



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

JUL 25 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations

The Department has evaluated numerous aspects of the Service Discharge Review Boards (DRBs) and Boards for Correction of Military / Naval Records (BCM/NRs) over the last two years. We have redoubled our efforts to ensure veterans are aware of their opportunities to request review of their discharges and other military records. We have initiated several outreach efforts to spread the word and invite feedback from veterans and organizations that assist veterans and active duty members, and issued substantive clarifying guidance on Board consideration of mental health conditions and sexual assault or sexual harassment experiences. And, we have partnered with the Department of Veterans Affairs to develop a web-based tool that provides customized guidance for veterans who want to upgrade their discharges. But our work is not yet done.

Increasing attention is being paid to pardons for criminal convictions and the circumstances under which citizens should be considered for second chances and the restoration of rights forfeited as a result of such convictions. Many states have developed processes for restoring basic civil rights to felons, such as the right to vote, hold office, or sit on a jury, and many states have developed veterans' courts to consider special circumstances associated with military service. States do not have authority, however, to correct military records or discharges.

The Military Departments, operating through DRBs and BCM/NRs, have the authority to upgrade discharges or correct military records to ensure fundamental fairness. DRBs and BCM/NRs have tremendous responsibility and perform their tasks with remarkable professionalism, but further guidance to inform Board decisions on applications based on pardons for criminal convictions is required.

The attached guidance closes this gap and sets clear standards. While not everyone should be pardoned, forgiven, or upgraded, in some cases, fairness dictates that relief should be granted. We trust our Boards to apply this guidance and give appropriate consideration to every application for relief.

Military Department Secretaries will ensure that Board members are familiar with and appropriately trained on this guidance within 90 days. My point of contact is Monica Trucco, Director, Office of Legal Policy, who may be reached at (703) 697-3387 or monica.a.trucco.civ@mail.mil.

Robert L. Wilkie

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary to the Defense for Public Affairs

Attachment

Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations

Generally

1. This document provides standards for Discharge Review Boards (DRBs) and Boards for Correction of Military / Naval Records (BCM/NRs) in determining whether relief is warranted on the basis of equity, injustice, or clemency.
2. DRBs are authorized to grant relief on the basis of issues of equity or propriety. BCM/NRs are authorized to grant relief for errors or injustices. These standards, specifically equity for DRBs and relief for injustice for BCM/NRs, authorize both boards to grant relief in order to ensure fundamental fairness.
3. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority that DRBs and BCM/NRs have to ensure fundamental fairness. BCM/NRs may grant clemency regardless of the court-martial forum; however, DRBs are limited in their exercise of clemency in that they may not exercise clemency for discharges or dismissals issued at a general court-martial.
4. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.
5. This guidance does not mandate relief, but rather provides standards and principles to guide DRBs and BCM/NRs in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each board.
6. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DRBs and BCM/NRs shall consider the following:
 - a. It is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds.
 - b. Relief should not be reserved only for those with exceptional aptitude; rather character and rehabilitation should weigh more heavily than achievement alone. An applicant need not, for example, attain high academic or professional achievement in order to demonstrate sufficient rehabilitation to support relief.

c. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

d. Evidence in support of relief may come from sources other than a veteran's service record.

e. A veteran or Service member's sworn testimony alone, oral or written, may establish the existence of a fact supportive of relief.

f. Changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received, may be grounds for relief.

g. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct in the case of the mitigating evidence in a case. For example, marijuana use is still unlawful in the military, but it is now legal under state law in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.

h. Requests for relief based in whole or in part on a mental health condition, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety.

i. Evidence submitted by a government official with oversight or responsibility for the matter at issue and that acknowledges a relevant error or injustice was committed, provided that it is submitted in his or her official capacity, should be favorably considered as establishing a grounds for relief.

j. Similarly situated Service members sometimes receive disparate punishments. A Service member in one location could face court-martial for an offense that routinely is handled administratively across the Service. This can happen for a variety of lawful reasons, for example, when a unit or command finds it necessary to step up disciplinary efforts to address a string of alcohol- or drug-related incidents, or because attitudes about a particular offense vary between different career fields, units, installations, or organizations. While a court-martial or a command would be within its authority to choose a specific disposition forum or issue a certain punishment, DRBs and BCM/NRs should nevertheless consider uniformity and unfair disparities in punishments as a basis for relief.

k. Relief is generally more appropriate for nonviolent offenses than for violent offenses.

l. Changes to the narrative reason for a discharge and/or an upgraded character of discharge granted solely on equity, injustice, or clemency grounds normally should not result in

separation pay, retroactive promotions, the payment of past medical expenses, or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded character.

7. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DRBs and BCM/NRs should also consider the following, as applicable:

- a. An applicant's candor
- b. Whether the punishment, including any collateral consequences, was too harsh
- c. The aggravating and mitigating facts related to the record or punishment from which the veteran or Service member wants relief
- d. Positive or negative post-conviction conduct, including any arrests, criminal charges, or any convictions since the incident at issue
- e. Severity of misconduct
- f. Length of time since misconduct
- g. Acceptance of responsibility, remorse, or atonement for misconduct
- h. The degree to which the requested relief is necessary for the applicant
- i. Character and reputation of applicant
- j. Critical illness or old age
- k. Meritorious service in government or other endeavors
- l. Evidence of rehabilitation
- m. Availability of other remedies
- n. Job history
- o. Whether misconduct may have been youthful indiscretion
- p. Character references
- q. Letters of recommendation
- r. Victim support for, or opposition to relief, and any reasons provided