



VETS HELPING VETS SINCE 1974

VA CHARACTER OF DISCHARGE REVIEW: AN ALTERNATIVE TO A DISCHARGE UPGRADE

Some veterans are able to access VA benefits immediately. People with Honorable and General discharges are typically able to access VA benefits without a problem. If you have a different discharge characterization—Other Than Honorable, Undesirable, or Bad Conduct—then it will be harder. But it might be possible.

This guide will show you how.

There is a lot of bad information about this topic. You may have heard from your chain of command, from other veterans, or even from VA employees, that your discharge makes you ineligible for VA benefits. You may have been told that the only way to get eligibility for VA services is to get a discharge upgrade from the military. For most people, this just isn't true.

Many people with "bad paper" might be able to receive most VA benefits, even without a discharge upgrade.

The truth is that many people with "bad paper" might be able to receive most VA benefits, even without a discharge upgrade. The VA is allowed to grant eligibility to most people in this situation, for all benefits except the G.I. Bill. This happens if the VA looks at your overall service and decides that it wasn't "Under Dishonorable conditions." This is called a **Character of Discharge** review. This doesn't change your discharge (it won't change what is written on your DD 214), it just changes how the VA treats you. But most people don't ever receive a **Character of Discharge** review because they don't ask the right way.

We typically advise people to apply for a discharge upgrade through the Department of Defense **and** to ask the VA to do a **Character of Discharge** review. If successful, either of those will get you eligibility for most VA benefits. And because they are both hard to do, your best bet is to try both. If you want help asking for a discharge upgrade from your service branch, check out our Self-Help Guide on Discharge Upgrades here: www.stp-sf.org/guides/upgrading-your-military-discharge-and-changing-the-reason-for-your-discharge/.

How to get a Character of Discharge review from the VA

The first thing to know is that the VA has probably not done a **Character of Discharge** decision for you. It doesn't happen automatically. You have to ask for it by applying for a benefit. If you have never applied for a benefit, the VA will assume that you are not eligible.

But if you get a successful **Character of Discharge** review after applying for one benefit, you will be eligible for other benefits also (healthcare, housing, service-connected disability compensation, pension, etc.). Your discharge will not stand in the way of you getting VA benefits ever again. (Except the G.I. Bill. Only people with Honorable discharges are eligible for the G.I. Bill. If you have a less than Honorable discharge, the only way to get G.I. Bill eligibility is with a discharge upgrade)

Here are five steps you can take to maximize your chances of getting a successful **Character of Discharge** decision.

Step 1: Apply for a benefit

If you have never applied for a benefit, the VA will assume that you are not eligible.

The VA will do a **Character of Discharge** decision if you apply for a benefit, such as Compensation, Pension, or Home Loan Eligibility. If you have not applied for a benefit, then the VA hasn't actually reviewed your service to decide if you're eligible.

Don't be discouraged if a VA hospital eligibility worker told you that you are ineligible. It isn't their decision to make. Apply for one of the benefits below to make sure that the right people evaluate your service. It doesn't matter which one you choose.

- If you have a disability from service, file for Compensation on VA Form 21-526EZ.
- If you are elderly or disabled, and have low income, file for Pension on VA Form 21-527EZ.

- If you have no disabilities, but you still want to access VA healthcare or other benefits, file for a **Certificate of Eligibility** for a VA Home loan using VA Form 26-1880. You don't have to actually apply for a home loan. Filing this form only acknowledges your ability to obtain a VA home loan. It will trigger the VA to do a **Character of Discharge** review first.

Do one of the three options listed above even if you are really only interested in VA healthcare, VA housing assistance, or other VA benefits. If you are successful, you will be eligible for those benefits as well.

Step 2: Write a letter explaining why you should be eligible.

The VA will see your military record, but that only tells one side of the story, and often only the worst side. When you file for a benefit, attach a letter telling your side of the story.

Here are some things that you should talk about in your letter, if they apply to you:

- Did you have a mental health condition, such as PTSD or TBI that was starting to affect you while in service?
- Were you experiencing personal problems at that time, such as family problems, or harassment in service?
- Were the conditions of your service stressful in the period leading up to your discharge?
- Did you have commendations for good service before the problems started? How long was your good service before you started having troubles?

Other people can also send in letters to help tell the story of what happened before you were discharged. Are you in touch with any friends from service, or with people in your chain of command, or with family members who knew what was going on at the time? You can ask them to also write letters explaining what was going on at the time.

Step 3: Speak the VA's language

The rules on **Character of Discharge** are complicated. But for most people, it's going to be decided based on just a few questions.

For most people, the VA will say that you are **not eligible** if there was “willful and persistent misconduct” in service. But the VA will say that you **are eligible** and meritorious,” or if you had a mental health problem that made you act very differently than you normally would, which the VA calls “insanity.”

Here are some things you might want to say in your letter, if it applies to you:

- *“My misconduct was not willful.”* Were you experiencing a mental health crisis at the time, so that you weren’t really acting deliberately?
- *“My misconduct was not persistent.”* Were there just one or two misconduct citations? Did they all happen in a short period of time? If you had an AWOL, was it for less than 30 days?
- *“My misconduct was minor.”* Was the misconduct a small discipline problem, or an off-duty behavior problem that didn’t interfere with your duties?
- *“My service was otherwise honest, faithful and meritorious.”* Did you have good performance evaluations? Did you receive decorations, or were you deployed in hardship conditions? Can someone in your leadership write a letter about your good service?
- *“My mental health at the time met the VA’s definition of “insanity.”* If you had a mental health problem at that time, and if it was causing you to act very differently than you normally would, then the VA is not supposed to hold that against you. The VA calls this “insanity”, and you would need to use that word, even though you don’t really need to be insane the way that people usually think of it. Here’s an example: “I was experiencing the first symptoms of PTSD, and it was really affecting my behavior. This was not how I would normally behave. I think that my situation at that time meets the VA’s definition of insanity.” If you were discharged by **General Court-Martial**, this will be the only way that you can get VA eligibility. It will be very helpful to have letters from family or friends saying how much your behavior had changed.

Were you experiencing a mental health crisis at the time, so that you weren’t really acting deliberately?

These are not magic words. They do not guarantee success. But including some of these statements might help the VA employee see how your story fits into the rules that they are supposed to use. The most important thing is to tell your whole story, and to get other people to help tell your story.

Step 4: Request a hearing

When you file your benefits claim, also send in VA Form 21-4138 with this statement: “I request a hearing on the issue of my **Character of Discharge**.”

The most important thing is to tell your whole story, and to get other people to help tell your story.

If you do this, the VA will invite you in to talk with the person who will decide your eligibility. You will be able to tell them exactly what happened, and the VA employee will be able to ask you questions about your experience. You will also be able to bring other people with you, like friends or family members. This can make a big difference, because it helps the VA see you as a person and better understand what happened to you.

Step 5: Wait

Unfortunately, the VA can take a long time to make these decisions. But it’s worth the wait. If the VA decides in your favor for one benefit, it opens the door for the other benefits also. You won’t have to deal with that again.

Some special situations

Here is some information about special situations that might apply to you.

Re-enlistment and multiple periods of service

For most VA benefits, you only need one “good” period of service. If you have multiple periods of service, or if you reenlisted, then you can get most VA benefits if you completed the period of time that you initially contracted for without any discipline problems. We have a separate guide that talks about this in more detail. If you had multiple periods of service, or if you re-enlisted or extended an enlistment, see our self-help guide on multiple enlistments here: www.stp-sf.org/guides/reenlistment.

The G.I. Bill

The G.I. Bill has special eligibility requirements. For the G.I. Bill, your DD-214 has to actually say “Honorable.” A General discharge isn’t enough, and unlike all other VA benefits, you cannot become eligible for the G.I. Bill through a successful **Character of Discharge** decision. If you have a less than Honorable discharge, the *only* way to get G.I. Bill eligibility is to get a discharge upgrade from your service department. Check out our self-help guide on discharge upgrades here: www.stp-sf.org/guides/upgrading-your-military-discharge-and-choose-the-reason-for-your-discharge/.

Reserve and National Guard discharges

The VA is generally only concerned with periods of active, federal service. If you were mobilized to federal service and received an Honorable discharge, then you should get VA benefits based on that period of service. If you received a discharge from the Reserves or the National Guard later on that is less than Honorable, that *does not* take away the eligibility you earned during your active, federal service. In order to get benefits based on your active, federal service you can just apply for the benefits as usual. You don't need to request a **Character of Discharge** review.

Benefits you can get anyway

There are some services that the VA provides to people even if they never requested a **Character of Discharge** review, or if the **Character of Discharge** decision was negative.

- Therapy for people who served in a combat theater or who experienced sexual assault. These services are available at VA Vet Centers. To locate a Vet Center near you, visit http://www.va.gov/directory/guide/vetcenter_fsh.asp.
- Medical care related to sexual assault. Ask to speak with the “MST Coordinator” at your local VA hospital.
- Housing services. Homeless shelter services under the Grant Per Diem program, and rental support under the Supportive Services for Veterans and Families programs, are available to people who served in the military unless they received a fully “Dishonorable” discharge. (This may be subject to change).

If you served less than two years, you will be eligible for services anyway if you have a service-connected disability.

Less than two years of service

If you enlisted after September, 1981, then you can only get VA benefits if you served a certain minimum amount of time. Usually this is two years. Some people who were discharged early for misconduct served less than two years. Those people might not get VA benefits even if they have a successful **Character of Discharge** decision.

However, there is an exception to this rule. If you served less than two years, you will be eligible for services anyway if you have a service-connected disability. So if you have a misconduct discharge with less than two years of service, you have two hurdles: you have to have a successful **Character of Discharge** review, and then you have to have a service-connected disability. You should follow the steps above by applying for Compensation for your disability. If the VA decides that your service was eligible, and that your disability is service-connected, then you will be eligible for all VA benefits except the GI Bill.

Disclaimer

This memorandum provides general information only. It does not constitute legal advice, nor does it substitute for the advice of an expert representative or attorney who knows the particulars of your case. Any use you make of the information in this memorandum is at your own risk. We have made every effort to provide reliable, up-to-date information, but we do not guarantee its accuracy. The information in this memorandum is current as of October 2015.

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Because our legal staff is small and our resources are limited, Swords to Plowshares can represent only a small number of veterans who seek our assistance with VA claims. Please do not appoint Swords to Plowshares to represent you before the VA without our express consent.

38 C.F.R. § 3.12

§ 3.12 Character of discharge.

(a) If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) A discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)).

(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term established basic eligibility to receive Department of Veterans Affairs benefits means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted.

Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(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.

(e) An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(f) An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (h)(1), (2) and (3) of this section by a discharge review board established under 10 U.S.C. 1553 set aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(g) An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d), but not paragraph (c), of this section provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military, naval or air service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(h) Unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (g) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(Authority: 38 U.S.C. 5303 (e))

(i) No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (h) of this section which would not be awarded under the standards set forth in paragraph (g) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (g) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(j) No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest.

(k) Uncharacterized separations. Where enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of the three categories of administrative separation that do not require characterization of service by the military department concerned. In such cases conditions of discharge will be determined by the VA as follows:

(1) Entry level separation. Uncharacterized administrative separations of this type shall be considered under conditions other than dishonorable.

(2) Void enlistment or induction. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation, with reference to the provisions of § 3.14 of this part, to determine whether separation was under conditions other than dishonorable.

(3) Dropped from the rolls. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation to determine whether separation was under conditions other than dishonorable.

(Authority: 38 U.S.C. 501 (a))