. STATION WHERE SEPARATED		9. COMMAND TO WHICH TRANSFERRED	
10. SOLI COVERAGE		NONE		AMOUNT: \$	
11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)		12. RECORD OF SERVICE		13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (List period of award)	
14. DATE ENTERED AD THIS PERIOD		15. SEPARATION DATE THIS PERIOD		16. NET ACTIVE SERVICE THIS PERIOD	
17. TOTAL PRIOR ACTIVE SERVICE		18. TOTAL PRIOR INACTIVE SERVICE		19. FOREIGN SERVICE	
20. SEA SERVICE		21. INITIAL ENTRY TRAINING		22. EFFECTIVE DATE OF PAY GRADE	
23. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)		24. MAILING ADDRESS AFTER SEPARATION (Include ZIP Code)		25. NEAREST RELATIVE (Name and address - include ZIP Code)	
26. MEMBER REQUESTS COPY 3 BE SENT TO (Specify state/locality)		27. OFFICE OF VETERANS AFFAIRS		28. MEMBER REQUESTS COPY 3 BE SENT TO THE CENTRAL OFFICE OF THE DEPARTMENT OF VETERANS AFFAIRS (WASHINGTON, DC)	
29. MEMBER SIGNATURE		30. DATE		31. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade and signature)	
32. DATE		33. DATE		34. DATE	
35. TYPE OF SEPARATION		36. CHARACTER OF SERVICE (Include upgrade)		37. SEPARATION CODE	
38. SEPARATION AUTHORITY		39. SEPARATION CODE		40. REENTRY CODE	
41. NARRATIVE REASON FOR SEPARATION		42. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD)		43. MEMBER REQUESTS COPY 4 (Initials)	

DD FORM 214, AUG 2009 PREVIOUS EDITION IS OBSOLETE MEMBER - 4



## The Numbers

19 million veteran in the United States

240,000 veterans in Massachusetts

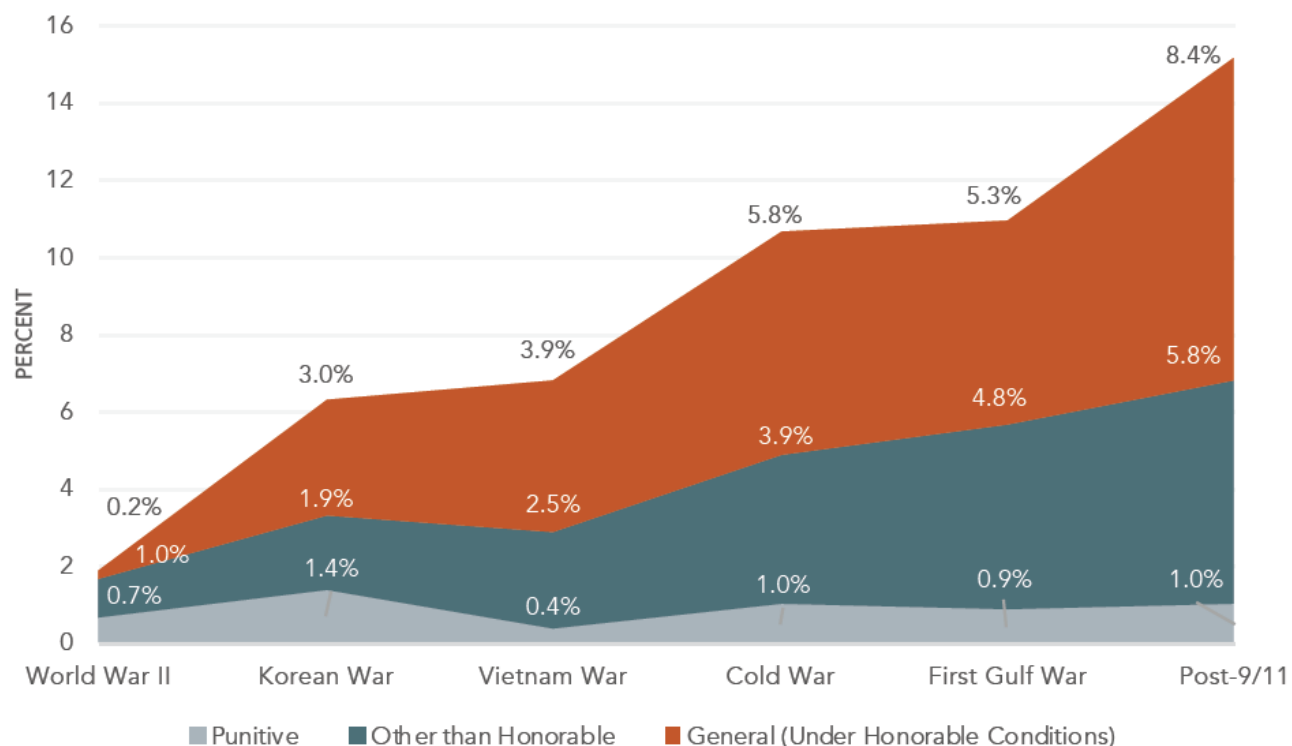
Since World War II, more than 2 million veterans discharged less-than-fully-Honorably

Rates of servicemembers receiving less-than-honorable discharges increasing

Punitive discharges steady at ~1%

Administrative discharges increasing

### PERCENT ENLISTED SERVICEMEMBERS WITH BAD PAPER DISCHARGES



# FACTORS THAT CONTRIBUTE TO A “BAD PAPER” DISCHARGE

## Mental Health

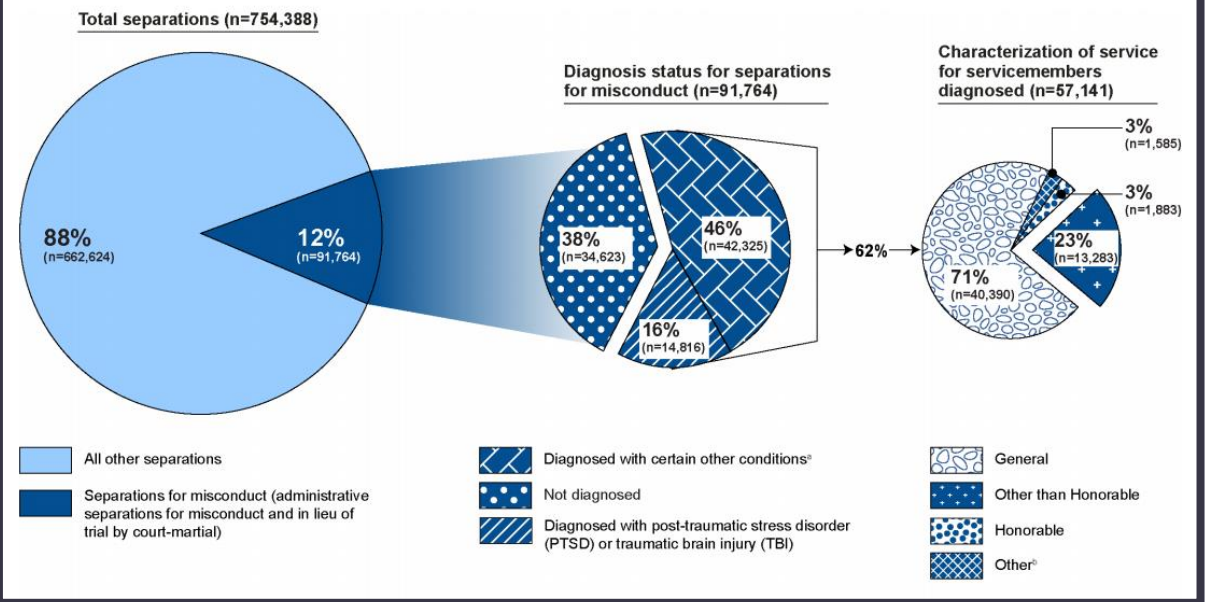
OIF Marine Corps combat veterans with PTSD 11x more likely to be discharged for misconduct, 8x more likely to be discharged for substance abuse

## Military Sexual Trauma

More than 22% who reported a sexual assault received a less-than-honorable discharge, from 2009-2015

Discrimination on the basis of Race, Sexual Orientation, Gender Identity

**Figure 2: Diagnosis Status and Characterization of Service for Servicemembers Separated for Misconduct from Fiscal Years 2011 through 2015**





## WAYS TO ACCESS VETERANS BENEFITS WITH A “BAD PAPER” DISCHARGE

1. Change discharge status through DOD discharge upgrade
2. Establish eligibility under existing laws at relevant agency (including VA and Mass. EOVS)

# DOD DISCHARGE UPGRADE



## Discharge Review Boards v. Boards for Correction of Military/Naval Records

- One of each in every service branch (Army, Navy/Marine Corps, Air Force/Space Force, Coast Guard)
- Staffed by military officers or DOD/DHS civilian staff
- Determine which to apply to based on branch of service, time since discharge, type of discharge, and relief sought

It is never too late to apply for an upgrade, but some advantages to applying within 15 years because right to a hearing at DRB ... and when veteran is ready

- DRB has 15-year deadline
- BCMR has 3-year deadline but waivable

# DOD DISCHARGE UPGRADE

## ERROR/IMPROPRIETY

### Violation of Constitution

- E.g., discharged for drug possession but drugs were found through unlawful search under 4<sup>th</sup> amendment

### Violation of law

- E.g., combat veteran separated for misconduct did not receive required PTSD/TBI exam prior to discharge

### Violation of separation regulation

- E.g., not notified of separation; separated OTH without notice of right to separation board



## INJUSTICE/INEQUITY

### New more favorable law/regulation

- E.g., repeal of Don't Ask, Don't Tell; COVID vaccine refusal

### Mental health condition or Military Sexual Trauma led to misconduct

- See Hagel Memo & Kurta Memo
- Note: *Kennedy, Manker, & Johnson* settlements

### Good post-service conduct

- See Wilkie Memo

### Extenuating or mitigating circumstances

### Overall favorable service in military

### And more!



# DOD RECORDS CORRECTION

Board for Correction of Military/Naval Records also can correct other parts of a veteran's personnel file besides discharge status and related information, such as:

Name change

Medals and awards on DD-214

Medical discharge or retirement

Removal of negative information

Anything else in a veteran's file (with some limited exceptions)

# DISCHARGE UPGRADE TIPS

1. There are many myths about discharge upgrades
  - Automatic upgrade after six months → not true
  - “VA upgrade” → not true, only DOD can upgrade
  - It's easy or it's impossible
2. There are steps a veteran can take to increase chances of success
3. Get a full copy of Official Military Personal File
  - Standard Form 180 to request
  - Online portal for some veterans
4. Submit more than just the application form
  - Statement of why upgrade warranted
  - Letters of support
  - Documents and other evidence
5. Favorable changes in the law for many veterans
  - In-service mental health conditions
  - Military Sexual Trauma
  - Don't Ask, Don't Tell/discharge for sexual orientation
  - Personality Disorder
  - Post-service good conduct



# VA CHARACTER OF DISCHARGE DETERMINATION



VA defines a “veteran” as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom *under conditions other than dishonorable*” 38 U.S.C. 101 (2), 38 C.F.R. 3.12

**IMPORTANT:** “veteran”  $\neq$  honorably discharged. OTH/BCD/DD may be eligible.

VA makes COD decision based on military service, especially misconduct (severity, frequency, timing) and any significant mental health condition

**\*\*New regulations as of July 2024! See 38 C.F.R. 3.12\*\***

Generally, start VA’s COD process by filing an application for benefits

- Best to apply for compensation, pension, or home loan certification
- Follow through adjudication and appeals process described in VBA presentation



## NEW CHARACTER OF DISCHARGE REGULATIONS

1. Changed definitions of disqualifying conduct
  - Removed stigmatizing and unconstitutional bar referring to “homosexual acts”
  - Added specifics to what counts as “willful and persistent misconduct”
2. Added “compelling circumstances” consideration for some veterans
  - Broadened definition of compelling circumstances to also include mental and physical health conditions, sexual assault, combat or overseas hardship, etc.
3. Outcomes improved since new regulations enacted

# Comparison: Old vs. New Rule 38 C.F.R. § 3.12

Last edited 10-28-24



## Old Rule

### § 3.12(d) Regulatory Bars:

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

1. Acceptance of an undesirable discharge to escape trial by general court-martial.
2. Mutiny or spying.
3. An offense involving moral turpitude. This includes, generally, conviction of a felony.
4. Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.
5. Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

VS

## New Rule

### § 3.12(d) Regulatory Bars:

(d) Benefits are not payable where the former service member was discharged or released under one of the conditions listed in paragraph (d)(1) or (2) of this section.

1. Compelling circumstances exception is not applicable for:
  - i. Discharge in lieu of trial. Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by general court-martial.
  - ii. Mutiny or espionage. Mutiny or spying.
2. Compelling circumstances exception\* is applicable for:
  - i. An offense involving moral turpitude.\* This paragraph (d)(2)(i) includes, generally, conviction of a felony.
  - ii. Willful and persistent misconduct. For purposes of this section, instances of minor misconduct occurring within two years of each other are persistent; an instance of minor misconduct occurring within two years of more serious misconduct is persistent; and instances of more serious misconduct occurring within five years of each other are persistent. For purposes of this section, minor misconduct is misconduct for which the maximum sentence imposed pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.

**CHANGE:** Introductory paragraph language changed to explicitly state that benefits are not payable where one of the below conditions is met.

**EXPANSION:** Extends the "compelling circumstances" exception from the statutory AWOL bar to apply to some regulatory bars to benefits.

**LIMITATION:** Veterans discharged in lieu of trial by general court-martial not eligible for "compelling circumstances" exception.

**LIMITATION:** Veterans discharged for mutiny or espionage also ineligible for "compelling circumstances" exception.

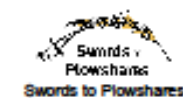
**EXPANSION:** Definition of instances in which "compelling circumstances" exception is applicable expanded to now consider length and character of service and mitigating factors like mental impairment, abuse, or physical health.

**CHANGE:** Previous definition of "willful and persistent misconduct" replaced with new, more detailed definition.

**DELETION:** Homosexual acts bar deleted as VA stated the bar was "outdated and unnecessary."

\*The following circumstances will be considered in determination on this matter: (1) Length and character of service exclusive of the period of prolonged AWOL or misconduct; (2) Reasons for prolonged AWOL or misconduct, such as mental or cognitive impairment, physical health, combat-related or overseas-related hardship, sexual abuse/assault, duress, coercion, desperation, family or comparable obligations, age, education, cultural background, and judgmental maturity; and (3) Whether a valid legal defense would have precluded a conviction for AWOL or misconduct.

Questions? Please contact...



# VA HEALTH CARE ACCESS



Many paths for veterans with bad paper to access full or limited VA health care

## Full health care access

- COD finds service “other than dishonorable” (“Honorable for VA Purposes”)
- Honorable discharge from prior enlistment

## Limited health care access

- COD finds service “dishonorable” by regulatory bar but veteran has service-connected disabilities → health care for service-connected conditions (“Chapter 17”)
- Mental health care for combat veterans, MST survivors, some others with OTH discharges
- Vet Centers mental health and readjustment counseling



## VA TIPS

1. Many myths about VA eligibility for veterans with bad paper
  - Do not necessarily need an upgrade to access VA
  - Do have a right to VA's duty to assist in proving claim
2. Engage with the process
  - Have right to submit evidence and to a hearing
  - Have right to appeal
  - May need to follow up to access full benefits & care
3. Consider balance of discharge upgrade application v. VA COD request

# EOVS CHAPTER 115 & ANNUITY ELIGIBILITY APPEAL



## **\*\*New state definition of “veteran” for EOVS purposes\*\***

General state law defines “veteran” with language including “under honorable conditions” and “not dishonorable”. See M.G.L. c. 4, s. 7, cl. 43.

For Chapter 115/EOVS purposes only, under HERO Act, “veteran” now includes:

- “veteran” under c. 4, s. 7
- Servicemember discharged under “other than dishonorable” conditions with 90 days wartime active service
- Servicemember (including NG/Reserve) with active duty for training and service-connected disability or died in service
- Determined by U.S. Department of Veterans Affairs to be a “veteran” (under federal definition)

EOVS Regulation states that veteran with OTH presumed ineligible but can challenge the presumption and prove that the circumstances of the discharge were “not dishonorable”.  
108 C.M.R. 3.06(2)



# EOVS CHAPTER 115 & ANNUITY ELIGIBILITY APPEAL



Generally, start the process by applying for Chapter 115 benefits (which are typically denied), then appeal to EOVS for a hearing

Certain veterans can apply to the **new** Veterans Equality Review Board (VERB) within EOVS who can make a recommendation to the Secretary of EOVS that the veteran be approved for benefits. M.G.L. c. 115, s. 16

- OTH discharge based on “sex, race, color, religious creed, national origin, age, genetic information, ancestry, marital status or disability”
- “Any United States Department of Veterans Affairs category eligible for a discharge upgrade, including, but not limited to, mental health conditions, military sexual trauma and traumatic brain injury”

More: <https://www.mass.gov/orgs/veterans-equality-review-board> & 108 CMR 17.00

If denied, follow adjudication and appeal process set forth in Chapter 115 presentation



## CHAPTER 115 TIPS

1. Lots of misinformation about state veterans benefits eligibility
  - May be eligible for state veterans benefits, including Chapter 115, Annuity, Bonuses, etc.
2. VERB offers expanded access to veterans with less-than-honorable discharges
  - Consider applying even if previously denied or turned away
3. Often have to appeal beyond EOVS to Division of Administrative Law Appeals or Superior Court

# RESOURCES



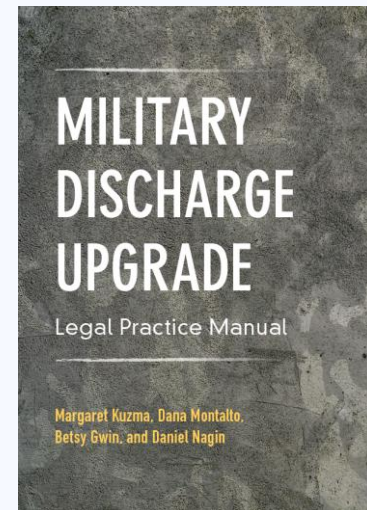
Swords to Plowshares Self-Help Guides: <https://www.swords-to-plowshares.org/resources/self-help-guides>

- Upgrading your discharge
- Discharge corrections for veterans discharged under DADT
- VA Character of Discharge review
- Requesting copies of military records
- Name change for transgender veterans

Stateside Legal: <https://www.statesidelegal.org/>

- Finding legal help
- Self-help guides

Military Discharge Upgrade Legal Practice Manual:  
<https://www.americanbar.org/products/inv/book/410982321/>



# THE MOST IMPORTANT SLIDE

If a veteran has a discharge that is not Honorable, the veteran may be eligible for federal and/or state veteran benefits.

*(You don't know until you try.)*