



VETS HELPING VETS SINCE 1974

VA CHARACTER OF SERVICE DETERMINATIONS: AN ALTERNATIVE TO DISCHARGE REVIEW

You left the military with “bad paper”—a discharge that was less than fully Honorable. Your discharge hasn’t been upgraded. Can you still get VA benefits?

The answer is maybe.

Character of Service Determinations are usually processed more quickly than discharge upgrades.

To learn what your chances are, read this memorandum. (If you stayed in the military beyond your original ETS date, you should also read our memorandum on back-to-back and conditional discharges. You’ll find it at www.stp-sf.org/guides/b2b.)

If your discharge was **General (Under Honorable Conditions)**, you’re eligible for most VA benefits. You’re not eligible for education benefits under the G.I. Bill, because they require a fully Honorable discharge. However, you may be able to get limited educational benefits through VA vocational rehabilitation.

What if you have a discharge that is **neither Honorable nor General (Under Honorable Conditions)**?

In that case, you probably can ask the VA for a **Character of Service Determination**, or **CSD**. If the VA rules in your favor, you’ll still have “bad paper”—but you’ll be eligible for most VA benefits, including disability compensation, pension, and health care.

A **CSD** is an alternative to a discharge upgrade. Discharge upgrade applications go to a Board—a panel of military or civilian officials—that is not part of the VA. The applications often take years to be processed, and the success rate is relatively low. (For more information about discharge upgrades, visit www.stp-sf.org/guides/discharge.)

CSD requests go to the VA. They're usually processed more quickly than discharge upgrade applications, and favorable **CSD** rulings are more common than successful discharge upgrade applications.

But not everyone is eligible for a CSD. In some cases, the VA can't even consider the request. For example, spies and mutineers aren't eligible for a CSD. Among the others ineligible are:

1. Veterans who receive a Bad Conduct or Dishonorable discharge following a conviction at a General Court-Martial.
2. Veterans who accept an Undesirable discharge to avoid a court-martial.
3. Veterans discharged for an offense involving moral turpitude. This includes, generally, conviction of a felony.
4. Veterans discharged for willful and persistent misconduct. ("Willful and persistent misconduct" can be a slippery term. If you're in this category, check with a Veterans Service Organization (VSO). For a list of VSO's, visit www.stp-sf.org/guides/vsos.)
5. Veterans discharged for "homosexual acts involving aggravating circumstances," such as "homosexual acts or conduct accompanied by assault or coercion."

*Are you eligible for a
CSD?*

In some other cases, the VA has more leeway. For example, let's say you received an Other Than Honorable discharge after being AWOL continuously for at least 180 days. By regulation, you're ineligible for VA benefits—**unless** the VA finds there were "compelling circumstances to warrant the prolonged unauthorized absence."

How does the VA decide whether there are "compelling circumstances"? It looks at what was happening at the time you went AWOL. Was there a family emergency? Were you suffering from combat wounds?

It also looks at how well—and for how long—you did your job while you weren't AWOL. If you had two years of honorable service before you went AWOL, you're in a better position than if you had only six months of service.

The VA will also take into account your “age, cultural background, educational level and judgmental maturity.” For example, the VA might expect more from a 35-year-old than from an 18-year-old.

When you ask the VA to make a CSD, you’re asking it to consider the complete history of your military service, weighing the pros and cons. The VA needs to decide whether it’s fair to deny benefits, based upon all the facts of your case.

Here’s an example: Say you joined the Army in 1970. You were eager to serve your country. You didn’t wait to be drafted—you enlisted. In Basic Training, you were a Platoon Leader. You completed Advanced Individual Training near the top of your class, and deployed to Vietnam immediately.

A CSD is based upon the complete history of your military service.

You were in country for a year. You saw heavy combat. You made Sergeant (E-5) after six months. You didn’t get a Purple Heart, but you did get a Bronze Star. You did your job well—but you also developed severe PTSD, although you didn’t know it at the time.

Your tour in Vietnam was about to end, and you foolishly decided to take a chance. You packed a stash of marijuana in your duffel bag. When you landed stateside, expecting to go home on leave, your baggage was searched. Three months later, you left the Army with an Undesirable discharge.

In such a case, the VA would weigh your years of creditable service against the discreditable act that led to your discharge, and might well decide to make a favorable CSD.

The simplest way to trigger a CSD is to apply for VA disability compensation or pension. The VA will respond to your application with a letter telling you what information you should submit in support of your request for a favorable CSD.

To respond to the letter, you’ll almost certainly need a copy of your Official Military Personnel File (OMPF). You may also need a court-martial transcript or military investigative records. (For more information about ordering all of these materials, visit www.stp-sf.org/guides/records and www.stp-sf.org/guides/transcripts.) Letters or affidavits from members of your former military unit could also be helpful.

We’ve attached a copy of 38 CFR § 3.12, the regulation governing CSD’s. It’s written in dense legalese, but you may want to review it before you apply.

NOTE

There's a **special rule concerning VA health care for veterans with “Other Than Honorable” discharges**. In some cases, they can receive VA treatment for conditions that began or became permanently worse during their military service. For additional information visit www.va.gov/healthbenefits/assets/documents/publications/FS16-8.pdf.

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 December 2012.

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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))